

**CHINA TOWARD CONSTITUTIONALISM?
INSTITUTIONAL DEVELOPMENT UNDER SOCIALIST RULE OF
LAW SYSTEM**

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Abstract

Building Constitutionalism in China is seemingly a constant topic worth exploring. However, attempts to adopt the current Western Mature Constitutional System, as a static standard for assessing constitutional development in China's Context is quite prevalent. By reference to three respective institutions in China's Socialist Rule of Law system: the Communist Party of China (CPC), National People's Congress (NPC) and the People's Courts (Courts), this thesis seeks to examine constitutional development in People's Republic of China (PRC). This thesis also argues the Mature Constitutional model is unable to engage with the orthodoxy of China's approach to constitutional development.

This thesis first demonstrates why applying the standard of mature constitutionalism to assess constitutional development in China is problematic and renders inaccurate results. Thus a more suitable institutional approach has been raised to examine constitutional development in China. It subsequently discuss the evolution of CPC (ideologies, structure, operation) in post 1978 China in order to examine the Party's role as both the determinant and product of China's constitutional development. Then the thesis will discuss how the NPC, a traditional "rubberstamp", has developed as the highest national legislature and constitutional supervisory organ. The courts in China, in particular, have taken the incremental approach to expand institutional authority by interacting with this highest political power holder and supporting the current constitutional order.

This thesis makes an original contribution to both the discourse of China's constitutional law and the studies on authoritarian constitutional development. The thesis has confirmed that institutional development in China's particular authoritarian context (the socialist rule of law system) is possible. Development of this nature would be difficult to be appreciated by the Mature Constitutional Standard. Thus, an institutional approach based on a contextual analysis is more suitable for examining how the authoritarian system responds to the challenge of constitutionalism. However, the thesis has found that the future of applying the Mature Constitutional Model to China's Socialist Rule of Law system is tentative and has predicted that China's system would confront potential tension between democracy and constitutional development in future.

Preface

This thesis is an original intellectual product of the author, Jiajun Luo.

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List of Abbreviations

PRC.....	People's Republic of China
CPC.....	Communist Party of China
NPC.....	National People's Congress of People's Republic of China
NPCSC.....	Standing Committee of National People's Congress
SPC.....	Supreme People's Court of People's Republic of China
China's Courts.....	People's Courts of People's Republic of China
SPP.....	Supreme People's Procuratorate of People's Republic of China
NRC.....	National Party Congress of Communist Party of China
CC.....	Central Committee of Communist Party of China
LPMG.....	Leading Party Members Group of Communist Party of China
KMT.....	China Nationalist Party (<i>Kuomintang</i>)
LAC.....	Legislative Affair Committee of National People's Congress
LAO.....	Legislative Affair Committee of State Council
RLL.....	Revision to Legislation Law of People's Republic of China
PLC.....	Political-Legal Committee
CPLC.....	Central Political Legal Committee

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Dedication

To my Father and Grandfathers

Introduction

1. Overview of The Thesis

This thesis examines constitutional development in People's Republic of China (PRC) by reference to critical institutions in China's socialist rule of law system. By examining the respective roles of the Communist Party of China (CPC), the National People's Congress (NPC), and the People's Courts, this thesis will explore how China's authoritarian system responds to the challenge of constitutionalism. The thesis will examine problems with applying the Mature Constitutionalism model to China's constitutional development, in part because this model cannot account for particularities of China's context and is unable to engage with the orthodoxy of China's approach to constitutional development.

It goes without saying that the current PRC is an authoritarian regime and a Party/State. Some might assert that constitutionalism could not develop in an "anti-constitutionalism" environment. Also, many insist that only through "constitutional transition" or democratization could a meaningful constitutional development be produced. However, the PRC, as an typical authoritarian state includes many factors which appear to be "anti-constitutionalist", such as the leadership of a Marxist-Leninist Party, "Party/State" structure, a seemingly "rubberstamp" parliament, a government without "checks" by constitutional means, a system of courts "lack of judicial independence", and so forth. This thesis, however, argues that, not only a meaningful constitutional development is possible in an authoritarian context, and that such development, may also be the necessary condition for constitutional potential in the future China. Moreover, this thesis also attempts to illustrate that, "constitutional development" might not be "discovered" by the static "Mature Constitutional Model". Instead, a more "pragmatic" framework

may be needed to complete the task to examine and assess such considerable constitutional development in China, an authoritarian state.

Interpreting constitutional development in current China is very important because, on one hand, it could contribute to our understanding of constitutional discourse in current authoritarian states. China, as one of the large authoritarian regimes, the second-economic entity in our world with billions of people, provides us, especially for those holding the “liberal-democratic” perspective, to explore constitutional development in a foreign terrain. As we will discuss in this thesis, interpretations on China’s constitutional development need a “liberal-democratic mind” to leave their comfort zone, i.e., a set of evaluating methods and standard based on the “Mature Constitutional System” that is referred to constitutional system of West Europe or North America. Thus, the case of China will surely contribute to the discourse of “constitutionalism”, or more precisely, constitutional development in authoritarian environments. On the other hand, China is a special authoritarian state with many unique characteristics. One of these important features is that “Communist” rulers in China today have embraced the concept of the “socialist rule of law”. It has been witnessed that, in recent decades, especially after entering the Xi Jinping Era in 2012, considerable constitutional development has occurred, or what we will call in this thesis: Institutional development in Socialist Rule of Law System in China. Discussion on the recent development in these institutions are important because as we will observe in latter part of this thesis, constitutional developments have manifested themselves through institutional politics and institutional behavior, in diverse constitutional organs of PRC polity. Such developments indeed

might share some important features as the prototype stage of current Mature Constitutional system, but China's current constitutional development is unique, mixed, or even self-contradictory in some aspects. Therefore, both similarities and differences in the case of China indeed deserve for our exploration.

This thesis focus on the CPC, NPC and China's courts as "lenses" into the of study constitutional development in China.

First, the reason for choosing the CPC is that the Party, or more precisely, the (1) Party ideologies, (2) structure of the Party/State, (3) the evolution of the Party/State, and (4) how the Party/State has impacted the China's society have set up the general background, or one could call "China Context" for constitutional development in the PRC. Moreover, since the Party itself has been a quasi-constitutional structure with its increasing institutionalization in post-1978 China, the development of both the CPC's constitutional discourse and Party structure have reflected the constitutional development in China.

This thesis choose the NPC for the second lens because, the politically speaking, the NPC was used to be a "rubberstamp", and a typical weakest constitutional organ in a typical Party/State. Moreover, constitutionally speaking, the NPC, as the highest national legislature and supreme national organ, is constantly wearing "two hats" in the PRC constitutional structure. However, as we will see, the NPC has grown as a meaningful constitutional supervisory organ and a powerful national supreme legislature, owed to the interplay between Party hegemony and several institutional strategies that it applies.

Thus, looking at how the NPC, a politically weak organ yet with “dual-supremacy” in the formal constitutional structure, develops itself with use of institutional politics and tactics from a complex and ambiguous political and constitutional setting of NPC is indeed a good example of constitutional development in an authoritarian state.

Third, we also concentrate our study on China’s courts as a lens to interpret the constitutional development in authoritarian environment, because the courts exert institutional politics by playing along with the Party hegemony and by supporting the supreme parliamentary system in order to self-develop and self-empower. By examining the example of “Adjudicate Independence”, a current goal for development in China’s courts, we could illustrate the interplay between courts, a traditional weak constitutional institution with Party Hegemony, the political leadership as well as the constitutional supreme organ in an authoritarian environment.

2. Outline of The Thesis

This thesis will be divided into another four Chapters and an additional Concluding Remark, outlined as follows:

Chapter One will focus on the model of “Mature Constitutionalism” and its application in China. This chapter will explore the concept of “Mature Constitutionalism” and its utility in assessing constitutional development in China’s rule of law institutions. After briefly examining major developments of western constitutional systems, the Chapter will first identify three Principles underlined by Mature Constitutionalism: (1) Constitutional Supremacy; (2) Separation of Power and (3) Liberalist Version of Rule of Law. This

provides an important conceptual framework for examining the behavior of China's rule of law institutions and their engagement with challenges of constitutionalism. In the chapters that follow I shall explore the problems with applying the Mature Constitutionalism model to China's constitutional development.

Chapter Two: Evolution of Party ideologies, legalization, institutionalization and liberalization of the Party/State. This chapter will focus on the role of the CPC as an illustration of how authoritarian rule affects the development of constitutional organs in the PRC. The evolution of ideological language of the CPC will be reviewed, and specifically, the Chapter will show how CPC's political theories evolved from Marxist-Leninist "anti-constitutionalist" orthodoxies, to Maoist constitutional discourse and a more coherent political discourse with Constitutionalism in post-1978 CPC. Emphasis will be put on "Rule of Law" rhetoric of the Xi Jinping Era since 2012. The second aim of this chapter is to demonstrate that, through ongoing institutionalization and legalization, the CPC organization and Party control, if quoting David Shambaugh¹, adapts and atrophies in the Deng and post Deng era. In addition, with "tactical withdrawing"² the Party/State structure that has started at 1978, attention will also be paid to several aspects of the process of liberalization and pluralism of Chinese society after Mao's era, as the third part of this chapter. Overall, in chapter two we will seek to depict the authoritarian context in which constitutional development has occurred in post-Mao China.

