

HOW TO OPTIMIZE DISCRETION? AN ANALYSIS OF THE NPCSC'S EXEMPTION FROM THE NOTICE-AND- COMMENT LAWMAKING*

Yinxiong Lin**

Table of Contents

I.	INTRODUCTION.....	88
II.	THE HISTORY AND VALUE OF THE NOTICE-AND-COMMENT LAWMAKING IN CHINA	90
A.	Development and Implementation of the NCLM in China	90
B.	Why Should Exemptions Be Limited? The Unique Value of NCLM in China	92
III.	EXEMPTION APPROACH 1: THE COUNCIL OF CHAIRPERSONS DECIDES ON EXEMPTION.....	95
A.	Lack of Statutory Exemption Standards.....	95
B.	Methodology.....	96
C.	Category 1: Review in a batch	97
D.	Category 2: Review separately	99
	1. Category 2.1: Amendment of non-special laws separately	99
	2. Category 2.2: Making or amending laws in the military or diplomatic fields.....	104
	3. Category 2.3: Making or revising laws specifically for special administrative regions	105
IV.	EXEMPTION APPROACH 2: FORMULATING RESOLUTIONS INSTEAD OF LAWS.....	107

The author thanks Tu Nguyen, Daniel Farber, Bowen Wang, and Sarah Biddulph for their comments or suggestions.

* Lin Yinxiong (林胤翔), PhD Candidate at China University of Political Science and Law, Visiting Scholar at UC Berkeley School of Law, linyinxiong@gmail.com.

A.	Legislation Disguised as Resolutions: Essentially Bypassing the Notice-and- Comment Process.....	107
B.	Inconsistent with the Principle of Legal Reservation	108
C.	Resurgence in Practice: The Enactment Process Still Needs Improvement.....	109
V.	OPTIMIZING THE NPCSC'S EXEMPTION DISCRETION	113
A.	Setting "Good Cause" Standards for the Council of Chairpersons	113
B.	Simplified Amendment, Simplified Public Consultation	114
C.	Using Interim Final Resolution-making to Adopt Legislative Resolutions	114
D.	Application of the Notice-and-Comment Process within the SARs	116
VI.	CONCLUSION	117

HOW TO OPTIMIZE DISCRETION? AN ANALYSIS OF THE NPCSC'S EXEMPTION FROM THE NOTICE-AND- COMMENT LAWMAKING

Yinxiang Lin

Abstract:

The National People's Congress Standing Committee (NPCSC) formally established the notice-and-comment lawmaking in 2015. Since the focus of China's legislative work is on pre-voting consultation and discussion, and the NPCSC and its bureaucracy play a more important role in legislation than National People's Congress (NPC) deputies, the notice-and-comment process that allows citizens' opinions to be directly conveyed to the real drafters of the law has unique value. The 2015 Legislation Law provides the Council of Chairpersons of the NPCSC with discretion to decide on exemptions, but does not set discretionary standards. In this context, this article presents an original empirical study of how the NPCSC applies and exempts the notice-and-comment procedure since 2015. By matching all the public consultation notices with laws enacted between 2015 and 2025, the study finds 56.1% of laws underwent public consultation, while 43.9% were exempted. The analysis shows that the Council of Chairpersons exercises broad discretion, granting exemptions not only for technical reasons such as time constraints or minor amendments, but also in response to political sensitivity and anticipated controversy. Simultaneously, legislative resolutions have been increasingly used to bypass both the three-reading procedure and public consultation, serving as an alternative form of exemption and raising concerns about transparency and constitutional principles. The article argues for codifying exemption criteria, introducing simplified consultation for minor amendments, clarifying legislative resolutions' temporary nature, and mandating localized consultation within the SARs. By optimizing NPCSC discretion, the study seeks to balance legislative efficiency with public participation and strengthen the democratic legitimacy of Chinese lawmaking.

Keywords: notice and comment; public consultation; legislative discretion; legislative process; National People's Congress Standing Committee

I. INTRODUCTION

On September 13, 2024, the NPCSC passed the “Resolution on the Implementation of Gradual Delay of the Legal Retirement Age”. According to the resolution, the legal working years of both male and female employees nationwide will be extended in proportion to their ages starting from January 1, 2025. This resolution amended the statutory retirement age, which is closely related to the interests of each citizen across the country. However, the NPCSC did not use the notice and comment process this time, which constitutes a recent case of its exemption from that requirement.

Since 2000, China has gradually adopted a notice-and-comment process similar to the notice-and-comment rulemaking process in the Administrative Procedure Act of the United States.¹ In China, this process is not only used in rulemaking but also in lawmaking. As is well known, the functional departments of the NPCSC play a greater role in the process of lawmaking than the NPC deputies. As the functional departments of the NPCSC are themselves a bureaucratic structure rather than a group of congressmen, the notice-and-comment process, which is mainly used by administrative agencies in rulemaking in the United States, is equally instructive for China’s legislation.

After the Legislation Law was amended in 2015, the notice-and-comment process was changed from a selective application procedure for legislation to a statutory universal application procedure.² However, the NPCSC still has discretion not to follow this procedure, owing to certain interpretive latitude within the current legal framework. In the aforementioned delayed retirement case, as well as the 2020 resolution to ban the consumption and trading of wild

1 See Shen Kui (沈崧), *Xingzheng Jiguan Ruhe Huiying Gongzhong Yijian: Meiguo Xingzheng Guize Zhiding de Jingyan* (行政机关如何回应公众意见——美国行政规则制定的经验) [How Administrative Agencies Respond to Public Comments: The U.S. Experience in Administrative Rulemaking], 40 *Huanqiu Falü Pinglun* (环球法律评论) [Global Law Review] 100, 101 (2018).

2 See Lifa Fa (立法法) [Legislation Law] (2015 amendment), art. 37 (China).

animals,³ the legislations specifically for Hong Kong in recent years, and the 2021 amendment to the Population and Family Planning Law,⁴ the NPCSC exempted the notice-and-comment process. We need to note that “important bills” needed to be publicly solicited for comments according to the Legislation Law before 2015.⁵ Chinese official documents also point out that the purpose of the notice-and-comment process is to “broadly absorb public opinion”, “balance social interests”,⁶ and “broadly build social consensus”.⁷ However, as shown in the above examples in practice, we are still facing the following paradox: important bills may also be circumvented, and even more important bills are more likely to be exempted due to their greater controversy. This phenomenon then raises important questions about whether and how the legislative practice in China is allied with the objectives and principles of legislation.

In China, the NPC is the highest organ of state power in the Constitution, but this should not mean that the NPC and its Standing Committee are allowed to have absolute discretion to be arbitrary or capricious. This also should not mean that they are impossible to violate the law.⁸ From the perspective of comparative law, the power of Congress is often at risk of being abused.⁹ Given that sovereignty

3 Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Quanmian Jinzhi Feifa Yesheng Dongwu Jiaoyi, Gechu Lanshi Yesheng Dongwu Louxi, Qieshi Baozhang Renmin Qunzhong Shengming Jiankang Anquan de Jueding (全国人民代表大会常务委员会关于全面禁止非法野生动物交易、革除滥食野生动物陋习、切实保障人民群众生命健康安全的决定) [Decision of the Standing Committee of the National People's Congress to Comprehensively Prohibit the Illegal Trade of Wild Animals, Eliminate the Bad Habit of Indiscriminate Consumption of Wild Animals, and Effectively Protect the People's Life, Health, and Safety] (promulgated by Standing Comm. Nat'l People's Cong., Feb. 24, 2020, effective Feb. 24, 2020) (China).

4 Renkou Yu Jihua Shengyu Fa (2021 Xiuzheng) (人口与计划生育法) [Population and Family Planning Law] (2021 amendment) (China).

5 See Lifa Fa (立法法) [Legislation Law] (2000 version), art. 35 (China).

6 Quanguo Renda Changweihui 2023 Niandu Gongzuo Yaodian (全国人大常委会 2023 年度工作要点) [Key Points of the Work of the Standing Committee of the National People's Congress in 2023] (China).

7 Quanguo Renda Changweihui 2024 Niandu Gongzuo Yaodian (全国人大常委会 2024 年度工作要点) [Key Points of the Work of the Standing Committee of the National People's Congress in 2024] (China).

8 See Albert H.Y. Chen, The Court of Final Appeal's Ruling in the “Illegal Migrant” Children Case: Congressional Supremacy and Judicial Review, in *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Johannes Chan et al. eds., 2000).

