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RESEARCH ARTICLE

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Conflict of normative documents and its management in China

Abstract Regulatory instruments in the form of normative documents has been used as a way to modernize Chinese society since the late 1970s. However, the conflict between laws undermines the effectiveness of such efforts. This article aims to answer the following questions in the process of law-making: How serious is the conflict of normative documents in China? Why there exists the conflict of normative documents? How the Legislation Law approaches the conflict of normative documents? What to be done to prevent the conflict of normative documents?

Keywords normative documents, conflict management, Legislation Law

摘要 自 20 世纪 70 年代末以来，以规范性文件规制社会一直被用作促使中国社会现代化的一个工具。然而，规范性文件之间的冲突会削弱其效果。本文旨在回答在广义的立法进程中出现的问题：如规范性文件之间的严重冲突问题，为什么会出现规范性文件之间的冲突，中国的《立法法》如何处理规范性文件之间的冲突，还需要采取何种措施避免规范性文件之间的冲突等。

关键词 规范性文件，冲突管理，立法法

1 Introduction

Laws or normative documents in general application, to some extent, are designed to regulate various social issues and resolve the conflicts between members of society. With this in mind, the National People's Congress (NPC) in

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China and its Standing Committee have published some 220 pieces of laws, the State Council have drawn up more than 700 pieces of administrative regulations in the past three decades, and local legislatures and governments have issued over 7,000 regulations or rules in the recent five years. (Wu, 2008)

However, there is frequent conflict between normative documents[1] in the Chinese context. Conflict of normative documents[2] not only adds difficulty to the application and compliance of normative document and hence casts a shadow on the task of law to solve conflicts between members of society, but, more importantly, impairs the dignity of law and uniform administration of law and the lawful rights of the people.

In March 2000, the NPC passed the Legislation Law. The law was designed, *inter alia*, as a means to preventing or solving the conflict of law problem. However, the examination of the Legislation Law and the situation of conflict of normative documents reveal that the Law can not fully address the conflict of normative documents. Therefore, new approaches need to be explored to fill the gap between the Legislation Law and the situation of the conflict of normative documents in China.

2 How serious is the conflict of normative documents in China?

Theoretically, in a country like China where the legislative power or the power to adopt normative documents of general application, is not exercised in a unified form, but by different bodies of different hierarchical status, conflict of normative documents may occur between normative documents that are adopted by different bodies of different hierarchical status or of same hierarchical status. Sometimes, conflict of normative documents may also occur between normative documents by the same body. Conflicts of normative documents between normative documents by the same body and between normative documents by different bodies of different hierarchical status are easily located and avoided. In

[1] In a broad sense, the family law in China includes the Constitution, basic law by the NPC, laws by the NPC Standing Commission, administrative regulations by the State Council, administrative rules by the ministries, local regulations by local congresses and rules by local governments, and even the interpretations made by the Supreme Court. In order to synthesize various sources of law, a term "normative documents" hereinafter refers to those components within the family of law.

[2] The term "conflict of laws" has three dimensions: (1) Conflict between domestic law of a country and the international treaty to which it is a party; (2) conflict between laws of different countries in legal relations involving foreign elements; and (3) conflict between different sources of law within one country. However, the term "conflict of laws" here refers specifically to conflict between different normative documents within one country.

fact, exercise of due care by the same legislative body or by the body of a subordinate status should be able to avoid the conflict of normative documents. In practice, therefore, conflict of normative documents often occurs between normative documents that are adopted by different bodies in the same hierarchical status.

In China, however, conflict of normative documents arises not only from normative documents by different bodies of the same hierarchical status, but also from normative documents by different bodies of different hierarchical status and by the same body.

2.1 Conflict between normative documents adopted by the same body

Both the Advertisement Law and the Consumer Protection Law were adopted by the NPC Standing Committee. However, the two laws contain conflicting provisions.

For example, Article 38 of the Advertisement Law provides that:

> Violating the provisions of this Law, publishing false advertisements, cheating and misleading consumers and hence causing damages to the legitimate rights and interests of consumers purchasing commodities or receiving services, the advertiser shall bear liabilities therein; if the advertisement business operators and publisher have the knowledge or ought to have the knowledge of the false advertisement, and still design, produce and publish it, they shall bear the several and joint liability.
>
> Advertisement business operator and publisher who can not provide the real names and addresses of the business operators shall bear full civil liabilities.

