Toward a More Rigorous Mechanism for Resolving Legislative Conflicts

Unpacking China's Transitional "Mini Law" on the "Recording and Review" Process

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In December 2023, China's national legislature, the Standing Committee of the National People's Congress (NPCSC), adopted the *Decision on Improving and Strengthening the System of Recording and Review* (Decision), a major bill aimed at reforming "recording and review" (R&R)—China's system of parallel processes for resolving legislative conflicts. Under R&R, an enacting body—that is, a governmental body authorized to issue documents of a legislative nature—must file its legislation with the designated reviewing body for subsequent review. The reviewing body is either a legislative or an administrative organ, as Chinese courts lack the power to review and invalidate legislation. Among all reviewing bodies, the NPCSC is the most powerful, because its jurisdiction extends to all major sub-statutory norms and it alone holds the power of constitutional review. Below, I will use "R&R" to refer just to the NPCSC's process, as it will be the focus of this post.

Background and Overview

Envisioned by China's 1982 Constitution, R&R was first operationalized (on paper) by the *Legislation Law* in 2000. It did not enter public awareness, however, until three legal scholars invoked it by filing a groundbreaking petition for constitutional review amidst the 2003 Sun Zhigang incident to challenge an administrative regulation that created an extrajudicial detention system. And it was only in May 2004 that the NPCSC established a dedicated office under its Legislative Affairs Commission (LAC), a professional support body, for conducting review on its behalf. Yet, for the next decade or so, R&R operated entirely behind closed doors and was widely seen as ineffective. Then things started to change in 2013, when the Communist Party first vowed to "improve" the process. Since then, the NPCSC has implemented a series of reforms aimed at making R&R more powerful, transparent, and accessible to the public.

Those reforms culminated in last December's Decision. It is the first statutory authority on R&R that is comprehensive in scope, albeit not exhaustive in details. For this reason, Chinese commentators have termed it a "mini law" on R&R, though it is nothing short of a milestone in R&R history. It simultaneously concludes one phase of R&R reform while starting a new one. The two verbs in its title reflect this dual role: The Decision "strengthens" R&R by elevating into law core *existing* components of the system. It is a symbol that China has built a relatively mature statutory framework for a unique legislature-centric process for resolving legislative conflicts—one that emphasizes consultation with and self-correction by enacting bodies. At the same time, the Decision "improves" R&R by introducing a raft of *novel* elements to address weaknesses in the system. Some would give more teeth to the rectification process so that enacting bodies do not abuse the latitude they enjoy. How the new measures would work in practice and whether they would achieve the intended goals, however, remain to be seen.

Codifying the Prior Chapter of R&R Reform

On the eve of the Decision's passage, R&R had three main governing authorities. Two were statutes: (1) the *Legislation Law* (as last amended in 2023), which effectuates NPCSC review of "regulations," an eclectic category that includes the State Council's administrative

regulations and the legislation of local people's congresses; and (2) the 2006 *Law on Oversight by the Standing Committees of People's Congresses* (*Oversight Law*), which provides for an analogous review process for "judicial interpretations"—legislation-like documents issued by China's top judicial authorities. The third instrument, the 2019 *Working Measures for the Recording and Review of Regulations and Judicial Interpretations* (*Working Measures*), was only an internal NPCSC document that (in theory) lacked external force. It did, however, flesh out the two statutes' largely skeleton provisions on R&R and filled in many statutory gaps, so for a while, it functioned as a nearly self-contained governing authority for R&R.

The Decision is, in a nutshell, a partial codification of the *Working Measures*. The following paragraphs offer a more detailed explanation of its relationship to preexisting authorities and double as a sketch of R&R before the Decision's adoption.

I conceptualize R&R as having three main parts, or three R's: recording, review, and rectification.

First, *recording* concerns the breadth of the filing requirement and related procedures. The Decision repeats the long-standing statutory requirement that all regulations and judicial interpretations be filed with the NPCSC within 30 days of promulgation (arts. 2–3). It also codifies the basic filing process and the NPCSC General Office's authority to accept filings and conduct formal reviews (art. 3). More detailed procedural and stylistic requirements are laid out in the *Working Measures*.