9 See John Locke, *Two Treatises of Government* 188–94 (Thomas I. Cook ed., 1947).

originates from the people and is reserved by the people.¹⁰ Given that the power of Congress originates from the authorization of the people. The NPC and its Standing Committee should naturally be subject to the implicit constraints of the Constitution and laws and operate legitimately and reasonably, even though this obligation was not written in the Constitution.¹¹

Therefore, this article argues that the discretionary mechanism should be optimised to limit exemptions from public consultation. The balance of this Article proceeds as follows. Part 2 describes the development history and implementation of the notice-and-comment lawmaking (NCLM), as well as its unique value in China. This lays the foundation for explaining why the notice-and-comment process should not be easily exempted. Part 3 and Part 4 count the cases in which the NPCSC exempted the notice-and-comment process in recent years, summarizes the two evasion paths it used, and analyses its discretionary laws and the legitimacy arguments it claimed. Part 5, based on the problems existing in China, refers to the U.S. experience to optimize the NPCSC's discretion on exemptions.

II. THE HISTORY AND VALUE OF THE NOTICE-AND-COMMENT LAWMAKING IN CHINA

A. *Development and Implementation of the NCLM in China*

In 2000, the NPC formulated the Legislation Law and stipulated the public consultation system for the first time. At that time, two conditions had to be met to initiate the public consultation: one was that the bill was an important one, and the other was that the Council of Chairpersons of the NPCSC agreed to consult the public.¹² This means that public consultation was only a selectively applicable provision at that time. In 2005, the NPCSC built its website and used it to solicit public opinions for the first time. After 2008, more laws were agreed to be publicly solicited for opinions during the legislative process. After 2013, draft laws can be publicly solicited for opinions not

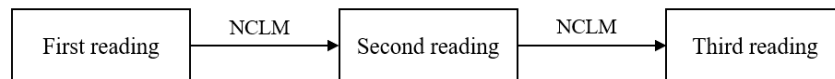
10 See Akhil Reed Amar, *America's Constitution: A Biography* (2005).

11 The reason I make this argument is that some Chinese scholars, such as Xiaobo Zhai, state that the NPC and NPCSC are above the Constitution and the law in terms of legal order. They believe that anything the NPC and NPCSC do cannot be considered wrong. See Zhai Xiaobo (翟小波), *Daiyi Jiguan Zhishang, Haishi Sifahua?* (代议机关至上, 还是司法化?) [Supremacy of Representative Institutions or Judicialization?], 18 *Zhongwai Faxue* (中外法学) [Peking University Law Journal] 426, 428 (2006).

12 See Lifa Fa (立法法) [Legislation Law] (2000 version), art. 35 (China).

only after the first reading, but also after the second reading (as shown in Figure 1).¹³ In 2015, the public consultation provision in the Legislation Law was significantly revised. The NPCSC should, not just can, publicly solicit opinions during the legislative process. In addition, according to the Legislation Law, the time for soliciting opinions must be no less than 30 days, and feedback should be given to the public.¹⁴ The system stipulated in the above clauses became very similar to the notice-and-comment process in the United States. This revision of the Legislation Law marks the formal formation of the notice-and-comment lawmaking in China. However, the Legislation Law still leaves a exemption for the NPCSC not to solicit public opinions, that is, if the Council of Chairpersons of the NPCSC decides not to do so. In addition, there are minor differences between China's and the United States' notice and comment procedures. For example, the US procedure applies only to administrative law, is subject to judicial review, each comment is publicly visible, and the drafting body provides overall feedback on public opinions.

Fig. 1 NCLM in the Bill Review Process



NCLM: Notice-and-Comment Lawmaking

In China, public participation in the notice-and-comment process for administrative rules is often sparse, with few or no comments submitted.¹⁵ By contrast, there remains considerable public enthusiasm for voicing opinions on legislation. Among them, many scholars and experts actively provide their professional opinions to the legislature through this process. According to Figure 2, since the Council of Chairpersons decided in 2008 that it would agree most bills to be open for public comments,¹⁶ the number of bills reviewed by the

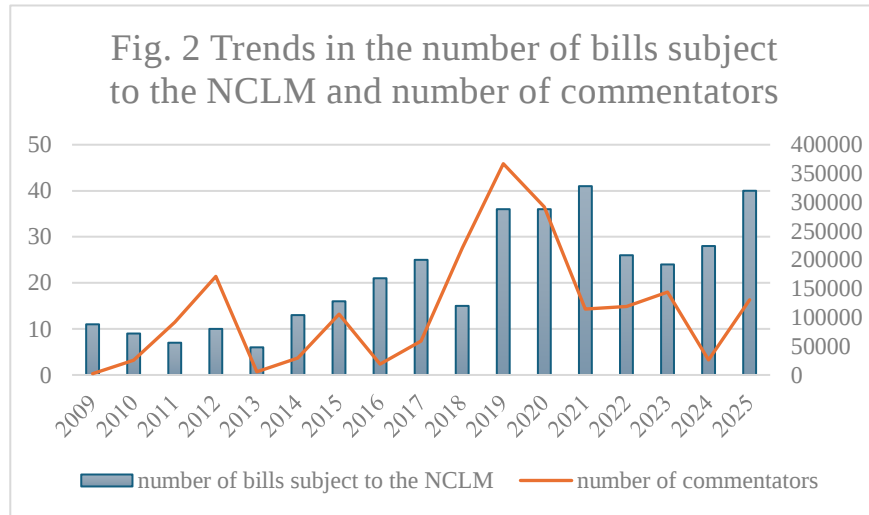
13 Quanguo Renda Changweihui Xiang Shehui Gongbu Falü Cao'an Gongzuo de Huigu yu Sikao (全国人大常委会向社会公布法律草案工作的回顾与思考) [Review and Reflection on the Work of the NPCSC in Notifying the Public of Draft Laws], Nat'l People's Cong. China (May 21, 2019), http://www.npc.gov.cn/npc/c2/c189/c220/201905/t20190521_224950.html.

14 See Lifa Fa (立法法) [Legislation Law] (2015 amendment), art. 37 (China).

15 See Sch. L.-Based Gov't, China Univ. Pol. Sci. & L., Zhongguo Fazhi Zhengfu Pinggu Baogao (中国法治政府评估报告) [Annual Report on China's Law-Based Government] 102 (2023).

16 See NPCSC, *supra* note 7.

NPCSC using the notice-and-comment process has generally been on the rise.¹⁷ The number of citizens submitting comments has also generally remained high.¹⁸



B. Why Should Exemptions Be Limited? The Unique Value of NCLM in China

In China, the notice-and-comment process is one of the few important channels that can directly convey citizens' opinions to legislators at the national level. This process helps to improve the transparency of legislation.¹⁹ It promotes communication between the people and the legislature, and avoids confrontation between stakeholders and the government during the law enforcement process.²⁰ Therefore, this process is more than mere "window

¹⁷ The decrease in bills following the notice-and-comment process in 2022 and 2023 occurred because the NPC and NPCSC enacted fewer laws in those two years.

¹⁸ The abnormally large number of commentators in 2019 resulted from the public comment campaign concerning the marriage and family book of the Civil Code, which alone received more than 213,000 comments concerning the divorce cooling-off period.

¹⁹ See Steven J. Balla & Zhoudan Xie, *Online Consultation and the Institutionalization of Transparency and Participation in Chinese Policymaking*, 246 *China Q.* 473, 491 (2021).

²⁰ See Baogang He, *Western Theories of Deliberative Democracy and the Chinese Practice of Complex Deliberative Governance*, in *The Search For Deliberative Democracy In China* 135 (Ethan J. Leib & Baogang He eds., 2006).

“dressing”.²¹ From a pragmatic point of view, the importance of protecting people’s right to know and right to participate in China’s unique political conditions is no less than in western countries.

In order to better understand the unique value of the notice-and-comment lawmaking in China, we need to have a deep understanding of the Chinese legislative process, which is the institutional background of this process. Understanding it can help us realize why the notice-and-comment process is still crucial when there are representatives in Congress and contacting them is also a kind of orderly political participation allowed by the government. Unlike in Western countries, China’s leaders have long insisted that Chinese democracy is not about voting but about consultation and discussion before the vote.²² Precisely, the consultation and discussion that is led by the government. Under this model, the first draft of a law is often drafted by an executive department or the NPCSC’s Legislative Affairs Committee (LAC).²³ NPCSC members and NPC deputies generally play the role of law modifiers rather than drafters in the lawmaking process. Although NPC deputies also have the right to propose bills, the NPC usually does not directly review the bills proposed by the deputies.²⁴ The NPCSC’s special committees will consider the legislative demands of NPC deputies and transform them into arguments to prove the legitimacy of their own legislative work. In this case, the first draft of such legislation will still be drafted by the LAC or the executive branch, and will be included in the NPCSC’s agenda after drafting.

Observing the laws enacted by the NPC and its Standing Committee since 2015, this article found that the NPCSC has enacted

21 Jonathan R. Stromseth et al., *China’s Governance Puzzle: Enabling Transparency and Participation in a Single-Party State* 241 (2017).

22 Zhou Enlai (周恩来), *Guanyu Renmin Zhengxie De Jige Wenti* (关于人民政协的几个问题) [Regarding Several Issues of People’s Political Consultative Conference] (1949).

