

# The Legislation in Autonomous Areas of China: Progress, Limitations and Recommendations

*Yang Feng\**

I. INTRODUCTION .....	46
II. OVERVIEW OF THE RNA SYSTEM .....	48
III. THE LEGAL FRAMEWORK IN THE REFORM ERA (1978 – PRESENT).....	51
A. <i>The Modification Power</i> .....	51
B. <i>The Scope</i> .....	52
C. <i>The Form</i> .....	54
D. <i>The Procedure</i> .....	57
IV. AUTONOMOUS LEGISLATIVE POWERS UNDER INTERNATIONAL LAW ..	61
A. <i>Minority Rights Protection Under International Law</i> .....	61
B. <i>A Comparison between the International Law and China’s         Domestic Law in the Legislative Requirement for Minority         Rights Protection</i> .....	63
V. NO REGIONAL-LEVEL AUTONOMOUS REGULATION HAS BEEN PASSED .....	65
A. <i>The Drafting Effort of Four Autonomous Regions</i> .....	65
B. <i>The Disapproving Opinions of the State Council’s         Departments for Guangxi’s Draft</i> .....	67
C. <i>The Reasons for the Absence of Regional Autonomous         Regulation</i> .....	69
1. <i>The Higher-Level Approval Procedure</i> .....	69
2. <i>The Economic System in Transition</i> .....	70
3. <i>The Lack of State Council’s Implementing Regulations             and Rules</i> .....	70
4. <i>The Revision of the Higher-level Law</i> .....	71
VI. LEGISLATIVE PRACTICE .....	72
A. <i>Sub-regional Autonomous Regulations</i> .....	72
B. <i>Separate Regulations</i> .....	76
C. <i>Modifying Rules and Supplementing Rules</i> .....	78
VII. CONCLUSION .....	81

## I. INTRODUCTION

In order to resolve ethnic issues, the PRC adopted the system of Regional National Autonomy (RNA) (少数民族区域自治) in the mid-

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\* Postdoctoral Researcher, Guanghua Law School, Zhejiang University. The author would like to thank anonymous reviewers for their helpful comments. All remaining errors are the sole responsibility of the author.

1950s.<sup>1</sup> Under this system, ethnic minorities in the national autonomous areas (autonomous areas) (民族自治地方) can exercise autonomous legislative powers, namely, enacting autonomous regulations (自治条例) and separate regulations (单行条例).<sup>2</sup> Prior to 1982, autonomous areas were the only type of locality that could exercise legislative powers in China.<sup>3</sup> During this era, however, the autonomous legislative system did not experience any development and autonomous areas only enacted forty-eight separate regulations in total.<sup>4</sup>

Under the 1982 Constitution, the PRC rehabilitated the RNA system and the autonomous legislative system.<sup>5</sup> Under this system, the exercise of autonomous legislative power is not only one of the main conduits to achieve autonomy for ethnic minorities, but also one of the two principal rights that are assigned to minorities in autonomous areas (the other is the preservation of key posts in the self-government organs to titular minorities).<sup>6</sup> Given its significance in the RNA system, autonomous legislation provides an important tool to examine whether, or to what extent, the autonomy under the RNA system is achieved. During the reform era, the autonomous legislation has experienced unprecedented development in some aspects, while showing limitations. This article aims to provide detailed analysis on the developments and limitations both in the legal framework and the legislative practice and offer recommendations for the future development. This article is composed of seven sections. Following the introduction, section two provides an overview of the system of the RNA, and section three provides a historical review of the autonomous legislation in the reform era. Section four analyzes the legal framework of the autonomous legislative power. Section five explores the autonomous legislative practice. Section six examines

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<sup>1</sup> (韩大元) [Han Dayuan], 1954 nian Xianfa yu Xinzhongguo Xianzheng (1954 年宪法与新中国宪政) [*The 1954 Constitution and the Constitutionalism of the PRC*] Hunan Renmin Chubanshe (湖南人民出版社) [Hunan People's Press] 2004, at 407-408.

<sup>2</sup> See 1954 XIAN FA (宪法) [Constitution] art. 70, (1954) (China).

<sup>3</sup> According to Article 22 and 70 of 1954 Constitution of the PRC, at the national level, the National People's Congress is the only organ to exercise the legislative power; and at the level, none of the localities, except autonomous areas, can exercise the legislative power. This limitation was followed by PRC's second and third constitutions, which were promulgated in 1975 and 1978,

<sup>4</sup> (吴宗金, 敖俊德) [Wu Zongjing & Ao Junde], *zhongguo minzu lifa lilun yu shijian* (中国民族立法理论与实践) [*The Theory and Practice of Autonomous Legislation in China*] Zhongguo Minzu Fazhi Chubanshe (中国民主法制出版社) [China Press of Democracy and Legality] 1998, at 384-385.

<sup>5</sup> See XIAN FA (宪法) [Constitution] art. 116, (1982) (China).

<sup>6</sup> See XIAN FA (宪法) [Constitution] art. 113 and 114, (1982) (China).

why no regional-level autonomous regulation has been passed. Section seven is the conclusion.

## II. OVERVIEW OF THE RNA SYSTEM

As Fei Xiaotong, a prominent Chinese sociologist, summarized, the Chinese nation (中华民族) is a “pluralistic, unified entity with a multi-level ethnic identity.”<sup>7</sup> Until now, China has recognized fifty-six ethnic groups.<sup>8</sup> The fifty-five ethnic minorities are very diversified in many aspects, such as language, culture, religion and the socio-economic development.<sup>9</sup> Despite the dominance of the Soviet model in China’s political and legal life in the early pre-reform era, the Chinese leadership chose to apply the RNA system under a unitary political and legal framework rather than adopting the Soviet ethno-federalism.<sup>10</sup> The reasons, as stated by Law Professor Barry Sautman at the Hong Kong University, lay in the different demographic conditions between China and

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<sup>7</sup> (费孝通)[Fei Xiaotong], *Jianshu Wode Minzu Yanjiu Jingli he Sikao* (简述我的民族研究经历和思考) [A Brief Introduction on the Experience and Thinking of My Ethnic Research], 10 (北京大学学报) J.Pek.U. 2(1997); 费孝通[Fei Xiaotong], *Zhonghua Minzu de Duoyuan Yiti Geju* (中华民族的多元一体格局) [The Unity of Pluralistic Society of the Chinese Nation], 4 (北京大学学报) J.Pek.U.19 (1989).

<sup>8</sup> The Chinese government initiated the Nationality Identification Project in 1953. This work was officially completed in 1979 when the Jino group was identified as the 56<sup>th</sup> ethnic group in China. For the details on China’s nationality identification, see, (秦和平)[Qing Heping], *56 ge Minzu de Laili Bingfei Yuanyu Minzu Shibie - Guanyu Zubie Diaocha de Renshi yu Sikao*, (56 个民族的来历‘并非源于民族识别 —关于族别调查的认识与思考) [The Origin of the Fifty-six Nationalities, Does not Derive from the Nationality Classification Project – Understandings and Reflections on the Nationality Classification Project], 5 (民族学刊) J.Eth. 38(2013). According to the Six National Census in 2010, only 640,000 persons were not recognized, accounting for 0.046% of the whole population. Data of the Sixth National Census (2010), <http://www.stats.gov.cn/tjsj/pcsj/rkpc/6rp/indexch.htm>; For the non-identified ethnic groups, see, (费孝通)[Fei Xiaotong], *Guanyu Woguo Minzu Shibie Wenti*, (关于我国民族识别问题) [Issues Concerning the Identification of the Nationalities in China], 1 (中国社会科学) Soc.Sci.Ch. 156-162 (1980).

<sup>9</sup> Xiaohui Wu, *From Assimilation to Autonomy: Realizing Ethnic Minority Rights in China's National Autonomous Regions*, 6 Chinese Journal of International Law 4(2014); Arthur Rosett, *Legal Structures for Special Treatment of Minorities in the People's Republic of China*, 66 Notre Dame L.Rev.1507 (1990); Thomas Heberer, *China and Its National Minorities: Autonomy or assimilation?* (ME SHARPE 1989); Maria Lunderg & Yong Zhou, *Hunting-Prohibition in the Hunters' Autonomous Area: Legal Rights of Oroqen People and the Implementation of Regional National Autonomy Law*, 16 International Journal on Minority and Group Rights, 351-352 (2009).

<sup>10</sup> (韩大元)[Han Dayuan], *Yazhou Lixian Zhuyi Yanjiu* (亚洲立宪主义研究) [On the Constitutionalism in Asia] Zhongguo Renmin Gong'an Daxue Chubanshe (中国人民公安大学出版社) [Press of People’s Public Security University of China] 1996, at 85-90.

Soviet Union, and the fear of disintegration of the country.<sup>11</sup> Under the RNA Law, which was passed by the National People's Congress (NPC) in 1984 and revised by the NPC Standing Committee (NPCSC) in 2001, the unified leadership of the State allows ethnic minorities to set up self-government organs that exercise the power over regional autonomy in the compact communities in which they live.<sup>12</sup> The RNA is claimed to be the "basic policy" of the Chinese Communist Party (CCP) and a "basic political system" of the State to resolve this national issue in the PRC.<sup>13</sup> It embodies "the State's full respect for the guarantee of the rights of ethnic minorities to administer their internal affairs and its adherence to the principle of equality, unity and common prosperity for all the nationalities."<sup>14</sup> Despite its uniqueness in name and formal provisions, the RNA system reflects the common integrationist and accommodationist practice around the world.<sup>15</sup>

The RNA is composed of two elements: territory and ethnicity. In terms of territory, China has established 155 autonomous areas where minorities live in compact communities and can exercise the power of autonomy.<sup>16</sup> Every autonomous area has at least one titular ethnic minority.<sup>17</sup> The autonomous areas, which cover sixty-four per cent of the PRC's territory, are mainly located in the northeast, northwest and southwest parts of the country. They are divided into three administrative levels, namely, five Autonomous Regions (analogous to provinces), thirty Autonomous Prefectures and 120 Autonomous Counties. In terms of ethnicity, forty-four out of fifty-five ethnic minorities have their own autonomous area(s), and seventy-one per cent of the minority population inhabits in autonomous areas where they are titular.<sup>18</sup> Some smaller

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<sup>11</sup> Barry Sautman, *Scaling Back Minority Rights: the Debate about China's Ethnic Policies*, 46 *Stan.J.Int'l L.* 88-89 (2010).

<sup>12</sup> Preface of MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy (RNA) Law].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Ge Zheng, *Economic Development and Cultural Autonomy in Tension, the Tibet Issue in China's Constitutional Framework*, 42 *Hong Kong LJ.* 199 (2012).

<sup>16</sup> For the designation and delineation of the autonomous areas, see Maria Lundberg & Yong Zhou, *Regional National Autonomy under Challenges: Law, Practice and Recommendations*, 16 *Int'l J.on Minority & Group Rts.* 294-299 (2009).

<sup>17</sup> To date, forty-three of the 155 autonomous areas (accounting for twenty-nine per cent of the total number of the ethnic minorities) have two or three titular ethnic minorities. There is only one autonomous area which has four or more titular ethnic minorities. It is Shuangjiang Lahuzu Vazu Bulangzu Daizu Zizhixian (双江拉祜族佤族布朗族傣族自治县) [Shuangjiang Lahu, Va, Blang and Dai Autonomous County].