In contrast, Article 39 of the Consumer Protection Law provides that:

> Consumers whose legitimate rights and interests are infringed upon on account of commodities or services supplied by the business operators by means of false advertisement may demand compensation from the business operators. Consumers may demand the competent administrative departments to punish the advertising agents who make false advertisements. Advertising agents who can not provide the real names and addresses of the business operators shall be liable for compensation.

Apparently, there are differences between the two laws at the following points: Provisions on several and joint liability, the subject that bears the liability and the scope of liability.

2.2. Conflict of normative documents between normative documents by different bodies of different hierarchical status

This type of conflict of normative documents is in fact the conflict between a normative document by the lower legislative body and an existing normative document by a higher legislative body. In the Chinese context, i.e., conflict between the Constitution and other normative documents and conflict between lower normative document and higher one.

2.2.1 Conflict between the Constitution and other normative documents

Given the supremacy of the Constitution in the hierarchy of the sources of law in a country, no normative documents shall, at least in the country with a statutory Constitution,[3] contravene with the Constitution. The provisions of a normative document not only shall not be in conflict with the constitutional provisions, but also shall not contravene with the principles of the Constitution.

In the Chinese context, it is not rare to find that conflicts between the Constitution or its principles and other sources of law. For example, Article 73 of the Constitution provides that "The Deputy to the National People's Congress and the members of its Standing Committee have the right, during the sessions of Congress and the meetings of the Committee, to address questions, in accordance with procedures prescribed by law, to the State Council or the ministries and commissions under the State Council, which must answer the questions in a responsible manner."

However, the Rules of Procedures of the Standing Committee of the National People's Congress adopted by the NPC Standing Committee in 1987 provides that "Ten or above members of the Standing Committee may, during the sessions of the Standing Committee, jointly propose to the Standing Committee to address questions to the State Council and its ministries and commissions, and the Supreme Court and the Supreme Prosecuratorate."

Obviously, the Constitution and the law differ on the scope of the bodies subject to questions by the members of NPC Standing Committee. Moreover, the two differ also regarding how many people are required in order for a question to be asked

Moreover, this type of conflict of normative documents occurs often between the principles of Constitution and other normative documents. For example, according to the principle laid down in the Constitution, administrative bodies including the State Council are merely the executive bodies of law, and

[3] In principle, in the country where there is no statutory constitution, constitutional provisions are only part of the common law system. They are of the same legal effect as other statutory provisions. Where the legislature adopts an act different from the existing constitutional provisions, the constitutional provisions are deemed to have been amended.

presumably shall not adopt regulations limiting the rights of citizens. However, Article 10(11) of the Law on Administrative Punishment, which provides that the administrative regulations by State Council may spell out administrative punishments other than limiting personal freedom, is open to criticism that it has violated the constitutional principle.

2.2.2 Conflict between a lower normative document and a higher one

According to the Constitution, all these normative documents are fixed in a hierarchy: Apart from the Constitution, the basic laws passed by the NPC are at the top of the hierarchy. Next are the laws by the NPC Standing Committee. Then follow the "administrative regulations" of the State Council. Next are local regulations by the congresses of the provinces and administrative rules by Ministries. Subsequently follows local rules by local congresses and governments below provincial levels. In view of the hierarchy, conflict between a lower normative document and a higher one can again be divided into five sub-categories:

2.2.3 Conflict between the basic law by the NPC and a law by the Standing Committee of the NPC

A typical example is the conflict between the Criminal Procedural Law by the NPC and the relevant decisions by the NPC Standing Committee concerning "strike-hard-crime campaigns". In the nationwide crime crack-down campaign of 1983, for instance, the NPC Standing Committee substantially shortened, merely by issuing a decree, the period in which a defendant involved in a criminal prosecution of first instance can file an appeal petition under the first Criminal Procedural Law (1979), i.e., from 3 days to 10 days.[4]

2.2.4 Conflict between a law of the Standing Committee and administrative regulations of the State Council

An example is the conflicting provisions of Article 18 of the Law on Industrial Enterprises Owned by the Whole People (adopted by the NPC Standing Committee) and Article 16 of the Regulations on Changing the Management Mechanism of Industrial Enterprises Owned by the Whole People (adopted by