23 Yang Tong-tong (杨铜铜), *Lun Lifa Qicao Zhe De Juese Dingwei Yu Suzao* (论立法起草者的角色定位与塑造) [On the Role Orientation and Shaping of Legislative Drafters], 38 *Hebei Faxue* (河北法学) [Hebei Law Science] 34, 37–38 (2020).

24 Zhang Xiaoti (张筱倜), *Quanguo Renda Daibiao Lifafa Ti’an Quan Xingshi Zhi Chengxu* (全国人大代表立法提案权行使之程序障碍及完善) [Procedural Obstacles and Improvements in the Exercise of the Right of National People’s Congress Deputies to Propose Legislation], 2 *Hubei Shehui Kexue* (湖北社会科学) [Hubei Social Sciences] 152, 154 (2017).

96.7% of the laws, while the NPC has only enacted 3.3%.²⁵ Moreover, the 3.3% of the laws enacted by the NPC have also first undergone the NPCSC's review process. After the process begins, whether the proposed law will finally be enacted by the NPC or the NPCSC itself, the NPCSC is accustomed to using consultation rather than voting to resolve differences of opinion. It resolves differences among stakeholders in this way, resulting in the least controversial proposal that is acceptable to the overwhelming majority.²⁶ In cases where it is impossible to reach a clear consensus, such proposals are mostly not put to a vote in the plenary of the NPCSC at all. For those 3.3% of laws, they have also gone through the above process, and any disagreements have been negotiated. And unless the NPCSC or the State Council is confident that the bill will have overwhelming support in the NPC, it is unlikely to be submitted there for review and discussion.²⁷

Based on the foregoing analysis of the Chinese legislative process, it has been proved that the role of NPC deputies in legislation is quite limited. They only have voting rights for 3.3% of the laws and are usually unable to participate in the NPCSC's pre-review process of these laws. Besides, the NPC only meets once a year, and each meeting lasts only about 10 days.²⁸ It is obviously impossible for NPC deputies to make major changes to these draft laws in such a short session.

Under the Chinese legislative model described above, which emphasizes consultation rather than voting, the focus of the legislature's work is not the plenary session where deputies voice their opinions in the open, but the drafting and repeated revision of documents by the NPCSC and its LAC over months leading to the plenary session.²⁹ Therefore, compared with the limited role of NPC deputies, the NPCSC and its LAC play a more critical role in legislation. As mentioned above, the NPCSC drafts 96.7% of laws and deliberates on another 3.3%. The LAC, as a main bureaucratic body of the NPCSC, although its members are congressional staff, is the real drafter of the

25 The statistical period runs from March 16, 2015, to December 31, 2025; the Legislation Law was amended on March 15, 2015.

26 Lu Xu, *Chinese Legal Reforms: Transformations in a Decade* 45 (2024).

27 See Benjamin van Rooij & Annemieke van den Dool, *Lawmaking in China: Understanding Substantive and Procedural Changes*, 1 *China L. & Soc'y Rev.* 5, 36 (2016).

28 Sun Ying (孙莹), *Zhongguo Renda Yishi Guize: Yuanli Yu Zhidu* (中国人大议事规则: 原理与制度) [Rules of Procedure of Chinese People's Congress: Theories and Institutions] 248 (2020).

29 See Xu, *supra* note 33, at 45.

law, the one who builds the legal structure and writes the provisions.³⁰ In this context, it is the notice-and-comment process that allows citizens to directly convey their opinions to the LAC. It will then compile and organize the public's opinions into a report for reference by the NPCSC members during the second or third reading.³¹ It is precisely because of the key role of the NPCSC and its LAC in legislation that the value of the notice-and-comment rulemaking should not be easily overlooked.

III. EXEMPTION APPROACH 1: THE COUNCIL OF CHAIRPERSONS DECIDES ON EXEMPTION

A. *Lack of Statutory Exemption Standards*

According to China's Legislation Law and the Rules of Procedure of the NPC, whether the NPCSC is reviewing a law for its own vote or reviewing a law to be submitted to the NPC, it shall issue a notice to publish the draft law and collect public comments. And the exception is when the Council of Chairpersons decides not to do so.³² However, the above two laws do not set standards for the Council of Chairpersons. That is, under what circumstances the Council of Chairpersons can or cannot make such a decision. Honestly, I do not deny that the Council of Chairpersons has the discretion not to issue a notice in special circumstances, but this shall not mean that the Council of Chairpersons can make such a decision in any circumstance. Otherwise, the role of the notice-and-comment process will be seriously weakened.

The lack of statutory standards makes the Council of Chairpersons' power on this matter a possibility to be arbitrary and capricious. Although the NPCSC's Secretary-General's Office Meeting, the Council of Chairpersons, and the LAC have formulated working

30 See Pitman B. Potter, *Domestic Law Reforms in Post-Mao China* 83 (2015).

31 Zai Falü Caoan Xiang Shehui Gongbu Zhengqiu Yijian Zhong Shenru Jianxing Quancheng Renmin Minzhu (在法律草案向社会公布征求意见中深入践行全过程人民民主) [Promoting Whole-Process People's Democracy in Soliciting Public Comments on Draft Laws], NPC Official Website (Apr. 12, 2022).

32 See Lifa Fa (立法法) [Legislation Law] (2015 amendment), art. 37 (China); Quanguo Renmin Daibiao Dahui Yishi Guize (全国人民代表大会会议事规则) [Rules of Procedure of the National People's Congress] (2021 amendment), art. 27 (China).

guidelines for this matter,³³ I still cannot retract my concerns. These guidelines are all documents formulated by the bureaucracy of the Congress that do not have sufficient legal binding. And they are internal documents that are not open to the public,³⁴ which means that scholars and citizens are not able to know the content of these documents and cannot judge whether the standards they set are reasonable. In addition, such decisions themselves are also not released to the public, making it difficult for the public to know whether the exemption has been decided by the Council of Chairpersons and whether the Council of Chairpersons has followed the aforementioned guidelines. In other words, this makes it difficult for the media, scholars, and citizens to monitor such actions of the Council of Chairpersons, even though such decisions are directly related to the right to know and the right to participate.

B. Methodology

After analysing the legal text, I turn to explore how this escape approach works in legislative practice. Although the exemption decision is made internally, the public consultation notice is publicly released, and the law is publicly promulgated. Therefore, this study uses the method of elimination to obtain a complete list of laws that do not adopt the notice-and-comment process. Specifically, this study obtained 330 texts of laws enacted (including amended) by the NPC and its Standing Committee from March 15, 2015, when the Legislative Law was amended, to December 31, 2025, from the PKULAW database. This study also obtained a list of 372 notices of public consultation on draft laws issued before December 31, 2025, from the NPC official website. The list includes notices before March 15, 2015, to ensure that notices of draft laws that were publicly solicited for comments before this date but were voted on after this date are covered. Some laws have multiple corresponding notices because they were publicly solicited for comments more than once. By matching the list of public consultation notices with the list of promulgated laws, this study found that among the 330 lawmakings since 2015 mentioned above, 185 lawmakings adopted the notice-and-comment procedure,

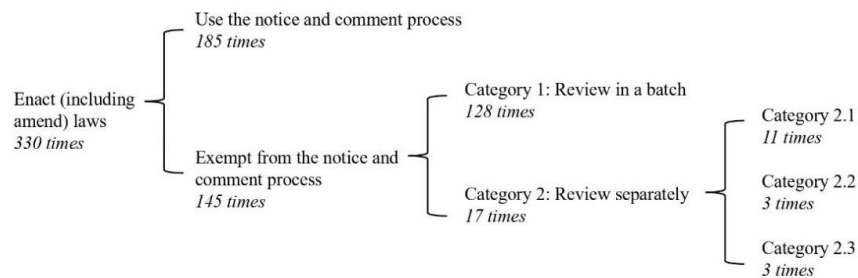
33 Zai Falü Caoan Xiang Shehui Gongbu Zhengqiu Yijian Zhong Shenru Jianxing Quancheng Renmin Minzhu (在法律草案向社会公布征求意见中深入践行全过程人民民主) [Promoting Whole-Process People's Democracy in Soliciting Public Comments on Draft Laws], NPC Official Website (Apr. 12, 2022).

34 See Jinrong Huang & Randall Peerenboom, *Improving Law Making in China: Public Participation, Legislation Evaluation and Law Harmonization* (2013).

while 145 lawmakings did not adopt the notice-and-comment process (as shown in Figure 3), accounting for 56.1% and 43.9% of the total.³⁵

When legislators choose to enact rules in the form of laws, if they want to avoid the notice-and-comment process, the only legal way is to have the Council of Chairpersons decide on the exemption. Therefore, I presume that these 145 exemptions belong to the type decided by the Council of Chairpersons. And then, I divide them into the following categories. In addition, it should be noted that the reasons for exemptions mentioned below are based on a comprehensive analysis of relevant materials, such as the LAC or a government department's explanations of the draft law, the NPC's Constitution and Law Committee's review report of the draft law, the LAC's answers to reporters' questions, scholars' research, etc. In other words, the reason analysis is not based on internal documents such as exemption decisions mentioned above.

