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**Selective Openness: An Evaluation on Open-Door  
Legislation in China**

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## ***Abstract***

It is a common practice that the National People's Congress releases law drafts to the society to solicit opinions. Such practice is called open door legislation. Based on cases and interviews, this paper examines whether and how the national legislature takes lawmaking advices from the general public. It finds that the transparency and openness in PRC national lawmaking is selective or strategic. On one hand, in the field of economic affairs and social welfares, the Party state listens to the general public, on the other hand, in more political related issues, the public participation hardly make a real impact.

**Keywords** Public Participation, Chinese congress, Lawmaking

## **I. Introduction**

How an authoritarian state responses to public opinion? In the case of China, there are literature on how the Chinese courts are influenced by populist pressures<sup>1</sup>, how mass-elite relations escalate in Chinese villages,<sup>2</sup> and how the State Bureau for letters and Visits absorbs grievances<sup>3</sup>. What has been inadequately addressed is "open door legislation" (*kai men li fa*) — how the Chinese Party-state response to the public pressure in lawmaking area. At the birth of PRC, the draft of 1954 Constitution was released to the society to receive feedbacks. 8000 people proposed 5900 suggestions in 81 days of debating. Ever since then, it becomes a custom that the national law drafts to the society for discussion. The draft of 1982 Constitution is also opened publicly. From year 1983 to 1997, the National People's Congress Standing Committee (NPCSC) release 5 important law drafts to society, namely, *State Owned Industries and Enterprises Law*, *Administrative Litigation Law*, *Hong Kong Special*

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<sup>1</sup> Liebman B (2011) A Populist Threat to China's Courts? In Gallagher M, Woo M (eds) *Chinese Justice: Civil Dispute Resolution in Post-Reform China*, at pp. 269-314. CUP, New York.

<sup>2</sup> Lianjiang Li, Kevin O'Brien (1996), Villagers and Popular Resistance in Contemporary China, *Modern China* 22(1).

<sup>3</sup> Isabelle Thireau and Hua Linshan (2010), *Les ruses de la démocratie. Protester en Chine* (Ruses of democracy: Protest in China) Paris, Seuil, L'Histoire immédiate,.

*Administrative Region Basic Law*, and *Assembly and Demonstration Law*.<sup>4</sup> From 1979 to 2006 the NPCSC released 12 law drafts.<sup>5</sup> On April 15th 2008, the 11<sup>th</sup> NPCSC 2<sup>nd</sup> chairmen meeting decided that from then on all the law drafts ought to be made known to the public.<sup>6</sup> In 2004 Guangzhou municipal people's congress standing committee decided that every time after first deliberation all the law drafts should be posted on the congress website to solicit opinions from the public, for the reference of second deliberation.<sup>7</sup> Institutional channels for the public to participate in lawmaking come in different forms. Both national and local congresses hold hearings, panel discussions, feasibility study meetings, or let citizens sitting on congress standing committee meetings, or invite a third party to draft law.

Open door legislation is recognized by the CCP. At the 17<sup>th</sup> Party National Congress of the CCP Former Party Secretary Hu Jintao asked for “scientific and democratic legislation” in his report. Hu also asked for “expand channels for people's orderly participation in the legislative process” in his report at the 18<sup>th</sup> Party National Congress of the CCP. Incumbent Party Secretary Xi Jinping emphasized “scientific and democratic lawmaking” in his report at the 4th plenary session of 18th CPC Central Committee. So far, “scientific and democratic lawmaking” has officially become a top-down party instruction for legislative work. It is also a legal requirement. Article 34 of *Legislation Law* stipulates that when a bill on the agenda of the law committee, the relevant specialized committee and the operating divisions of the Standing Committee shall hear the opinions of all the parties concerned in various

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<sup>4</sup> “Quan Guo Ren Da Chang Wei Hui Xiang She Hui Gong Bu Fa Lv Cao An De Gong Zuo Yu Si Kao”, (Reflection on NPCSC release law drafts to society), [www.npc.gov.cn](http://www.npc.gov.cn) visited on May 23<sup>rd</sup>, 2016.

<sup>5</sup> Ying Sun (2015), “Zhong Guo Ren Da Li Fa Guo Cheng Yan Jiu Shu Ping” (Review Essay on Studies of Chinese People's Congress Lawmaking Process), in *Zhong Guo Xian Fa San Shi Nian: 1985-2015* (30 Years of Chinese Constitution Law Studies: 1985-2015), China Law Press, at p. 369.

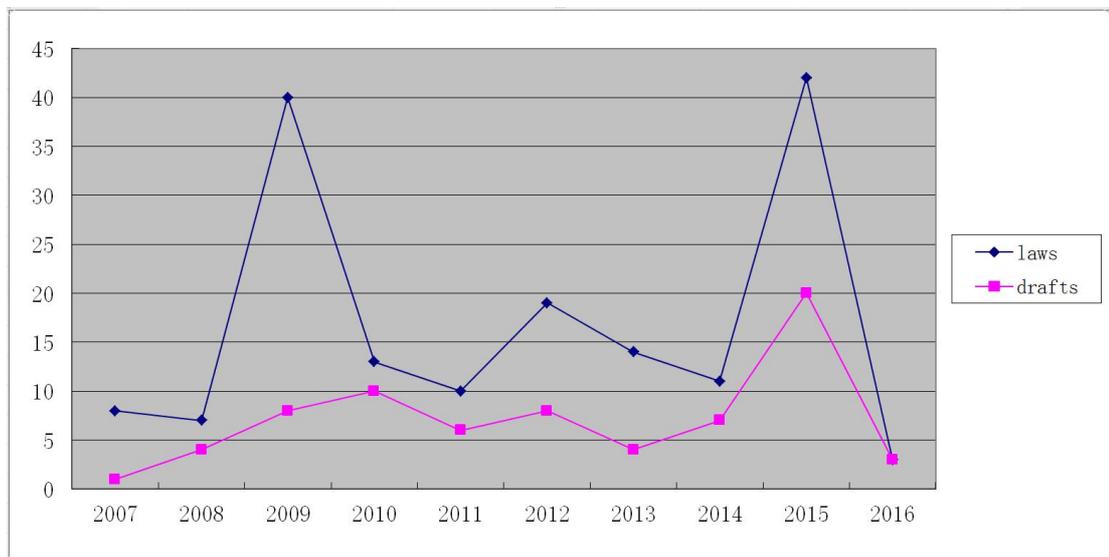
<sup>6</sup> After all, the *Legislation Law* makes it clear that the congress chairmen's meeting has the authority to decide whether to release draft law to the public (Article 36 of 2015 revision).