<sup>18</sup> Information office of the State Council of the PRC, *Zhongguo de Minzu Zhengce he Geminzu Gongtong Fanrong Fazhan Baipishu* (中国的民族政策和各民族共

(lower-level) autonomous areas are incorporated into larger (higher-level) autonomous areas and have different titular ethnic minorities. For example, the Qapqal Xibe Autonomous County (察布查尔锡伯自治县) is within the Yili Kazakh Autonomous Prefecture (伊犁哈萨克自治州) and the latter is within Xinjiang Uyghur Autonomous Region.<sup>19</sup>

In terms of the form of government, there is no difference between the autonomous areas and non-autonomous areas. Under the 1982 Constitution, the self-government organs in autonomous areas are the people's congress and the people's government (Article 112).<sup>20</sup> From the historical perspective, this represents an attempt to tighten the reign on the right to choose the form of government because the 1954 Constitution – the first constitution in the PRC, allowed the ethnic minorities to determine the forms of self-government (Article 67).<sup>21</sup>

According to the RNA Law, self-government organs enjoy a wide range of autonomy, among which the most salient elements include more flexible legislative powers, modification of decisions of higher-level State organs, preservation of key posts in self-government organs to titular ethnic minority/minorities, freedom to develop their own languages, religions and cultures, prioritization for the recruitment of ethnic minority cadres and specialized personnel, greater autonomy on local economic development and the management of local finance. The RNA Law also requires the State to formulate preferential policies for autonomous areas for “assisting ethnic minorities to accelerate economic and cultural development.”<sup>22</sup> These preferential policies are mainly focused on providing financial, material, educational, and technical assistance.<sup>23</sup>

Among these preferential policies, the power to make autonomous legislation is deemed the most important and distinctive, and it is regarded as one of the two principal methods for the exercise of regional national autonomy (the other is the preservation of key posts in the self-

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同繁荣发展白皮书) [*The White Paper: China's Ethnic Policy and Common Prosperity and Development of All Ethnic Groups*], [http://news.xinhuanet.com/politics/2009-09/27/content\\_12117333.htm](http://news.xinhuanet.com/politics/2009-09/27/content_12117333.htm) (Xinhua News 新华网), Sep. 27, 2009),

<sup>19</sup> Lundberg & Zhou, *supra* n. 9, at 297-298.

<sup>20</sup> See XIAN FA (宪法) [Constitution] art.112, (1982) (China).

<sup>21</sup> See XIAN FA (宪法) [Constitution] art. 67, (1982) (China).

<sup>22</sup> Preface of MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy Law].

<sup>23</sup> For detailed discussion on preferential policies, see Barry Sautman, *Preferential Policies for Ethnic Minorities in China: the Case of Xinjiang*, Nationalism and Ethnic Politics, 4<sup>th</sup> ed. 86-118 (1998); Wang Tiezhi, *Preferential Policies for Ethnic Minority Students in China's College/University Admission* 8 Asian Ethnicity, 149-163 (2007).

government organs to titular minorities).<sup>24</sup> Under the 1982 Constitution, the RNA Law and the Legislation Law (passed in 2000 and revised in 2015), the autonomous peoples' congresses are empowered to enact regulations, and the regulations they enact can modify provisions of higher-level laws and regulations. The purpose of granting this modification power is to suit "the political, economic and cultural characteristics" of the titular minority.<sup>25</sup>

### III. THE LEGAL FRAMEWORK IN THE REFORM ERA (1978 – PRESENT)

In the reform era, the autonomous legislative power was incorporated into the 1982 Constitution. Generally, Chinese national laws provide a range of rules regulating the exercise of autonomous legislative powers. The most important national laws include the 1982 Constitution, the RNA Law, and the Legislation Law.<sup>26</sup> Among the national laws, the Legislation Law is the most comprehensive and specific on regulating autonomous legislation. This section will first assess the modification power, which is the key for the autonomous legislation. Then it will in turn discuss the scope, form and procedure of autonomous legislation. Finally, the legal framework will be assessed under international law.

#### A. *The Modification Power*

In line with the 1954 Constitution, the 1982 constitution specifically grants one type of legislative power to autonomous areas: the power to enact autonomous regulations (自治条例) and separate regulations (单行条例) in light of the political, economic and cultural characteristics of the local ethnic minorities in autonomous areas.<sup>27</sup> The RNA Law and the Legislation Law repeat the same language as prescribed in the 1982 Constitution.<sup>28</sup> Apart from autonomous legislative powers, the 1982 Constitution and the Legislation Law also recognize the power of autonomous governments to enact ordinary local regulations as ordinary local governments do.<sup>29</sup>

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<sup>24</sup> Yash Ghai & Sophia Woodman, *Unused powers: Contestation over Autonomy Legislation in the PRC*, 82 *Pac. Affairs* 29 (2009).

<sup>25</sup> See XIAN FA (宪法) [Constitution] art. 116, (1982) (China), and MINZU QUYU ZIZHIFA (民族区域自治法) [Regional National Autonomy Law] art. 19.

<sup>26</sup> The RNA Law was revised in 2001, but the change on autonomous powers was minor. For the revision of RNA Law in 2001, see Guimei Bai, *International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities*, 3 *The Chinese J. Int'l L.* 453-454(2004).

<sup>27</sup> See XIANFA (宪法) [Constitution] art. 116, (1982) (China)

<sup>28</sup> See MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy Law] art. 19, and LIFA FA(立法法) [Legislation Law] art. 63.

<sup>29</sup> See XIANFA (宪法) [Constitution] art. 100, (1982) (China) and Lifa Fa

The most distinctive feature of autonomous legislation, *vis-à-vis* ordinary local legislation, is that it can modify higher-level national laws and regulations.<sup>30</sup> The Legislation Law also specifies that the provisions of autonomous regulations and separate regulations, which modify national laws and administrative regulations, prevail over the latter in concerned autonomous areas.<sup>31</sup> Ordinary local legislation, however, cannot make such modifications.

The exercise of modification powers is under central supervision. As decreed in the RNA Law, the self-government organs should “exercise autonomous power within the limits as prescribed by the Constitution and national laws, and implement the State’s national laws and policies in light of local conditions;”<sup>32</sup> should “uphold the unity of the country and guarantee the observance and implementation of the Constitution and national laws;”<sup>33</sup> and may “adopt special policies and flexible measures in light of local conditions to speed up the economic and cultural development of autonomous areas, provided that the principles of the Constitution and national laws are not contravened.”<sup>34</sup> The central supervision, mentioned above, has the potential to cause tension between the exercise of autonomy by ethnic minorities and the central control.

#### B. *The Scope*

Under the current legal framework, the scope of subject matters under autonomous legislation is largely unspecified. The national laws merely provide a general rule, which asserts that the legislation should be based on the political, economic and cultural characteristics of the local minority.<sup>35</sup> In this sense, the scope of the legislative autonomy is limited to political, economic and cultural affairs. This rule is too vague to delineate the scope of autonomous legislative powers in practice. The rule closely resembles the provisions on legislative powers in ordinary localities,

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(立法法) [Legislation Law] art. 63.

<sup>30</sup> See LIFA FA(立法法) [Legislation Law] art. 66.

<sup>31</sup> See LIFA FA(立法法) [Legislation Law] art. 81.

<sup>32</sup> See MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy Law] art. 4.

<sup>33</sup> See MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy Law] art. 5.

<sup>34</sup> See MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy Law] art. 6.

<sup>35</sup> See XIANFA (宪法) [Constitution] art. 116, (1982) (China), Minzu Quyu Zizhi Fa (民族区域自治法) [Regional National Autonomy Law] art. 19, and Lifa Fa (立法法) [Legislation Law] art. 66.

which also emphasizes legislating based on the actual local environment.<sup>36</sup> The resemblance in terms of scope between autonomous legislative powers and ordinary local legislative powers makes it difficult to distinguish one from the other. How an autonomous/separate regulation differs from a local regulation? In May 1986, the NPCSC Legislative Affairs Commission, which was the principal drafting organ in the NPC, answered this question. This commission stated that while they were clearly different in form, the question of whether the autonomous/separate regulation was a type of local regulation required ‘further research’.<sup>37</sup>

The modification power is the most distinctive feature of autonomous legislation. In its interpretation on the enactment of modifications and supplement provisions for the Electoral Law delivered in November 1983, the NPCSC Legislative Affairs Commission stated that if a national law does not contain a provision allowing for modification, enactment of modification provisions in autonomous areas is not permitted.<sup>38</sup> This statement implies that in the early reform era, the NPCSC tended to regard modification power as a delegated power. Prior to 2000, less than a dozen national laws had authorized the modification power on various matters to autonomous areas. The Succession Law passed in 1985, for example, provides: “an autonomous people’s congress may, in accordance with the principles of this Law and the actual practice of the local ethnic minority/minorities with regard to property inheritance, enact modification provisions or supplementary provisions.”<sup>39</sup>

In fact, during this period, the autonomous legislation was not strictly in line with the NPCSC’s interpretation. Prior to 2000, a number of autonomous areas had passed regulations that modify higher-level national laws without relevant authorization. Some Chinese scholars contend that modification is allowed except when it has been expressly prohibited.<sup>40</sup> This view was accepted by the NPC in 2000 with the passage of the Legislation Law. With four limitations, this law allows autonomous areas

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<sup>36</sup> According to Article 72 of the Legislation Law, non-autonomous areas may, in light of the specific conditions and actual needs of their respective administrative areas, formulate local regulations, provided that such regulations do not contradict the Constitution, national laws and administrative regulations.

<sup>37</sup> (周伟) [Zhou Wei], *Minzu Quyu Zizhifa Anli Shizheng Wenti Yanjiu* (民族区域自治法案例实证问题研究) [Case Study on the Interpretation of the Law on Regional National Autonomy], 23 (西南民族学院学报) J.SW.U.NAT’L 152(2002).

<sup>38</sup> *Id.* at 153.

<sup>39</sup> See JICHENG FA(继承法) [Succession Law] art.35.

<sup>40</sup> (杨旭) [Yang Xu], *Minzu Zizhi Difang Lifa Xuanti Ji Biantong Wenti Chutan* (民族自治地方立法选题及变通问题初探) [A Preliminary Analysis on the Subject Matters of Legislation in Autonomous Areas and the Issue of Modification], 3 (民族研究) J. MANCHU 6(2002).

to modify higher-level laws without prior authorization. According to the Legislation Law, these limitations are as follows:

- Provisions of the 1982 Constitution and the RNA Law should not be modified.
- Where other laws and administrative regulations already make particular provisions for national autonomous areas, no further modification is allowed.
- Modification should not contravene the basic principles of national laws and administrative regulations.
- No modification is allowed for the matters under the exclusive legislative powers of the central government.<sup>41</sup>

In summary, both the autonomous legislative power and the scope of modification power are vaguely defined. The current legal framework does not provide a specific list of legislative powers that can be exercised by autonomous areas. The four limitations mentioned above suggest that the exercise of modification power is not guaranteed. Its actual scope hinges on the will of the central government.

### C. *The Form*

There are four types of autonomous legislation: the autonomous regulation, the separate regulation, modifying rules, and supplementing rules. At this point of time, Chinese authoritative sources have not defined any of them. Nevertheless, Chinese legal scholars have generated some discussions on this issue which can help us better understand these three types of autonomous legislation.

The term ‘autonomous regulation’ (自治条例) has not been defined by law or other authoritative sources. Chinese legal scholars usually use the terms “comprehensive” or “basic” to define the autonomous regulation. Kang Yaokun, for example, defines it as a comprehensive regulation that adjusts the relationships between nationalities in autonomous areas.<sup>42</sup> According to Cai Dingjian, it is a regulation governing the basic system concerning national regional autonomy in autonomous areas.<sup>43</sup> Chinese law does not specify the status or effect of the autonomous regulation. Scholarly discussion considers it as “a kind of regulation having special

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<sup>41</sup> See LIFA FA(立法法) [Legislation Law] art. 66.