Fig. 3 Categories of exemptions from the notice-and-comment process



C. *Category 1: Review in a batch*

Among the aforementioned exemptions, 128 belong to this type. Using this method means that the NPCSC may amend 2 to 15 laws at a time, and only a few articles in each law are amended. This study shows that when the NPCSC amends laws in this way, it rarely uses the notice-and-comment process. In addition, since only a few articles are amended, the NPCSC often votes after the first reading instead of

³⁵ The enactment or amendment of a law is considered one act of lawmaking; batch amendments to multiple laws are treated as multiple lawmakings; a law is treated as having undergone the notice-and-comment process if there was one or more public consultations before the vote; and a promulgated law is also treated as having undergone the notice-and-comment process if its title changed after public consultation.

following the three readings procedure.³⁶ The NPCSC may take this approach for several reasons. Sometimes it is because of administrative reforms that the NPCSC needs to amend multiple laws at once,³⁷ such as the establishment of an administrative department or the merger of administrative departments. In this case, if citizens want to submit their opinions to the government, they should express their views on the decision of administrative reform, rather than amending the laws in batches at this time, when it is too late and meaningless. And sometimes it is the decentralization reform or the reform of abolishing administrative approval that leads to the NPCSC's batch amendment of laws.³⁸ For the above matters, the NPCSC's exemption decisions are generally reasonable.

However, amending only a few provisions is not always insignificant. When the NPCSC amended eight laws at once on April 23, 2019, it increased the upper limit of the fine that administrative agencies can impose on infringement of trade secrets under the Anti-Unfair Competition Law by RMB 2 million.³⁹ When it amended eleven laws on November 4, 2017, it added administrative penalties for revoking the licenses of cultural relics stores and auction companies in the Cultural Relics Protection Law.⁴⁰ These amendments would undoubtedly have a practical impact on the rights and obligations of potential administrative counterparts. And the NPCSC's exemption from the notice-and-comment process prevented these stakeholders from fully expressing their opinions at the stage of legal amendment.

36 See Legislative Planning Office of the LAC of the NPCSC, *Zhonghua Renmin Gongheguo Lifa Tongji* (中华人民共和国立法统计) [Legislative Statistics of the People's Republic of China] 5-135 (2018).

37 For instance, *Quanguo Renda Changweihui Guanyu Xiugai "Chanpin Zhiliang Fa" Deng Wu Bu Falü de Jueding* (全国人大常委会关于修改《产品质量法》等五部法律的决定) [Decision of the NPCSC to Amend Five Laws Including the Product Quality Law] (China).

38 *Quanguo Renda Changweihui Guanyu Xiugai "Dianli Fa" Deng Si Bu Falü de Jueding* (全国人大常委会关于修改《电力法》等四部法律的决定) [Decision of the NPCSC to Amend Four Laws Including the Electric Power Law] (China).

39 *Quanguo Renda Changweihui Guanyu Xiugai "Jianzhu Fa" Deng Ba Bu Falü de Jueding* (全国人大常委会关于修改《建筑法》等八部法律的决定) [Decision of the NPCSC to Amend Eight Laws Including the Construction Law] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 23, 2019) (China).

40 *Quanguo Renda Changweihui Guanyu Xiugai "Kuaiji Fa" Deng Shiyi Bu Falü de Jueding* (全国人大常委会关于修改《会计法》等十一部法律的决定) [Decision of the NPCSC on Amending Eleven Laws Including the Accounting Law] (promulgated by Standing Comm. Nat'l People's Cong., Nov. 4, 2017) (China).

More importantly, in the 2017 revisions to the Civil Litigation Law and the Administrative Litigation Law, although the NPCSC only revised one article in each of these two laws, it established a quite important system for the procuratorate to initiate public interest litigation.⁴¹ This system allows the procuratorate to initiate civil public interest litigation like NGOs, and allows the procuratorate to sue the government through administrative litigation to safeguard the public interest. However, such an important system in China's legal reform was not written into law through the notice-and-comment lawmaking.

D. Category 2: Review separately

In addition to the 128 amendments to the law mentioned above, there were 17 other times (as shown in Figure 3) when the NPCSC reviewed the draft laws separately rather than in combination to make or amend the laws. I admit that these 17 times are the ones I pay more attention to, because the Council of Chairpersons decided that some of the laws were exempted from the notice-and-comment process, not just to reduce the workload, but for specific purposes or reasons. For these 17 times of making laws or amendments, I divide them into the following three categories: 2.1, 2.2, and 2.3.

1. Category 2.1: Amendment of non-special laws separately

Table 1: Amendment of non-special laws separately

Title	Issuing Authority	Date Issued	Effective Date
Foreign Trade Law (2022 Amendment)	NPCSC	12.30.2022	12.30.2022
Trade Union Law (2021 Amendment)	NPCSC	12.24.2021	01.01.2022
Population and Family Planning Law (2021 Amendment)	NPCSC	08.20.2021	08.20.2021
Election Law for the NPC and Local People's	NPCSC	10.17.2020	10.18.2020

41 Quanguo Renda Changweihui Guanyu Xiugai "Minshi Susong Fa" he "Xingzheng Susong Fa" de Jueding (全国人大常委会关于修改《民事诉讼法》和《行政诉讼法》的决定) [Decision of the NPCSC on Amending the Civil Procedure Law and the Administrative Litigation Law] (China).

Title	Issuing Authority	Date Issued	Effective Date
Congresses at All Levels (2020 Amendment)			
Law on the Protection of Investments by Taiwan Compatriots (2019 Amendment)	NPCSC	12.28.2019	01.01.2020
Social Insurance Law (2018 Amendment)	NPCSC	12.29.2018	12.29.2018
Enterprise Income Tax Law (2018 Amendment)	NPCSC	12.29.2018	12.29.2018
Population and Family Planning Law (2015 Amendment)	NPCSC	12.27.2015	01.01.2016
Law on Commercial Banks (2015 Amendment)	NPCSC	08.29.2015	10.01.2015
Cultural Relics Protection Law (2015 Amendment)	NPCSC	04.24.2015	04.24.2015
Pharmaceutical Administration Law (2015 Amendment)	NPCSC	04.24.2015	04.24.2015

All legislation in this category is listed in Table 1. Among them, only a few articles of the Foreign Trade Law, the Law on the Protection of Investments by Taiwan Compatriots, the Social Insurance Law, the Enterprise Income Tax Law, the Commercial Bank Law, the Cultural Relics Protection Law, and the Pharmaceutical Administration Law were amended, and no substantive changes were made to the main contents of these laws. For example, the 2017 amendment to the Enterprise Income Tax Law only modified one article to adjust how corporate public welfare donations are deducted when calculating taxable income. For another two examples, the 2022 amendment to the Foreign Trade Law only deleted one article to cancel the filing and registration obligation for foreign trade operators. The 2019 amendment to the Law on the Protection of Investments by Taiwan Compatriots cancelled the obligation for Taiwan investors to apply for

government approval when investing and establishing enterprises in mainland China. These two amendments did not reduce the rights of citizens, legal persons, and other organizations or increase their obligations. Therefore, based on the reasons of saving legislative costs and improving legislative efficiency, the NPCSC's decision to exempt the notice-and-comment process in this case is generally reasonable. Anyway, it is still worth mentioning that complete exemption may result in the opinions of scholars and the public suggesting that more clauses should be amended without being heard by the legislature. This happened when the Law on Commercial Banks was amended in 2015.⁴² In this situation, semi-exemption rather than full exemption may be a better choice, which I will discuss further in the fifth part.

Unlike the above 7 laws, there are still 4 laws in Category 2.1 that the NPCSC did not use the notice-and-comment process, but they were substantially amended. The amendments to the Population and Family Planning Law in 2015 and 2021 are typical examples. The 2015 amendment abolished the one-child policy for the first time, making this policy that lasted for more than 30 years become history.⁴³ The amendment encouraged couples to have two children, cancelled the contraceptive and birth control obligations of couples, and stipulated a fertility incentive policy, marking that China had officially entered the two-child stage.

There is no doubt that the adjustment of the family-planning policy affects not only citizens' legal rights but also their constitutional rights, particularly their reproductive rights.⁴⁴ The adjustment of such policy is directly related to the number of members in each family, the career advancement planning of women of childbearing age, and the maternity leave management and daily operations of employers, which means that such adjustment has a very wide range of stakeholders. Indeed, the fertility policy was also a hot topic among people across the

42 See Zeng Gang (曾刚) & Chen Jing (陈婧), "Shangye Yinhang Fa" De Xiuding Fangxiang (《商业银行法》的修订方向) [The Revision Direction of the Commercial Bank Law], *Zhongguo Gaige* (中国改革) [China Reform] 49, 49-52 (2015).