<sup>7</sup> Chen Sixi(2008), “Ke Xue Min Zhu Li Fa Shi Da Shi Jian”(Ten Events of Scientific and Democratic Legislation), *Hainan Renda*, (12), at p.56.

forms such as forums, discussion meetings, and hearings. The 2015 revision of *Legislation Law* accentuates the importance of experts by saying that when there is a need for specialized and requires feasibility evaluation, relevant experts, departments, deputies, and other parties concerned should be involved (Article 36 of 2015 *Legislation Law*).

Previous literature mainly focus on the inter-power play among bureaucracy structures of the Chinese legislative system, yet overlook this bottom up dynamic in lawmaking.<sup>8</sup> Open door legislation phenomenon cannot simply be taken at face value. It needs closer examination: To what extent the Party state opens doors to the ruled? Can the general public influence or shape the law? Can the open door practice bring transparency into the lawmaking process and constrain the bureaucracy agencies? As Chart 1 shows, not every legislation goes through an open door process, and even the draft was released to the public, how much difference have the public opinion made upon the lawmaking result?

Chart 1: Comparison between Law Enacted and Draft Released by NPCSC (2007-2016)



This paper argues that the effects of public participation in lawmaking vary according to the theme of the laws. It discovers that the public participation in law

<sup>8</sup> See Murray Scot Tanner (1999), *the Politics of Lawmaking in Post-Mao China: Institutions, processes and Democratic Prospects*, Oxford: Clarendon Press. Ming Xia (2008), *The People's Congresses and Governance in China: Toward A Network Mode of Governance*, London; New York: Routledge. Young Nam Cho(2009), *Local People's Congresses in China: Development and Transition*, Cambridge; New York : Cambridge University Press. Stanley Lubman (2006) , "Looking for Law in China", *Columbia Journal of Asian Law*. Vol.20, No.1.

making in China is de facto a “half-opened door” or “selectively-opened door” approach. In the area of economic and social rights and certain aspects of legal development, citizen’s participation can play a certain role; in the area of national security, democratic development style and other areas concerning the authoritarian core of the Party-state, the lawmaking is still tightly controlled. This paper has four parts. Part I is this introduction. Part II describes how expert suggestions and populist opinions been absorbed into law drafting in the field of rights protection. Part III explains the limits of popular participation in political lawmaking. Part IV concludes the paper by presenting the implications of the semi-open door legislation in China to the larger discussion of China’s political development.

## **II. Open Door Legislation in Rights Protection**

The rise of “Right Consciousness and Rule Consciousness” among Chinese citizens are one of the most intriguing research topic in recent years. The response of Chinese citizens in open door legislation echoes the discussion of right consciousness. According to Li Lianjiang, rights consciousness is “a combination of awareness of the necessity of having protection from central rule making authorities and a willingness to secure such protection through direct or indirect participation in rule-making”<sup>9</sup>. Law making is the elementary form of rule making. The following sections reveal how the Chinese citizens actively participate in the making of rights-protective laws.

### ***Tax rights***

As China embraces modern standards of market and adapts itself into globalization, parts of its legal system draw largely from western models.<sup>10</sup> The Constitutional principle of “Paying the tax according to law” or “no taxation without law” is gradually recognized. Article 56 of *Chinese Constitution* stipulates that “It is the duty of citizens of the People's Republic of China to pay taxes in accordance with the law.” Article 8 of The *Legislation Law* (released in Year 2000) points out that basic economic system and basic systems of finance, taxation, customs, banking and

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<sup>9</sup> Lianjiang Li, (2010) “Rights Consciousness and Rule Consciousness in Contemporary China”, *The China Journal*, No. 64, at pp. 47-68; Rule consciousness refers to “a combination of awareness of the necessity of having protection form rule-enforcement authorities and a willingness to secure such protection through direct or in-direct participation in rule-enforcement.

<sup>10</sup> Pitman B, Potter (2001), *The Chinese Legal System: Globalization and Local Legal Culture*, Oxford University Press.

foreign trade can only be governed by laws which can only be made by the National People's Congress(NPC) and National People's Congress Standing Committee(NPCSC).<sup>11</sup> Article 9 compromises the strictness of article 8 by saying that if the NPC and NPCSC have not make law yet, they could delegate the State Council to formulate administrative regulations dealing with matters mentioned in article 8 (except matters concerning criminal offences and their punishment, mandatory measures and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their person, and the judicial system). Article 9 of Legislation Law creates a dilemma: The Constitution asks for rule of law in tax, yet the Legislation Law suggests otherwise. Thus tax legislative power has been shared among NPC, NPCSC, State Council, Ministry of Finance, State Administration of Taxation, and local government and congresses. Until 2015, only three kinds of tax are legalized, which are personal income tax, enterprise income tax, and vehicle and vessel tax. 70% of national tax total income comes from tax which are set by administrative regulations and documents.<sup>12</sup> The inconsistency in tax law system is criticized from the perspective of legality of taxation and protection of taxpayers' interests.