¹ David Shambaugh, *China's communist Party—Atrophy and Adaptation* (Washington, D.C.: Woodrow Wilson Center Press, 2008).

² Ambrose King Yeo-Chi, *Chinese Politics and Culture* (London: Oxford University Press, 2013) at XIII. [translated by author].

Chapter Three will examine the NPC as an illustration of how, even under an authoritarian environment, a constitutional body may be able to evolve from a “rubberstamp” into a meaningful constitutional player, a powerful legislature and a growing supervisory body in contemporary China. Specifically, the chapter will separately discuss the development of “two hats” of the NPC, as noted above, by examining the NPC’s development in the legislative process and the NPC growing supervisory power through its growing constitutional functions such as the Law-Making Process and Filing and Review system. This chapter will particularly examine how the new passage of Revised Legislation Law in 2015 will strengthen the “dual-supremacy” of NPC institutional authority. In addition, the chapter will identify and analyze several factors contributing to the continuing development of NPC since the 1978.

Chapter Four examines the role of pragmatism and “Adjudicative Independence” in PRC courts under the Dual-Supremacy of NPC and authoritarian environment. This chapter will focus on constitutional development in China’s courts. This chapter will firstly show how the “global” standard of “judicial independence” based on mature constitutionalism may not be accurate for measuring the development of China’s courts. The chapter will then provide a detailed analysis mainly through the institutional politics exerted by courts in China, and how China’s courts interplay with other powerful political players and constitutional organs. The lens of this chapter, however, is how China’s courts pursue of “Adjudicative Independence” rather than “Judicial Independence” in exchange of space for judicial development from the NPC’s constitutional support and political patronage of the Party. The thesis then argues that, currently, the main task for China’s court is

pragmatic, by seeking to establish a fairer and more efficient justice system, rather than departing itself from Party authority or trying to be a neutral and independent arbitrator in China's constitutional system.

The concluding chapter will summarize observations presented in the thesis as a whole and offer tentative conclusions about the application of Mature Constitutionalism to China's Socialist Rule of Law system. The Conclusion will also identify questions for further research, such as the tension between democracy and constitutional development in China's context.

Chapter 1: The Model of “Mature Constitutionalism” and Its Application in China

Building Constitutionalism in China has received much attention from both academia and general public of the world. However, many researchers have only focused on introducing or transplanting the entrenched Western constitutional system, what I call the “Mature Constitutional System” to China. In this chapter, we would demonstrate why a successful constitutional system might not be the best choice for examining and accessing constitutional development in China. The “Mature Constitutional Model”, on one hand, it blinds one’s eyes on considerable institutional development on premature constitutional system for using the static standard based on established constitutional system. On the other hand, it usually fails to take cultural, historical and contextual differences into account. In the latter part of the thesis, we will observe the dilemma of applying “Mature Constitutionalism” into the case of China by adopting the pattern of parliamentary supremacy and constitutional supremacy into PRC constitutional configuration. The incompatibility of applying this framework into China’s constitutional system has illustrated that we need a more suitable framework to study constitutional development in a China’s typical yet unique authoritarian environment.

1.1 Mature “Constitutionalism” Model and Its Dilemma to Apply to China’s Context

“Constitutionalism” seems to be a constant topic for the world. In China, since the late 19th century, the pursuit of constitutionalism has undergone more than 100 tumultuous years entailing many disasters and pains³. However, few will see that the definition of

³ Chen Albert Hung-yee, *Fazhi, renquan yu minzhuxianzheng de lixiang* [Rule of law, Human Rights and Ideal of Democratic Constitutionalism] (Hong Kong: Commercial Press, 2013) at 66 [translated by author].

constitutionalism is actually highly controversial. The controversy is due to the fact that very few constitutional systems develop in exactly the same context, political environment, historical experience, cultural influence or social structure. Thus, “contextual analysis” is needed for the study of “constitutionalism” in different constitutional systems. However, the temptation, and subsequent attempts, to generalize or conceptualize constitutional developments in different contexts by static standard do exist, as demonstrated by applying the prevalent model of “Mature Constitutionalism” to China.

1.1.1 Model of “Mature Constitutionalism”

It is widely accepted that the definition of “Constitutionalism” originated in the American Revolution. Rooted in American history, “Constitutionalism” first means the opposition to the Parliamentary Supremacy and the check on majoritarian rule. Under the colonial rule imposed by the British Parliament, an organ entrenching “majoritarian rule”, the American founders developed the idea that “majoritarian authority” should also be questioned, at least should be suspected and thus parliamentary power should also be circumscribed by a higher law. As the British colonial experience demonstrated that the decision of the majority had the possibility to infringe on the fundamental rights of minorities and individuals. As James Madison pointed out in *the Federalist Papers*: “it is of great importance...not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part...if a majority be united...the rights of the minority will be insecure...The Structure of the Government

Must Furnish the Proper Checks and Balances between the Different Departments.⁴” Therefore, after independence, institutionally, the US Constitutionalism accepted the idea of “Constitutional Supremacy” from “Federalists” and local autonomic experiences⁵, “Separation of Powers” from John Locke and Montesquieu, and inherited wisdom from common law tradition: rule of law, and an impartial and independent judiciary⁶. In 1803 *Marbury v. Madison*, the idea of judicial review⁷ was first introduced, then after several decades of evolution, the system of judicial review was, for the first time, institutionalized in human history. Therefore, the “standard” definition of “American constitutionalism” could be summarized by Eskridge and Ferejohn as the following principles: “First, the Constitution is a written legal document whose meaning is authoritatively elaborated through Supreme Court precedents applying and trumping ordinary state and federal laws. Secondly, the legitimacy of Constitutional law and the validity of its ability to trump laws adopted by current legislative majorities is derived and justified by the super-majoritarian and popular process through which the document was ratified and amended. Thirdly, the primary role of the Constitution is to be a bulwark protecting the People against government oppression or discrimination, by which, “when

⁴ James Madison, “The Federalist Paper No. 51”, in Michael A. Genover, ed, *The Federalist Papers* (New York: Pargrave Macmillan, 2009) at 121-122.

⁵ Research conducted by Wang Jianxun has revealed, “Before independence, some British colonies(States) in North America has already entrenched the ‘Constitutional Supremacy’ through local autonomy”. See Wang Jianxun, “Xianzheng de difang genyuan [Local Roots of Constitutionalism]”, in Cai Dingjian & Wang Zhanyang, eds, *Toward Constitutionalism* (Beijing: Law Press, 2010) at 215-235 [translated by author].

⁶ As Hamilton commented, “The judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments...the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.” Alexander Hamilton, “The Judiciary Department”(the Federalist Paper No. 78), see *supra* note 4 at 236.

⁷ “In the United States, constitutionalism first and foremost means constitutional review by the judiciary, also referred to as ‘judicial review’. Specifically, the term “judicial review” refers to the power of courts (1) to reach independent judgments about the meaning of the Constitution, and (2) thus to set aside laws, regulations and policies that conflict with the judicial construction of the Constitution. Also, in the U.S., all state and federal courts have the power of judicial review. See Michael C. Dorf & Tervor W. Morrison, *Constitutional Law* (New York: Oxford University Press, 2010) at 12.

the state traverses those limits, the Constitution overrides.”⁸

It was not until the disaster of World War II that the ideas of “Constitutionalism” were accepted internationally. In 1949 Basic Law of Germany⁹, the idea of Constitutionalism was enshrined as a fundamental value. Section 3 of Article 1 declared the constitutional goal to protect constitutional rights that “the following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law¹⁰”. Section 3 of Article 20 stated that “the legislature shall be bound by the constitutional order” and clearly entrenched the supremacy of the constitution. Moreover, Articles 79, 92, 93 and 100 further underpinned the principle of Constitutional Supremacy¹¹. Furthermore, the Basic Law has provided two mechanisms for direct application of Basic Law: judicial review and constitutional litigation in Articles 93 and 100¹². Generally speaking, judicial decisions from the Federal Constitutional Court are legally binding for all state organs, and it even imposes enormous influence on parliamentary debates in Germany¹³.

⁸ See William N. Eskridge Jr. & John Ferejohn, *A Republic of Statutes-the new American Constitution* (London: Yale University Press, 2010) at 34.

⁹ Before that, for example, the “Enabling Act of 1933”(1933 Ermächtigungsgesetz) granted the power for the executive organ to supersede the Congress to enact the law, including those substantively alter the Constitution and constitutional order. See Bjorn Ahl, “xianfa zhishang: deguo de xianfa fazhan ji zhongguo dangqian de xianfa zhushu [Constitutional Supremacy: the Constitutional development in Germany and current Constitutional discourses in China]”, in Lin Feng, ed, *Bainian xianzheng yu zhongguo xianzheng de weilai* [Constitutionalism in China in the last 100 years and its future] (Hong Kong: City University of Hong Kong Press, 2011) 337 at 340 [translated by author].