43 Du Yifang, The Evolution of China's Legislation on Reproduction, 18 *San Diego Int'l L.J.* 1, 30 (2016).

44 Qin Aolei (秦奥蕾), Shengyu Quan, "Jihua Shengyu" De Xianfa Guiding Yu Hexianxing Zhuanxing (生育权、“计划生育”的宪法规定与合宪性转型) [Reproductive Right, Family Planning in Constitution and Transformation According to Constitution], *Zhengfa Luntan* (政法论坛) [Tribune of Political Science and Law] 37, 37-40 (2016).

country on social media during the review of the amendment.⁴⁵ Although this amendment only amended 5 articles, its impact cannot be underestimated. Perhaps opponents of this study may question that this amendment was to relax the government's regulation of fertility, which is beneficial to citizens, so it does not matter if the public is not consulted. In response, I think we need to note that the amendment still included mandatory family planning and population control,⁴⁶ which means that Chinese couples still could not have more children after reaching the legal maximum number of children. In such a situation, experts and the public may have different and specific suggestions and reasons for the degree of relaxation of fertility regulation. In addition, the draft amendment also included the regulation of the sale of sperm, eggs, fertilized eggs, and embryos, as well as the regulation of surrogacy,⁴⁷ which were also controversial issues in society. The NPCSC decided to exempt the notice-and-comment process, making it impossible for experts and citizens to directly convey their aforementioned opinions to the legislature.

Similar to the 2015 amendment, the 2021 amendment did not adopt the notice-and-comment process. Unlike the 2015 amendment, which only amended 5 articles, the 2021 amendment amended most of the articles of the law, allowing couples to have 3 children and completely changing China's reproductive policy from restricting fertility to encouraging fertility. The amendment requires the finance, taxation, insurance, education, housing, employment, and other departments to formulate policies to support childbirth. However, the limit on the number of children born is still retained.

This article then analyses the reasons why the NPCSC chose to exempt this law. I found that before the NPCSC amended the law on December 27, 2015, the CPC Central Committee had already decided on October 29, 2015 to fully implement the two-child policy;⁴⁸ before the NPCSC amended the law again on August 20, 2021, the CPC

45 See Qiwei L. Wu et al., *Debating the Two-Child Policy on Sina Weibo: A Study of Social Media as Symbolic Space in China*, 65 *J. Broad. & Elec. Media* 699, 699–700 (2021).

46 Meghan Tatum, *China's three-child policy*, 397 *Lancet* 2238 (2021).

47 See Quanguo Renda Falü Weiyuanhui Guanyu “Renkou Yu Jihua Shengyu Fa Xiuzheng'an (Cao'an)” Shenyi Jieguo de Baogao (全国人大法律委员会关于《人口与计划生育法修正案(草案)》审议结果的报告) [Report of the Legal Affairs Committee of the NPC on the Review of the Draft Amendment to the Population and Family Planning Law] (China).

48 Shiba Jie Wuzhong Quanhui Gongbao (十八届五中全会公报) [Communiqué of the Fifth Plenary Session of the 18th CPC Central Committee] (Oct. 29, 2015).

Central Committee and the State Council had already proposed specific measures for implementing the three-child policy on June 26, 2021.⁴⁹ The two amendments to the law by the NPCSC were actually made directly in accordance with the requirements of the CPC Central Committee.⁵⁰ Against this backdrop, it can be inferred that the lack of final decision-making power over birth policy by the NPCSC was the main reason they were granted exemptions at that time. However, asserting that this was the only reason is inaccurate. Many laws enacted by the NPCSC are to implement the decisions of the CPC Central Committee, but some of them are still enacted or amended through the notice-and-comment process. Although the NPCSC's political legislation, major administrative, economic, social legislation, and other major legislation require the review and approval of the CPC Central Committee, it is not uncommon for draft laws to circulate between the NPCSC and the CPC Central Committee many times.⁵¹ In other words, the NPCSC can request the approval of the CPC Central Committee again after amending the draft law through the notice-and-comment process. Moreover, it is inappropriate to regard the NPCSC as a "rubber stamp" that just translates the Party's policies into laws.⁵² The NPCSC can decide how the laws should be specifically stipulated under the general direction determined by the Party. Therefore, another reason why the NPCSC decided to exempt in this case can be inferred as time constraints. To be specific, the decisions of the CPC Central Committee and the State Council have a certain legal effect in China. After their decisions were made, governments at all levels were already preparing to implement the policy, and the people had already formed expectations for the implementation of the policy,

49 Zhonggong Zhongyang Guowuyuan Guanyu Youhua Shengyu Zhengce Cujin Renkou Changqi Junheng Fazhan de Jueding (中共中央 国务院关于优化生育政策促进人口长期均衡发展的决定) [Decision of the CPC Central Committee and the State Council on Optimizing Birth Policy to Promote Long-Term Balanced Population Development] (June 26, 2021).

50 See Guojia Weijiwei Guanyu "Renkou Yu Jihua Shengyu Fa Xiuzheng'an (Cao'an)" de Shuoming (国家卫计委关于《人口与计划生育法修正案(草案)》的说明) [National Health and Family Planning Commission's Explanation on the Draft Amendment to the Population and Family Planning Law]; Guojia Weijianwei Guanyu "Renkou Yu Jihua Shengyu Fa (Xiuzheng Cao'an)" de Shuoming (国家卫健委关于《人口与计划生育法(修正草案)》的说明) [National Health Commission's Explanation on the Population and Family Planning Law (Draft Amendment)] (China).

51 See He Junzhi (何俊志), Cong Suweiai Dao Renmin Daibiao Dahui Zhi (从苏维埃到人民代表大会制) [From the Soviets to the People's Congress System: The Chinese Communist Party's Conception and Practice of Modern Representative System] 272-278 (2011).

52 Murray Scot Tanner, *The Politics of Lawmaking in Post-Mao China* (1999).

which put forward the requirement for the NPCSC to amend the law in a relatively short period. At this time, the shortcomings of the single notice-and-comment method stipulated in the Legislation Law, that is, the national public consultation for at least 30 days, were exposed, which would lead to the NPCSC's inability to pass the amendments to the law in a short time. This is also one of the reasons why this article proposes a simplified notice-and-comment process for some circumstances in the fifth part.

In addition, the NPCSC made substantive amendments to the Trade Union Law in 2021 and to the Election Law for the NPC and Local People's Congresses at All Levels in 2020. Trade unions are closely related to every employee, and the Electoral Law is closely related to every citizen, but both amendments also did not go through the notice-and-comment process. The subject matter of the above two laws does not belong to special affairs such as military, diplomacy, and national security, which will be discussed later. Owing to the opacity of the exemption decision process, this study cannot accurately infer the reasons for the exemption of these two laws.

2. Category 2.2: Making or amending laws in the military or diplomatic fields

Table 2: Making or amending laws in the military or diplomatic fields

Title	Level of Authority	Issuing Authority	Date Issued	Effective Date
Decision on the Grade and Rank System for Enlisted Members on Active Duty of the Chinese People's Liberation Army	Laws ⁵³	NPCSC	02.28.2022	03.31.2022
Anti-foreign Sanctions Law	Laws	NPCSC	06.10.2021	06.10.2021

53 According to the NPC's catalogue of currently effective laws, the Decision on the Grade and Rank System for Enlisted Members on Active Duty of the Chinese People's Liberation Army is categorized as a law.

Title	Level of Authority	Issuing Authority	Date Issued	Effective Date
Measures for the Election of Deputies from the Chinese People's Liberation Army to the NPC and the Local People's Congresses at and above the County Level (2021 Amendment)	Laws ⁵⁴	NPCSC	04.29.2021	04.30.2021

This category includes the enactment of two laws and the amendment of one law. Under China's political system, military and diplomatic affairs are sensitive. Understandably, legislation on such topics is exempted from the notice-and-comment process. Compared with other laws, the three exempted laws in this category, especially the soldier rank system and the military election measures, are less relevant to citizens. If opinions are collected through traditional methods such as symposiums and surveys in the military, it is also possible to listen to the main stakeholders. Indeed, the NPCSC has not exempted all legislation on these topics. For example, the Law on the Status and Protection of Rights of Military Personnel adopted the notice-and-comment process, and the Foreign State Immunity Law and the Foreign Relations Law also used the process.

3. Category 2.3: Making or revising laws specifically for special administrative regions

Table 3: Making or revising laws specifically for special administrative regions

Title	Level of Authority	Issuing Authority	Date Issued	Effective Date
Annex II to the Basic Law of the Hong Kong SAR: Method for the	Laws	NPCSC	03.30.2021	03.31.2021

⁵⁴ According to the NPC's catalogue of currently effective laws, the Measures for the Election of Deputies from the Chinese People's Liberation Army to the NPC and Local People's Congresses at and above the County Level are categorized as a law.