When the *Legislation Law* is brought to revise in 2014, advocates of taxation legality saw a window of opportunity. How to describe rule of law in taxation in the revised version of tax system? The second draft of *Legislation Law* puts that in "the types of tax, tax payer, objection of taxation, basis of tax assessment, and tax rate are governed by law". This detailed and comprehensive description is considered an

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<sup>11</sup> Article 8 made a list of basic systems that should be governed by laws only. No other legislative bodies can touch those items. Article 8 "The following affairs shall only be governed by law:

- (1) affairs concerning State sovereignty;
- (2) formation, organization, and the functions and powers of the people's congresses, the people's governments, the people's courts and the people's procuratorates at all levels;
- (3) the system of regional national autonomy, the system of special administrative region, the system of self-government among people at the grassroots level;
- (4) criminal offences and their punishment;
- (5) mandatory measures and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their person;
- (6) requisition of non-State-owned property;
- (7) basic civil system;
- (8) basic economic system and basic systems of finance, taxation, customs, banking and foreign trade;
- (9) systems of litigation and arbitration; and
- (10) other affairs on which laws must be made by the National People's Congress or its Standing Committee. "

<sup>12</sup> Wei Cao (2015), "Fang Quan Yu Que Quan: Li Fa Fa Xiu Gai De Bei Hou" (Delegation and Affirmation of Power: The Background of Legislation Law Revision), *Insight China* (7).

embodiment of “rule of law in taxation” and therefore advancement in Chinese legal system. Surprisingly the third version of Legislation Law draft deducted the aforementioned terms, and only maintained “the establishment and abolishment of tax category, tax collection administration and other basic taxation rules are ought to be governed by law.” This change provoked a number of congress deputies and experts. They expressed their discontent through the media. The third version of Legislation Law was submitted to NPC deputies on March 8th 2015, and at the same night Caixin website published three interviews with Zhu Zhengfu, the vice-chairmen of National Bar Association and also a member of National Chinese People’s Political Consultative Committee (NCPCC), Jing Hong, a professor of Shanghai University of Finance and Economics who are also a member of NCPCC, and Liu Jianwen, a law professor of Peking University, respectively. Zhu Zhengfu said that the so-called “paying tax according to law” means that whenever the government collected tax it had to get the consent from the people. To delete the term of tax rate from the Legislation Law means that the government can take whatever it feels like without asking the people. Jiang Hong said the third revision endowed the State Council with an unlimited power to set the tax rate and such power is unacceptable from the perspective of rule of law.<sup>13</sup> Jiang believed that the deletion in third draft was an attempt made by the administrative branch to keep its lucrative tax power.<sup>14</sup> On March 9th Zhang Shuna, vice-chairperson of the NPC legislative affairs commission explained that the word “tax type” consists of tax rate and other basic elements, there is no need to specify all the basics.<sup>15</sup> Experts and deputies were not persuaded. Li Weiguang, a leading scholar of Tianjin University of Finance and Economics said in an interview that if the third version of legality of taxation were adopted officially, that would be “a substantial backward of legislation law and a unforgivable mistake”<sup>16</sup>. Li insisted that “legalization of taxation must be specific, detailed,

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<sup>13</sup> Yuding Feng (2015), “Li Fa Fa Shui Shou Fa Ding Xiu Ding Ni Zhuan Bei Hou”(The Background of Taxation According to Law in Legislation Law), *Rule and Law and Society*, (5).

<sup>14</sup> Meng Li (2015), ““Shui Shou Fa Ding Xie Ru Li Fa Fa De Si Tian Si Ye”( Four Days and Four Nights of Adding Taxation According to Law to the Legislation Law), *Democracy and Legal System*, (4).

<sup>15</sup> “Zheng Shu Na Tan Li Fa Fa Xiu Zheng An San Shen Gao Shan Chu Shui Lv Fa Ding: Yin Biao Shu Bu Gou Ke Xue”(Zheng Shu Na’s Explanation on Why The Third Draft of Legislation Law Revision Deleted Taxation According to Law )

<<http://lianghui.people.com.cn/2015npc/n/2015/0309/c394369-26662811.html>>.

<sup>16</sup> “Li Weiguang: Shui Shou Fa Ding Ru Bu Dao Wei Jiang Bu Ke Yuan Liang”(Li Weiguang: It’s Unforgivable to Give Up Taxation According to Law ), <<http://topics.caixin.com/2015-03-09/100789458.html>>.

precise, and clear, because the tax is directly tied to citizens' property rights.”<sup>17</sup> That same night on his trip to a meeting in Nanjing, Prof. Liu Joanne of Peking University talked to the NPC working staffs in Wechat groups saying that the tax type does not necessarily cover the elements of tax rates, tax payers, objection of taxation, basis of tax assessment, and tax preference. Liu's opinion gained sympathy of some NPC working staffs.<sup>18</sup> After the event Liu was informed that his opinion in Wechat group was forwarded to the very person who is in charge of drafting the Legislation Law Revision in the legal affairs commission.<sup>19</sup> On March 10th, Liu managed to publish an article on taxation according to law on a newspaper called Economic Information Daily. He also managed to send relevant materials to the NPC law committee, budget committee and legislative affairs commission.<sup>20</sup>

Trying to reverse the situation, scholars and NPC deputies fought hand in hand. Zhao Donglin, a renowned screen writer and NPC deputy has previous experience in pushing forward legalization of taxation in China. In 2013 when Zhao elected as a NPC deputy, she was approached by a few scholars who expected her to submit deputy proposals in their favor. Zhao cooperated. In 2013, allied with 31 other NPC deputies Zhao submitted a proposal on the termination of the authorized power of State Council to make provisional tax collection rules. It is called the proposal of the year. And that proposal was a team work of deputies and scholars. In 2014 Zhao and other 30 NPC deputies submitted a proposal asking the NPC to take back its total legislative power in taxation, and to provide a route map and time schedule of when and how such take over happens.<sup>21</sup> On March 10th Zhao Spoke out at the NPC delegation meetings and her speech received positive feedback from peer deputies. Debates on taxation according to law spread over delegation meetings. NPC working staff are pressured. They realized that if they insisted on the third draft they may lose huge support votes in final voting.<sup>22</sup> March 15th is the last day of 2015 NPC meeting and final voting day of the revision of legislation law. On March 11th NPC law

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<sup>17</sup> Feng Yuding, “Li Fa Fa Shui Shou Fa Ding Xiu Ding Ni Zhuan Bei Hou”, *Rule and Law and Society*, 2015(5).