¹⁰ *Basic Law for the Federal Republic of Germany*, 1949, online: Deutscher Bundestag <https://www.btg-bestellservice.de/pdf/80201000.pdf>, last accessed on April 15 2015 [translated by Christian Tomuschat, David P. Currie, Language Service of the German Bundestag].

¹¹ In specific, Section 2 provides that any constitutional amendments shall be carried by two thirds of the Members of the Bundestag (Federal Diet) and two thirds of the votes of the Bundesrat(Federal Council). And the Section 3 is “Amendments to this Basic Law affecting the division of the Federation into *Länder* (state of Germany), their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 (principle of democracy, rule of law and constitutional order) shall be inadmissible.” See *supra* note 9 at 338.

¹² Article 93 (2) 1 of German Basic Law reads “in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or *Land* law with this Basic Law, or the compatibility of *Land* law with other federal law, on application of the Federal Government, of a *Land* government, or of one fourth of the Members of the Bundestag;” Article 100 (1) provides: “If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the *Land* court with jurisdiction over constitutional disputes where the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by *Land* law and where a *Land* law is held to be incompatible with a federal law.”

¹³ See *supra* note 9 at 343.

In Japan, after World War II, the allied forces (SCAP) implemented “five major reforms¹⁴”, and swept away the old authoritarian Meiji Constitution¹⁵. The 1946 Constitution was enacted, modeled by American Constitution¹⁶. It clearly declares that the Constitution is the supreme law of Japan and that all governmental acts should not contravene the Constitution. As in the US, the Supremacy of the Constitution in Japan is safeguarded through constitutional review by the judiciary¹⁷. The 1946 Constitution provides the fundamental rights of Japanese people, which are elaborated as inviolable and eternal. Also, the judiciary has been established as entirely independent¹⁸. Furthermore, the principle of separation of power was endorsed in the 1946 Constitution with the aim of restricting governmental authority.

In 1958, France promulgated a new Constitution. Before that, France was ruled by the traditional doctrine of Parliamentary Sovereignty¹⁹. In the 1958 Constitution, the separation of power and the principle of rule of law were sustained. Also, within a few years of 1958, the Constitutional Council, established by the 1958 Constitution, had magnified its importance by undertaking a strict constitutional review of legislation²⁰. In a landmark decision in 1971, the *Liberté d’ Association*, which can be called France’s *Marbury v. Madison* because of its tremendous impact, that the *Conseil*

¹⁴ Hiroshi Oda, *Japanese Law*, 3rd ed (May 2009), online: Oxford Scholarship <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199232185.001.1/acprof-9780199232185>, last accessed on April 15 2015 at 9.

¹⁵ Meryll Dean, *Japanese Legal System: Text and Materials* (London: Cavendish Publishing Limited, 1997) at 502-503.

¹⁶ *Ibid* at 10.

¹⁷ Hidenori Tomatsu, “Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories”, in Yoichi Higuchi, *Five Decades of Constitutionalism in Japanese Society* (Tokyo: University of Tokyo Press, 2001), 251 at 252.

¹⁸ See: Percy R. Luney Jr. & Kazuyuki Takahashi, eds, *Japanese Constitutional law* (Tokyo: University of Tokyo press, 1993) at 39-56; Also see Shigenori Matsui, *The Constitution of Japan* (Portland: Hart Publishing, 2011) at 29-35; *Ibid* at 6; See *supra* note 15 at 506; Lawrence W. Beer & Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 Through 1990* (Seattle: University of Washington Press, 1996) at 7.

¹⁹ After the Republican form of government had been firmly established in the Third Republic (1870-1946), “parliamentary sovereignty” promoting absolute majoritarian role derived from Rousseau has achieved its triumph. See Laurent Pech, “Rule of law in France” in Randall Peerenboom ed, *Asian Discourses of Rule of Law—Theories and implementation of rule of law in twelve Asian countries, France and the U.S.* (New York: Routledge Curzon, 2004) 79 at 86.

²⁰ *Ibid* at 91.

constitutionnel(Constitutional Council) refused the promulgation of a law enacted by Parliament on the grounds that it was substantively unconstitutional. In a 1985 decision, the Constitutional Council argued: “The (Parliamentary) law expresses the general will only when it respects the Constitution.”²¹”

Traditionally, Canada had basically transplanted the British constitutional system under British rule. Canada shared the traditional of Parliamentary Supremacy and British wisdom of rule of law: a limited government with a basis in the Magna Carta. However, in 1981, the new Constitutional Act was passed which transformed parliamentary rule into constitutional supremacy. The principle, as held by the Supreme Court of Canada in *Re Secession of Quebec*, that “constitutional protection overrides parliamentary legislation” had been entrenched.²² Therefore, the “American” way of Constitutionalism entrenched in contemporary Canada has *de facto* substantially superseded the British-style parliamentary supremacy.

The more recent but renowned example of adopting part of the “American model” was the UK. Traditionally, the Constitution of UK “rests upon...the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen’s courts in interpreting and applying the law²³”. However, an important modern challenge toward the British Parliamentary Supremacy comes from the 1998 Human Rights Act (HRA). By this Act

²¹ *Ibid* at 91-93.

²² According to the court, there are three overlapping reasons why an entrenched Constitution beyond the reach of the majority is required: “The first reason is that a constitution may provide an extra layer of protection for fundamental human rights and freedoms might otherwise be susceptible to government interference when the majority will be tempted to ignore those rights in accomplishing collective goals. Second, a constitution may ensure that minorities will be protected from assimilative forces and provided with the institutions and rights necessary to maintain and promote their identities...” See *Reference re Secession of Quebec*, (1998) S.C.J. No. 61, 2 S.C.R. 217. See also Guy Regimbald & Dwight Newman, *The Law of the Canadian Constitution* (Markham: LexisNexis, 2013) at 97.

²³ David Feldman & Andrew Burrows, eds, *English Public Law*, 2nd ed (New York: Oxford University Press, 2009) at 293.

litigants could complain to the Court if they felt their rights were being violated by the United Kingdom including the British parliament. Conclusively, the HRA only preserves the doctrine of parliamentary sovereignty in formal terms, but limits the legislative power of Parliament in substance²⁴. In short, the American-style constitutionalism has found its own way to adapt to the British context.

Thus, it seems that the model of “Mature Constitutionalism” based on the American constitutional experience has increasingly gained currency and been adopted, as referred by Francis Fukuyama, “the end of the history”. These “liberal-democratic” constitutional systems share three common principles as following:

(1) The principle of Constitutional Supremacy

First, the primary objective of “Mature Constitutionalism” seeks to protect the constitutional rights from infringement. This requires the Constitution to have the highest legal effect, which also usually demands special procedures to amending the constitution, and prohibit any state organs from depriving constitutional rights through ordinary law. This has marked the great difference from the Parliamentary Supremacy as noted *infra*. Secondly, constitutional remedy should be the last resort when infringing constitutional rights, including “top down” patterns such as American style constitutional review and “bottom up” patterns such as constitutional litigation in post World War II Germany.

²⁴ See Colin Turpin & Adam Tomkins, *British Government and the Constitution*, 6th ed, (Cambridge: Cambridge University Press, 2007) at 62. Specifically, under the Human Rights Act 1998(HRA), the courts are, for the first time, empowered to review primary legislation for compliance with a codified set of fundamental rights. Under section 3 of the HRA, they are placed under a duty to interpret legislation compatibly with Convention rights, ‘so far as it is possible to do so’. The court’s issue of declaration of incompatibility is very likely to prompt the amendment of defective legislation. This follows because such a declaration is likely to create considerable political pressure in favor of the rectification of national law. In this practical sense, the Human Rights Act does introduce a limited form of constitutional review that is able fully to coexist with the theory of parliamentary sovereignty. See Lord Irvine of Lairg, “Sovereignty in Comparative Perspective: Constitutionalism in Britain and America”, in Norman Dorsen ed, *The Unpredictable Constitution* (New York: New York University Press, 2002) 309 at 322.

(2) The principle of separation of powers

The principle of separation of powers, simply put, requires that state power should not be centralized in one hand or one branch of the government. For the parliamentary organ, once the constitution is promulgated, it should return to the normal position as the national legislature. Without legitimate ground, also the legislative body shall not interfere with judicial activities. The executive power, shall also refrain from intruding into the judicial realm, and has the constitutional duty to respect the legislative authority. Finally, for the judicial system, in order to apply the law impartially, they must be independent. To quote Montesquieu, “there is no liberty if the judiciary power be not separated from the legislative and executive.”²⁵

(3) The principle of “Liberalistic” Rule of Law

Thirdly, the principle of rule of law should be implied. Rule of law provides a safeguard for the other two principles of Constitutionalism. The principle of rule of law is generally understood as a basic idea that all actions of the government shall be circumscribed by laws that originated from the Liberalism. Ideally, for administrative branches, the principle of limited government should be applied. For legislature, it shall not override the constitution through general legislative procedure, and theorists tend to regard the legislature as a representative organ with majoritarian rule under the Constitution, but not as a symbol of all the state sovereignty.