[4] The Decision of the Standing Committee of the National People's Congress Regarding the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security, adopted at 2nd Session of the Standing Committee of the 6th NPC on September 2, 1983, provided that "The time limit for appeal by the criminals [who have seriously endangered public security]" "shall be changed to three days from the ten days provided in Article 131 of the Criminal Procedural Law."

the State Council). The former provides that "The merger of enterprises or the division of an enterprise shall be subject to approval by the government or competent department of the government in accordance with the provisions of the laws and administrative regulations." The latter provides that "Enterprises may, in accordance with the principles of voluntariness and compensation, merger other enterprises, subject to the filing with the department for record." Obviously, the Law and the administrative regulations differ on the point whether a merger needs approval from the government.

2.2.5 Conflict between local regulations and national normative documents

The conflicting provisions of Article 47 of the Land Administration Law by the NPC Standing Committee and Article 15 of the Fujian Province Implementing Measures for Land Administration Law serve as an example. While the former provision states that the compensation fee for requisitioned cultivated land shall be six to ten times the average annual output value of the land in the three years before the requisition, the latter provides that the compensation for requisitioned arable land shall be five times the average annual output of the land in the three years before the requisition. There is an apparent conflict on the compensation criteria.

2.2.6 Conflict between a legislative instrument and an interpretative instrument

In the Chinese sources of law that the courts must observe, judicial interpretations of the Supreme Peoples Court belong to the category of rules of general application. Courts may interpret laws and regulations only when adjudicating cases. Nevertheless, the judicial interpretations of the Supreme Court play a special role in the Chinese legal system. The Constitution does not specify whether they have legal force. However, for the uniform application of laws, the NPC Standing Committee authorizes the Supreme Court to interpret laws and decrees relating to their specific application at trial.[5] Moreover, the Supreme Court has asserted that it has the authority to give courts at different levels directives, in the form of judicial interpretations, concerning the application of laws and regulations in relevant cases.[6] As a matter of fact, its directives are binding on the courts across the country, thus assuming the

[5] Resolution regarding the Strengthening of Legal Interpretation Work, promulgated by the 19th Session of the Standing Committee of the 5th National People's Congress on June 10, 1981.

[6] See the Supreme Court, Several Provisions concerning Judicial Interpretations (June 23, 1997). The Interpretations on Certain Questions regarding the Administrative Procedural Law (Supreme Court, 2000) is an example.

same legal effect as other normative documents. The Supreme Court is often seen promulgating judicial interpretations when a law is passed. It is not rare to find that the judicial interpretations deviate from the interpreted law.[7] (Yuan, 2006)

Moreover, while interpreting a law, the Supreme Court goes so far as adopting more applicable rules than the interpreted law has. For example, the Supreme Court promulgated lengthy interpretations of the General Principles of Civil Law, the Civil Procedural Law, the Administrative Procedural Law, the Succession Law, and the amendments to the Criminal Law. In the broad sense, such extensive judicial interpretations may be deemed to be conflicting with the interpreted laws.

2.3 Conflict between normative documents by different bodies of the same hierarchical status

This type of conflict of normative documents basically refers to the conflict between administrative rules by different ministries. It is often seen that a ministry and a provincial authority adopt different rules on the same subject at different time. A reported case suggests the existence of the disputing provisions, of whatsoever, by the State Economic and Trade Commission (SETC) and by Sichuan Province concerning foreign investment in the retailing industry. While the SETC measures on foreign investment in the retailing industry requires its approval, Sichuan Province authorized Carrefour, a French firm, to set up a supermarket in Chengdu according to its own rules.[8] There is apparently a conflict between the SETC measures and the provincial rule.

3 Causes for the conflict of normative documents

3.1 Diversification of legislative power and vague definition of the stratification of the legislative power

Generally speaking, if the legislative power[9] rests on one body, conflict of normative documents could occur only where the body is negligent in adopting two conflicting normative documents at the same time or enacting a new

[7] For example, it is often cited that the Supreme Court interpretations concerning misappropriation was a result of the misunderstanding of misappropriation for embezzlement and thus a deviation from Article 126 of the Criminal Law.