Title	Level of Authority	Issuing Authority	Date Issued	Effective Date
Formation of the Legislative Council of the Hong Kong SAR and Its Voting Procedures (2021 Revision)				
Annex I to the Basic Law of the Hong Kong SAR: Method for the Selection of the Chief Executive of the Hong Kong SAR (2021 Revision)	Laws	NPCSC	03.30.2021	03.31.2021
Hong Kong National Security Law	Laws	NPCSC	06.30.2020	06.30.2020

Unlike the previous laws, these three pieces of legislation were specifically enacted for the Special Administrative Region. Hong Kong has autonomous legislative power,⁵⁵ but it is worth noting that the above legislation was voted on by the NPCSC. Although Hong Kong is a special administrative region, in recent years, mainland Chinese scholars generally believe that such laws are still national laws in nature and have the same hierarchy of legal effect as other national laws.⁵⁶

More importantly, before the NPCSC enacted these three laws, the NPC purposefully issued resolutions authorizing the NPCSC to exercise the power to enact them. Therefore, they are closely related to the resolutions, and I will discuss them together in the next section.

55 See Xianggang Tebie Xingzhengqu Jiben Fa (香港特别行政区基本法) [Basic Law of the Hong Kong Special Administrative Region] art. 2 (China).

56 See Jiang Hui (江辉), Xiaoliu Weijie You Tiaojian Guanxi Jueding Ma? (效力位阶由条件关系决定吗?) [Is the Hierarchy of Legal Effect Determined by Conditional Relationship?], 38 Zhongguo Renmin Daxue Xuebao (中国人民大学学报) [Journal of Renmin University of China] 102, 102-03 (2024).

IV. EXEMPTION APPROACH 2: FORMULATING RESOLUTIONS INSTEAD OF LAWS

A. *Legislation Disguised as Resolutions: Essentially Bypassing the Notice-and-Comment Process*

As mentioned above, if the NPCSC wants to make rules in the form of statutory law, requesting the Council of Chairpersons to make a decision is the only legitimate exemption method it can use. However, by observing the operation practice of the NPCSC, this study found that NPCSC sometimes exercises legislative power in essence by making resolutions (*Jueding*) that have external and executive effects. This study calls these resolutions “legislative resolutions” (*Lifaxing Jueding*), which is a term proposed by Chinese scholars but not an official term.⁵⁷

Before the Legislation Law was amended in March 2023, the law did not set procedural requirements for “resolutions on legal issues” made by the NPCSC. This means that before that, the NPCSC did not need to apply the three-reading procedure or the notice-and-comment process when adopting resolutions, which is required when making laws. After the Law was amended in March 2023, it stipulates that “resolutions on legal issues made by the NPC and its Standing Committee shall be subject to the relevant provisions of this law.”⁵⁸ However, this article does not specify which provisions of the Legislation Law are the “relevant provisions”, which leaves a huge space for the NPC and its Standing Committee to exercise discretion. I further find that the result of the NPC and its Standing Committee’s discretion is that none of the resolutions they made applied the notice-and-comment process stipulated in the Legislation Law in practice, although some of the resolutions have external legal effect. Therefore, this study further demonstrates the importance and urgency of optimizing their discretion.

Peng Zhen, the former chairman of the NPCSC who led the formulation of the 1982 Chinese Constitution, summarized the powers of the People’s Congress into four types: legislative power, resolution-making power (*Jueding Quan*), election and appointment power, and

57 Jiang Hui (江辉), *Lun Quanguo Renda Ji Qi Changweihui Yi Jueding Fangshi Xingshi Lifa Quan* (论全国人大及其常委会以决定方式行使立法权) [The Exercise of Legislative Power by the NPC and Its Standing Committee through the Adoption of Resolutions or Decisions], *Huanqiu Falü Pinglun* (环球法律评论) [Global Law Review] 94 (2023).

58 *Lifa Fa* (立法法) [Legislation Law] (2023 amendment), art. 68 (China).

supervisory power.⁵⁹ The Chinese Constitution classifies the matters that the NPC and its Standing Committee can make based on the resolution-making power into twelve categories.⁶⁰ It should be pointed out that the resolutions that this article focuses on are not all of these resolutions, but rather those made by the NPC or its Standing Committee in the name of exercising resolution-making power, but in essence, exercising legislative power. Specifically, the “legislative resolutions” analyzed in this section refer to resolutions that produce the legal effect of making laws, amending other laws, and repealing other laws,⁶¹ or resolutions that give the NPCSC the power to make specific laws. In other words, it refers to resolutions that, like laws, are directly binding on the public and directly regulate the rights and obligations of citizens and legal persons. In addition, legislative resolutions are generally applicable, that is, they are not just for a single event or a single matter, but for a certain aspect and can be applied repeatedly. In theory, only statutory law can have the aforementioned legal binding and characteristics, but in practice, the NPC and its Standing Committee use this discretion to bypass the three-reading procedure and the notice-and-comment process that must be followed when making laws, which is why this section focuses on such resolutions.

B. Inconsistent with the Principle of Legal Reservation

Legislative resolutions are not a way of legislation that the NPC and its standing committee have recently discovered. As early as the 1980s, during the period of severe crackdown on criminal activities (*Yan Da*), when China’s rule of law was still in its nascent stage, the NPC Standing Committee frequently used legislative resolutions to make laws or change the provisions of other laws. For example, during that period, the NPCSC passed the “Resolution on Severe Punishment of Criminals Who Seriously Endanger Public Security”, allowing judges to impose sentences exceeding the terms stipulated in the Criminal Law, amending the Criminal Law in the form of resolutions. Moreover, the “Resolution on Drug Control” made by it in 1990 essentially stipulated the content of the Criminal Law just in the procedure and form of adopting resolutions. These legislative resolutions, made about forty years ago, ignored the protection of the

59 Kan Ke (阚珂), *Renmin Daibiao Dahui Naxie Shi* (人民代表大会那些事) [Stories about the People’s Congress] 37 (2017).

60 See Xianfa arts. 62, 67 (2018) (China).

61 See Jiang Hui (江辉), *Lun Youguan Falü Wenti De Jueding De Hanyi Yu Shibie* (论有关法律问题的决定的含义与识别) [On the Meaning and Identification of the Decision on Legal Issues], 36 *Zhongwai Faxue* (中外法学) [Peking University Law Journal] 1363, 1368 (2024).

rights of criminal suspects, resulting in contradictions between the Criminal Law and resolutions, and between resolutions, which were criticized by many scholars.⁶² After that, the NPC and NPCSC gradually reduced their legislative activities in the name of resolution-making.

In theory, the Legislation Law stipulates the principle of legal reservation (Gesetzesvorbehalt in German).⁶³ This principle emphasizes that matters related to crimes and penalties, deprivation of citizens' political rights, compulsory measures and penalties that restrict personal freedom, and judicial systems can only be regulated by the NPC or its Standing Committee through the formulation of statutory laws. If the NPC or its Standing Committee regulates them by resolution, it will inevitably undermine the principle of legal reservation.⁶⁴ This is because the limitation of the legislative way required by the principle of legal reservation is a trust in the NPC and its Standing Committee's stronger democracy and scientific legislative procedures compared with other state organs. Compared with the legislative procedures, the simple resolution-making procedures are difficult to play the role of legalizing restrictions on fundamental rights. In addition, the examples mentioned above about 40 years ago also show that adopting resolutions that have the same legal effect as laws without going through the lawmaking process will undermine the seriousness of the lawmaking process and affect the stability of the legal order.⁶⁵

C. Resurgence in Practice: The Enactment Process Still Needs Improvement

Although legislative resolutions were frequently used about 40 years ago, this study does not deny that the NPC and its Standing Committee have used legislative resolutions relatively less in recent years. However, given that the process of adopting resolutions is simpler, less time-consuming, and has a higher approval rate than

62 See Liu Zhongwei (柳忠卫), Xingfa Lifa Moshi De Xingshi Zhengce Kaocha (刑法立法模式的刑事政策考察) [The Legislative Mode of Criminal Law: A Perspective of Criminal Policies], 32 Xiandai Faxue (现代法学) [Modern Law Science] 48, 53 (2010).

63 Lifa Fa (立法法) [Legislation Law] (2023 amendment), arts. 11, 12 (China).

64 Tan Qingzhi (谭清值), Quanguo Renda Jueding Xingquan Fangshi De Quanmian Guifanhua (全国人大决定行权方式的全面规范化) [On the Normalization of the Mode of Power Exercise in All Resolutions of NPC: Focusing on Article 68 of Chinese Legislation Law], Zhengzhi yu Falü (政治与法律) [Political Science and Law] 25, 37 (2024).