²⁵ Montesquieu, *Spirit of Laws*, 6th ed, (Dublin: W. Mckenzie & J. Moore, 1792) at 154 [translated by Thomas Nugent].

1.1.2 Dilemma of Mature Constitutionalism Model Applied in China's Context

Although the definition of Constitutionalism in PRC scholarship is varied in light of different criteria, most of them perceive the aforementioned idea of “constitutionalism” in Mature constitutional systems as the only desirable end. On one side, some PRC scholars hold that Constitutionalism consists of more than the restriction of power, but also contains other elements like democracy, the principle of rule of law and the protection of human rights²⁶. A famous constitutional scholar in PRC, the late professor Cai Dingjian, defined constitutional government as a “splendid and magnificent picture” which combines democracy, the rule of law and human rights with other “human ideals” which depict the human society in all aspects....it is an echo to the modern civilization.²⁷ Likewise, Zhang Qianfan defines constitutionalism as four dimensions: most fundamentally, constitutionalism was produced by individualism and skepticism. The process of Constitutionalism was first based on freedom of expression in “free idea market”; then the public options are formed by democratic process; Also, the constitutional government must observe the rule of law, separation of powers and judicial independence; finally the judicial review system protects individual freedoms and minorities rights from infringement²⁸. On the other side, some scholars interpret constitutionalism in a more minimal sense, arguing that constitutionalism should mainly refer to the restriction of public power²⁹. Many scholars in PRC have coined the term “Socialist Constitutionalism” proving that constitutionalism could be compatible with socialism in PRC, then they divide constitutionalism into “socialist constitutionalism”

²⁶ Li Buyun, “zhongguo xianzheng zhilu” [China's Path to Constitutionalism], in Cai & Wang, *supra* note 5, 23 at 24.

²⁷ Cai Dingjian, “fazhiyuxianzheng” [Rule of Law and constitutionalism] (2002) 4 Journal of Beijing College of Politics and Law 1 at 1.

²⁸ Zhang Qianfan, *The Principles of Constitutional Law* (in Chinese) (Beijing: Law Press, 2011) at 3, 5-7, 159, 277, 280, 282 [translated by author].

²⁹ Zou Pingxue & Fei chun eds, *Constitutional Law*, 2d ed (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2006) at 114.

and “capitalist constitutionalism”³⁰. According to scholars such as Qin Qianhong, only “socialist environment” can achieve “substantial constitutionalism” by eliminating legitimate infringement in “capitalist constitutionalism”³¹. In addition, a few scholars in PRC, like Han Dayuan³², Zhai Guoqiang and Lin Laifan, have mentioned the paradigm between Classical Constitutionalism and Modern Constitutionalism³³.

Apparently, most of these arguments are largely based on the ideal model of “Mature Constitutionalism” or attempted to justify that “mature constitutionalism” could be applied to China’s context in the near future. Not surprisingly, despite containing vast values, these arguments largely prove ineffective to understand China’s constitutional development. The reason, simply put, is that they merely are *prescriptive* based on Mature Constitutionl Model without *describing* and *understanding* constitutional development in China’s particular context. In modern China, Constitutional development indeed has a more unorthodox path. The Model of “Mature Constitutionalism” seems to fall short when applied to China’s context. As noted, this “incompatibility” is both historical and institutional.

Historically, from the perspective of Mature Constitutionalism, pre-modern China, ruled by imperial despotism for over two thousand years, was composed of many factors that are widely perceived as “hostile” to Constitutionalism, such as the absolute “top-down”

³⁰ Qin Qianhong & Ye Haibo, *Shehuizhuyi xianzheng yanjiu* [Studies on Socialist Constitutionalism] (Jinan: Shandong renmin chubanshe, 2008) at 61 [translated by author].

³¹ See Qin Qianhong & Ye Haibo, “lun shehuizhuyi xianzheng” [On ‘Socialist Constitutionalism’] (2004) 12:2 Journal of National Procurators College 3 [translated by author].

³² See Han Dayuan, *Yazhou lixian zhuyi yanjiu* [Studies on Asian Constitutionalism], 2nd ed, (Beijing: Zhongguo renmin gongandaxue chubanshe, 2008) [translated by author].

³³ See Lin Laifan, *Cong xianfa guifan dao guifan xianfa* [From Constitutional to Normative Constitution] (Beijing: Law Press, 2001) at 22-27 [translated by author].

pattern rather than some degree of “check and balance”. Further hostile factors included the autocratic rule by the Chinese Emperor, the integration of administrative chief and judges, the tradition of “Legalism”(fajia) without the idea of “rule of law”, the lack of liberal concepts such as “right”, “justice” or “citizen”, etc. As commented by Zhang Boshu, these historical-cultural factors had been internalized into constitutional structure and operation when China moved toward the modern state in late 19th Century and 20th Century³⁴.

On the other hand, the concept of “Constitutionalism” was introduced to China in an environment in which China faced the external pressure from colonial powers, although the widespread diffusion of constitutionalism in the late Qing Dynasty and early years of the Republic of China had very strong echoes³⁵. In early 20th Century, Chinese acceptance of Constitutionalism came from the need to resist colonial powers and to strengthen the country. This inevitably led to instrumentalism and misleading application of the concept of Constitutionalism to democracy and then to “majoritarian rule”. For example, Mao Zedong once wrote in 1940s: “What is constitutionalism? Constitutionalism means democratic politics.”³⁶ A direct reason for this is Mao’s political considerations for fighting against the Guomindang (KMT) government during 1940s, by using the ideological discourse from opponent as platform and resources, in order to

³⁴ Zhang Boshu, *Cong wusi dao liusi: 20 shiji zhongguo zhuanzhi zhuyi pipan* [From May 4 to June 4: the Criticism on Chinese Despotism in 20th Century] (Hong Kong: Morningbell, 2008) vol.1 at 54 [translated by author].

³⁵ Even warlords who did not know much about “constitutionalism” used the Constitution as the shield for their arbitrary despotism. During this era, whoever openly and officially against the Constitution and constitutionalism, would be nationally denounced and repudiated. After Yuan Shikai self-proclaimed himself as the “emperor of China”, for example, even his old subordinates and loyal followers opposed to him, and questioned the legitimacy of his regime, in the name of “protecting constitution and constitution”.

³⁶ Mao Zedong, “Xinminzhuzhuyi de xianzheng” [Constitutionalism in New Democratic era], in Mao Zedong et al, *Selected Works of Mao Zedong*, 2nd ed (Beijing: Renminchubanshe, 1991) vol 2 at 731,735-736 [translated by author].

demonstrate the legitimacy of Revolution³⁷. In fact, Mao was not original for such understanding³⁸. Instead, it came from the Chinese misinterpretation and mistaken association with such two concepts since the late 19th century under the instrumentalism perspective³⁹, as we will demonstrate in chapter 2. A more fundamental reason is, for modern Chinese people, that the influence of Rousseau's public sovereignty vastly overrode the influence of liberalism from John Locke, thus the voice of democracy was far louder than the voice advocating the restriction of parliamentary power. Moreover, with the spread of Marxist-Leninist theories after the May 4th Campaign, "democracy" became the most legitimate political value, which heavily emphasized the idea of public participation and elections, while neglecting the discourse to check the public power⁴⁰. Thus, this might explain why Mao Zedong's equation of "democracy" and "constitutionalism" could be accepted by both ordinary people and social elites. As commented by Dowdle, the Anglo-American constitutional state has never been seriously faced with external threats to its existence. By the time both England and its North American colonies started to explore their own constitutions, the principal threats to their societies had long since become internal rather than external⁴¹. However, for other states, the more persistent external threats, the less attractive the power-constraining emphasis of American constitutional metaphors will be. Under such circumstances, visions of constitutionalism will correspondingly tend to focus much more on state-building and not

³⁷ See Lin Laifan & Chu Cheng, "Zhongguoshi 'xianzheng' de gainian fazhanshi [The history of terminological development of 'Constitutionalism' in China Version]", in Lin, *supra* note 9, 51 at 66 [translated by author].

³⁸ As a Marxist, Mao accepted the Marxist version of "democracy", which he paraphrased as "democratic politics", combining a pair of contradicted concepts, "democracy", and "dictatorship" "Marxist jurisprudence orientates by class struggle...although it advocate democratic process, 'struggle' is the real purpose behind the democratic process." See Shih Chih-yu, *Zhonggong fazhilun jixi: guanyu "zhongguotese" zhi lunzheng* [Analysis of legal theories of CPC: the Argument of "Chinese Characteristics"] (Taipei: San Min Book co., Ltd, 1993) at 5 [translated by author].