[8] People's Daily. http://english.peopledaily.com.cn, 2001-4-10.

[9] The legislative power means, in broad sense, the power to draft, motion, examine, adopt, promulgate, ratify, amend, interpret, codify and annul normative documents, and its core is the power to adopt, amend and interpret the normative documents.

normative document while failing to repeal an old normative document that is in conflict with the new one. Therefore, the possibility of conflict of normative documents is slight where one body retains the power of legislation. With the diversifying of legislative power, the possibility of conflict of normative documents rises substantially. (Liu, 2003)

However, if the legislative power that numerous bodies share is clearly defined and observed, the possibility of conflict of normative documents is not necessarily set to be higher than in the case of one body retaining the legislative power. Therefore, where there is no clear definition or where a definition of the legislative power exists only on paper, the possibility of conflict of normative documents is higher than in the case of one body retaining the legislative power.

Diversification of the legislative power is a new phenomenon. Traditionally, China is a centralized State. All the power, including the legislative power, comes from the centre. This practice was reflected in the 1954 Constitution, which provided that "the National People's Congress is the sole body to exercise the legislative power of the State". Nevertheless, as a bid to "giving full scope to the initiative and enthusiasm of the local authorities",[10] the 1982 Constitution provides that apart from the NPC, the NPC Standing Committee, the State Council, the ministries, the congress at local levels and the governments all share the power to enact normative documents. And the relevant laws and administrative regulations, such as the Organizational Law of the National People's Congress, the Organizational Law of the People's Congresses at Local Levels and Governments at Local Levels, the Law on Self-government in the Minority Regions, the Regulations on Record of Regulations and Rules, the Interim Procedures for the Making of Administrative Regulations, the Circular on the delimitation of the power and Procedures for Interpreting administrative Regulations, further provide for the pattern of diversification of the legislative power.

Moreover, the Constitution and laws and regulations provide merely a vague definition of legislative power. According to Article 89 (1) of the Constitution, for example, the State Council may adopt administrative regulations "in accordance with the Constitution and law". The provision is open to different interpretations. Some may argue that the State Council can only adopt regulations based on the existing laws as well as the Constitution. Other may hold the State Council may adopt regulations as long as the subject matter falls within its jurisdiction. Similarly, the provisions in these laws or administrative regulations are either incomplete or unclear.

[10] Article 3(4) provides that: "The divisions of functions and powers between the central and local governmental organs is guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities."

3.2 Defining provisions on legislative power not strictly observed

This refers to the case where a lower body adopts a normative document on a subject that shall be regulated by a higher body. For example, the issue of civil servants is relating to the state bodies and state budget which according to the Constitution fall within the exclusive legislative jurisdiction of the NPC. Before the NPC adopts a law in this regard, the State Council that can only adopt administrative regulations for the purpose of implementing the law by the NPC shall not adopt any administrative regulations.[11] In spite of this, the State Council adopted the Regulations on State Civil Servants.

Under such a circumstance, when the higher body adopts a normative document later, conflict may arise before the normative document by the lower body and the normative document by the higher body, unless the lower body amends the normative document it adopted previously or adopts a new normative document in line with the normative document by the higher body.

Non-observance with the defined legislative powers is even worse at the local level. In fact, abuse of powers of local levels has been the major problems in the Chinese history that used to be settled by wars.

The defined legislative power being not strictly observed is interest-driven. Since the diversified interests can be best represented in each piece of legislation, different interested subjects of legislation thus compete for seizing legislative power. This is particularly true where the scope of legislative power of localities is not defined. The practice is where there are no national normative documents, the local congresses and governments may regulate. Accordingly, conflict of normative documents becomes inevitable.[12] (Wan, 1997)

3.3 Lack of professionalism among legislators

The legislative bodies and their legislators are generally ill prepared for legislation. Even the NPC, the highest legislature of the country, is not a “place for professional politicians” in the sense that its composition are selected from designated functional electoral districts and meet only once a year, in which case most of them have no idea of how to make laws as legislative members and have no time to think about all kinds of legislative drafts beyond their own work.

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[11] For the same reason, the Regulations on Budget belong also to such a category (the Regulations adopted before the Budget Law).