<sup>42</sup> (康耀坤等) [Kang Yaokun, et al.], *Zhongguo Minzu Zizhi Difang Lifa Yanjiu* (中国民族自治地方立法研究) [*On the Legislation of National Autonomous Area in China*] 162 China Press of Democracy (2007).

<sup>43</sup> (蔡定剑) [Cai Dingjian], *Xianfa Jingjie* (宪法精解) [*Chinese Constitution: An Intensive Reading*], Falv Chubanshe (法律出版社) [China Law Press] 2006) at 125.

status in the national legal system.”<sup>44</sup> According to Song Caifa, an autonomous regulation serves as the local constitution for the autonomous area.<sup>45</sup> Some scholars asserted that it has higher legal effect than the separate regulation and the latter must be in accordance with it.<sup>46</sup> Given the comprehensive content and special status of an autonomous regulation, an autonomous area can only have one at a time.

The subject of an autonomous regulation, according to Kang Yaokun, is the relationship between different ethnic groups in autonomous area.<sup>47</sup> Wu Zongjin and Ao Junde asserted that autonomous regulations also govern the relationship between the organs of an autonomous area and higher-level organs.<sup>48</sup> In general, the matters governed by an autonomous regulation are comprehensive and cover various aspects of political affairs, economy, and cultural and social lives. Kang Yaokun lists six domains that may be governed by an autonomous regulation. These include principles on exercising autonomy, autonomous organs, autonomous powers, relationships between autonomous organs, ethnic groups, and between lower autonomous organs and higher-level autonomous organs.<sup>49</sup>

Kang Yaokun defines separate regulation (单行条例) as a regulation governing one particular matter in the autonomous area.<sup>50</sup> This stands in contrast to the autonomous regulation that governs comprehensive matters. There is a superior-subordinate relationship between the autonomous regulation and the separate regulation. According to Kang Yaokun, the separate regulation aims to materialize provisions of the autonomous regulation, and depending on the actual needs, an autonomous area may enact more than one separate regulation.<sup>51</sup>

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<sup>44</sup> (吴, 敖) [Wu & Ao], *supra* note. 4, at 398.

<sup>45</sup> (宋才发) [Song Caifa], *Minzu Quyu Zizhifa Tonglun (民族区域自治法通论) [The General Theory on the Law on National Regional Autonomy] 140 Minzhu Chubanshe (民族出版社) [China Press of Ethnicity]*, 2003.

<sup>46</sup> (张文山) [Zhang Wenshan, ], *Zizhiquan Lilun yu Zizhi Tiaoli Yanjiu (自治权理论与自治条例研究) [On the Theory of Autonomous Power and Autonomous Regulation]*, 399 Falv Chubanshe (法律出版社) [China Law Press], 2009; Wu & Ao, *supra* n. 4, at 399.

<sup>47</sup> (康等) [Kang, et al.], *supra* note. 42, at 162.

<sup>48</sup> (吴, 敖) [Wu & Ao], *supra* note. 4, at 394-395.

<sup>49</sup> (康等) [Kang, et al.], *supra* note. 42, at 167-171. For a case study on the content of the Autonomous Regulation on Yanbian Korean Autonomous Prefecture, see (吴, 敖) [Wu & Ao], *supra* note. 4, at 395-398.

<sup>50</sup> (康等) [Kang, et al.], *supra* note. 42, at 215.

<sup>51</sup> *Id.* at 216; also see (吴, 敖) [Wu & Ao], *supra* note. 4, at 393.

In general, the scope of separate regulations is quite extensive. According to Wu Zongjin and Ao Junde, the separate regulations may deal with the following twelve matters: culture, education, population control, drug prohibition, protection of forests and grasslands, economic management, environmental protection, water resource protection, administration of electric power facilities, land and city planning, rural development and agriculture.<sup>52</sup> According to Kang Yaokun, apart from the abovementioned twelve matters, separate regulations may also deal with the following seven matters: protection of private economy, tourist management, mineral resources administration, minority protection, archive management, Muslim food management, water resource protection, promoting science and technology, and legislative procedure.<sup>53</sup>

The 1982 Constitution, the RNA Law and the Legislation Law do not mention the modifying rules (变通规定) and supplementing rules (补充规定). The autonomous areas may enact these two forms of autonomous legislation based on the authorization of national laws. The modifying rule aims to modify provisions of the national law. Scholarly discussion interprets two forms of modification: partly or entirely modifying national laws for execution, and partly or entirely stopping the implementation of national laws.<sup>54</sup> The supplementing rule aims to enrich the contents of national laws. The purpose of these two forms of autonomous legislation is to guarantee the “correct implementation of national laws in autonomous areas.”<sup>55</sup> To date, fourteen national laws have made such authorization.<sup>56</sup> The difference between these modifying/supplementing rules and autonomous/separate regulations is that the former needs explicit authorization of national laws; enacting autonomous regulations and separate regulations, however, do not need such delegation.<sup>57</sup>

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<sup>52</sup> (吴, 敖) [Wu & Ao], *supra* note. 4, at 399-400.

<sup>53</sup> (康等) [Kang, et al.], *supra* note. 42, at 222-225.

<sup>54</sup> (吴, 敖) [Wu & Ao], *supra* note. 4, at 401-402.

<sup>55</sup> (康等) [Kang, et al.], *supra* note. 42, at 241-242.

<sup>56</sup> These 12 national laws include the Criminal Law, Election Law, Marriage Law, Heritage Law, Forest Law, General Principles of Civil Law, Civil Procedural Law, Adoption Law, Law on the Protection of Women's Rights and Interests, Land Administration Law, National Flag Law, Law on the Industrial Enterprise owned by the Whole People, Law on Prevention and Treatment of Infectious Diseases.

<sup>57</sup> (邓建民) [Deng Jianmin], *Lun Biantong Huo Buchong Guiding yu Danxing Tiaoli de Qubie* (论变通或补充规定与单行条例的区别) [*The Difference between Modifying/Supplementing Rules and Separate Regulations*], 23 (西安民族学院学□) J.XIAN.COL.NAT'L, 111-112(2002).

#### D. *The Procedure*

In general, a regulation/rule passed by an autonomous people's congress needs to be approved by its higher-level People's Congress Standing Committee before it goes into effect. There is also an un-codified rule that the regulation/rule drafting is led by the local committees of the CCP. After completing the drafting, a draft should be approved by its higher-level CCP committee before it enters the formal approval procedure of the higher-level people's congress. This section will first examine the procedure of making autonomous and separate regulations. It will then examine the procedure of making modifying rules and supplementing rules followed by the examination of the role of the CCP in the autonomous legislative procedure as a whole.

Under the 1982 Constitution and the RNA Law, only the autonomous people's congress can enact autonomous regulations and separate regulations. Its standing committee is not granted this power. This stands in contrast to the enactment of ordinary local regulations, which can be exercised by both the local people's congress and its standing committee.<sup>58</sup> Only allowing the autonomous people's congress to enact autonomous regulation and separate regulation reflects the significance of these two forms of legislation. The Legislation Law decrees, the legislation governing particularly important matters in an administrative area should be passed by the people's congress of this area.<sup>59</sup>

An autonomous regulation or a separate regulation would not come into effect until the standing committee of the higher-level people's congress approves it. In the case of regional-level autonomous regulations and separate regulations, the approving organ is the NPCSC and for sub-regional/provincial autonomous regulations and separate regulations, and the standing committee of the provincial/regional people's congress.<sup>60</sup> The regional/provincial autonomous regulations and separate regulations are also required to, within 30 days after the date of promulgation, be submitted to the NPCSC and the State Council for the record.<sup>61</sup> Ordinary local regulations, however, do not require such higher-level approval. The local legislative organ, namely, the people's congress and its standing committee, will determine when they go into effect, though they also need to be submitted to the NPCSC for the record.<sup>62</sup>

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<sup>58</sup> See LIFA FA(立法法) [Legislation Law] art. 63.

<sup>59</sup> See LIFA FA(立法法) [Legislation Law] art. 17.

<sup>60</sup> See LIFA FA(立法法) [Legislation Law] art. 66.

<sup>61</sup> The approving organs are responsible to submit for the record. Regional autonomous regulations and separate regulations do not need to be submitted to the NPCSC for the record, because the approving organ is the NPCSC. See LIFA FA(立法法) [Legislation Law] art. 89.

<sup>62</sup> See LIFA FA(立法法) [Legislation Law] art. 63.

Compared to the autonomous and separate regulations, the procedure to enact modifying rules and supplementing rules is more complicated. Under some national laws, the enacting organ is the autonomous people's congresses. The Marriage Law, for example, only assigns the modification power to autonomous people's congresses.<sup>63</sup> Some other laws (e.g., the Adoption Law), however, grant this power to both the local people's congress and its standing committee.<sup>64</sup> Some Chinese scholars contend that the enacting organ should be standardized in order to avoid conflicts and reduce legislative costs.<sup>65</sup>

Unlike autonomous/separate regulations, the procedures of approval and record for modifying rules and supplementing rules are not unified. These procedures vary in accordance with relevant national laws that make the delegation. For regional-level modifying rules and supplementing rules, some national laws state that they should be submitted to the NPCSC for the record.<sup>66</sup> Under some other national laws, these rules are required to be submitted to the NPCSC for approval.<sup>67</sup> Several other laws do not specify the rule for approval and record (备案).<sup>68</sup> For the rules under regional levels (i.e., prefectural and county levels), they are required to be submitted to the standing committee of regional people's congress for approval, and they are also required to be submitted later to the NPCSC for the record.

Some Chinese scholars argue that because of the higher-level approval required, autonomous areas only have half legislative power, meaning that the exercise of autonomous legislative power ultimately resides with the central government.<sup>69</sup> Compared to autonomous areas,

<sup>63</sup> See HUNYIN FA(婚姻法) [Marriage Law] art. 50.

<sup>64</sup> See SHOUYANG FA(收养法) [Adoption Law] art. 32.

<sup>65</sup> (康等) [Kang, et al.], *supra* n. 42, at 256-257.

<sup>66</sup> These national laws include FUNV QUANI BAOHUFA(妇女权益保护法) [Protection of Women's Rights and Interests] art. 53, JICHENG FA (继承法) [Heritage Law] art. 35, and SHOUYANG FA (收养法) [Adoption Law] art. 31.

<sup>67</sup> These national laws include XINFALIA(刑法) [Criminal Law] art. 90, MINSHI CHENGXU FA(民事程序法) [Civil Procedural Law] art. 17, and HUNYIN FA(婚姻法) [Marriage Law] art. 50.

<sup>68</sup> These national laws include MINFA TONGZE (民法通则) [General Principle of Civil Law] art. 115, and LAONIAN REN QUANYI BAOZHANG FA (老年人权益保障法) [Law on the Protection of Elder's Rights and Interests] art. 49.