<sup>18</sup> Meng Li, “Shui Shou Fa Ding Xie Ru Li Fa Fa De Si Tian Si Ye”, *Democracy and Legal System*, 2015(4).

<sup>19</sup> Yuding Feng, “Li Fa Fa Shui Shou Fa Ding Xiu Ding Ni Zhuan Bei Hou”, *Rule and Law and Society*, 2015(5).

<sup>20</sup> Ibid.

<sup>21</sup> Meng Li, “Shui Shou Fa Ding Xie Ru Li Fa Fa De Si Tian Si Ye”, *Democracy and Legal System*, 2015-4-13).

<sup>22</sup> Ibid.

committee held a meeting discussing the revision of legislation law. Meanwhile Beijing located scholars also held a seminar discussing the same issue.<sup>23</sup> More and more newspapers and websites kept posting follow up reports. On March 12th Qiao Xiaoyang, the chairman of NPC law committee reported to the NPC presidium that tax rates is added into the law draft based on the collective opinions of NPC deputies. Less than 96 hours, the term of tax rate is deleted and added back.<sup>24</sup> “Such dramatic turn of events is rare in the legislative history of PRC” says Jiang Houyi, a law professor of Nankai University and a NCPPCC member, “I attributed to this turn of events to the popular will. This is a vivid experiment of legislative democracy.”<sup>25</sup>

This is not the first time the NPC yield to public pressure on the matter of tax. On 2011 the NPCSC deliberated the revision of *Individual Income Tax Law*. The main aim of this revision is the adjustment of personal income tax exemption. The current tax exemption threshold is 2000 RMB per month.<sup>26</sup> The first draft law revision tended to adjust it from 2000 RMB/month to 3000RMB/month. On April 22<sup>nd</sup>, the first draft of *Personal Income Tax Law* revision failed to pass. From April 25<sup>th</sup> to May 31<sup>st</sup> the NPCSC posted the law draft on its official website and solicited opinions from the public. During that period, the NPCSC received 237684 opinions from 82707 netizens, 181 letters, and suggestions from 11 experts and 16 citizens.<sup>27</sup> This is a new record in NPC history of public legislative participation.<sup>28</sup> Only 15% of the respondents approved the 3000 RMB/month threshold.<sup>29</sup> The majority of public opinions called for a higher standard. A poll showed that 58.7% interviewees believed the threshold should be 5000RMB/month.<sup>30</sup> A survey showed that out of 100 economists 69% of

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<sup>23</sup> Ibid.

<sup>24</sup> Juan Xu, “Shui Lv Chong Hui Fa Ding De Jiu Shi Liu Xiao Shi”(96 Hours of Putting Taxation According to Law Back to the Legislation Law), *People's Daily*, 2015-03-14.

<sup>25</sup> “Li Fa Fa Shui Shou Fa Ding Ni Zhuan Bei Hou: Duo Fang Lian Ming Jian Yi”(The Background of Putting Taxation According to Law Back to the Legislation Law: Multiple Partisan Involvement), <<http://news.sohu.com/20150319/n410010224.shtml>>.

<sup>26</sup> The personal income tax threshold is uplifting as China's economy develops. Before 2006, it is 800RMB/month, after 2006, it is 1600RMB/month, from 2008, it is raised to 2000RMB/month.

<sup>27</sup> “Quan Guo Ren Da Yuan Zhi Yuan Wei Gong Bu Gong Zhong Dui Ge Shui Fa Xiu Zheng An Cao An Yi Jian” (The NPC Publicized the Public Opinions on Individual Income Tax Law Revision) <[http://news.xinhuanet.com/legal/2011-06/15/c\\_121540944.htm](http://news.xinhuanet.com/legal/2011-06/15/c_121540944.htm)>.

<sup>28</sup> <[http://news.xinhuanet.com/fortune/2011-06/02/c\\_121486775.htm](http://news.xinhuanet.com/fortune/2011-06/02/c_121486775.htm)>, <[http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2011-06/01/content\\_1657418.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2011-06/01/content_1657418.htm)>, <<http://finance.people.com.cn/GB/14780166.html>>.

<sup>29</sup> “Quan Guo Ren Da Yuan Zhi Yuan Wei Gong Bu Gong Zhong Dui Ge Shui Fa Xiu Zheng An Cao An Yi Jian” <[http://news.xinhuanet.com/legal/2011-06/15/c\\_121540944.htm](http://news.xinhuanet.com/legal/2011-06/15/c_121540944.htm)>.

