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论文

隐性立法者：中国立法工作者的作用及其正当性难题

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摘要：

在以建构主义为特征的大立法时代,中国人大的立法工作者基于其专业技能,借助法制工作委员会这个特殊组织,在立法规划(计划)、法案起草、协助法案审议和立法适用解释四大场域悄然发挥了立法者所不及的关键性作用,成为“显性立法者”之外的“隐性立法者”。显然,这些“隐性立法者”对中国立法的实际作用需要正视和重估。但立法工作者以辅助者的身份对立法产生如此巨大的影响,又存在深层的正当性难题。从专业主义角度看,解决问题的方法不是从此舍弃立法工作者,而在于构建立法者与立法工作者之间的信息均衡,达到两者技术意义上“对立的契合”。

关键词： 中国 立法工作者 隐性立法者 诠释

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Invisible Legislators: The Function and the Legitimacy Problem of Legislative Staff in Legislation in China

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Abstract:

Due to the dominant impact of normative method and occasional excellent performance of the legislators ,the actual role and function of legislative staff is neglected by the academic and officials for a long time ,the problem of which further results in the misunderstanding of the true process of legislation in China . Therefore , this dissertation tries to revaluate the role of legislative staff , dissipates the myth that the laws in China are drafted and legislated independently by legislators ,describes the true process of legislation in China and explains the true role of legislative staff as invisible legislators . Invisible legislators refer to legislative staff that are different from legislators and are not considered as legislators according to traditional normative theory of legislation but can have great impact on and even have dominance in the structure ,content and agenda of the drafting of law .In china ,invisible legislators could to beyond the legislative staff in People,s Congress to include legal staffs in administrative agencies . However , by the criteria of orthodoxy , flexibility , criticality and finality ,legislative staff in the Legislative Affairs Commission of People,s Congress at all levels should be the representative type of invisible legislators and thus they are the main object of our discussion . The emergence of invisible legislators is attributed to some universals found in all legislative bodies all around the world and some specifical principles found only in People,s Congress in China .As to the former ,the transition from the legislative staff to invisible legislators is based on the demand for the professional skill of legislative staff in the process of legislation .As to the latter ,the establishment of the Legislative Affairs Commission contributes to the transition . Additionally ,China characteristic uniform review procedure which requires that all drafts of law should be reviewed by Law Commission ,the co-office of the Legislative Affairs Commission and Law Commission , and dual identity of some legislative staff as legislators , all provide the mechanism of the expansion of the impact of legislative staff and make the transition from legislative staff to invisible legislators possible . The impact of legislative staff on the legislation does not run through the entire process of legislation but instead is confined to four fields ,that is ,the making of legislative plan which decides which drafts of law will enter the process of legislation , the drafting of law which determines the content of law ,the review of the draft of law which decides whether different opinions will be accepted or not and the interpretation of law which l determines how to understand the original intent of legislators . The four fields mentioned above are usually neglected by traditional theory of legislation in China but are the de f acto engine of legislation in China and provide the space for the expansion of invisible power for invisible legislators . The de f acto dominance of the invisible legislators on the legislation in China arouses questions and challenges .From the point of democracy ,as assistants to legislators ,legislative staff have adverse control on the legislators and decrease the democracy of legislation .From the point of technique ,occasionally ,some legislative staffs don,t have enough professional skills . From the point of virtue ,it is possible that the legislative staff will be captured by

moral hazard risk . In recognition of unique political and law system in China , technical reforms are more realistic and more operational than radical political transformation .One possible reform is to strengthen the supervision of the legislative staff though strengthening the duty of argument of legislative staff in legislation .The other reform is to establish amicus curiae in legislation in order to realize the balance of information between legislators and legislative staff .In the end ,diligent and discernible legislators ,and professional and responsible legislative staff should cooperate with each other efficiently .

Keywords: China;legislative staff;invisible legislators;interpretation

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