[12] It has been observed that expanding powers such as powers to approve, to issue licenses, to order fines, by various bodies vested with legislative power, is primary for and in the departmental interests.

Similarly, heavy legislation load upon the bodies vested with legislative power may in part account for the conflict between normative documents.

3.4 Change of circumstances

Change of circumstances propels the change in law. However, it is often seen that a normative document of high hierarchical status is altered with the change of circumstance but the lower one is not, or the lower one is altered with the change of circumstance but the higher one remains untouched. This further complicates the conflict of normative documents.

4 The Legislation Law: A new foundation for approaching the conflict of normative documents

4.1 Defining legislative power limit to avoid conflict of normative documents

The Legislation Law defines the legislative power of various legislative bodies. The provisions of the Legislation Law in this regard, however, differ in that some clearly define the legislative powers of a certain legislative body, other fail to do so.

It is not difficult to find that the Legislative Law was successful in defining the legislative power of the NPC and its Standing Committee. The Law specifically refers the "basic law" to those laws relating to criminal, civil and state organ matters. It lists the exclusive legislation scope of the NPC and its Standing Committee, which includes enforcement measures relating to citizens' rights of political and personal freedom; civil codes on real rights, obligatory rights, intellectual property rights, marriage and inheritance; lawsuits and enforcement systems and some other major items concerning the fundamental systems of politics, economy and laws of the state, thus preventing other legislative bodies particularly the State Council, from adopting normative documents in these areas.[13]

[13] Obviously, however, the Legislation Law provides where laws have not been legislated on the matters in the prescribed areas, the NPC and its Standing Committee may authorize the State Council to adopt administrative regulations to meet the practical needs for normative documents, with the exceptions of crime and penalties, deprivation of the political rights of citizens, and coercive measures and punishment concerning the restriction of personal freedom, and the judicial system. The NPC and its Standing Committee may take back the authorization when time is right for adopting laws.

Similarly, the Legislation Law also specifies the scope of the legislative power of the State Council.[14] It states that the State Council may adopt administrative regulations for the purpose of implementing laws and on matters falling within its administrative power as the Constitution specifies.

Nevertheless, the Legislation Law seemed to have failed to give a clear-cut definition of the legislative power of localities. It merely provides that the congresses at provincial level or of larger cities[15] may adopt local regulations for the purpose of implementing laws and regulations, or on local matters on which local regulations are needed, in accordance with the local situations and to meet the practical needs, under the condition that they are not in conflict with the Constitution, laws and administrative regulations.

4.2 Providing for the guidelines for application of normative documents

For the application of normative documents' purpose, the Legislation Law adds new provisions to of the existing Constitutional structure on the basic hierarchy of normative documents and thereby forming a complete hierarchy of normative documents. The puzzling issue whether ministerial rules or local regulations prevail in event of conflict between ministerial rules and local regulations is solved. According to the Legislation Law, in case of conflict between local regulations and administrative rules by Ministries, the matter shall be referred to the State Council to determine either to apply the local regulations in the relevant locality, or to submit to the NPC Standing Committee for a determination if it believes that the application of the ministerial administrative rules. Where there is a conflict between administrative rules by different ministries or between ministerial administrative rules and local rules by local governments, the conflict shall be referred to the State Council for a determination as to which rule shall apply.[16]

Apart from laying down a complete hierarchy of normative documents, the Legislation Law also provides for the treatment of inconsistency in normative documents for the application of normative documents' purpose. In general, where the same body adopts the conflicting normative documents, the specific

[14] The Legislation Law seemed to expand the scope of legislative power of the State Council. The legislative power of the State Council is only one of its functions and powers that Article 89 of the Constitution specifies. The rest are concerning other administrative powers of the State Council that are not necessarily exercised through administrative regulations. However, the Legislation Law provides that the State Council may adopt administrative regulations on all administrative matters that Article 89 of the Constitution sets out.

[15] Larger cities are referred to cities where the provincial governments are situated and where the Special Economic Zones are situated, and "large-sized cities" approved by the State Council.

[16] Article 86 of the Legislation Law.

takes precedence over the general, and the new controls the old. For example, the NPC Standing Committee is responsible for determining whether there exists a conflict between two laws, and the State Council is responsible for determining whether there exists a conflict between administrative regulations.