65 Jiang, *supra* note 57, at 97–98.

making laws,⁶⁶ the NPC and its Standing Committee still adopt legislative resolutions under special circumstances. Although according to the previous discussion of academic theories, the best way is not to use legislative resolutions, but in the case where the need to use legislative resolutions does exist and is difficult to avoid in practice, this study is committed to promoting the resolution-making procedures of the NPC and its Standing Committee to be more scientific and still efficient. Article 68 of the Legislation Law mentioned above gives the NPC and its Standing Committee discretion to promote them to use legislative procedures more when adopting resolutions, which is also an effort made in this regard. Moreover, this article also finds that although the use of resolution-making by the NPC and its Standing Committee in recent years is less than 40 years ago, it has increased slightly compared to 20 years ago, with a particularly significant increase in the last decade. Therefore, in this context, the importance of improving the resolution-making procedure should not be underestimated.

By observing the resolution-making practices of the NPC and its Standing Committee since the 2015 Legislation Law added the notice-and-comment procedure, this study found that there are 7 examples of legislative resolutions listed in Table 4 that are not controversial. There are also 15 resolutions that may be legislative resolutions, but there are disputes in the academic community.⁶⁷ Regarding the resolution on delaying retirement, the reason why this resolution is a legislative resolution is that the “legal retirement age” is an important concept that has been repeatedly invoked in the Social Insurance Law and the Labor Contract Law. The resolution to change the statutory retirement age has essentially adjusted the application of these two laws, and at least it can be regarded as supplementary legislation to these two laws.

Another important example is the resolution made by the NPCSC in 2020 to completely ban the trading and consumption of wild animals. According to the Wildlife Protection Law amended in 2018, breeders can artificially breed and use wild animals on the premise of obtaining a license. However, this 2020 resolution completely banned the industry of artificially breeding wild animals, essentially amending the provisions of the Wildlife Protection Law on artificial breeding of wild

66 See Sun, *supra* note 35, at 289.

67 See Jin Meng (金梦), *Woguo Lifaxing Jueding de Guifan Fenxi* (我国立法性决定的规范分析) [Normative Analysis of China's Legislative Resolutions], 9 *Faxue* (法学) [Law Science] 74, 76 (2018).

animals, forcing the industry with 100,000 breeders and a production value of 2 billion to terminate. This resolution did not go through the notice-and-comment process, but it is understandable based on the urgency of maintaining public health at the time.

Table 4: Typical examples of legislative resolutions after 2015

Title	Date Issued	Effective Date
Resolution of the NPCSC to Approve the Report of the LAC on the Status of and Recommendations for the Clearing-up of Laws	12.27.2025	12.27.2025
Resolution of the NPCSC Regarding Gradually Raising the Statutory Retirement Age	09.13.2024	01.01.2025
Resolution of the NPCSC to Improve and Strengthen the Recordation Review System	12.29.2023	12.29.2023
NPC Hong Kong Electoral Reform Resolution	03.11.2021	03.11.2021
NPC Resolution on Hong Kong National Security Legislation	05.28.2020	05.28.2020
Resolution of the NPCSC to Comprehensively Prohibit the Illegal Trade of Wild Animals, Break the Bad Habit of Excessive Consumption of Wild Animals, and Effectively Secure the Life and Health of the People	02.24.2020	02.24.2020
Resolution of the NPCSC to Repeal the Relevant Legal Provisions on and System of Custody and Education	12.28.2019	12.29.2019

In Table 4, there are 2 resolutions made by the NPC specifically for Hong Kong SAR affairs. These two resolutions are different from other resolutions. The Hong Kong National Security Law listed in Table 3 was enacted based on the NPC's Hong Kong National Security Resolution shown in Table 4, and was incorporated into Annex III of the Basic Law of Hong Kong pursuant to Article 18 of the Basic Law.

The revised Annexes I and II of the Basic Law, also shown in Table 3, reflect revisions made by the NPCSC in accordance with the NPC's resolution on improving Hong Kong's electoral system (see Table 4), rather than through the revision procedures originally stipulated in Annexes I and II. According to the interpretation of Article 7 of Annex I and Article 3 of Annex II of the Hong Kong Basic Law by the NPCSC in 2004, the Annexes to the Basic Law are also part of the Basic Law.⁶⁸ Although scholars have disputes over whether the Annexes to the Basic Law are part of the Basic Law or independent of the Basic Law,⁶⁹ no matter what the result of the dispute is, the Annexes are at the level of law. Therefore, amending Annexes I and II of the Basic Law is amending the law. However, out of respect for the exclusivity of the Basic Law,⁷⁰ since the Basic Law does not stipulate the notice-and-comment process, it is legal to amend Annexes I and II of the Basic Law without adopting this process, even if the Council of Chairpersons did not make the exemption decision.

This study finds that, according to Article 18 (2) of the Hong Kong Basic Law, the NPCSC did not originally have the power to enact laws specifically for the Hong Kong SAR. However, in the past 20 years of practice, the NPCSC has gradually proved its power to adopt resolutions specifically for the SAR and make them have a certain legal effect there, which should at least be regarded as important materials by the SAR courts.⁷¹ Therefore, the three legislative activities of the NPCSC on Hong Kong in Table 3 are all based on the resolutions of the NPC. Moreover, these two NPC resolutions about Hong Kong are not just pure authorization resolutions, but also involve adjustments to the content of existing laws. These are the special features of the laws in Table 3 and the two resolutions about Hong Kong in Table 4 compared with other laws and resolutions.

68 See Interpretation of Article 7 of Annex I and Article 3 of Annex II to the Basic Law of the Hong Kong SAR of the PRC by the NPCSC (Apr. 6, 2004) (China).

69 Ricky Y. H. Fong, Universal Suffrage in Hong Kong: Promise or Illusion? A Critical Analysis of National People's Congress Standing Committee's Interpretation of Hong Kong Basic Law Annexes, 24 UCLA Pac. Basin L.J. 225, 230-36 (2007).

70 See Jiang Hui, A Non-Legislative Reading of the Co-Location Decision and the NPCSC's Constitutional Review Power under the Basic Law, 49 Hong Kong L.J. 547, 549-53 (2019).

71 See Johannes Chan, Reconciliation of the NPCSC's Power of Interpretation of the Basic Law with the Common Law in the HKSAR, 50 Hong Kong L.J. 657, 678 (2020).

V. OPTIMIZING THE NPCSC'S EXEMPTION DISCRETION

A. *Setting "Good Cause" Standards for the Council of Chairpersons*

In political practice, it is not difficult to find that no other branch of government has more extensive discretionary powers than the legislature.⁷² This is because the legislature exercises power on behalf of the people. The discretion of the legislature comes from and is retained by the people's sovereignty. We should not ignore that the notice-and-comment procedure is a system that directly connects the legislature with the people. The legislature's discretionary power of exemption should naturally be limited in matters involving direct communication between the legislature and its people, who are the source of the legislative power.

Since the NPC is the supreme authority in China and a symbol of national sovereignty, it is unrealistic to believe that the court is sufficient to limit the discretion of the NPC and NPCSC.⁷³ In this case, the constraint of the discretion of the NPCSC can rely only on the constraint of the NPC on it and the NPCSC's self-constraint. According to my previous analysis, given that any law enacted by the NPC is always first reviewed by the NPCSC, these two constraints on the NPCSC's discretion both are essentially what Georg Jellinek calls "self-limitation".⁷⁴ For the construction of the rule of law, the NPC and its Standing Committee are not only constrained by the Constitution, but also voluntarily subject to the self-limitation of the law through legislation.⁷⁵ Only in this way can the country not be a power state (Machtstaat in German) but a rule of law state (Rechtsstaat in German).⁷⁶ And this obligation of the highest state organ to consciously be constrained by the Constitution and the law is exactly what the Chinese Constitution requires.⁷⁷ Therefore, for this procedure that is directly connected with the people, the NPCSC and the NPC should set certain standards in the Legislation Law for the

72 See Legislative Discretion, 7 Alb. L.J. 337, 337 (May 31, 1873).

73 Some scholars expect Hong Kong courts to play such a role. See Jonathan Lam, Rethinking the NPCSC's Power to Interpret the Basic Law, 47 Hong Kong L.J. 825 (2017).

74 See James Wilford Garner, Political Science and Government (1935).

75 See Lam Hingchau & Qin Jing, Rethinking the Constitutional Jurisdiction of Hong Kong Courts over Acts of the National People's Congress in Light of the Auto-Limitation Theory, 46 Hong Kong L.J. 511 (2016).

76 See Georg Jellinek, System der subjektiven öffentlichen Rechte (1892).

77 See Xianfa art. 5 (2018) (China).

circumstances in which the Council of Chairpersons decides on exemptions, and should not leave it entirely to the Council of Chairpersons' own discretion. This would also help to provide a more sufficient and specific legal basis for the exemption decisions. This article suggests that the Legislation Law should explicitly limit the standard of "good cause" to national security, military, diplomatic, and technical modifications that do not involve rights and obligations. The NPCSC and its Council of Chairpersons can continue to formulate work guidelines to refine their own discretionary standards after the law stipulates the good cause standard. However, given that the NPC is generated by the people and is responsible to the people, these work guidelines should be made public to accept the supervision of the people. Similarly, the exemption decisions should clearly state the exemption and also be made public to accept public supervision.