<sup>69</sup> (朝丽)[Chao Li], *Dui Minzu Zizhi Difang Zizhi Jiguan Lifaquan de Sikao (对民族自治地方自治机关立法权的思考)* [Analysis on the Legislative Power of the Self-government Organ in the National Autonomous Areas], 23 (西南民族学院学报) J.SW.U.NAT'L138-139(2005); (陈绍凡) [Chen Shaofan], *Woguo Minzu Zizhi Defang Lifa Ruogan Wenti Xintan (我国民族自治地方立法若干问题新探)* [New Exploration on Several Issues concerning Legislation of National Autonomous Areas in Chin], 1 (民族研

ordinary localities have complete legislative power since they do not need to submit local regulations to the central government for approval.<sup>70</sup> The regional-level autonomous legislation has binding force on the central government because the latter approves the autonomous legislation. Some scholars assert that because of the high-approval procedure, autonomous legislation has the binding force not only for autonomous areas concerned but also for the central government; this stands in contrast to ordinary local regulations that only have binding force in the localities.<sup>71</sup>

In practice, higher-level approval for autonomous legislation not only exists in the formal congress's system but also exists in the CCP system. Take the drafting of prefectural autonomous regulation as an example. After a draft is completed by a drafting group composed of chief officials from the prefectural Party committee, the standing committee of the prefectural people's congress and people's government, the prefectural Party committee will submit it to the regional Party committee for approval.<sup>72</sup> After receiving the approval, the prefectural party committee will submit the draft to the prefectural people's congress for passage. After passage, it will be submitted to the standing committee of the regional people's congress for approval. It should be noticed that the drafting is an iterative process. The higher-level Party committee and people's congress would usually give their revising opinions, and the local drafting organs would revise the draft accordingly and re-submit the revised draft for approval again. The following chart illustrates the *de facto* process of the enactment of an autonomous regulation, which combines the Party system as well as the congressional system.

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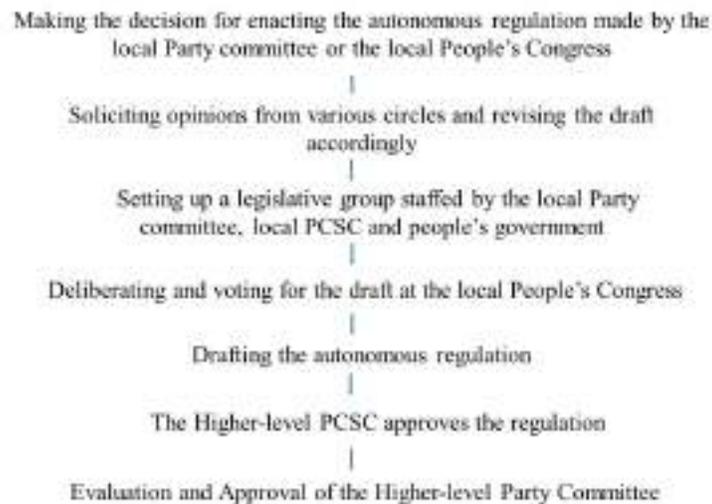
究)Ethology Study 11(2005).

<sup>70</sup> (吴, 敖)[Wu & Ao], *supra* note 4, p. 390.

<sup>71</sup> (覃乃昌) [Qin Naichang], *Lun Zhiding Zizhi Tiaoli de Kunnan ji Tuijin Minzu Lifa de Xinsilu* (论制定自治条例的困难及推经民族立法的新思路——以广西壮族自治区为例) [*On the Difficulties in Enacting Autonomous Regulations and New Thoughts on Promoting Minority Legislation— the Case of Guangxi Zhuang Autonomous Region*], 3 (广西师范大学学报) J. GUANGXI. U. NAT'L, 2-10(1995).

<sup>72</sup> If the draft regulation is drafted for county-level autonomous area, it needs to be submitted to the prefectural Party committee as well as the the regional level Party committee for approval.

**Figure 1: *De facto* process of the enactment of an autonomous regulation**<sup>73</sup>



In summary, the autonomous legislation requires higher-level approval in both the formal congress system and the CCP system. As stated by some Chinese scholars, the approval of higher-level organs for autonomous legislation has advantages such as guarantee the unity of the legal system, improving legislative quality and contributing to better implementation.<sup>74</sup> However, its disadvantages are also obvious. First, the criteria for approval are not clear, with some legislation receiving stricter scrutiny than others. According to an interpretation by the NPCSC Legislative Affairs Commission, the approving criterion is whether the autonomous legislation is “appropriate” (适当).<sup>75</sup> This criterion is too vague to be applicable. As mentioned above, the autonomous legislation only comes into effect once it has been approved, but the national laws are silent on what should happen if approval is not granted.<sup>76</sup> The adverse

<sup>73</sup> (吴, 敖)[Wu & Ao], *supra* note. 4, at 244-246.

<sup>74</sup> (康等) [Kang, et al.], *supra* note.42, at 173-174; Xisheng Zhang, *Written Language Reform and Regional Autonomy of Dai Nationality in Xishuangbanna*, 16 Int'l J. on Minority & Group Rts, 423-432(2009).

<sup>75</sup> See *Difangxing Guifan Zizhi Tiaoli he Danxing Tiaoli Guizhang* (地方性法规、自治条例和单行条例、规章) [Local Regulation, Autonomous Regulation, Separate Regulation and Administrative Rules], [http://www.npc.gov.cn/npc/flsyywd/xianfa/2001-08/01/content\\_140409.htm](http://www.npc.gov.cn/npc/flsyywd/xianfa/2001-08/01/content_140409.htm). (The Website of the NPC 中国人大网).

<sup>76</sup> In practice, the approving organs have never refused to approve the drafts of autonomous legislation reported to them. The reason lies in the fact that these drafts

effect of higher-level approval rule is that it undermines the local legislative autonomy, which will be discussed at length in the following section.

#### IV. AUTONOMOUS LEGISLATIVE POWERS UNDER INTERNATIONAL LAW

##### A. *Minority Rights Protection Under International Law*

International covenants and declarations relevant to the minority rights protection include the United Nations Charter in 1945, the Universal Declaration of Human Rights (UDHR) adopted by the United Nations Conference on International Organization in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the General Assembly of the United Nations in 1966, and the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities Declaration) adopted by the General Assembly of the United Nations in 1992. Among these international authoritative documents, the Minorities Declaration is the most comprehensive on the protection of the rights of ethnic minorities. Although it is not a legally binding instrument, the Minorities Declaration is increasingly recognized as an important point of reference to define and guide the broad international efforts to promote minority rights.<sup>77</sup> The Chinese government has reiterated its commitment to abide by the key international human rights treaties relating to the respect and protection of human rights.<sup>78</sup> China has signed both the ICESCR and the ICCPR in 1997 and 1998 respectively. The former was ratified by the NPCSC in 2001 and the latter yet to be ratified.

Generally speaking, the rights of ethnic minorities guaranteed by the above international covenants and declarations can be divided into three major categories. The first category is the rights of equal protection as provided in Article 27 of the ICCPR and Article 2.1 of the Minorities Declaration.<sup>79</sup> These are the most frequently cited claims in the international law, which includes protection from discrimination as well as rights that are aimed at the preservation of their culture and ethnic identity.<sup>80</sup> As provided by Article 55(c) of the UN Charter, equal

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have been approved in advance by higher-level Party committees, which have the final say on the approval of these drafts, *see* (吴, 敖)[Wu & Ao], *supra* note. 4, at 245.

<sup>77</sup> Wu, *supra* note. 9, at 22.

<sup>78</sup> Edward Wu, *Human Rights: China's Historical Perspectives in Context*, 4 J. of the History of Int'l L. 351-353 (2002).

<sup>79</sup> For similar expression in other international legal source, *see* Article 15 of the International Covenant on Economic, Social and Cultural Rights, and Article 27.1 of Universal Declaration of Human Rights.

<sup>80</sup> Wu, *supra* note. 9, pp. 22-23.

protection of human rights serves as a fundamental purpose of the United Nations, and all member States are obliged to promote universal respect for human rights without distinction on the basis of race, sex, language or religion.<sup>81</sup> The second category is the rights of participation and/or self-governance as provided in Article 2.2 of the Minority Declaration and Article 25 of the ICCPR.<sup>82</sup> The third category is that the State is obliged to take affirmative measures for the achievement of the above two categories of rights entitled to ethnic minorities. This is clearly reflected in the Minorities Declaration, which obligates the State to provide five types of affirmative measures.<sup>83</sup>

It should be noted that the current international legal instruments only provide general standards and guidelines for the minority rights protection at the state level. It remains unclear how the acceptable level of autonomy/treatment granted to minority groups regarding the above three categories of rights are defined.<sup>84</sup> A considerable level of discretion is left to the states in deciding what rights and treatments should be granted, which groups should be entitled to these rights and treatments and when these steps should be taken. In addition, a sovereign state is subject to these international legal instruments only to the extent that it has so consented. Another limitation concerning the use of international legal instruments to enforce minority rights protection is the lack of mechanisms for enforcement. The international community has yet to develop a coherent political and legal approach to deal with ethnic conflicts and claims of ethnic groups.<sup>85</sup> As a consequence, enforcement of human rights obligations entrenched in the international laws have been achieved primarily through various domestic processes by which states have incorporated international laws into their domestic legal orders.<sup>86</sup>

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<sup>81</sup> The principal of equal right protection can also be found in other international legal sources, such as Article 2 of the Universal Declaration of Human Rights in 1948, Article 2.1 of the ICCPR, Article 2.2 of the International Covenant on Economic, Social and Cultural Rights in 1966, and Article 3.1 and 4.1 of the 1992 Declaration.

<sup>82</sup> Other international authoritative sources referring to the right of participation of minorities include: Article 15 of the ICESCR, Articles 7 and 14 of the UDHR, Article 8 and 14 of the Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979 by the UN General Assembly.

<sup>83</sup> Article 4 of the Minorities Declaration.

<sup>84</sup> Reuter Tina Kempin, *Dealing with Claims of Ethnic Minorities in International Law*, 24 Conn. J. Int'l L. 236 (2008).

<sup>85</sup> *Id.*

<sup>86</sup> Koh Harold Hongju, *How is International Human Rights Law Enforced*, 74 Indiana L. J. 1397 (1998).

B. *A Comparison between the International Law and China's Domestic Law in the Legislative Requirement for Minority Rights Protection*

Generally speaking, under the international law, legislative measures are regarded as one of the principal conduits for the achievement of the minority rights protection. The ICCPR provides:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>87</sup>

The ICESCR particularly stresses the legislative measure as the most important means for the realization of the rights guaranteed by the Covenant. Article 2.2 provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>88</sup>

In line with these declarations, the Minorities Declaration also emphasizes the importance of the legislative measure for the protection of minority rights protection. Article 1.2 decrees: "States shall adopt appropriate legislative and other measures to achieve those ends."<sup>89</sup> Most noticeable is Article 2.3, which recognizes the right of minorities, who live in compact communities, to take measures which may alter national legislation:

Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.<sup>90</sup>

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<sup>87</sup> Article 2.2 of the ICCPR.

<sup>88</sup> Article 2.2 of the ICESCR.

<sup>89</sup> Article 1.2 of the Minorities Declaration.

<sup>90</sup> Article 2.3 of the Minorities Declaration.

By comparing the international law with China's domestic law with regard to the legislative requirement on minority rights protection, it can be concluded that the latter is generally in line with the former. There are, however, many specific points relating to the minority rights' protection are not clear.<sup>91</sup> The three categories of minority rights under international law (as mentioned in the previous section), are generally covered by Chinese laws.<sup>92</sup> The details are provided below. The first category, the right of equal protection, is reflected in Article 4 of the 1982 Constitution, which states that all nationalities in China are equal. The second category, the right of participation and/or self-government, is reflected in the 1982 Constitution and the RNA Law, which promise self-government and lays out a wide range of autonomy, including the preservation of key posts in self-government organs.<sup>93</sup> The third category, the State's obligation to take affirmative measures, is reflected in Chapter 6 of the RNA Law, which require the State to formulate preferential policies in finance, material provision, education and technology for autonomous areas to "assisting ethnic minorities to accelerate economic and cultural development."<sup>94</sup>

Chinese laws on the autonomous legislative powers in general meet the legislative requirement under the international law. First, as mentioned above, under Chinese laws, the autonomous legislative powers enjoy significant status and are deemed as one of the two principal rights (the other is the preservation of key posts in self-government organs).<sup>95</sup> Second, the scope of legislative powers is extensive, covering a wide range of matters. This enables autonomous areas to use legislation as a conduit for the exercise of minority rights and autonomy. Third, the Legislation Law grants modification powers and this is in line with the requirement in Article 2.3 of the Minorities Declaration. This conclusion echoes Zheng Ge's general argument in his study on the cultural protection of Tibet, which states that despite its uniqueness in name and formal provisions, the system of Regional National Autonomy reflect the common integrationist and accommodationist practice around the world.<sup>96</sup>

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<sup>91</sup> Randall Peerenboom, *Assessing Human Rights in China: why the Double Standard?* 38 *Cornell Int'l L.J.*, 134-135 (2005).