Second, *review* implicates three main issues: how review may be triggered; how review is conducted; and on what grounds a document may fail review. Like the *Legislation Law*, the Decision provides for four modes of review: (1) proactive review of newly filed legislation; (2) review conducted at the request of a state or private entity; (3) "targeted reviews" that focus on a particular area of existing law; and (4) review conducted after another institution forwards a wrongly addressed petition to the NPCSC (arts. 6–9). Unlike the *Legislation Law*, which fails to articulate any procedure for review, the Decision has incorporated the requirements of the *Working Measures* that the LAC communicate with the persons requesting review (when applicable) and hear the views of enacting bodies as well as relevant third-party institutions and persons through hearings, discussion sessions, field research, or other means (art. 15).

As for the substantive criteria for review, the *Legislation Law* and the *Oversight Law* generally provide that a document may be rejected for violating the Constitution or a statute. The *Working Measures* refined those two general grounds by further specifying the circumstances in which a document will be deemed unconstitutional or unlawful. They also added that a document will fail review if it is inconsistent with the Party's major decisions or major national reforms; or if it is "clearly inappropriate," including when "the means prescribed to achieve its legislative purpose clearly does not match the legislative purpose"—a simple means-end test that one official claims "tentatively" incorporated the proportionality principle.[1]

Notably, the Decision has not wholesale codified all the detailed criteria under the *Working Measures*. Rather, it requires only that the LAC "focus on" certain issues that have repeatedly come up in practice,[2] including whether a piece of legislation comports with the Constitution; is consistent with major national policies and reforms; exceeds the enacting body's legislative authority; substantively violates any superior legislation; or violates legislative procedure (art. 11).

Finally, *rectification* concerns the enforcement of a decision that a document has failed review and the decision's legal effect. Three progressively forcible corrective measures were available before the Decision's adoption. Only the two more coercive but *less* often employed measures were codified in the *Legisla-*

[1] Chen Qian [redacted] "[redacted][Research on the Application of the Principle of Proportionality in R&R]," [redacted][*Journal of Regulations Filing and Review*], no. 3 (December 2023): 12.

[2] See Yan Dongfeng [redacted] "[redacted][The Background of the R&R Decision's Promulgation and an Explanation of Its Main Contents]," [redacted][*China Law Review*], no. 1 (February 2024): 206.

tion Law and the *Oversight Law*. The first is the issuance of a written opinion by the LAC to the enacting body, which triggers the latter's obligation to decide whether to follow the opinion and correct the offending legislation on its own. If it complies with the LAC's opinion, the review ends. If not, the NPCSC may then invoke the second option by annulling the legislation outright—a most drastic measure that it has yet to deploy in practice. The third enforcement measure, one that has closed "the vast majority"[3] of cases, was recognized by the *Working Measures* only. And that is the LAC's initial informal attempt (e.g., via a phone call) to persuade the relevant enacting body to remedy an identified problem—which, if fruitful, would obviate the need for a written opinion or the NPCSC's intervention.

This three-stage corrective process encapsulates China's heavy reliance on consultation and self-correction to resolve identified legislative conflicts. In a political culture that values harmony among state organs, the NPCSC's direct annulment of an enacting body's legislation would not only "damage [the latter's] face and authority" and thus potentially reduce its willingness to support the NPCSC's work, but also "undermine the narrative of unity under Party leadership."[4] In addition, before recent R&R reforms, the NPCSC lacked the political capacity to resolve major political and legal issues often presented by citizen petitions, so had to resort to encouraging consensus-building and self-correction. Today, with the Party's support, the LAC appears more assertive in deciding hard questions and less constrained by the political taboo of publicly rebuking other state organs. But the consultative approach persists, and the Decision further solidifies it by codifying informal communication as the first step of rectification (art. 13, para. 1). Similar factors underly the approach's continued vitality: The NPCSC still depends on the goodwill and cooperation of other state organs to effectively perform its duties (R&R and otherwise), and an ever-growing emphasis on the Party's leadership requires all state organs to effectively implement its decisions, so open confrontation is counterproductive (not to mention unnecessary in this context). And with the retroactive effect of NPCSC annulment (if any) being unsettled, this measure will most likely serve as a deterrent that is never deployed.