4.3 Employing procedures of ratification, record and amending and repealing

Ratification is part of the legislative process. It is also a means to resolution of conflict of normative documents. The higher legislative body may exercise the power not to ratify an inferior normative document so as to avoid possible conflict between an inferior law and a superior law. The Legislation Law lays down provisions for the provincial congresses to examine and approve the local regulations by major cities and autonomous rules by autonomous prefectures or counties within their jurisdictions, and for the NPC Standing Committee to examine and approval autonomous regulations by minority autonomous regions.[17]

Record is part of the supervision process and conducive to avoiding conflict of normative documents. The Legislation Law spells out in detail the provisions for recording of administrative regulations by the State Council with the NPC Standing Committee, of local regulations with the NPC Standing Committee and the State Council, of ministerial rules and local rules with the State Council, etc.[18]

Amending and repealing is the last resort to resolution of conflict of normative documents. The Legislation Law explicitly provides when a normative document needs repealing or amending and how it shall be repealed or amended.[19] In general, a body of higher hierarchical status is in a position to repeal or amend a normative document that it deems conflicting with the normative document adopted by it.

5 What needs to be done to prevent the conflict of normative documents?

Firstly, it is always wise to remember that no legislation means no conflicts of normative documents. Of course, this does not mean not adopting normative documents at all; instead, it means refrain legislating in certain fields. Specifically, more attention needs to be paid to deregulation of business.

[17] Articles 63 (2) and 66 of the Legislation Law.
[18] Article 89 of the Legislation Law.
[19] Articles 87 and 88 of the Legislation Law.

Although deregulation in essence is related to the readjustment of the government role, it has a "side effect" as avoiding conflicts of laws.

In view of this, the Legislation Law thus has a fatal defect. It does not specify which fields shall not be regulated, thus opening more possible areas for competing for legislative powers among different bodies and leaving areas for conflict of normative documents.

Secondly, judicial review is an effective means to resolution of conflict of normative documents. It is a failure that the promulgated Legislation Law did not to institutionalize judicial review, regardless of its form.[20] Indeed, when a Court finds a conflict between normative documents of different hierarchical status, it is able to exercise its power to apply the higher one in accordance with the Legislation Law. Nevertheless, in case it finds a conflict between normative documents of the same hierarchical status, it should have, at least, the power to report the conflict to a competent body for resolution. More advisable is that judges are authorised to have the power to declare which of the conflicting normative documents are null and void. Having omitted to clothe the courts with the power of judicial review or semi-judicial review, the Legislation Law is clearly defected.

Thirdly, it is advisable to provide in principle that when a higher normative document is passed all the lower normative documents shall be reviewed and, if appropriate, amended within a prescribed period of time; otherwise they are deemed as ceasing to be effective automatically. The Legislation Law fails to impose such an obligation upon the bodies with legislative powers, and particularly, to provide that a normative document conflicting with a higher normative document shall be deemed as void.

Lastly, it should be pointed out that a fundamental remedy for the conflict of normative documents between normative documents by the centre and those by the localities is to institute a federal system. Similarly, the remedy for the conflict of normative documents between laws by the NPC or its Standing Committee and the administrative regulations by the State Council and between the statutory provisions and judicial interpretations is to introduce the concept of separation of powers. For China, however, one of the difficulties is that the human infrastructure is often simply not there. When it comes to these politically sensitive issues, one has reason to see whether the leadership is prepared for change. Of course, as far as the Legislation Law is concerned, no further improvement can be done in this regard.

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[20] In most of the countries, either a special Constitutional Court or the Supreme Court is for the responsibilities for judicial review. Noteworthy, a previous draft of the Legislation Law on December 17, 1994 provided for a Constitutional Committee responsible for "legal supervision", including reviewing conflicting laws and reporting to the NPC Standing Committee on the constitutionality of the reviewed laws.

In concluding, it is fair to argue that the Legislation Law, for the first time in the legislative history of the People's Republic of China, signifies the institutional attempts to resolve the conflict of normative documents. However, it leaves a wide spectrum of problems unsolved and therefore its ability to achieve its goals is undermined. What the Legislation Law can not accomplish has to be achieved through further political transformation which rests on the political determinations of the Chinese leadership.

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