| 行政院 | 國家科 | 學委 | 員會? | 補助 | 專題 | 研究 | 計畫 | 成果 | 報告 |
|----------------|------------------|-------------------------|--------------------------|--------------|--------------|----------------|-------------|----------------------------------|--------------|
| ×××× | < * * * * | · * * * | × × × | < | · * * | * * * | × × | * * * | * * * |
| ※ | .,,. | | | | .,, | , | | , , , , , , , , | * |
| * | | 大陸 | 地區「 | 立法 | 法 12 | 研究 | | | × |
| * | | / C (T) | | | Δ] C | , , , , , , | | | × |
| ^ **** | ∕ | . | * * * | % * | * * * | * * * | * * | * * * | |
| * * * * | \ | | / * / * /• | | * * | * * * * | * * | /• \ /• \ <i>/</i> | ~ ~ ~ |
| <u>ئ</u> ے | -畫類別: | ெகுவ | 川山士 | | □敕 △# | 刊斗士 | | | |
| · | ■炽州· -畫編號: | | , - | | | , - | | | |
| | | | | | | | | | |
| 郭 | 1.行期間: | 90年 | 8月 | I 日 <u>3</u> | 至 91 | 年 7 | 月 3 | 1日 | |
| د | しまとは | 1 · 咕 | 🗅 ահ | | | | | | |
| | 十畫主持。 | • | 月端 | | | | | | |
| + | 共同主持 / | 人 : | | | | | | | |
| 吉 | 十畫參與人 | 人員:阿 | 東煒仁 | | | | | | |
| | | o E | 自憲忠 | | | | | | |
| | | 木 | 木維信 | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| 本 | 成果報告 | 与包括以 | (下應繳 | 交之所 | 1件: | | | | |
| 71 | | 3 分出差 3 外出差 | , | | • | 分 | | | |
| | | 、陸地區 | | . • • • • | | • | | | |
| | | (正) 西際學 | | | . • | | 命文 名 | 一份 | |

執行單位:中國文化大學

中華民國91年10月25日

□國際合作研究計畫國外研究報告書一份

行政院國家科學委員會專題研究計畫成果報告

大陸地區「立法法」之研究 A Study of Legislative Law in MainLand China

計畫編號: NSC 90-2414-H-034-005-執行期限: 90 年 8 月 1 日至 91 年 7 月 31 日

主持人:陳月端 共同主持人:

計畫參與人員:陳煒仁、曾憲忠、林維信

一、中文摘要

不可諱言,「立法法」有其特點,如 較為全面系統地規定了立法制度及基本原 則,明確界定國家專屬立法權之範圍,初 步確定授權立法制度,立法程序之民主化 及透明度有所增強及立法監督較為全面。 然而,「立法法」仍存在諸多缺失:其一, 在適用範圍上,將軍事立法排除在國家立

法制度之外(「立法法」第九十三條)。 其二,未能合理解決立法權限配置問題, 亦即法律保留過於狹窄及模糊(「立法法」 第八、九條);又由於權限規定不明(「立 法法」第六十四、七十一條)及現行衝突 解決機制存在之弊端(「立法法」第八十 六條),無法消除部門立法及地方立法之 權限衝突;此外,經濟特區之職權立法與 授權立法,缺乏區分界限,致法之適用造 成困難。其三,關於立法程序方面,其缺 點在於行使提案權之主體過窄(「立法法」 第十二、十三、二十四、二十五條);公 民參與立法機制之民主程度有限(「立法 法」第三十五、五十八條);法律案之表 决程序有欠科學(「立法法」第二十二、 四十、六十條)。其四,關於法律解釋制 度,僅規定立法解釋,對司法解釋及行政 解釋隻字未提,且對立法解釋主體如何行 使解釋權,「立法法」亦未規範;除此之 外,「立法法」第五十五條,對於人大常 委機構之法律詢問答覆權亦有私偏頗。其 五,違憲、違法立法審查對象過窄(「立 法法」第九十條)。

凡此缺失,均有修法之必要,本計畫 係對於「立法法」提出修法建議或配套措施,藉由權力劃分等立法改革,以完善大 陸地區之政治體制,進而使其邁向民主法 制、適合投資之地區。

關鍵詞:立法制度、立法權限、立法、立 法法。

Abstract

Different form legal system in Capitalist countries, the character of legislative system

in Mainland China is "One Unite, Two Degrees, Many Levels". "One Unite" means only the National peoples' Congress and local governments have the legislative power. "Two Degrees" means both the central and local government have the legislative power. "Many Levels" means the different degrees of legislator in central and local governments can divide into several levels. This kind of system was originally promulgated in several law, such as Constitution in Mainland China. Due to this system, it has some bad points, for example, beyond the legislative limitation; legislative conflict; the bad quality and in legislation.