<sup>92</sup> Guimei Bai, *International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities*, 3 *The Chinese J. Int'l L.* 441 and 468 (2004).

<sup>93</sup> See 1954 XIAN FA (宪法) [Constitution] chapter 3, (1954) (China) and MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy (RNA) Law], chapter 2-5.

<sup>94</sup> See MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy (RNA) Law], chapter 6.

<sup>95</sup> Ghai & Woodman, *supra* n. 24, at 29.

<sup>96</sup> Zheng, *supra* note. 15, at 199-200.

In summary, China's legal framework on the minority rights protection, and in particular, those concerning legislative requirements on minority rights protection, is generally in line with standards under international law. It should be pointed out that the above discussion only evaluates the normative aspect of the legislative autonomy in autonomous areas. Whether ethnic minorities in China can enjoy genuine legislative autonomy depends on the autonomous legislation in practice, which will be discussed in depth in the following sections.

#### V. NO REGIONAL-LEVEL AUTONOMOUS REGULATION HAS BEEN PASSED

##### A. *The Drafting Effort of Four Autonomous Regions*

As discussed earlier, the autonomous regulation functions as a “sub-constitution” or “basic law” for an autonomous area.<sup>97</sup> The regional-level autonomous regulation is particularly important because it lays out basic framework for the exercise of autonomy in the whole region. In theory, as long as an autonomous area exists, it should have an autonomous regulation. Surprisingly, although the overwhelming majority of autonomous areas under the regional level (namely, autonomous prefectures and autonomous counties) have enacted their autonomous regulations, none of the five regional autonomous areas have passed them.<sup>98</sup>

The absence of regional autonomous regulations does not mean that these autonomous regions do not want to have them. In contrast, except for the Xinjiang Uygur Autonomous Region, the other four regions were remarkably active in attempting to enact their autonomous regulations. Among the four autonomous regions, the Guangxi Zhuang Autonomous Region was the first and most active one to engage in the drafting work. In March 1958, the Guangxi People's Congress passed its first draft of the Autonomous Regulation.<sup>99</sup> It also made a resolution, requiring that after conducting investigation and revision by soliciting opinions from various circles, the Guangxi People's Committee, which was the Guangxi government at that time, should submit the draft to the later session of the people's congress for passage and then to the NPCSC for approval.<sup>100</sup> However, due to the interruption of political campaigns

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<sup>97</sup> See (蔡) [Cai], *supra* note. 43, at 125,

<sup>98</sup> To date, 135 out of 150 autonomous areas under regional/provincial level have passed their autonomous regulations.

<sup>99</sup> Ethnic Affairs Commission of Guangxi Zhuang Autonomous Region Ethnic Affairs Commission of Guangxi Zhuang Autonomous Region. *Guangxi Minzu Quyu Zizhi Wenjian Ziliao Huibian*, (广西民族区域自治文件资料汇编) [*Selected Documents and Other Materials on Regional National Autonomy in Guangxi*], 254 Guangxi Zhuangzu Zizhiqu Minzushiwu Weiyuanhui (广西壮族自治区民族事务委员会) [Ethnic Affairs Committee of Guangxi Zhuang Autonomist Region]1988.

<sup>100</sup> *Id.*

since 1957, in particular, the Anti-rightist Movement (1957-1959) and the Cultural Revolution (1966-1976), the drafting was suspended until the early 1980s.<sup>101</sup> Guangxi re-started the drafting in 1980. After three years of arduous drafting, the Standing Committee of the Guangxi Provincial People's Congress formulated the thirteenth draft in 1987, and in the same year the Guangxi Party Committee submitted the draft to the Party Central Committee for approval. The Party Central Committee circulated it to the NPC Ethnic Affairs Committee and "the relevant departments of the State Council" for soliciting opinions.<sup>102</sup> However, the latter's disapproving opinions blocked the drafting from going any further. After this failure, Guangxi organized people to conduct drafting again. Under the guidance of the NPC Minority Affairs Committee, Guangxi completed 18th draft in 1991 and this was submitted to the center for approval.<sup>103</sup> This draft had the same fate as its 1987 counterpart and was rejected during the stage of soliciting opinions of the State Council's departments.<sup>104</sup> In 1993, Guangxi formulated the nineteenth draft but did not submit to the central government. After this, the drafting work was by and large suspended.

It is noticeable that among the four autonomous regions that conducted the drafting of the autonomous regulation, only Guangxi submitted the draft to the central government for approval. The Inner Mongolia Autonomous Region initiated the drafting in 1980. When the seventeenth draft was completed in 1987, the drafting group sent people to report it to the Ethnic Affairs Committee and the Legislative Affairs Committee of the NPC, and relevant departments of the State Council. After completing the twentieth draft in 1993, the drafting work was suspended.<sup>105</sup> In the Ningxia Hui Autonomous Region, drafting was initiated in 1980. In 1994, the fifteenth draft was completed and submitted to the Ningxia regional Party committee. Consistent with the revision of the RNA Law in 2001, Ningxia formulated the sixteenth draft and again submitted to the Ningxia regional Party Committee.<sup>106</sup> In 2004 and 2008,

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<sup>101</sup> (张文山) [Zhang Wenshan], *Tongwang Zizhi de Qiaoliang - Zizhitiaoli yu Danxing Tiaoli Yanjiu* (通往自治的桥梁—自治条例与单行条例研究) [*The Bridge for Autonomy, Study on Autonomous Regulation and Separate Regulation*] 91-92 Zhongyang Minzu Daxue Chubanshe (中央民族出版社) [Central Ethnic Press] 2009.

<sup>102</sup> (覃) [Qin], *supra* note. 71, p. 3.

<sup>103</sup> *Id.*

<sup>104</sup> (张) [Zhang], *supra* note. 101, at 92-96.

<sup>105</sup> (白永利) [Bai Yongli], *Zizhiqu Zizhi Tiaoli Zhiding Yanjiu - yi Neimenggu Zizhiqu Weili* (自治区自治条例制定研究—以内蒙古自治区为例) [*Study on the Enactment of Regional Autonomous Regulation, the Case of Inner Mongolia Autonomous Region*], 6 (内蒙古师范大学学报) J. INNER MONGOLIA NOR.U., 52(2010).

<sup>106</sup> (潘红祥) [Pan Hongxiang], *Zizhiqu Zizhi Tiaoli Chutainan de Yuanyin Fenxi ji Duice* (自治区自治条例出台难的原因分析及对策) [*The Analysis on the*

drafting the regional autonomous regulation was introduced into the five-year legislative plan of the ninth and tenth sessions of the regional people's congress respectively.<sup>107</sup> To date, Ningxia has not submitted its draft to the central government for approval. By 2001, the Tibet Autonomous Region had completed its sixteenth draft, and since then the drafting work was suspended.<sup>108</sup> Unlike the other autonomous regions, Xinjiang Uygur Autonomous Region has not yet initiated the drafting.

The Undertakings of Ethnic Nationality of the eleventh Five-year Plan (2007-2012), which were approved by the State Council, asserted to push forward the enactment of regional autonomous regulations.<sup>109</sup> The State Council, in the twelfth Five-year Plan (2012-2017), also asserts to enact departmental directives and other normative documents to implement the RNA Law.<sup>110</sup> These assertions indicate that the State Council perceives the absence of regional autonomous regulations as an abnormal phenomenon and wishes to support their enactment. However, these assertions seem to only remain on paper. To date, the drafting work in the above mentioned four autonomous regions has not been re-started since the mid-1990s and the central government's directives and other normative documents aiming to facilitate or promote the drafting is scarce.

#### B. *The Disapproving Opinions of the State Council's Departments for Guangxi's Draft*

It can be observed that although autonomous regions showed their considerable willingness to enact autonomous regulations, the drafting has stagnated. Guangxi went one step further, submitting its drafts of the Autonomous Regulations to the CCP Central Committee for approval twice, but its submissions were rejected.<sup>111</sup> As reflected in the

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*Reason for the Difficulty of Enacting Regional Autonomous Regulation*] 3 (北方民族大学学报) J.N.U.NAT'L, 55-56(2009).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See, the State Council General Office, Shaoshu Minzu Shiye Shiyiwu Guihua (少数民族事业 '十一五规划') [The Undertakings of the Ethnic Minorities of the 11<sup>th</sup> Five-year Plan], [http://www.gov.cn/zwgk/2007-03/08/content\\_545955.htm](http://www.gov.cn/zwgk/2007-03/08/content_545955.htm). (中国政府网 Central People's Government of the PRC).

<sup>110</sup> See, the State Council General Office, Shaoshu Minzu Shiye Shierwu Guihua (少数民族事业 '十二五规划') [The Undertakings of the Ethnic Minorities of the 12<sup>th</sup> Five-year Plan], [http://www.gov.cn/zwgk/2012-07/20/content\\_2187830.htm](http://www.gov.cn/zwgk/2012-07/20/content_2187830.htm). (中国政府网 Central People's Government of the PRC).

<sup>111</sup> As mentioned in *supra*, if the CCP central committee approves the draft, the draft will be sent back to the regional people's congress to go through the formal legislative process. More specifically, after approved by the CCP Central Committee, it will be deliberated and passed by the regional people's congress and finally will go into effect after being approved by the NPCSC.

Guangxi case, the principal obstacle for blocking the legislative process is the disapproval by the central government. Thus, the evaluation of these disapproving opinions can provide insight into the difficulties of enacting regional-level autonomous regulation.

As mentioned before, after receiving the seventeenth Guangxi draft in 1987, the CCP Central Committee circulated the draft to the NPC Ethnic Affairs Committee and relevant ministries and commissions of the State Council for 'soliciting opinions'. The latter put forward two disapproving opinions: (1) the provisions of the draft was 'relatively general and did not deeply reflect the characteristics of Guangxi'; and (2) there was a relatively large difference in the opinions of the State Council's ministries and the requirements of Guangxi which reflected the differing perceptions of the spirit of the RNA Law.<sup>112</sup> According to Qin Naichang, an ethnologic scholar at Guangxi Academy of Social Science, the key lay on the divergence towards "the affair of decentralizing powers and ceding interests."<sup>113</sup>

For the eighteenth draft submitted in 1991, State Council departments provided more detailed opinions. A few ministries and committees either "had no opinion," had "no opinion in general," or "basically agreed."<sup>114</sup> Each of the other ministries and committees put forward objections to six and up to thirteen provisions of the draft.<sup>115</sup> The objections were mainly concerned with the decentralization of economic powers and interests. Some ministries and committees completely rejected the stipulations of the draft that allowed the Guangxi to carry out special policies, stressing that policies must be in accordance with unified national regulations; some ministries and committees rejected the provisions that required the central government to make preferential arrangement for Guangxi, stating that it was difficult to formulate preferential policies to a particular autonomous region; Other ministries and committee asserted that the provisions of the draft contravened their departmental policies, implying that their departmental rules prevail over autonomous regulations ; One ministry even stated: "the price Guangxi charges is too high (要价太高)."<sup>116</sup>

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<sup>112</sup> (覃)[Qin], *supra* note. 71, at 7.