<sup>30</sup> Muxia Zhang, “Ge Shui Fang An Zheng Dao 23.7 Wan Tiao Yi Jian, Ti Gao Mian Zheng E Hu Sheng Qiang Lie”(The Individual Income Tax Law Revision Received 237 Thousands Pieces of

them believed that 3000RMB/month was too low, and 55% suggested 5000RMB/month.<sup>31</sup> Some called for a departmentation of tax exemption. People complained that in metropolis like Beijing, Shanghai, Guangzhou, 3000 RMB is barely enough to pay house mortgage, and such basic living expense should be exempted from tax.<sup>32</sup> Some experts suggested that according to different living standards in different areas, the tax exemption should be different. Beijing, Shanghai, Guangzhou citizens suggested that 6000 in eastern provinces, 4000 in middle provinces, and 3000 in western provinces. On the contrary, some other citizens support a unified tax threshold. They argued that in a unitary system like China the tax system should be unified. And if different regions has different threshold, talents are more likely to flow from middle and western provinces to eastern provinces.<sup>33</sup> In a symposium held by NPC on May 20<sup>th</sup>, some participants endorsed 3000 RMB as the personal income tax exemption point. They argued that if the tax standard is too high, some poor western provinces may collect no personal tax at all.<sup>34</sup> An attendant to the symposium said that if the threshold were too high, the number of tax payers inevitably decrease, and the public may lose the awareness of paying tax. Various public opinions are all disclosed on the NPC website. On 30<sup>th</sup> NPCSC passed the revision of Personal Income Tax Law, and the tax threshold is raised to 3500 RMB. Li Fei, the vice-chairman of NPCSC Legislative Affairs Commission commented that “When exemption point is 3000RMB, 48 million Chinese citizens are exempt from paying tax, and when it is 3500 RMB, 60 million people do not have to pay tax. Please do not underestimate this 500 RMB.”<sup>35</sup> Ye Qing, a NPC deputy who participated throughly in the personal income tax law revision, contributed the 500 RMB raise to the participation of netizens and determination of NPC deputies. The

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Opinions Calling for Increasing Tax exemption Shreshold), *Shanghai Securities News*, 2011-06-01.

<sup>31</sup> Ibid.

<sup>32</sup> “Quan Guo Ren Da Yuan Zhi Yuan Wei Gong Bu Gong Zhong Dui Ge Shui Fa Xiu Zheng An Cao An Yi Jian” <[http://news.xinhuanet.com/legal/2011-06/15/c\\_121540944.htm](http://news.xinhuanet.com/legal/2011-06/15/c_121540944.htm)>.

<sup>33</sup> “Quan Guo Ren Da Yuan Zhi Yuan Wei Gong Bu Gong Zhong Dui Ge Shui Fa Xiu Zheng An Cao An Yi Jian” <[http://news.xinhuanet.com/legal/2011-06/15/c\\_121540944.htm](http://news.xinhuanet.com/legal/2011-06/15/c_121540944.htm)>.

<sup>34</sup> Muxia Zhang, “Ge Shui Fang An Zheng Dao 23.7 Wan Tiao Yi Jian, Ti Gao Mian Zheng E Hu Sheng Qiang Lie”.

<sup>35</sup> “Ren Da Chang Wei Hui: Mian Zheng E Ti Gao 500 Yuan, Na Shui Ren Shao 1200 Wan”(The NPCSC: to Increase the Individual Income Tax Exemption threshold by 500 RMB means to decrease the number of Tax Payers by 1.2 millions People), <<http://money.163.com/11/0630/17/77QIOQG000254LG5.html>>.

first law draft received 83% veto from NPC deputies. In the following deliberations, many NPC deputies and NPCSC members insisted that if in the final draft the threshold is still 3000RMB, they would definitely vote against it. After the NPC changed the threshold to 3500RMB, it took only 20 minutes to pass the final draft, and the draft only got 10% dissenting votes and abstentions. Wu Bangguo, then Chairman of NPCSC said “The public opinions we got from internet shows that 83% people want to increase the individual income tax exemption threshold. we respect the expectation of common men. We took into consideration of such expectation and communicated with the State Council, and finally we changed the law draft.”<sup>36</sup>

### ***Environmental and food safety rights***

China’s impressive economic growth is a double edged sword. The GDP oriented development model caused environmental degeneration. The Chinese *Environmental Protection Law* (EPL) was passed in 1989. The 1989 EPL is deemed outdated and weak. NPC deputies and general public urged the NPC to make a new powerful law. Between 1995 and 2012 there were 2474 NPC deputies submitting 78 proposals asking for revising the EPL.<sup>37</sup> From 2012 the EPL was brought to revision in NPC. The revision went through 4 rounds of deliberation and finally passed in 2014. Each round of deliberation publicized the law draft to the society and invited the public to comment.<sup>38</sup> The experts and general public made comments on the following issues: stricter obligations on local governments and enterprises on pollution prevention and control; re-construction of the administrative structure in environment management; reorganization and protection of citizens’ rights to environment. It is well known that the degenerated environment situation is largely caused by local government’s delinquency, yet the 1989 EPL did not emphasize the governments’ liability in maintaining a good environment. It is a common understanding that the citizens’ rights to environment include the right to know, the right to express, the right to supervise and the right to participate. Cai Shouqiu, a leading scholar in the field of environment law has pushed the general public’s right to environment for 20 years.

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<sup>36</sup> Liping Chen, “Ge Shui Fa Xiu Gai Yi Xiao Bu Min Zhu Li Fa Mai Da Bu”(A Small Step of Individual Income Tax A Big Step of Democratic Legislation), *Legal Daily*, 2011-7-5.

<sup>37</sup> Tao Wang, “Huan Bao Fa Xiu Ding: Yi Jian Yi Luo Kuang”(Revision of Environmental Protection Law: Lots of Suggestions”, <<http://www.infzm.com/content/80777>>.

<sup>38</sup> “Huan Bao Fa Xiu Ding: Ji Ben Ding Wei Xiu Gai Yuan You”(Revision of Environmental Protection Law: The Purpose and Reasons),<<http://www.calaw.cn/article/default.asp?id=9727>>.