The legislative Law in Mainland China was adopted at the third Meeting of the ninth National peoples' Congress, promulgated on March 15, 2000, and effective as of July 1, 2000. It has six chapters and 94 articles. Its main mission is solidifying the legislative system in Mainland China and protecting the unification of this system.

The legislative Law in Mainland China has some traits, such as wholly promulgating the legislative system and basic principle; clearly confining the specific range of legislative power in national peoples congress and its standing committee; primarily establishing the mandate in legislative system; democratization strengthening the Law-making processes and transparency and legislative Meanwhile, there are some faults in this supervision law. The first, it excludes martial law from national legislative system (Article 93). The second, it cannot reasonably solve the distribution of legislative limitation. That is, the legal reservative range is too narrow and ambiguous (Article 8; 9); there is no basis of organization law about the limitation in the administrative departments of the State Council of Mainland China. The "according to meaning of law" "performing law" is unclear so it is hard to control effectively by the rules in legislative law (Article 71; 72). Beside, the limitation is unclear (Article 64; 71) and some faults in present system about soluting conflict (Article 86), so it cannot erase the limitation conflict between department and local legislative. In addition, the legislation of power and mandate in Economical Area is short of limitation, so it is hard to apply law. The third, concerning the legislative process. It is fault is the proposal subject is just a few (Article 12; 13; 24; 25); people just have a little power to participate in legislation (Article 22; 40; 60). The fourth, about legal explanation system, it just mentioned legislative explanation; and did not write anything about judicial and administrative explanation. The fifth, the range of legislative scrutiny of violating constitution is too narrow (Article 90); and it is process is unscientific (Article 91).

All of these faults should be amended. This study proposes some suggestions or supplemental measures. By means of legislative reform, it will improve the political system in Mainland China and let it be democratic, legal, and suitable investment area.

Keywords: legislative system; legislative limitation; legislate; legislative law

二、計劃說明

(一)計劃緣由

大陸地區由於採行其特有之「一元二級多層次」之立法體制,造成實踐上存容之不少問題,規章規定與法律、規章規定與法律、規章或法規與規章被此間相互矛盾,立法組織,立法組織,立法組制,立法和問主義及大陸地區法制,均危及大陸地區法制,均危及大陸地區法制,深感最需要解決之基本研究,是否能解決之基本。大陸地區於西元 2000 年三月十五日通過之「立法法」,是否能解決上述問題,實值加以深入探討。

(二)計劃目的

本研究之目的有三:

- 1. 對「立法法」提出修法建議或配套措施,藉由權力劃分等立法改革,以完善 善大陸地區之政治體制;
- 2. 針對大陸地區各地方政府規章在上 位法之根據下,對台商設定管制及收

費項目,本文將提出解決方案,以保 障台商之權益;

 本計劃將針對大陸地區法規矛盾及 衝突之現象,試圖提出建議,以解釋 大陸地區司法審判上法之適用難題。

(三)計劃成果自評

由於大陸地區之「立法法」甫於西元 2000年三月十五日通過,故國內外有關本 計劃之研究可謂是鳳毛麟角,而大陸地區 權力劃分之改革,又係政治體系中之一項 系統工程,或許「立法法」無法解決所有 之問題,但至少是解決問題之開端。藉由 本計劃對「立法法」提出修法建議或配套 措施,或能解決大陸地區立法體制中實務 所存在之諸多問題。

(四)參考文獻列舉

- 董和平等,憲法學(北京:法律出版社, 2000年1月1版);
- 2. 朱福惠主編,憲法學新編(北京:法律 出版社,2000年1月3刷);
- 3. 朱力宇等主編,立法學(北京:中國人 民大學出版社,2001年9月1版);
- 4. 周旺生主編,立法學(北京:法律出版社,2000年2版)等。