<sup>113</sup> *Id.*

<sup>114</sup> (韦以民)[Wei Yimin], *Dui Minzu Zizhiquan yu Shangji Guojia Jiguan Lingdao Bangzhu de Guanxi de Zairenshi* (对民族自治权与上级国家机关领导帮助的关系的再认识) [*Reevaluating the Relationship Between the National Autonomy and the Assistance of Higher State Organs*], (广西政法管理干部学院学 □) J.GUANGXI.ADM.CA.INS.POL.L., 3 (1996).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

Until now, the procedure of soliciting the opinions of the State Council's departments is not codified. The solicitation is understandable given the fact that the various levels of daily coordinative administrative work between the center and autonomous regions is managed by these departments. These drafts were not applicable in practice if relevant departments did not agree with the contents in advance. Some Chinese scholars have asserted that because of this procedure, the *de facto* approving power rests on some State Council's departments, in particularly, those in charge of economic management.<sup>117</sup>

### C. *The Reasons for the Absence of Regional Autonomous Regulation*

#### 1. The Higher-Level Approval Procedure

As already mentioned above, the primary reason for the absence of regional autonomous regulations is that the central government did not approve the Guangxi drafts and the key is the disapproving opinions of the State Council's departments. From the perspective of the autonomous regions, the State Council's departments hold an indifferent attitude towards the exercise of regional autonomy and are reluctant to concede their powers and interests to them;<sup>118</sup> however, from the perspective of these State Council's departments, the price that the autonomous regions charge is too high. Take the nineteenth draft as an example.

This draft required the central government to provide five per cent of the "mobilization fund" and five per cent of the "reserve fund" based on the budget of the Guangxi Autonomous Region, required the central government to provide specific subsidies for sudden changes in the national financial system, the adjustment of the State policies and cases of major natural disasters, and required the central government to return the profits of the enterprises directly under the central government to the Regional Government for appropriate use.<sup>119</sup>

The central government was reluctant to accept these financial arrangements proposed by Guangxi because these policies could affect national unified management and increase additional financial burden of the central government. The higher-level approval procedure echoes the argument of Pitman Potter, which states that the legal system reveals the continuing commitment of the Chinese government to the primacy of state power at the expense of regional autonomy.<sup>120</sup>

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<sup>117</sup> (张) [Zhang], *supra* note. 101, at 110.

<sup>118</sup> (覃) [Qin], *supra* note. 71, at 7.

<sup>119</sup> See Article 48, 49, 50, 59, 60, 68, 71, 75, 76, 77 and 78; For the text of the 19th Guangxi draft, *see*, (张) [Zhang], *supra* note. 101, pp. 223-241.

<sup>120</sup> Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 *The China Quarterly*, 673-683(1999).

By analyzing the content of the draft, we can go one step further to see that the fundamental reason lies on the difficulty of re-adjusting the powers and interests between the central government and autonomous regions. Compared to the arduous process of enacting regional autonomous regulations, enacting sub-regional autonomous regulations proved to be much smoother. The reason, as explained by Song Caifa, a scholar in ethnology from Beijing, lies in the fact that it is easier to adjust the interests between two levels of local autonomous governments.<sup>121</sup>

## 2. The Economic System in Transition

Autonomous areas are some of the least developed areas in China. One of the main goals of the regional autonomous regulation is to delineate economic autonomy and guarantee preferential treatment from the central government. Since China's reform and opening up in the late 1970s, however, the Chinese economic system has been under rapid transition. The change has been accelerated since the early 1990s when China began to turn to a market economy. Thereafter, the central government has formulated a wide range of reform measures concerning various aspects of the economic system, including finance, foreign trade, banking, and investment. The changing economic system affects the enactment of regional legislation mainly from two aspects. On the one hand, the change has led to a difficulty in delineating the economic autonomy and preferential policies for autonomous regions. On the other hand, the change stands in contrast to the stability requirement of law.<sup>122</sup> Qin Naichang proposed a similar view from the perspective of the transformation of the economic system. Mr. Qin Naichang asserted that, consistent with the establishment of the market economy, the previous special treatment under the planned economy given to the autonomous areas has been either diminished or was offset by preferential policies given to the eastern coastal areas. To date, the new policies that can replace old special treatment and accords with the principles of market economy have yet to be found.<sup>123</sup>

## 3. The Lack of State Council's Implementing Regulations and Rules

The language used in the RNA Law is too general to be implemented.<sup>124</sup> Thus, the State Council and its departments are expected

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<sup>121</sup> (宋才发) [Song Caifa], *Zizhiqu Zizhi Tiaoli Yanjiu* (自治区自治条例研究) [*Study on Regional Autonomous Regulations*], 1(黑龙江民族学刊) HEILONGJIANG.NAT'L.SERIES. 63 (2007).

<sup>122</sup> *Id.* at 63.

<sup>123</sup> (覃)[Qin], *supra* note. 71, at 4.

<sup>124</sup> According to Qin, these general terms appear twenty times in the text of the RNA Law. For example, in terms of the State's assistance for autonomous areas, the RNA Law use very general terms such as 'striving to help', 'may offer assistance', 'may

to formulate regulations, directives and other normative documents in order to crystallize autonomous powers enshrined in the RNA Law. The RNA Law, for example, states that while exploiting natural resources, the State should give consideration to the interests of autonomous areas. From a legal perspective, it implies that while formulating relevant nationwide rules on resources exploitation, the State Council should strike out rules specific to autonomous areas, which differ from the nationally applied rules. It is predictable that the enactment of regional autonomous regulations would be easier if relevant State Council's implementing regulations and rules were in place. The authoritative source shows that the State Council is well aware of the importance of its implementing regulations and rules for the enactment of regional autonomous regulations. The twelfth Five-year Plan (2012-2017) of the Undertaking of Ethnic Nationality requires that the State Council and its departments enact administrative regulations, rules and other normative documents to implement the RNA Law, and to support the autonomous areas to enact autonomous regulations.<sup>125</sup> However, these central government's rules are scarce, if they existent at all.

#### 4. The Revision of the Higher-level Law

The revision of the RNA Law had an adverse impact on the drafting work of the regional-level autonomous regulations.<sup>126</sup> As mentioned earlier, the RNA Law serves as a basic law for ethnic affairs in China and the local autonomous legislation should be in accordance with the provisions of the RNA Law. Although several pieces of legislation had been drafted, autonomous regions suspended their drafting work after the initiation of the revising work of the RNA Law in 1993. They had hoped to re-start this process after the passage of the revised RNA Law, so that their new drafts could be in accordance with the revised RNA Law. However, the RNA Law was not passed until 2001, seven years after the initiation of the revising work. During this period, the drafting of regional autonomous regulations was suspended. The drafting was also affected by the belated passage of the State Council's implementing regulation on the RNA Law.<sup>127</sup> The State Council began to draft this regulation just after the passage of the RNA Law in 1984. It did not pass the administrative regulation, however, until 2005, twenty-one years after its drafting.

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offer appropriate consideration', 'should properly set lower standards', *see*, (覃)[Qin], *supra* note. 50, at 4.

<sup>125</sup> The General Office of the State Council, *supra* note 79.

<sup>126</sup> (白) [Bai], *supra* note. 105, at 54.

<sup>127</sup> The title of this administrative regulation is the Implementing Rules on the RNA Law.

## VI. LEGISLATIVE PRACTICE

A. *Sub-regional Autonomous Regulations*

In contrast to the situation at the regional level, most sub-regional/provincial autonomous areas have enacted their autonomous regulations. More specifically, twenty-five out of thirty autonomous prefectures have enacted their autonomous regulations. All of these were passed within six years after the passage of the RNA Law in 1984. At county level, 110 out of 120 autonomous counties have enacted their autonomous regulations, all of which were adopted before 2001. After the revision of the RNA Law in 2001, most of the above 135 autonomous areas revised their pre-existing autonomous regulations accordingly.<sup>128</sup> At this point in time, there are still five autonomous prefectures and ten autonomous counties that have not passed their autonomous regulations. The five autonomous prefectures that have not passed their autonomous regulations are all located in the Xinjiang Uygur Autonomous Region.

In general, the contents of the existing autonomous regulations have two sources: the RNA Law and two autonomous regulations that were adopted earlier. Copying occurred in nearly all of the main subject matters including the autonomous government, people's courts, people's prosecutors, economic construction, financial management, education and science, and culture. As Yash Ghai points out, these autonomous regulations are generally a collection of provisions from the RNA Law combined with relevant national policies.<sup>129</sup> Moreover, their structure and contents are similar because they are modeled on two earlier autonomous regulations: the Autonomous Regulation for the Yanbian Korean Autonomous Prefecture and the Xinhuang Dong Autonomous County, enacted in 1985 and 1986 respectively. According to a provincial legislative official, these regulations are rather general and do not reflect the characteristics of local ethnic minorities and lack the necessary applicability for these communities.<sup>130</sup> For illustration, the structure of the Yanbian regulation is provided below:

- Chapter One: General Provisions
- Chapter Two: The Self-government Organs

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<sup>128</sup> Compared with the provisions of the 1984 RNA Law, the new RNA Law revised 31 provisions, deleted two provisions and added nine provisions. The thrust of the amendment is to make the law accord with the market economy, which the Chinese government adopted in the early 1990s.

<sup>129</sup> Ghai & Woodman, *supra* note. 24, at 42.

<sup>130</sup> (陈洪波、王光萍) [Chen Hongbo & Wang Guangping], *Minzu Lifa Gongzuo zhong Cunzai de Zhuyao Wenti Chengyin ji Duice* (民族立法工作中存在的主要问题、成因及对策) [*The Main Problems, Reasons and Resolutions for the Current National Legislative Work*], 2(民族研究) ETH.STUD. 4 (2001).

- Chapter Three: People's Court and People's Procuratorate
- Chapter Four: Economic Construction and Financial Management
- Chapter Five: The Undertakings of Education, Science and Technology, Culture, Public Health and Physical Culture
- Chapter Six: The National Relationship
- Chapter Seven: Supplementary Provisions

While modeled on the NRA Law and earlier autonomous regulations, some autonomous regulations, to certain degree, revealed the exercise of autonomy. In terms of representation of ethnic minorities in the local government, many autonomous areas not only repeated the provisions of the RNA Law, which required the chief executive to be a titular ethnic minority, but also reserve a greater number of governmental posts for titular nationalities and other ethnic minorities. The Autonomous Regulation for the Yanbian Korean Prefecture passed in 1985, for example, decrees that the Chairman of the Standing Committee of the Prefectural People's Congress *should* be a Korean, and Koreans *may* occupy more than half of the posts in the Committee and of the posts comprising the Prefectural People's Government (including vice mayors, the chief secretary, directors of bureaus).<sup>131</sup> The head or deputy heads of the Prefectural Intermediate People's Court (the highest court in the area) and the Prefectural Procuratorate *should* be Koreans.<sup>132</sup> Another example is the Autonomous Regulation for Dorbod Mongol Autonomous County, which states that each of the nationalities that inhabit the county should be assigned with appropriate posts and Mongols may occupy more than thirty per cent of the posts in the People's Congress of the County and its Standing Committee.<sup>133</sup> This regulation also states that leading officials in the People's Government of the County and the head or deputy heads of the People's Court of the County and the Procuratorate at the same level *should* include Mongols.<sup>134</sup>

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<sup>131</sup> The Yanbian Korean Prefecture, located in the east of Jilin province, has 798,000 Koreans, making up 36.5 per cent of the local population, Yanbian Gaikuang(延边概况) [Profile of Yanbian], [www.yanbian.gov.cn/tplt/xl2012031611081743.jsp?inoid=16840](http://www.yanbian.gov.cn/tplt/xl2012031611081743.jsp?inoid=16840).