³⁹ Zou Pingxue, "Dangdai zhongguo xianzheng mianlin de jiyu yu tiaozhan" [Opportunities and Challenges for Building Constitutionalism in Contemporary China], in Lin, *supra* note 9, 118 at 121-122 [translated by author].

⁴⁰ See *supra* note 37, at 67-68.

⁴¹ Micheal W. Dowdle, "Constitutional Listening" 88 Chicago-Kent L Rev 115 2012-2013 at 117.

on state-constraining⁴².

In addition, unsuccessful experiments of Constitutionalism in China's republican era and "chaotic scenarios" resulted from premature constitutionalist practices in Republican period greatly influenced the contemporary understanding of Constitutionalism in China. For example, in *On the People's Democratic Dictatorship*, Mao asserted that "the western bourgeois civilization, bourgeois democracy, bourgeois republic, went bankrupt in China, during the early period of Republican period." He also emphasized that: "The constitution has been enacted in China. Was Cao Kun [’s Constitution] not an enacted constitutional? But where is liberal democracy? [China once] had much more Presidents...but what is the difference between them and despotic emperors? Whatever is Constitution or the President, are fake⁴³." Deng Xiaoping also repeated a similar view, for instance, one of his reasons to oppose "checks and balances" is that "it would definitely lead to chaos in China⁴⁴". Although one could argue that these words served as political rhetoric to justify one-party rule, the undoubtedly relevant historical experiences have seemingly made the model of "mature Constitutionalism" less attractive to both political elites as well as ordinary people in China.

Institutionally, the incompatibility of applying the model of Mature Constitutionalism to China's context not only has been intensively reflected on the intellectual discourses, but also conformed by institutional predicaments. In fact, the aforementioned three basic principles are all dampened in China's constitutional system.

⁴² *Ibid* at 118-119.

⁴³ Cai Dingjian, *Lundao Xianfa* [On Constitutional issues] (Nanjing: Yilin Press, 2011) at 249[translated by author].

⁴⁴ Deng Xiaoping, *Selected Works of Dengxiaoping*, vol 3, 2d ed (Beijing: Renmin Chubanshe, 1993) at 244 [translated by author].

Regarding the first principle of Constitutional Supremacy, discussed in the latter parts of this thesis, there is an institutional “tension” in the PRC constitutional system. This “tension” is that the current Constitution of China has formally established supremacy of the Constitution, as provided by Article 5 of the Constitution⁴⁵. Therefore, logically, even the National People’s Congress (NPC), the national legislative body, cannot issue any law that contravenes the Constitution. Also, even the NPC does not have the privilege to act beyond the Constitution. However, the Constitution also entrenched the parliamentary sovereignty. According to Article 3, Article 57 and Article 58, NPC is the “highest organ of state power”, which has the highest authority to promulgate, alter or interpret the Constitution⁴⁶. Also, all state organs should be responsible for the NPC. Therefore, the NPC is wearing two hats, as the supreme state organ and the highest national legislature. Essentially, it undoubtedly contravenes the very basic principle in the “Mature Constitutionalism” model, that China’s legislature, by design, not only has a higher stature than the Constitution, but also commits to Parliamentary Supremacy and to “majoritarian rule”.

The second basic principle, Separation of Powers, is also inconsistent with the “fundamental” People’s Congress system in PRC. Constitutionally speaking, all state organs derive their power and authority directly from the NPC, the supreme constitutional body. As will be demonstrated in Chapter 3, in principle, the chief of

⁴⁵ “No law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law.” See *Constitution of the People’s Republic of China*, 1982, last amended 2004 (PRC).

⁴⁶ See *Ibid*.

administrative branch (the State Council), the judiciary (Supreme People's Court and Procuratorate) and other constitutional bodies are appointed and removed by the NPC, and all are answerable to the NPC and subject to the supervision of the legislative authority. Moreover, in many occasions, the leadership of Party/State in China has consistently and openly refused the idea of "check and balance". Thus, apparently such constitutional configuration of China's polity is far away from the model of "Mature Constitutionalism" in terms of "Separation of Power".

Ultimately, few will question that China's constitutional and legal systems fail to evince most of the defining features of the rule of law. If viewed from the perspective of "Mature Constitutionalism", then China still struggles in the long march toward the "thin version" of rule of law but not the thick version which embraces some key values of liberal-democratic-constitutionalism⁴⁷. Likewise, as pointed out by another PRC scholar, although today's China has basically met the eight indexes of "inner morality of law" put forward by Lon L. Fuller in 1969⁴⁸, it is still far from the next higher standard for rule of law that the governmental power are generally circumscribed by law. In China, the citizenry have no electoral say over who runs the country or how they run it. Extralegal, political interventions frequently compromise the legal system. Few real formal protections, and no real legal protections, exist against unconstitutional exercises of state power by elite actors⁴⁹. In particular, judicial reviews on constitutional issues are prohibited by China's constitutional system. Thus, it is also disappointed if adopting the

⁴⁷ Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002) at 2-6.

⁴⁸ See Tai Benny Yiu Teng, *Xianzheng. Zhongguo: cong xiandaihua ji wenhua zhuanbian kan zhongguo xianzheng fazhan* [Constitutionalism. China: perspective on development of Constitutionalism in China from Modernization and Cultural Transformation] (Hong Kong: Hong Kong University Press, 2012) at 56 [translated by author].

⁴⁹ Micheal W. Dowdle, "Of Parliaments, pragmatism, and the dynamics of constitutional development: the curious cases of China" 35 NYUJ Int'l L & Pol 1 2002-2003 1 at 2.

standard from “Mature” Constitutional system to measure China’s constitutional development.

In addition, China also lacks institutional direct public election to fill principal constitutional offices and a bureaucracy that also fails to fulfill the standard of traditional model of constitutional accountability⁵⁰ established in Liberal-Democratic States.

Of course, the above analyses provide a fairly pessimistic picture of China’s constitutional potential. However, as argued by Micheal Dowdle, while China’s current constitutional configuration might “tell us about China's current constitutional maturity, it tells us very little about that system's transformative capacity to identify and develop institutional foundations that could support and promote a mature constitutional commitment to these goals.⁵¹” In fact, Dowdle continues to argue, that these principle such as “separation of power” or “judicial review” are more like the product of mature constitutional development rather than the motor for it. In the United States, for example, the Supreme Court’s power to review federal governmental activities, although initially articulated in 1803, did not become an effective source of constitutional discipline until the 1870s. Even today, the political-question doctrine and case-in-controversy requirement effectively block judicial review from courts in the United States. Likewise, the constitutional histories of many other mature constitutional systems display a similar pattern⁵². This is because judicial review is “more the product of constitutional discipline

⁵⁰ Michael W. Dowdle, “Public Accountability in Alien Terrain: exploring for constitutional accountability in the People’s Republic of China”, in Michael W. Dowdle ed., *Public Accountability-Designs, Dilemmas and Experiences* (New York: Cambridge University Press, 2006) 330 at 330-331.

⁵¹ See *supra* note 49 at 17-18.

⁵² France’s constitution, for example, did not articulate a practice of constitutional review until 1958, some eighty years after the initial

than the source of constitutional discipline.” A judiciary’s inherent status as the constitution’s least dangerous branch makes it a poor candidate for enforcing constitutional norms against truly recalcitrant political actors⁵³ unless it developed sufficient institutional authority to do so. Another means by which scholars commonly evaluate the developmental potential of China’s constitutional system is by identifying structural criteria commonly regarded as essential for the success of mature constitutional systems and measuring the developmental relevance of China’s constitutional system by looking at the degree to which China’s system conforms to the structural criteria⁵⁴.

Therefore, the use of a static standard drawn from “Mature Constitutionalism” may not be the best way to evaluate the constitutional potential of a developmental system. This kind of stereotype might also blind one’s eye to the actual development of a constitutional system. For example, Dicey once claimed that English constitutionalism and American constitutionalism were actually of a single kind. He also attempted to show why Anglo-American constitutionalism had succeeded while in contrast, continental and Asian visions of constitutionalism had all proved comparatively unsuccessful, by claiming their executive governments either were not subject to law at all, or it was subject to a special law administered not by an ordinary court, but by a special body⁵⁵. Similarly, today’s many comparative projects, inside or outside the PRC, like Dicey’s

establishment of her constitutional foundation, and that practice did not begin protecting the political and civil rights enumerated in that constitution until the 1970s. Britain developed a practice resembling judicial review only in the 1990s. The Dutch constitution, now entering its second century, forbids judicial review. Sweden’s constitution articulates a judicial review practice, but as of 1987 Sweden had not yet resorted to this practice in its two-hundred-year history. Both Japanese and Italian courts occasionally have performed acts of constitutional review, but to date the effect of this review on central government behavior appears limited: In both countries, the central government has been allowed to ignore the courts’ constitutional pronouncements. Even in India- where the practice of judicial review is more vibrantly exercised than perhaps anywhere else in the world-evidence exists that judicial review in fact has had only a marginal effect on the actual development of India’s political and constitutional practices. See *supra* note 49 at 23-25.