Lv Zhongmei and Wang Canfa, both scholars in this field also believe the revised law should declare citizens' right to environment.<sup>39</sup> Being a NPC deputy for 11 years, Lv has urged for a better environment protection legal system for 11 years. Lv said that "Only when the citizens' environment rights are clarified in the environmental law, can the citizens' participation in environment protection, public interest litigation, and citizens' supervision on pollution be legalized."<sup>40</sup> Disappointingly, in the first revision draft of EPL the citizens' rights to environment are not even mentioned; nor did the law draft provide any legal procedure to hold the governments accountable.<sup>41</sup> Disappointed but not discouraged, scholars and the general public kept bargaining with law makers. In the end, environment public interests litigation is accepted. Under public pressure, the revised EPL imposed greater liability and more severe punishments on enterprises. A "daily penalty" system is established. It is the public pressure made big changes like "public interests litigation" and "daily penalty" possible.<sup>42</sup>

Food safety is another public concern. In 2009 the NPCSC passed the *Food Safety Law*. Article 140 stipulates that "A social group or any other organization or an individual which recommends food to consumers in any false advertisement or other false publicity, which cause any damage to the lawful rights and interests of consumers, shall assume joint liability with the food producer or trader." This provision is too harsh in the eye of a few legal scholars and entertainment celebrities.<sup>43</sup> Is it reasonable to make ads spokesperson to assume joint liability? Li Yuan the director of NPCSC legislative affairs commission administrative law office and also the very draftsman of *Food Safety Law*, explained that this regulation is a consequence of the tainted-baby-milk scandal. The infamous 2008 melamine tainted infant formula incident infuriated the public and it is the public opinion that celebrities who recommend a toxic food to the public should be punished harshly. Li Yuan recalled that a victim once sued actress Deng Jie for representing the toxic baby milk in court. Finally the court found Deng Jie not guilty because the Advertisement

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<sup>39</sup> Wang Canfa, "Huan Bao Fa Ying Zeng Gong Min Huan Jing Quan"(The Environmental Protection Law Should Specify Citizens' Rights to Environment), *People's Daily*, 2013-9-14.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Interview with an environmental law professor in Guangzhou, February 2016.

<sup>43</sup> Interview with a civil law professor in Beijing, June 2010.

Law did not specify such individual liability. The new Food Safety Law could provide a legal basis and filled in the loophole.<sup>44</sup>

### ***Legal procedure privileges***

Common wisdom holds that since 1979 legal reform China has done well in social and economic rights and not so well in political and civil rights area. Such observation undervalues China's gradual progress in protecting civil rights in legal procedures. Milestone events are the 2013 abolishment of re-education through labor (*Laojiao*), 2012 revision of Criminal Procedure Law, and 2014 revision of Administrative Litigation Law, etc.

Having served the Party state for over half a century, *Laojiao* is accused of being an illegal administrative punishment which is in conflict with Chinese *Constitution* and *Legislation Law*. Since 1990s scholars had urged for abolishment of *Laojiao* institution. From 2003, NPC deputies and NCPPCC members started making yearly proposals on abolishing *laojiao*. In 2005 and 2010 respectively, the NPCSC made legislative plans on reforming the *laojiao* system but the plan postponed.<sup>45</sup> Until 2013 the case of Tang Hui and the case of Ren Jianyu attracted nationwide attention and *laojiao* was finally brought to an end. Evidently the public outburst is the last straw.

Presumption of innocence, prevention of extortion of confession by torture, exclusion of illegal obtained evidence, and privileges against self-incrimination are fundamental for criminal justice. These fundamental principles are established piecemeally in Chinese criminal proceedings by revisions of *Criminal Procedure Law* (CPL). These achievements are built upon reflections on wrongful convictions in past years.<sup>46</sup> Most influential are Du Peiwu case, Xu Jingxiang case, Teng Xingshan case, She Xianglin case, Zhao Zuohai case, Nie Shubin case, etc. Those wrongfully convicted and executed men are victims of self-crimination under torture. Urged by public outrage, the 2012 revision of CPL added that ".....It shall be strictly prohibited to extort confessions by torture, gather evidence by threat, enticement,

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<sup>44</sup> Zhang Ying, Yu Shuhong, "Wo Men De Chu Fa Gou Qing Le"(The Punishment is not severe), <<http://www.infzm.com/content/25585?dooc>>.

<sup>45</sup> For the reform trajectory of *Laojiao* system, see Fu Hualing, "Dissolving *Laojiao*", *China Rights Forum*, pp54-58.

<sup>46</sup> For the relations between wrongful convictions and criminal justice reforms, see Na Jiang, "Problems and Prospects: China's response to Wrongful Convictions", *International Journal of Law, Crime and Justice*, 43(2015),pp.109-128.

deceit, or other illegal means, or force anyone to commit self-incrimination.....”<sup>47</sup>

For past two decades the 1989 *Administrative Litigation Law* (ALL) has not become a utilized legal weapon for the citizens to fight against power abuse.<sup>48</sup> The 1989 ALL has following flaws: the purpose of the law is not clear; the scope of cases acceptable to court is too narrow; the cost of administrative lawsuit is higher than other types of lawsuits; and the court cannot review the legality of regulatory documents, etc. From 2009 the NPC legislative affairs commission started preparing revising the law through field trips and forums. The forums are attended by deputies, judges, prosecutors, government officials, lawyers, entrepreneurs, association representatives and scholars. Forums were held before the first round deliberation, after the first draft was made, and after the second draft was made. Meanwhile, the NPC also publicized the law drafts on its official website to solicit social opinions. A major topic was how to protect citizens’ legal rights in administrative litigations. In 1989 ALL citizens can only litigate a lawsuit against a “concrete administrative action”. Some NPCSC members, experts and judges suggested that citizens’ option should not be limited to “concrete administrative action”. The legislative affairs commission took this suggestion and changed “concrete administrative action” to “administrative action.” Some NPCSC members, judges and citizens argued that the law should clarify that the person in charge of an administrative agency must appear in court. This suggestion was also taken into the revised ALL. Another breakthrough is the expansion of complaints which can be accepted by the courts, this breakthrough is also based on opinions raised by the experts and citizens.<sup>49</sup>

### **III. Limits of Open Door Legislation**

Openness in legislation is not without limits. As Fu Hualing keenly observes, “While the legal reform in china since the late 1970s may have witnessed the reemergence of a legal system which is functioning and effective in civil and commercial matters, the CCP is in direct control over matters of political significance,

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<sup>47</sup> To be honest, the new CPL did not change the provision which asked that “the criminal suspect shall answer the investigators' questions truthfully”, this requirement undercuts the exclusion of self-incrimination.