B. Simplified Amendment, Simplified Public Consultation

The analysis in the third part shows that, in addition to the cases where the NPCSC purposefully refuses to consult the public, it also requests exemptions when amending some laws in order to improve legislative efficiency or because of time constraints. The analysis in the third part also shows that although these cases are not the ones that have the most significant impact on citizens' rights, they are the most common exemptions by the Council of Chairpersons. Based on the above, this article recommends that in cases where the NPCSC amends only a few provisions of the law, it can issue a notice of proposed amendments at the stage of drafting the amendments rather than after the amendments have been drafted. And the content of the notice can be the purpose and the description of the main content of the amendments, without having to include the specific provisions of the amendments. In this way, the notice-and-comment procedure can be initiated earlier and simplified to avoid delays in amending the law. I believe this approach can strike a balance between making legislation reflect more inclusive public preferences and ensuring legislative efficiency.

C. Using Interim Final Resolution-making to Adopt Legislative Resolutions

As I have argued in Part 4, if a legal provision is to be amended or repealed, the best way should naturally be to do so through the statutory amendment procedure, rather than directly adopting a resolution to bypass the constraints of the lawmaking process. However, given the practical needs of legislature, this article also

recognizes that in special circumstances, the NPCSC can be allowed to make legislative resolutions.

Observing the practice of the NPCSC in adopting legislative resolutions in recent years discussed in the fourth part, this study agrees that it is acceptable to make legislative resolutions in emergency situations⁷⁸ or when the conditions for making laws are not yet mature. For example, in response to the COVID-19 pandemic, the NPCSC took less than a month to make the 2020 resolution to completely ban the trading and consumption of wild animals. For another example, because the conditions for making laws are not yet mature, the NPCSC made provisions for the filing review it led in 2023 in the form of a resolution rather than a law.⁷⁹ However, in either of these two situations, it is sufficient for the resolution to have a temporary effect. Legislative resolutions inevitably have an impact on the rights or obligations of citizens or organizations, but their formulation has not gone through the three-reading legislative procedure, nor has it gone through the notice-and-comment procedure, which does not meet the democratic requirements for restricting fundamental rights.⁸⁰ Therefore, it is inappropriate to allow it to have a permanent effect. When adopting a legislative resolution, the validity period of the resolution should be clearly stipulated.

Moreover, even if a legislative resolution is made for an emergency, the right to participate is limited to ensure legislative efficiency, rather than because the content of the resolution is inherently inappropriate for public comment. In other words, if there is a way to allow the resolution to go into effect quickly while ensuring the public's right to participate, it will certainly be better than the current approach of not using the notice-and-comment procedure for all legislative resolutions. For this reason, the American interim final

78 See Kevin Hartnett Jr., *An Approach to Improving Judicial Review of the APA's "Good Cause" Exception to Notice-and-Comment Rulemaking*, 68 *Buff. L. Rev.* 1561, 1576–79 (2020).

79 Quanguo Renda Changweihui Guanyu Wanshan he Jiaqiang Beian Shenchu Zhidu de Jueding (全国人大常委会关于完善和加强备案审查制度的决定) [Decision of the NPCSC to Improve and Strengthen the Recordation Review System] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 29, 2023, effective Dec. 29, 2023) (China).

80 Tan, *supra* note 64, at 36–37.

rulemaking paradigm is worth referring to.⁸¹ Observing the legislative activities of the NPCSC, this article finds that the NPCSC is likely to consider amending the law after adopting a resolution to deal with an emergency, and it is also likely to consider making a law after adopting a resolution when the legislative conditions are not yet mature. In either case, the legislature should listen to the opinions of the people in a timely manner. It should decide whether to further amend or make laws or take no further action after the interim final resolution expires, based on public opinion.⁸² Therefore, this article recommends that after a legislative resolution is passed by the NPCSC, the LAC should immediately issue a notice of this resolution to invite the public to comment and plan its following legislative activities on this matter based on these post-promulgation comments. This article also suggests that if subsequent legislation is carried out, the explanation of the draft law should provide a general overview of the public opinions received previously, in order to accept public supervision. In this way, we can better promote the balance between the public's right to participate and legislative efficiency, and enhance the democratic level of legislative resolutions.

D. Application of the Notice-and-Comment Process within the SARs

At the national level, the Legislation Law provides for the notice-and-comment procedure. At the SAR level, Hong Kong has a public consultation system, and Macao has a policy consultation system. China's legislative public participation system at both the national level and the SAR local level is sufficient. Therefore, when the NPCSC makes resolutions or enacts laws specifically for the SAR, there is no reason not to adopt any of the above paradigms unless it falls under an exemption.

Specifically, when the NPCSC makes resolutions in accordance with the Basic Law, the procedures prescribed by the Basic Law are naturally applicable, instead of the procedures prescribed by the Legislation Law. And the notice-and-comment procedure prescribed

81 U.S. administrative agencies have used interim final rulemaking to adopt rules; under that mechanism, the agency issues an interim final rule that becomes effective before the agency receives public comments, invites comments after effectiveness, and considers whether to amend the rule in response. See Mark Seidenfeld, Rethinking the Good Cause Exception to Notice-and-Comment Rulemaking in Light of Interim Final Rules, 75 Admin. L. Rev. 787, 787–788 (2023).

82 See Thomas E. Nielsen, Interim Final Rules and the APA: Some Rule of Law Problems, Harv. J.L. & Pub. Pol'y Per Curiam 1, 2 (2023).

in the Legislation Law is also not applicable. For example, the legal basis for the resolutions made by the NPCSC relating to the election of deputies to the NPC is Article 21 of the Hong Kong Basic Law. The legal basis for the resolutions made by the NPCSC relating to the addition or deletion of the list of national law in Annex 3 of the Basic Law is Article 18 of the Hong Kong Basic Law.⁸³ In addition, when the NPCSC makes resolutions or enacts laws for the SAR beyond the Basic Law and in accordance with the Constitution,⁸⁴ it should naturally comply with the procedures prescribed by the Legislation Law. Therefore, the notice-and-comment procedure should be adopted. Similarly, the suggestions for improving discretion in Sections A to C of this Part also apply to this situation. It is worth mentioning that when faced with statutory exemptions such as urgency endangering national security, the Council of Chairpersons has the right to decide to exempt the notice-and-comment procedure.

Out of respect for the high degree of autonomy of the Special Administrative Region, the NPCSC should only use the notice-and-comment procedure in the SAR regulated by the legislation, and should not use this procedure nationwide as in the Hainan Free Trade Port Law. When the NPCSC makes resolutions or legislation specifically for the SAR, if it can give the residents of the SAR the opportunity to comment, it will help enhance the legitimacy and democracy of the resolution or law, make the resolution or law more suitable for the local situation of the SAR, and improve the relationship between the NPCSC and the residents of the SAR.

VI. CONCLUSION

Any power is subject to the risk of abuse, and legislative power is no exception. This article has been devoted to optimizing discretion to avoid improper exercise of legislative power. By improving the discretionary paradigm, the legislature can constrain itself, which will not undermine the supreme authority of the NPCSC and is in line with the logic of the Chinese Constitution. Therefore, this article recommends optimizing its discretion mainly through the following ways. First, the discretionary standards for the Council of Chairpersons

83 Chan, *supra* note 71, at 678.

84 See Sun Cheng (孙成), “Renda She Gang Jueding” De Diwei, Xiaoli Yu Gongneng (“人大涉港决定”的地位、效力与功能) [NPC/NPCSC Decision Concerning the Hong Kong Issue: Status, Effectiveness and Function], *Suzhou Daxue Xuebao (Faxue Ban)* (苏州大学学报 (法学版)) [Journal of Soochow University (Law Edition)] 67, 69 (2022).

to decide to exempt the notice-and-comment procedure should be improved to avoid it from exercising power arbitrarily or capriciously. It is suggested that the grounds for exemption be limited by legislation to national security, military, diplomatic, and technical modifications that do not affect rights and obligations. Second, the notice-and-comment procedure should be optimized. Setting up a simplified notice-and-comment process to serve minor amendments to the law, and setting up an interim final resolution-making paradigm to serve legislative resolutions, providing NPCSC with more options for discretion. Third, when NPCSC uses its discretion to decide which notice-and-comment method to adopt and whether to exempt the notice-and-comment process, it should consider the importance of public participation more than before to avoid the law becoming a management tool. When legislating, citizen participation should be promoted to make the laws more inclusive and more reflective of public preferences.

Data Availability Statement

The data that support the findings of this study are available from the author upon reasonable request.