Beginning the Next Chapter of R&R Reform

More importantly for the future of the R&R system, the Decision has also introduced a few novel provisions of an aspirational or experimental nature that likely aim to address shortcomings of the pre-Decision R&R regime. Below, I will highlight four such provisions.

First, the Decision foregrounds constitutional review in R&R. While constitutional review has always been embedded in the process, the Decision affords it particular attention, outlining special requirements for constitutional review in a separate article. It reiterates that the LAC should "focus on" constitutional issues when conducting review and for the first time directs it to "accurately grasp and clarify the relevant provisions and spirits of the Constitution" to respond to societal concerns over constitutional issues (art. 5). As I have observed, the LAC remains hesitant to make official constitutional determinations by either obscuring the precise legal bases for its decisions or dodging constitutional claims entirely. Such hesitation likely arises from both political and legal considerations. As to the former, a formal finding of unconstitutionality is widely understood by Chinese political actors to entail (perhaps not always fairly) political—i.e., disciplinary—consequences for the responsible officials.[5] Though this outcome is not explicitly spelled out anywhere, the mere possibility of it deters formal constitutional determinations. On the legal front, again, because of the as-yet unresolved retroactivity question, a formal

[3] Liang Ying [redacted] "[redacted][Speech at the Closing Ceremony of the NPCSC Legislative Affairs Commission's Symposium on Theoretical Research and Curriculum Development on R&R at Zhejiang University]," [redacted][*Developments in Legislation*], no. 7 (January 2024): 10.

[4] Keith J. Hand, "Understanding China's System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony," *Columbia Journal of Asian Law* 26, no. 1 (January 2013): 215.

[5] Tian Wei [redacted] "[redacted][Standardizing the Types and Force of Constitutional Review Decisions]," [redacted][*China Law Review*], no. 1 (February 2020): 79.

declaration of unconstitutionality could have the effect of upsetting otherwise settled expectations and unleashing chaos in the society—an outcome that a stability-obsessed regime would surely wish to avoid. By authorizing—and urging—the LAC to "clarify" constitutional provisions, the Decision may spur the development of appropriate accountability and retroactivity doctrines and help reverse the trend of avoiding mentions of the Constitution in constitutional review.

Second, the Decision establishes a novel link between R&R and the judicial process. Under article 6, when a court finds a regulation or judicial interpretation unconstitutional or unlawful, or has doubts about its constitutionality or legality, it may report the issue up the judicial hierarchy to the Supreme People's Court (SPC), which will then decide whether to seek NPCSC review. (The Decision lays down analogous procedures for procuratorates and supervision commissions, which are, respectively, China's prosecutorial and anti-corruption bodies.) Previously, R&R and litigation ran independently from each other such that petitioners who obtained a favorable decision from the LAC still could not then use that decision to seek individualized relief in court, especially if they had already exhausted the judicial process.[6] The new linkage mechanism could alleviate this dilemma, but the Decision leaves many questions unanswered. It fails to specify, for instance, whether litigants have an affirmative right to invoke the new process in court; whether a lower court's decision to refer problematic legislation to the SPC stays the judicial proceedings; and what effect, if any, a ruling by the LAC or NPCSC will have on the pending case. While a few enterprising courts might invoke and experiment with this new mechanism, individual courts cannot be relied on to supply those missing answers. Empirical research shows that Chinese courts have been actively avoiding exercising their power to review non-legislative regulatory documents in administrative litigation.[7] It would be foolish to expect anything different here. Hence further clarification must jointly come from the SPC and other relevant national authorities to unify the rules nationwide and across different branches of government.