<sup>48</sup> For the failure of 1989 ALL, see Kevin J. O'Brien and Lianjiang Li, “Suing the Local State: Administrative Litigation in Rural China”, *The China Journal*, No. 51 (Jan., 2004), pp. 75-96.

<sup>49</sup> Administrative Laws Office of NPCSC Legislative Affairs Commission, *Legislation Background and Point on Administrative Procedure Law*, (Beijing: Law Press, 2015), pp 5-14.

especially those concerning the direct interest of the Party. ”<sup>50</sup> The limits of open door legislation may define the scope of the Party’s direct or core interests.

### ***National Security***

In 2015 the NPCSC passed *National Security Law*. As usual the NPCSC invited scholars to discuss the law draft and posted the law draft on its official website to solicit opinions from the society. In discussion panels there were constitutional law experts who opposed the *National Security Law* regulating Hong Kong and Macau Special Administrative Regions (SAR).<sup>51</sup> The reason is that according to *Hong Kong SAR Basic Law*, national laws shall not be applied in the Hong Kong SAR except for those listed in Annex III to the Basic Law. This suggestion was denied.<sup>52</sup> The central authority’s stubbornness came from the fear that they may lose control of Hong Kong. The denial of Hong Kong Basic Law Article 23, disputes of electing Hong Kong SAR chief executive, occupation of Central, the rise of localism and even radical separatism made Hong Kong now a disturbing place even a nightmare for the ruling elite in Beijing. For the central rulers, to specify the Hong Kong and Macau residents’ loyalty obligation to the Chinese state is necessary.

### ***Approach to Democratization***

How China will democratize is a fascinating myth for China watchers. Speculations abound. Some argues that western liberal democracy is the only way out for China, some finds that Chinese leaders has their own agenda in mind for China’s political future, and some concludes that China has trapped in developmental autocracy. Have an agenda or not, Chinese top leaders are determined in reforming China in their own way. Any pressure from outside or inside trying to alter China’s path of political reform are resisted firmly.

Freedom of press is a fundamental pillar in building a liberal democracy. In PRC, the media are “one of many competing Party-state institutions” with “traditional

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<sup>50</sup> Hualing Fu (2013), “The Upward and Downward Spirals in China’s Anti-Corruption Enforcement”, in McConville, M&Pils.E (eds.) *Comparative Perspectives on Criminal Justice in China*, Cheltenham, UK: Edward Elgar Publishing.

<sup>51</sup> Article 11 “The sovereignty and territorial integrity of China shall not be infringed upon or partitioned. Maintaining the sovereignty, unity, and territorial integrity of the state shall be the common obligation of all Chinese people including Hong Kong and Macao compatriots and Taiwan compatriots.”

<sup>52</sup> Interview with a constitutional law professor in Guangzhou, December 2015.

close links to the Communist Party”.<sup>53</sup> It serves as both “throat and tongue” and “ears and eyes” for the Party. A *Media Law* has to deal with the dilemma between the embeddedness nature of the Chinese media and privatization and of press. In 1980 during the 5<sup>th</sup> NPPCC 3<sup>rd</sup> plenary session there were scholars urged for a *Media Law*. In 1984 the NPCSC intended to make such *Media Law* and delegated research institutes to draft the law. After the 1989 tragedy, this legislative program was suspended.<sup>54</sup>

Another pillar for liberal democracy is free, open and competitive election. The *Election Law* is one of the most frequently revised laws in PRC history.<sup>55</sup> In 2015 the *Election Law* was revised for the 6<sup>th</sup> time. Routinely scholars are asked to submit suggestions. Law professors made suggestions about the transparency of electoral process, the independence of election board, and competition rules in election. None of these suggestions were taken. And scholars were told they could not make suggestions beyond the imagination of official outline.<sup>56</sup>

The *Deputy Law* was passed in 1992 and revised respectively in 2010 and 2015. During the 2010 revision a controversy was whether China should have full-time deputies. Chinese legislature is called a rubber stamp for many reasons: the lack of genuine election, the weak link between deputies and voters, the paradox between the Party and the congress, and most of all, congress deputies are part timers who are not get paid for doing congress work.<sup>57</sup> In 2010 Luojiang County in Sichuan province

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<sup>53</sup> Benjamin L. Liebmann (2005), “Watchdog or Demagogue? The Media in The Chinese Legal System”, *Columbia Law Review*, 105(1), at p.8.

<sup>54</sup> “Xin Wen Li Fa, San Shi Nian Wei Cheng”(Media Law Legislation, 30 Years ), <[http://news.takungpao.com/mainland/yanguang/q/2013/0128/1412170\\_2.html](http://news.takungpao.com/mainland/yanguang/q/2013/0128/1412170_2.html)>.

<sup>55</sup> For Election Law and election process, see Sun Ying, “Independent Candidates in Mainland China: Origin, Development, and Implications for China’s Democratization”, *Asian Survey*, Vol.53, Number 2, 2013. Sun Ying, Municipal People’s Congress Elections in the PRC: a process of co-option”, *Journal of Contemporary China*, Volume 23, Issue 85, 2014.