⁵³ *Ibid* at 25-26.

⁵⁴ Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford: Stanford University Press, 1999) at 34-35.

⁵⁵ Michal W. Dwyer, “Dicey, Lubman, and Bagehot: Chinese Law in the Common Law Mind”, 19 Colum. J. Asian L. 72 2005-2006 at 90-91.

constitutional discourse, see its principal contribution to find whether there are particular “essences” associated with the Constitutionalism.

For example, China debated for nearly ten years before the NPC finally passed the Property Law in 2007 for encountering theoretical difficulties. One of these, are the ideological and constitutional controversies of “Property Law” ignited by Gong Xiantian, a law professor in China. Gong defend the public ownership enshrined by the PRC Constitution and attacked supports of Property Law for eroding the foundation of “people’s democratic dictatorship⁵⁶”, which one might feel the least familiar in Mature Constitutional system. However, Gong has many supporters within Chinese academia as well as among ordinary Chinese “netizens”, because: “the ideals and values that Gong attaches to China’s distinctly socialist experiences seem admirable, even from a liberal perspective. These include a desire for economic equality, recognition of the state’s duty to provide for the alienated and needy, and the value of providing the citizenry a safe and stable economic and social life.⁵⁷” Unfortunately, the prejudice from liberal-democratic perspective may prevent one from appreciating these values and their potential influence(s) on the constitutional development in China.

Moreover, the peak of the prolonged debate, however, was the openly dispute between Liang Huixing, the leading civil-law scholar in China, and Tong Zhiwei, also a famous Chinese constitutional professor. The crux of their debate is whether “this Law has been

⁵⁶ Gong's constitutional critique was not directed towards a particular provision in the law, it was directed towards the spirit of that law, and how it implicates the meaning of China's constitution. Gong's principal complaint with the draft law was that it effectively prioritized the development of the private economy over the public economy, which was contrary to China's constitutional status as a distinctly socialist polity. “The draft law focuses exclusively on privatization and marketization, without recognizing at all the contrary needs of the socialist property system.” See *supra* note 41 at 144-145.

⁵⁷ *Ibid* at 154.

enacted in accordance with the Constitution” should be added into the Property Law. Notably, Liang maintained a traditional Marxist jurisprudential view that it is not necessary for the NPC to self-claim that it is empowered by the Constitution to enact the Property Law, because the NPC is the source of Constitution rather than the result of it⁵⁸. Otherwise, it is bourgeois view adopting from “check and balance” system if the Property Law incorporates such a provision with a “Constitution”. Despite enormous the controversy incurred by Liang’s article, the “Constitutional clause” still enshrined by Article 1 of the Property Law promulgated in 2007. This indicated a fact that although it seems to be remote to Liberal-Democratic rhetoric, China has its own constitutional discourse and it had been witnessed that if there is inconsistency within this constitutional discourse, serious resistance may result⁵⁹.

In short, these limits manifest themselves in at least two dimensions: the first limitation is that the static standard mirror of Mature Constitutionalism may lead to enormous inaccuracy when evaluating other developing constitutional system. The second point arises out of a particular failure of liberal constitutional imagination that blind one from discovering other constitutional possibilities, as David Scullli has presciently termed “the presupposition of exhausted possibilities⁶⁰”, or “the end of history” if paraphrasing Francis Fukuyama’s phraseology.

Indeed, “listening” to other constitutional system is very important⁶¹. Dowdle himself, for

⁵⁸ Liang Huixing, “Wuquanfa caoan de ruogan wenti” [On Several Issues of Property Law Draft] (2007), 1 Zhongguo Faxue [China Legal Science] 8 at 8-9 [translated by author].

⁵⁹ See *supra* note 9 at 345-347.

⁶⁰ See *supra* note 41 at 116.

⁶¹ “The claim that we should not listen to odious constitutional systems simply because they are odious is to effectively assert that we

example, provides an alternative to describe the development of Chinese constitutionalism, “Constitutional *Poiesis*”⁶². To further clarify this point, this thesis will use a set pattern within the discourse of “Mature Constitutionalism” to further explain the incompatibility between liberal-democratic model in China’s Context, and more importantly, to demonstrate the necessity to “build” a more suitable mode for studying China’s constitutional development.

1.2 Constitutional Supremacy, Parliamentary Supremacy and China’s Constitutional Configuration

In this part, this thesis take one important realm in constitutional studies, which is the pattern between constitutional supremacy and parliamentary supremacy, as an example to further explain the difficult situation when applying Mature Constitutional Model to examine China’s constitutional development. There is simply an “awkwardness” of applying these two concepts into China’s Constitutional configuration.

1.2.1 The Pattern of Parliamentary Supremacy and Constitutional Supremacy

As previously noted, the idea of constitutional supremacy originated from United States, and after World War II, a number of liberal-democratic states have joined the “constitutional supremacy club”⁶³, examples include German, France, Japan, Canada, and the United Kingdom. Notable, the “Constitutional Supremacy” entrenched in these

have already learned all there is to know about what we might call constitutional morality...During the twentieth century many of humanity’s more egregious political-moral transgressions have been the product of feelings of moral certainty, more than of moral uncertainty.” See *ibid* at 156.

⁶² Stephanie Balme & Michael W. Dowdle, “Introduction: Exploring for Constitutionalism in 21st century China”, in Stephanie Balme & Michael W. Dowdle, eds, *Buidling Constitutionalism in China* (New York: Palgrave Macmillan, 2009) 2 [Balme & Dowdle]; Michael Dowdle, “Beyond Judicial Power: Courts and constitutionalism in Modern China”, in Balme & Dowdle, *ibid* at 199.

⁶³ Before the 20th Century, “restrain government through legislation” was a common practice and thus the legislative power was generally exclusively exercise by the parliament. But it had been changed after World War II, when administrative power began to expand with the increasing governmental interference to the economic life. For example, the 1946 French Constitution explicitly prohibits empowered legislation, whereas in 1958 Constitution the empowered legislation has been constitutionally permitted. *Supra* note 30 at 315-317.

countries are all somehow divergent from their American counterpart. In principle, Constitutional Supremacy is an idea that the Constitution *per se* is supreme over parliamentary authority, because most importantly, constitutional supremacy contains an underlying principle that fundamental constitutional rights are paramount and directly conferred by the Constitution, which shall not be altered, overridden or abolished by majoritarian rule or administrative acts whatsoever. Constitutional supremacy lies in following principles: (1) The Constitution itself shall be declared or implied as the supreme law, and any statutes made by other state organs which are inconsistent with or contravene the constitution shall be void. (2) Related to the first principle, constitutional rights could not be deprived or reduced merely through ordinary statutes or governmental act. (3) The constitutional protection should be the last but most powerful resort to protect civil rights and freedoms. In the institutional realm, such “constitutional resort” means the Constitution could be directly applied to cases by the judiciary.

An important counterpart of Constitutional Supremacy is Parliamentary Supremacy, which refers to the fact that the parliamentary authority has a self-empowering stature over the Constitution *per se* and that the majority of the legislature enjoys and exercises unlimited power in law-making and other state affairs⁶⁴. It goes without saying that the original meaning of parliamentary supremacy, coined in the British Parliament, was defined as having “the right to make or unmake any law whatever”. Adding, for the avoidance of doubt it seems, that “no person or body is recognized by the law of England

⁶⁴ The most popular definition of “parliamentary supremacy” is that supplied by Albert Venn Dicey. Writing in 1885, he described the Westminster Parliament as having “the right to make or unmake any law whatever. Adding, for the avoidance of doubt it seems, that “no person or body is recognized by the law of England as having a right to override or set aside” its legislation. See AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London, UK: Macmillan, 1885) at 39-40.

as having a right to override or set aside” parliamentary legislation⁶⁵.” As Sir William Blackstone concluded, “the British parliament has the supreme disposal of everything. ⁶⁶” In a word, parliamentary authority could override everything, even Constitutional authority. Notably, Marxist-Leninist states, in order to reflect the “Supremacy of People” and openly proclaim the “Proletarian rule”, have usually also adapted the form of parliamentary supremacy.

Apparently, the “embarrassment” lies in the fact that neither purely “Constitutional Supremacy” model nor “Parliamentary Supremacy” could be enough to fully depict China’s constitutional system or constitutional development. Something more is needed for conceptualize the constitutional development in China’s context.

1.2.2 China’s Constitutional Configuration, Institutional Development and a “More Suitable Framework”

One would be wrong to conclude simply that because China’s case does not apply to either Constitutional Supremacy or pure Parliamentary Supremacy, that China’s Constitution has no force or real effect, and China’s constitutional institutions are simply rubberstamp of the Party, as asserted by many scholars. In fact, quite the opposite is true. As will be shown in the following Chapters, ever since the re-establishment of a rationalized political order, following the end of the Cultural Revolution in 1976, constitutional arguments have consistently shown themselves “capable of shaping and

⁶⁵ *Ibid* at 39-40.