Third, the Decision introduces the principle of proportionality into the review process. Article 11 directs the LAC to focus on (among the other issues noted earlier) "whether the measure taken [by a piece of legislation] and its purpose satisfy the principle of proportionality," without spelling out the legal test or the scope of its applicability. Later, writing in the *China Law Review*, Yan Dongfeng, director of the LAC's R&R office, clarifies that proportionality applies to constitutionality, legality, *and* reasonableness review—and that the test has three prongs: suitability, minimal impairment (necessity), and proportionality as such (balancing).[8] Proportionality review will entail not only "abstract balancing of interests and value judgments" but also quantitative analysis, according to Yan, and the principle could therefore render the LAC's review "sounder and more precise" and its conclusions "more persuasive."[9] He also notes the global trend of adopting proportionality as an "important" principle of constitutional review, suggesting that this phenomenon at least partially motivated China's official embrace of proportionality review. Notwithstanding a recent official effort to reinterpret several LAC decisions (none concerning fundamental rights) through the lens of proportionality,[10] the body has yet to offer

[6] See, e.g., Liang Hongxia [redacted] "[redacted]——[redacted][The Function of Recording and Review in Safeguarding Human Rights and the Path to Realizing It: Rethinking the Pan Hongbin Case]," [redacted][*Human Rights*], no. 2 (March 2020): 65. In the so-called "Pan Hongbin case," Pan's e-bike was seized by Hangzhou's traffic police and then towed back to its place of registration (a different city) at his own expense, in accordance with a municipal regulation that the LAC later ruled unlawful at Pan's request. Hangzhou's legislature then repealed the provision at issue. But because at that point Pan had already lost his administrative lawsuit against the traffic police and exhausted all appeals, and because the courts refused to reopen the case on the ground that the provision's repeal was not retroactive, he never received the compensation he was due.

[7] He Haibo [redacted] "[redacted][On Courts' Collateral Review of Normative Documents]," [redacted][*China Legal Science*], no. 3 (June 2021): 140.

[8] See Yan, "R&R Decision," 206. He did not mention if the LAC would inquire whether the legislation at issue has a legitimate aim, which in other jurisdictions is typically the first step of, or a threshold inquiry for, proportionality review.

[9] Yan, 206.

[10] See Chen, "Research on Proportionality," 16–19.

a complete proportionality analysis—at least publicly. So the applicability and robustness of proportionality review in China remain to be seen.

Finally, the Decision adds new ways to involve the NPCSC itself in rectifying problematic legislation. As noted earlier, the LAC has been able to secure compliance with its decisions through informal communications and written opinions, making it unnecessary for the NPCSC to invoke the "nuclear option" of annulling a document outright. This also means, however, that the NPCSC has so far played no direct role in rectification. To "strengthen the authority of NPCSC oversight and the rigor of the rectification process,"[11] the Decision adds two weapons to the NPCSC's arsenal: (1) declaring a document unconstitutional or unlawful and requiring correction "within a specified period"; and (2) requesting that an enacting body "amend or improve" the relevant document "on its own." According to Director Yan, the former method would be used for "serious constitutional or statutory violations," and the latter for "ordinary" violations (such as those that occur only because of subsequent changes in national law, he suggests).[12] These new measures could, argues one leading Chinese scholar, prompt the NPCSC to sort out the temporal effects of its actions—and of the LAC's decisions as well; the retroactivity of review decisions is perhaps the biggest unsettled issue in R&R reform today. But as Yan acknowledges, how to deploy the new corrective measures requires further experimentation in practice.[13]

Conclusion

The Decision belongs to a category of legislation that Chinese scholars have dubbed "quasi-legislative decisions"—instruments with the force, though not the form, of statutes. Given China's unwritten rule that statutes should be substantively comprehensive and infrequently amended, quasi-legislative decisions have proven useful in allowing legally complex and politically salient institutions like R&R to develop gradually without formal statutory changes. The Decision serves this purpose by both placing existing elements of the R&R system on a stronger legal footing and adding new building blocks aimed at making the process more efficient and rigorous. To be sure, the Decision has not resolved all the critical questions currently confronting R&R reformers. It has, however, set the stage for further development of the system and goes a long way to laying the groundwork for an eventual statute on R&R.

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[11] Yan, "R&R Decision," 207.
[12] Yan, 207.
[13] See Yan, 207.