<sup>132</sup> See YANBIAN CHAOXIANZU ZIZHIZHOU ZIZHI TIAOLI(延边朝鲜族自治州自治条例) [Autonomous Regulation for Yanbian Korean Prefecture] art. 12, 16 and 25.

<sup>133</sup> Located in Heilongjiang Province, the Dorbod Mongol Autonomous County has 45,500 Mongols, making up 18.2 per cent of local population, *see*, local government website, <http://www.drbt.gov.cn/qygz/zrdl/index.html>.

<sup>134</sup> See DUER BOTE MENGGUZU ZIZHIXIAN ZIZHI TIAOLI(杜尔伯特蒙古族自治县自治条例) [Autonomous Regulation for Dorbod Mongol Autonomous County] art. 8, 9, 12 and 22.

Some autonomous regulations go further to detail the autonomous rights in the fields of language, education and culture, which were incorporated in higher-level laws. The Yanbian Autonomous Regulation, for example, accentuates the use of Korean language and the education for Korean people. This regulation requires that while performing governmental duties, the local autonomous organs should use both the Korean and Chinese languages and the former should be the principal language used. The local autonomous organs are responsible for setting up a working organ for studying and standardizing the Korean language, to promote the publications in Korean and to encourage the learning of the Korean language in local primary and middle Han schools.<sup>135</sup> As stated in the regulation, the education of Korean people has “strategic status and should be prioritized.”<sup>136</sup>

Economic construction is the main content in the existing autonomous regulations. Take the Autonomous Regulation for Qianan Buyer and Miao Autonomous Prefecture as an example. A total of twenty-two provisions of this regulation were related to economic construction and this makes up one third of its total provisions. According to Zhang Wenshan, this reflects the strong desire of autonomous areas for economic development.<sup>137</sup> These economic provisions largely copy the provisions in the higher-level laws and hardly reflect the local features. Nevertheless, the Autonomous Regulation for Evenk Autonomous Banner goes beyond this.<sup>138</sup> It accentuates the protection of local herdsmen’s interests and rights on managing the grassland, which covers 68.9 per cent of the territory of the banner.<sup>139</sup> According to this regulation, the boundary between grassland and the forest can only be changed by the decision of the People’s Congress of the Banner. The users of the grassland may, with the approval of the People’s Government of the Banner, make plans to remove forests that grow naturally in the grassland and cultivate forests for conserving grassland; the ownership of forests that grow naturally in the grassland belong to the users of grassland.<sup>140</sup>

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<sup>135</sup> See YANBIAN CHAOXIANZU ZIZHIZHOU ZIZHI TIAOLI(延边朝鲜族自治州自治条例) [Autonomous Regulation for Yanbian Korean Prefecture] art. 18, 19,53 and 55.

<sup>136</sup> See YANBIAN CHAOXIANZU ZIZHIZHOU ZIZHI TIAOLI(延边朝鲜族自治州自治条例) [Autonomous Regulation for Yanbian Korean Prefecture] art. Article 53.

<sup>137</sup> (张) [Zhang], *supra* note 101, at 177.

<sup>138</sup> The Evenk Autonomous Banner (which is equal to an autonomous county) is located in the northeast of the Inner Mongolia Autonomous Region.

<sup>139</sup> The Evenk Autonomous Banner has a territory of 19111 km<sup>2</sup>. It is rich in grassland and forest.

<sup>140</sup> See Article 25 of the Autonomous Regulation for Evenk Autonomous Banner.

One common shortcoming in the existing autonomous regulations is the lack of rules on the selection of chief executives in autonomous areas where more than one ethnic minority is designated. With respect to this issue, relevant autonomous regulations only vaguely decree that both or all (in case there are three titular groups) groups are qualified. In practice, however, it has been revealed that in most cases the post is taken by the titular group with the largest population within the community. In the Haixi Mongol and Tibetan Autonomous Prefecture, its chief executive is always a Mongolian since its establishment in 1953; the chief executive in Ngawa Tibetan and Qiang Autonomous Prefecture is always a Tibetan, and the people from the other ethnic group, Qiang, never get this post. Some scholars assert that this practice contravenes the principle of national equality.<sup>141</sup>

Some tensions have materialized between the existing autonomous regulations and the RNA Law. For example, the Autonomous Regulation for Yanbian Korean Autonomous Prefecture decrees that the Chairmanship of the Standing Committee of the Prefectural People's Congress can only be taken by the titular ethnic nationality, namely Korean. A few autonomous areas followed the Yanbian model, incorporating the same provisions in their autonomous regulations. However, these provisions are not in line with the RNA Law, which provides that the people from the titular minority should at least hold one position between the chairman and vice chairmen.<sup>142</sup> In its reply to the local governments in June 1992, the NPCSC Legislative Affairs Commission stated that the Yanbian model is incompatible with the RNA Law and therefore local autonomous governments should not follow it.<sup>143</sup> After the issuing of this authoritative reply, no autonomous area follows the Yanbian model. Nevertheless, the Yanbian Autonomous Regulation retains relevant provisions for the chairmanship in the local people's congress even after its revision in 2001.

The tension between autonomous regulations and the RNA Law is also reflected on whether the organs of ordinary Han-dominated counties, which are within the territory of autonomous prefectures, should enjoy autonomy. Some autonomous areas tend to regard them as self-government organs, and therefore preserve key posts to people from titular ethnic minority. The Autonomous Regulation for Shien Tujia Yi Autonomous Prefecture, for example, states that the chief executive of

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<sup>141</sup> (张) [Zhang], *supra* note. 101, at 418-420.

<sup>142</sup> MINZU QUYU ZIZHIFA(民族区域自治法) [Regional National Autonomy Law] art. 36.

<sup>143</sup> (乔晓阳, 张春生) [Qiao Xiaoyang & Zhang Chunsheng], *Xuanjufa he Difang Zuzhifa Zhiyi he Jieda* (选举法和地方组织法释义和解答) [Interpretation and Explanation on the Election Law and the Organic Law of Local People's Congress and Local People's Government], 276 Falv Chubanshe (法律出版社) [China Law Press 1997).

counties (which includes a few ordinary counties) under the jurisdiction of the prefecture should be members of Tujia group or Miao group.<sup>144</sup> In contrast to these autonomous regulations, the NPCSC Legislative Affairs Commission stated that the organs of these counties are ordinary state organs rather than self-government organs, and therefore cannot exercise relevant autonomy.<sup>145</sup>

The key reason for the tension is that some autonomous areas endeavored to expand their autonomy using autonomous regulations. In the face of this tension, the NPCSC tends to disapprove these local legislative initiatives, labeling them as incompatible with the RNA Law.

### B. *Separate Regulations*

Until now, none of the five autonomous regions have passed any separate regulations, although efforts were made to formulate some drafts.<sup>146</sup> Autonomous prefectures are the most active in enacting separate regulations among the three levels of autonomous areas. Among the pre-existing 489 separate regulations, 233 were enacted by autonomous prefectures and this covered twenty-eight out of the thirty prefectures.<sup>147</sup> On average, each autonomous prefecture has enacted 8.3 separate regulations. The number of separate regulations enacted by an autonomous prefecture vary significantly from twenty-seven (the Yanbian Korean Autonomous Prefecture) to one (Changji Hui Autonomous Prefecture and Bortala Mongol Autonomous Prefecture). The remaining two autonomous prefectures that have not enacted any separate regulations are the Diqing Zang Autonomous Prefecture (in Yunnan Province) and the Kizilsu Kirgiz Autonomous Prefecture (in Xinjiang Autonomous Region). By 2008, the 120 autonomous counties had enacted 256 separate regulations, averaging 2.1 per county.<sup>148</sup> Changyang Tujia Autonomous County in Hubei province was the most active, enacting eleven separate regulations; however, there are twenty-one autonomous counties that had only enacted one.

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<sup>144</sup> Similar provisions can be seen in Autonomous Regulation for Chuxiong Yi Autonomous Prefecture, Autonomous Regulation for Shien Tujia Yi Autonomous Prefecture, Autonomous Regulation for Qianan Buyi Miao Autonomous Prefecture, and Autonomous Regulation for Qianxinan Buyi Miao Autonomous Prefecture.

<sup>145</sup> (乔, 张) [Qiao & Zhang], *supra* note. 143, at 273.

<sup>146</sup> For example, in October 2000, after nearly two years of drafting, the Ethnic Minority Commission of the PCSC in Guangxi province completed the Draft of Separate Regulation for Resettling Relocated People for Water Conservancy and Hydroelectric Projects in Guangxi Zhuang Autonomous Region. However, this draft did not enter the formal congress system for passage. As pointed out by Zhang Wenshan, the main drafter of this draft, the reason is basically the same as that of the absence of regional autonomous regulation, *see*, (张) [Zhang], *supra* note. 101, at 459.

<sup>147</sup> *Id.* at 508.

<sup>148</sup> *Id.* at 560.

The subject matters regulated by pre-existing separate regulations are fairly extensive. Zhang Wenshan categorizes the matters into ten areas with thirty-nine subject matters.<sup>149</sup> According to Kang Yaohui, the contents can be categorized into twenty areas: culture, education, population control, the development of private economy, tourism, mineral resources, protection of the interests of special groups, archive, Muslim food, prohibition of opium, economic management, agriculture, protection of forest and grassland, ecological environment protection, water resources protection, water conservation and hydroelectric projects, land and city planning, promotion of science and technology, procedure for autonomous legislation, and others.<sup>150</sup>

Pre-existing separate regulations usually copy higher-level laws and regulations. Many, if not most, of these regulations have failed to exercise modification power, analogous to ordinary local regulations. Take the Regulation of Water Resource Management for Liangshan Yi Autonomous Prefecture as an example. This regulation, which was adopted in May 2008, mainly repeats the provisions of three higher-level laws and regulations, namely, the Water Law (promulgated by the NPCSC in 1988), the Law for the Prevention and Control of Water Pollution (promulgated by the NPCSC in 1984), and the Implementation measures of Sichuan Province for the Water Law (promulgated by Sichuan Provincial PCSC of Sichuan in 1992).<sup>151</sup> This separate regulation does not modify these three higher-level laws and regulations. The reason for the analogy between separate regulations and ordinary local legislations is that prior to 2015, sub-regional autonomous areas did not have the power to enact the latter, and therefore the enactment of separate regulations became the only legislative form available to them.

The making of separate regulations is inactive, and more importantly, none of the five autonomous regions have enacted any separate regulation. There are two main reasons for this inactivity. The first reason, as stated by Zhang Wenshan, is essentially the same as that for the absence of regional autonomous regulation, namely the arduous, iterative drafting process resulting from the higher-level approval procedure. According to Zhang Wenshan, the enacting process would take at least three to five years. The autonomous areas are demotivated to start

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<sup>149</sup> *Id.*, at 561-562.

<sup>150</sup> (康等) [Kang, et al.], *supra* n. 42, at 222-225.