⁶⁶ See Sir William Blackstone, *Commentaries on the Law of England*, 3rd ed, Tomas M. Cooley, ed, (Chicago: Callaghan and Company, 1884) vol 1 at 50; See also, Gary L. McDowell, *The language of law and foundation of American Constitutionalism* (New York: Cambridge University Press, 2010) at 209.

disciplining political behavior⁶⁷”.

Constitutionally speaking, China’s constitutional system upholds the idea of “Constitutional Supremacy”. Qin Qianhong and Ye Haibo thus divided such “Constitutional Supremacy” into “formal Supremacy” and “Substantial Supremacy”⁶⁸. The former concept refers to the formal constitutional order that has declared the highest legal effect of the Constitution. As noted above, in the PRC constitutional system, the Constitution had been regarded as “fundamental law” and all legislations should not contravene the Constitution. Moreover, as Bjorn Ahl pointed out, the principle has been also confirmed by the special procedure for amending the Constitution stipulated by PRC Constitution⁶⁹. However, for “substantial supremacy of the Constitution”, it is obviously beyond the grasp of the PRC Constitution. Indeed, the contemporary constitutional system based on 1982 Constitution of PRC is a mixed principle between parliamentary supremacy and constitutional supremacy, and also blended with Marxist-Leninist Ideology. For example, as concluded by a PRC scholar, Zhai Xiaobo, such a “mixture”, which he called “People’s Constitutionalism with Parliamentary Supremacy”, composing three principles: (1) Dual-track application of the Constitution, (2) unitary constitutional supervision and (3) the Constitution is fundamentally implemented by “People”⁷⁰. Despite the enormous disparity between this ideal picture and the reality, Zhai’s theoretical framework is actually quite insightful.

⁶⁷ See *supra* note 41 at 139-140.

⁶⁸ See *supra* note 30 at 166-167.

⁶⁹ See *supra* note 9 at 344.

⁷⁰ Zhai Xiaobo, “Daiyi jiguan zhishang de renmin xianzheng” [People’s Constitutionalism: Legislative supremacy], in Fu Hualing & Zhu Guobin, eds, *Xianfa quanli yu xianzheng: dangdai zhongguo xianfa wenti yanjiu* [Constitutional Rights and Constitutionalism: Researches on Contemporary Chinese Constitutional problems] (Hong Kong: Hong Kong University Press, 2012) 219 at 220 [translated by author]. [Fu & Zhu].

This thesis argues that the crux is to focus on dynamic and changing institutional behavior in the developing China's constitutional system, i.e., institutional politics and interplay, rather than the static "portrayal" of China's constitutional structure.

We have already rejected to directly use Mature Constitutional standard to describe (not prescribe!) the actual development of China's constitutional system, and based on the actual configuration of PRC constitutional system. Accordingly, we offer a more "suitable" framework for examining constitutional development in PRC as following:

1. The evolution of Party/State has underlain the "China's context" for constitutional development in PRC after 1978

As will be discussed in Chapter 2, CPC's changing ideology and the dynamic of Party/State has formed basis of the "big picture" for institutional development in China's constitutional system. A prime example for this is how these factors influence the nature of the PRC's Constitution. Since the 1954 Constitution, the prototype Constitution for PRC has consistently served as "A set of General Rule (总章程)⁷¹" and, to quote the phraseology of Mao Zedong, "to guide all People to a clear and correct path⁷²". Indeed, the "General Rule" means that the Constitution is only a political document enumerating the changing ideology and policy of the CPC, as commented by Pitman Potter, "China's changing Constitution reflects the continued interplay between politics and policy and their expression through formal law.⁷³" For example, the 1954 Constitution copied the policies during the "transition period" whereas the 1982 Constitution is generally

⁷¹ See supra note 43 at 249 [translated by author].

⁷² Mao Zedong, "Guanyu Zhonghua Renmin gongheguo xianfa caoan"[On Constitutional Draft of PRC] (1954), in *Mao Zedong Xuanji* [Selected Works of Mao Zedong] (Beijing: Renminchubanshe, 1977) vol 5 at 125-132 [translated by author].

⁷³ Pitman B. Potter, *China's Legal System*, (Cambridge (UK): Polity Press, 2013) at 58.

regarded as “Constitution of Reform”, a document recording “Open and Reform” Policies set up by the Party after 1978⁷⁴. In short, as stated by the Preamble of the 1982 Constitution: “This Constitution, in legal form, affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the State; it is the fundamental law of the State⁷⁵.” And because of this, under this circumstance underpinned by the Party/State, China’s courts inherently lack the power to “judicialize” the Constitution. More importantly, the Constitution lacks a mechanism for “direct application” by the standard of “Mature Constitutionalism” and “Constitutional Supremacy”. The authority of the Constitution, depends on constitutional organs in China who indirectly implement the Constitution by legislation, administration and judicial activities.

Ideological discourse has enormously impacted China’s constitutional configuration and institutional features of state organs. In Socialist states, including the PRC, constitutional obsession to Parliamentary Supremacy derived from the Orthodox Marxism, in which “as radical democrats, Marxism commits to majoritarian rules”. Marxism even insists that the majoritarian rules imply an “absolute and unlimited” power in proletarian instates⁷⁶. On the other hand, in China, the Party organs and Party control have simultaneously become both resources for institutional development and a prolonged obstacle preventing these constitutional bodies from growing as “real constitutional players”, in contrast to their counterparts in Mature Constitutional system.

⁷⁴ See *supra* note 70 at 225.

⁷⁵ *Constitution of the People’s Republic of China*, 1982, last amended 2004 (PRC).

⁷⁶ See *supra* note 30 at 300.

2. Constitutional authority reflected by the “Dual-Supremacy” of the NPC

Seemingly contradictory, the extent of “constitutional supremacy”, in China’s context, is largely reflected by institutional activities, especially the authority of NPC, the parliamentary body, and how they develop distinct institutional competence from the traditional Party/State and how they form their own institutional characteristic and prepare themselves for, if possible, future development.

As will be evidenced in Chapter 3, in a constitutional configuration established by the Communist Revolution, the idea of “People’s Congress system” is directly in contrast to the aforementioned three principles implied by “Mature Constitutionalism”. Specifically, from Party/State’s narrative, in China, “People” (in this context, means CPC) created the Sovereignty of PRC directly via revolution, and “People” then formulated the Constitution through NPC⁷⁷. Under this Marxist-Leninist rhetoric, the NPC thus symbolize the will of whole “People”, and thus the NPC wears two hats, representing the supremacy of the constitutional authority whilst still keeping its traditional role as the highest national legislature. In practice, the NPC would never be “unconstitutional”, because the NPC and its Standing Committee not only have the sole authority to interpret the Constitution, but also could prevent it from “trapping” the parliamentary authority itself in the unconstitutional valley simply through amending the Constitution. This has already been confirmed by the constitutional history of the PRC: the Constitution of the PRC either amended the formal four Constitutional amendments in 1988, 1993, 1999 and

⁷⁷ Dong Biwu, *Dong Biwu Faxue Wenji* [Selected works on legal studies of Dong Biwu] (Beijing: Law Press, 2001) at 101 [translated by author].

2004, or the Constitution substantially amended by NPC-promulgated legislations⁷⁸.

On the other hand, the development dual-supremacy of NPC is displayed by the development of NPC's institutional authority, i.e., the legislative competence of NPC and the legislative supervisory system of NPC. But almost from the beginning of its tenure, selected aspects of political authority began gravitating to the constitutional apparatus. For example, a key moment in this occurred in the early to middle 1980s when a senior party member named Peng Zhen successfully deployed a constitutional argument within the Party itself to effectively locate some degree of autonomous political authority in the National People's Congress (NPC)⁷⁹. Subsequently, the NPC began revising its own international operating procedures to give greater voice to a greater diversity of social interests as a means of reifying, at least to some degree, its unique constitutional status as China's principal constitutional fount of "democratic" legitimacy⁸⁰. Internal constitutional discussion and argument is a constant feature of this internal development⁸¹. In particular, such "dual-supremacy" also dictates a "unitary constitutional supervisory system" which refers to the mechanism that under the current constitutional system only the NPC (in reality is NPCSC though) could have the power to conduct constitutional review, and the development of "constitutional review" in China is also definitely depend on the NPC constitutional supervisory system, as entrenched by the PRC Constitution and other constitutional legislation.

⁷⁸ See *supra* note 70 at 225.

⁷⁹ Murray Scot Tanner, "Organizations and Politics in China's Post-Mao Law-Making System", in Pitman B. Potter ed., *Domestic Law Reforms in Post-Mao China* (M.E. Sharpe: New York, 1994) 56 at 74-76.

⁸⁰ Michael W. Dowdle, "The Constitutional Development and Operations of the National People's Congress" (1997) 11 *Colum J Asian L* 1, at 22-23.

⁸¹ See *supra* note 41 at 139-140.