<sup>56</sup> Interview with constitutional law professors in Beijing, Wuhan, Guangzhou. May and August, 2015.

<sup>57</sup> For the role of Chinese congress deputies, see Kevin J. O’Brien, *Reform without liberalization: China’s National People’s Congress and the Politics of Institutional Change*, New York: Cambridge University Press, 1990; Ming Xia, *The People’s Congresses and Governance in China: Toward A Network Mode of Governance*, London; New York: Routledge, 2008; Young Nam Cho , *Local People’s Congresses in China: Development and Transition*, Cambridge; New York : Cambridge University Press, 2009. Sun Ying, “Constraining or Entrenching the Party-state?: The Role of Local People’s Congresses in PRC China”, *Hong Kong Law Journal*. vol.40 pt3. 2010; Sun Ying, “Development of Chinese Local People’s Congresses—Dynamics and Limits”, *American Journal of Chinese Studies*, Vol. 18.2010. Sun Ying, *What Drives Reforms in Local*

experimentally elected full time deputies and set up individual deputy offices. 2010 revision of *Deputy Law* called off such practice. Some top constitutional scholars harshly criticized this law revision as “driving backwards”.<sup>58</sup> In 2015 revision the idea of full time deputy and individual deputy activity are still off the table.

### ***Entrenched Faction Interests***

China’s policy making process is accurately depicted as a “Fragmented Authoritarianism”.<sup>59</sup> Bureaucratic units are grouped into various clusters and Party elites formed different faction or cliques.<sup>60</sup> Each cluster of bureaucracy or each faction within the Party has its own domain. Major interests within their domains are untouchable for outsiders. For example, the government proposal on three gorges dam project was resisted strongly at NPC, with 177 NPC deputies who voted against the project, 644 deputies abstained, and 25 deputies did not even touch the voting machine.<sup>61</sup> The Chinese government launched the project regardless of such strong opposition. The patron of three gorge dam is then premier Li Peng whose faction dominates the Chinese hydroelectric system.

When it comes to entrenched interest of a bureaucracy cluster, the bureaucracy usually steer clear of the public and monopolize the decision making. A typical example is aforementioned tax management. As aforementioned, the State Council, Ministry of Finance, and State Administration of Taxation share the power of tax collection and management. In November 2014, approved by the State Council, the Ministry of Finance and State Administration of Taxation jointly released an official notice to increase fuel tax. Against the backdrop of oil price decreasing all around the world. The public and mass media made protest against the tax increase. But the

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*People's Congresses? The Dynamics of Local Congressional Developments in PRC:1979-2010*, (Saarbrücken : Lambert Academic Publishing AG & Co KG, 2012) .

<sup>58</sup> Interview with a constitutional law professor in Beijing, and also see Cai Dingjian, “Dai Biao Fa Xiu Gai Bu Neng Kai Dao Che”(The Revision of Deputy Law Should not Drive Backwards), *China Reform*, 2010(10).

<sup>59</sup> Kenneth G. Lieberthal and David M. Lampton, *Bureaucracy, Politics, and Decision Making in Post-Mao China*, ( University of California Press, 1992).

<sup>60</sup> For China’s faction politics, see Huang Jing, *Factionalism in Chinese Communist Politics*, (Cambridge University Press,2006) ; Victor C. Shih , *Faction and Finance in China*, ( Cambridge University Press,2007).

<sup>61</sup> “Quan Guo Ren Da Yi Shi Gui Ze You He Bian Hua?”(What have changed in the NPC Meeting Rules?), *The Beijing News*, 2013-03-16, <[http://news.china.com.cn/2014lianghui/2014-03/08/content\\_31715176.htm](http://news.china.com.cn/2014lianghui/2014-03/08/content_31715176.htm)>.

protest did not stop the above two agencies from increasing the fuel tax again and again in December 2014 and January 2015. And the latter two tax increases did not even get approval from the State Council which means illegal practice. Nevertheless the general public has to pay the tax accordingly.<sup>62</sup> Identically, in June 2015 the Ministry of Finance and State Administration of Taxation jointly released an official notice to increase tobacco tax in a large scale (from 5% to 11%) despite public opposition.

#### **IV. Conclusion**

The story of a managed participation in lawmaking tells that China follows the road of authoritarian resilience. Lacking genuine election and real electoral link between voters and lawmakers, the open door practice intends to absorb the social voice. In less political spheres public participation in lawmaking is developing.<sup>63</sup> The state gives Chinese citizens incentives and opportunities in the form of open door legislation. However, the door is half open at best. In regimes regarding national security, democratization model, and core interests of bureaucracy agencies, the participation of outsiders makes little difference. Based on the above observation, it is proper to say that the bottom up participation in legislation unlikely leads China to a liberal democracy. Substantial ideas on liberalization and limits on government can not be raised and accepted via this channel. Rather only when Chinese Party state be more open and liberal, can the public touch more substantive democratic issues in lawmaking.

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<sup>62</sup> “Wai Mei Kan Wen Zhi Yi Cai Zheng Bu Guo Shui Zong Ju San ci Tiao Zheng Ran You Shui Wei Fa”(Foreign Media Questions the Three Raises of Fuel Tax by the Ministry of Finance and State Administration of Taxation ),  
<[http://www.guancha.cn/economy/2015\\_01\\_21\\_306959.shtml](http://www.guancha.cn/economy/2015_01_21_306959.shtml)>.

<sup>63</sup> Lawmaking in the 1990s was mainly a process of inter-agency consensus-building. A reference to Murray Scot Tanner (1999) , *The Politics of Lawmaking in China*, Oxford University Press.