<sup>151</sup> As a matter of fact, Article 2 of the Regulation of Water Resource Management for Liangshan Yi Autonomous Prefecture enumerates six higher-level laws and regulations that it is based on. Except the above three, the other three are the RNA Law, the Several Provisions of the State Council for the Implementation of the RNA Law (promulgated by the State Council in 2005), and the Several Provisions of Sichuan Province for the Implementation of the RNA Law (promulgated by Sichuan People's Government in 2006).

the drafting process of autonomous legislation because higher-level governments are reluctant to make more flexible arrangements. Zhou Wenju's interview of two officials of the PCSC in Jingxiu Yao Autonomous County reflects this. One official said: "the current autonomous legislation in Jinxiu does not have significant effect, and in contrast it would restrain the local development; the subject matters, which were regulated by our autonomous legislation, had been regulated by national laws".<sup>152</sup> The other official said: "we planned to enact the Regulation for the Management of Water Resource, but the higher-level government does not give us the power of modification; the drafting is meaningless if we do not have this power."<sup>153</sup>

The second reason for the inactivity is that autonomous regions tend to use ordinary local legislation because the ordinary local legislation does not need higher-level approval. The standing committee of local people's congress has risen to be the principal organ for enacting ordinary local regulations. The local people's congresses, however, have become inactive in legislation, and therefore the autonomous regions regard ordinary local legislation as an alternative when the drafting of a separate regulation is blocked by the central government. In the early 1980s, the Inner Mongolia Autonomous Region drafted the Regulation for the Management of Grassland as a separate regulation. It was then submitted to the NPCSC for approval, but the latter did not approve it. Given that the Grassland Law had not been enacted at that time, indicating that this regulation did not need to modify higher laws, the Inner Mongolia Region passed this regulation in the form of ordinary local regulation in June 1984.<sup>154</sup>

### C. *Modifying Rules and Supplementing Rules*

As noted above, the modifying rules and supplementing rules cannot be made without the authorization of national laws. To date, the number of national laws making such authorization is limited. Only fourteen national laws make such authorization.<sup>155</sup> Concerning these

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<sup>152</sup> (何文矩) [He Wenju], Master Dissertation, *Jinxiu Yaozu Zizhixian Minzu Lifa Yanjiu* (金秀瑶族自治县民族立法研究) [*The Study on the Autonomous Legislation in Jinxiu Yao Autonomous County*], 11-12 Guangxi Minzu Xueyuan (广西民族学院) [Guangxi U. NAT'L, 2008].

<sup>153</sup> *Id.*

<sup>154</sup> (白) [Bai], *supra* note. 105, at 55.

<sup>155</sup> These national laws include the Criminal Code, the Marriage Law, the Forest Law, the Heritage Law, the General Principles of the Civil Code, the Civil Procedural Law, the Adoption Law, the Election Law, the Grassland Law, the National Flag Law, the Law on the Industrial Enterprises owned by the Whole Population, the Law on the Protection of Women's Rights, the Land Law and the Law on the Prevention and Treatment of Infectious Diseases.

fourteen authorizations, four common features can be observed. First, these authorizations are comprehensive, directed at the general subject matter of the national law as a whole, and do not focus on certain specific provisions. Second, two restrictions are imposed: the principles of national laws cannot be contravened and these two forms of rules should be based upon characteristics of local ethnic groups. Third, while national laws authorize modification, they also authorize supplementation at the same time. Fourth, the authorizations use general language and lack specific rules. They usually contain only one provision and are located in the supplementary section of relevant national laws. These authorizations also omit some key issues, such as the authorizing subjects, the purpose, criteria and the possibility of re-authorization.<sup>156</sup> The Forest Law represents the standard authorization.<sup>157</sup> This law states: “if the provisions of this law cannot be fully applied in the autonomous areas, the autonomous organs may, in line with the principles of this law and based upon the characteristics of autonomous areas thereof, formulate modifying rules or supplementing rules.”

In practice, the rulemaking in autonomous areas is inactive. By the end of 2008, autonomous areas had adopted a total of sixty-eight modifying rules and supplementing rules.<sup>158</sup> These rules only relate to five of the fifteen laws that empower the authorization, which include the Marriage Law, the Heritage Law, the Election Law, the Land Law and the Forest Law. More than half of the existing rules are concerned with the modification and supplementation of the Marriage Law. The number of rules on Marriage Law ranges from one to eighteen provisions. Modifications in these rules mainly related to the lowering of the legal marriage age from twenty-two years old for male and twenty years old for female, to twenty and eighteen respectively. Some rules aim to loosen the restriction on the first-cousin marriage, which is forbidden under the Marriage Law. For example, the Marriage Law forbids the marriage between persons who are collateral relatives by blood within three generations of kinship.<sup>159</sup> However, the Supplementing Rules for Implementing the Marriage Law in Inner Mongolia Autonomous Region, which was passed in 1988, provided that it energetically advocates no marriage between persons who are so related. This implies that while this kind of marriage is legally recognized, it is not encouraged. The supplementing matters in these rules usually focus on matters such as reasserting and detailing the principles and important provisions of the

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<sup>156</sup> (康等) [Kang, et al.], *supra* note. 42, at 198.

<sup>157</sup> SENLIN FA(森林法) [Forest Law] art. 48.

<sup>158</sup> The State Council Information Office, *supra* n. 11.

<sup>159</sup> See HUNYIN FA(婚姻法) [Marriage Law] art. 7.

Marriage Law.<sup>160</sup> For example, the Supplementing Rules for Implementing the Marriage Law in the Garzê Tibetan Autonomous Prefecture, which was passed in 1981, decrees that the practice of levirate marriage remaining in Tibet is in contravention with the principles of the freedom of marriage, and therefore should be forbidden.<sup>161</sup>

The rulemaking practice reveals that the goals of these rules are mainly regarded as a means to transform the local *backward* cultural convention. Take the lowering legal marriage age as an example. Early marriage is prevalent in many autonomous areas and people get married at ages between thirteen and eighteen. It is practically difficult to enforce the minimum legal marriage age in the Marriage Law, which is several years older than the practical marriage age in these autonomous areas. Thus, the modifying rules lowered the legal marriage age by two years to make the Marriage Law more enforceable and to improve the people's awareness of the negative effects of early marriage.<sup>162</sup>

It should be pointed out that local lawmakers deem the modifying rules as a transitional arrangement and the ultimate goal is to abolish the rules and implement the Marriage Law. In 1982, the Nanjian Yi Autonomous County (in Yunnan province) adopted its modifying rules on the Marriage Law, which lowered the legal marriage age by two years for local rural citizens.<sup>163</sup> As stated by the interpretation report of the Standing Committee of the People's Congress of the County, the reason for lowering the legal marriage age is because of the backward socio-economic conditions.<sup>164</sup> After eight years of implementation, the Standing Committee passed a decision to abolish the rules. According to this decision, these rules "played a certain function on safeguarding the dignity

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<sup>160</sup> Such as the principle of monogamy, equality of men and women, the exercise of population control, encouraging late marriage and postponed child-bearing, forbidding the interference of marriage freedom, forbidding the demand of property in the name of marriage, forbidding bigamous marriage, forbidding the marriage between lineal relatives, and compulsory marriage registration.

<sup>161</sup> It can be seen that these rules are entitled as supplementing rules but they contain modifying provisions. It reflects the fact that in terms of content, the distinction between modifying rules and supplementing rules blurs. It is always the case that the existing supplementing rules contain modifying provisions and *vice versa*.

<sup>162</sup> (吴, 敖)[Wu & Ao], *supra* note. 4, at 403.

<sup>163</sup> After passage by the local people's congress, the rules were approved by the Standing Committee of the Yunnan Provincial People's Congress in the same year.

<sup>164</sup> The report stated: 'our county is a Yi dominated mountainous county with other 21 ethnic groups including Hui, Bai, Miao, Lisu, Bulang and Han. The economy and culture are quite backward. Local ethnic groups all get used to get married at the age of 15 or 16. Although the tradition of early marriage has been under change after thirty years of liberalization, due to historical reasons, cadres and the masses are required to implement Article 5 of the Marriage Law, namely, 'the marriage age for man should not earlier than 22 and for woman should not earlier than 20', with modification'.

of the Marriage Law and guiding people from all ethnic groups in our county to go on the track of rule by law,” and the abolition is due to the fact that ‘the condition for implementing the marriage age of the Marriage Law in the rural areas of our county is ripe’.<sup>165</sup>

## VII. CONCLUSION

Compared with the past, it is fair to say that the current autonomous legislation is enjoying its best time in the PRC’s history. The autonomous legislative system has experienced marked development. The autonomous areas possess a more flexible legislative autonomy, and the key is the modification power. However, ordinary localities do not possess such power. The autonomous legislative powers are more delineated than ever before. Chinese national laws have not defined the scope of the autonomous legislative powers, but vaguely state that the autonomous legislation may cover political, economic and cultural affairs. The vague delineation implies that the *de facto* powers are comprehensive. This stands in contrast to the scope of the legislative power of the Special Economic Zones (SEZs) (经济特区), which is limited to economic affairs. By comparing the international law and China’s domestic law in the legislative requirement for minority rights protection, it can be concluded that China is in line with the international standard.

The autonomous legislation has made marked improvement since 1978, reflecting a higher degree of tolerance of the central government for political, social and cultural diversity. Nevertheless, compared to other types of legislative powers (i.e., ordinary legislative power and the SEZ legislative power), the autonomous legislative power is still underused and the reform era does not see any significant expansion of autonomous legislation in number. Although there are 135 autonomous areas, covering more than sixty-three per cent of the territory and thirteen per cent of the population, by 2008, there are only about 700 pieces of autonomous legislation, merely an average of 5.2 per autonomous area. Most importantly, although the autonomous regulation is deemed as the most important form of autonomous legislation, until now, none of the five autonomous regions have passed them. Given that the autonomous legislation is one of the two principal means to exercise autonomy in autonomous areas, its underuse indicates that the exercise of autonomy is substantially hindered.

The immediate reason for the inactivity in autonomous legislation is the higher-level approval procedure. Given the enthusiasm of local autonomous lawmakers, the autonomous legislation would be largely accelerated if the higher-level approval procedure was removed. However,

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<sup>165</sup> The text of this decision is available at [http://www.yn.xinhuanet.com/gov/2004-10/11/content\\_3013076.htm](http://www.yn.xinhuanet.com/gov/2004-10/11/content_3013076.htm). (Xinhua News 新华网] Oct. 11, 2004.

this scenario is highly unlikely to come true because the provisions of autonomous regulations, in particular those at the regional level, always requires the higher-level government to provide assistance, especially financial assistance. Without the approval of the higher-level government, the assistance in autonomous regulations cannot be settled.

Since the current legal framework provides a relatively significant legislative autonomy for autonomous areas, the key for the development of autonomous legislation is not creating a new mechanism for the exercise of legislative autonomy, but on how to improve the implementation of the present legal framework. Some Chinese scholars have put forward proposals for achieving genuine autonomy in autonomous areas. A recent proposal is put forward by Zheng Ge, Constitutional Professor at Shanghai Jiaotong University. In his study on the cultural autonomy in Tibet, by modeling the SEZs, he proposed to designate Special Cultural Zones in the area of Tibet, where special policy and law-making power over cultural affairs are decentralized.<sup>166</sup>

Zheng's proposal may contribute to the expansion of cultural legislation. However, considering that it is such a comprehensive reform, it is unlikely to be accepted by the Chinese central government in the short term. Nevertheless, some cautious technical recommendations for the legislative development in autonomous areas can be provided below. First, with respect to the development of the regional autonomous legislation, both the central government and autonomous areas should adjust their attitude and expectations. One the one hand, the central government should take a more tolerant attitude to the legislative initiatives in autonomous areas; on the other hand, autonomous regions should take a more realist view in the regulation drafting. Second, the autonomous regions should try to acquire the support of national leadership. With the support of national leadership, the likelihood of higher-level approval for autonomous legislation would be enhanced. Third, detailed rules on the approval procedure should be provided. The difficulty of higher-level approval is also due to the lack of detailed procedural rules. The future development for the autonomous legislation should pay attention to lay out relevant rules, such as the criteria and the time limit for the higher-level approval.

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<sup>166</sup> Zheng, *supra* note. 15, at 195-251.