3. Institutional politics and interplay: exemplified by China's courts

However, as mentioned above, China's current constitutional system is a changing dynamic, which is clearly demonstrated through institutional development, which is incrementally expanding their constitutional power and authority through maneuvering political strategy and interplay with other power players in PRC constitutional and political system. The prime example is China's court system. Unlike many contemporary Mature Constitutional systems, China's courts were not conferred other functions or power besides pure "adjudicate works" by ideological theory and initial blueprint of PRC Constitution, let alone the "unconstitutional" power for judicial review. However, as will be demonstrated in Chapter 4, China's courts, both the Supreme People's Court (SPC) and lower courts, has adopted the pragmatic approach to incrementally increase their institutional authority. For example, by design the Courts in China do not interpret power and likewise, the 1982 PRC Constitution also does not provide a word about such power. However, by exerting institutional specialty and by taking advantage of Party authority and other power holders, the SPC have successfully gained the enormous power to issue judicial interpretation, and these interpretations has gradually become an inevitable way to implement NPC legislations. There are also attempts from China's courts to strive for further, more "constitutional" power such as trying to open the gate of "constitutional review" yet they failed in institutional sense⁸². However, these setbacks strengthen China's courts' commitment to ongoing pragmatic paths that promote "adjudicate independence" rather than "judicial independence" by continuingly using institutional

⁸² Research from Stephanie Balme on rural grassroots judiciaries has showed that in the early and middle part of the first decade of the 2000s, these judiciaries were in fact being influenced by constitutional argument despite the formal prohibitions against constitutional interpretation. Stephanie Balme & Michael W. Dowdle, "Ordinary Justice and Popular Constitutionalism in China", in Balme & Dowdle *supra* note 62 & 179.

politics and exploiting other power players, as discussing further in Chapter 4.

1.3 Summary of the Chapter

In this chapter, we have briefly examined the evolution and the three principles of the Mature Constitutional Model: (1) Constitutional Supremacy; (2) Separation of Powers; and (3) Liberalistic Rule of Law. This chapter has illustrated the dilemma of Mature Constitutional Model when it applies to China's Context. The failure is both intellectual and institutional. The static standard of Mature Constitutionalism may only lead to a fairly disappointingly shows that China virtually lacks all conditions to meet these three principles as noted above. Accordingly, one might accordingly conclude that no "substantial constitutional development" is occurring in China. Moreover, rejecting to take cultural, historical and contextual difference into consideration, "Mature Constitutionalism" also prevents one from "constitutionally listening" to constitutional discourse in China and from appreciating constitutional development "with Chinese characteristics" that might not be able to interpret from "Liberal-Democratic Mind". We then have further seen the difficult situation the Mature Constitutional Model is in adopting the pattern of parliamentary supremacy and constitutional supremacy to PRC constitutional configuration. The incompatibility of applying such a framework into China's constitutional system has illustrated that we need a more suitable framework to study constitutional development in China. In subsequent chapters, I will use institutions, (the CPC, NPC and courts) as individual lenses through which to comprehend and analyze constitutional development in PRC.

Chapter 2: Constitutionalism and The Party Rule

This Chapter mainly discusses the “China context” which has formed the background for Constitutional development in the PRC. The first part of the chapter seeks to examine the evolution of the CPC’s ideologies from Marxist classics to “Socialism with Chinese Characteristics”, analyzing the “compatibility” of the CPC’s constitutional discourse with the Mature Constitutional Model as we discussed in Chapter 1. The second part of this chapter will discuss Party organization and Party control in China, a more obstructive factor to China’s constitutional development. In the third part, I will analyze the institutionalization and legalization of the Party/State in the post-Mao era, and argue that institutionalization and legalization have contributed to a more free and pluralistic society in China. This chapter will then demonstrate that both changes in the Party/State and China’s society are not only the main context for institutional development of China’s constitutional structure, but also the manifestation of constitutional development in China *per se*.

2.1 From Marxist Orthodoxies to “Socialism with Chinese Characteristics” Theory: Compatibility of the CPC’s Changing Ideology and Constitutionalism

In this section, we will review the changing political theories of the CPC and analyze whether changes in the ideological language of these theories could be harmonious with the idea of constitutionalism. There are three reasons for examining the changing political theory of the CPC: First, official political theories, or ideologies often serve as a vehicle to understand a Party’s attitude toward constitutionalism and other institutional design. Second, understanding CPC political theory can help us interpret political reality. For the purposes of our discussion, to comprehend the dynamic of constitutional system, since all

political system or constitutional structure built on political discourse to some extent. Third and most importantly, as Michael Dowdle suggested, one should “take ideas seriously” and “listen to constitutional meaning” in a non-liberal context⁸³. In this way, it would enable us to better interpret constitutional discourse in the “China Context” by seeing the constitutional potential in a foreign terrain that largely perceived as “anti-constitutionalist.” In particular, this requires one to not only listen to liberal Chinese dissidents such as Liu Xiaobo, but to “find constitutional meaning” from non-liberal voices⁸⁴, such as the constitutional articulations of Mao Zedong or Deng Xiaoping. The thesis argues it is these seemingly “non-liberal voices” that have formed the constitutional discourse of the CPC, constructed the institutional design of the constitutional system in China, and have established the constitutional potential therein.

From 1921 to 2014, CPC political theories experienced continuous transformation and adaption. The current ideology of the CPC is indeed offering spaces for all stages of political theories that have evolved in three parts: Marxist-Leninist orthodoxies, “Mao Zedong thought” (or Maoist political theory), Post-1978 Socialism with Chinese Characteristics theories developed by Deng Xiaoping, Jiang Zemin, Hu Jintao, Xi Jinping and their theorists.

2.1.1 Orthodox Marxist-Leninism, Maoism and “Mature Constitutional Model”

As a “Marxist Party”, the CPC’s political theories have strong roots in Orthodox Marxist political philosophy, founded by Carl Marx and Friedrich Engels in 19th Century Europe.

⁸³ See *supra* note 41 at 126- 127.

⁸⁴ *Ibid.*

Orthodox Marxism greatly affected CPC political doctrines in the revolutionary period and in the first three decades in the PRC. Its influence peaked during the Cultural Revolution. After 1978, the impact of orthodox Marxism began to decay, but influence from “Classical Marxism” has remained until today. The critical core of Marxist political theories, “Class” and “Class Struggle” has not only repeatedly demonstrated by Marx and Engels themselves in their own works⁸⁵, but also has been thoroughly discussed by scholars from PRC or outside worlds⁸⁶.

In fact, if we use Max Weber’s sociological pattern, “Orthodox Marxism” has justified the legitimacy of the CPC by its Charismatic Domination (familial and religious authority), rather than traditional domination and legal domination. Under orthodox Marxism, the CPC has become a “selfless and effective leading party” to guide the Chinese to a brighter tomorrow. This discourse started from the Marxist meta-logic and

⁸⁵ Karl Marx, “The German Ideology” (1845), Marxist.org, online <https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm>, last accessed on April 15 2015; Karl Marx, “The Poverty of Philosophy”(1847), Marxist.org, online <https://www.marxists.org/archive/marx/works/1847/poverty-philosophy/ch02.htm>, last accessed on April 15 2015; Karl Marx, *Capital*, Vol.1, Marxist.org, Chapter Thirty-Two: Historical Tendency of Capitalist Accumulation, online <https://www.marxists.org/archive/marx/works/1867-c1/ch32.htm>, last accessed on April 15 2015; Karl Marx, “A Contribution to the Critique of Hegel’s Philosophy of Right” (1844), Marxist.org, online <https://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm>, last accessed on April 15 2015; Marx to J. Weydemeyer in New York (1852), online: Marx/Engels Internet Archive (marxists.org) 2000, https://www.marxists.org/archive/marx/works/1852/letters/52_03_05-ab.htm, last accessed on April 15 2015; Karl Marx, “Critique of the Gotha Programme”(1875), Marxist.org, online <https://www.marxists.org/archive/marx/works/1875/gotha/ch04.htm>, last accessed on April 15 2015; Frederick Engels, “The Origin of Family, Private Property and the State” (1884), online: Marx/Engels Internet Archive (marxists.org) 2000, <https://www.marxists.org/archive/marx/works/1884/origin-family/>, last accessed on April 15 2015; Marx, “The Civil War in France”, second drafts (1871), online: Marxist.org <https://www.marxists.org/archive/marx/works/1871/civil-war-france/drafts/ch02.htm#D2s8>, last accessed on April 15 2015. Karl Marx, “The German Ideology” (1845), Marxist.org, online <https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm>, last accessed on April 15 2015; Karl Marx, “The Poverty of Philosophy”(1847), Marxist.org, online <https://www.marxists.org/archive/marx/works/1847/poverty-philosophy/ch02.htm>, last accessed on April 15 2015; Karl Marx, *Capital*, Vol.1, Marxist.org, Chapter Thirty-Two: Historical Tendency of Capitalist Accumulation, online <https://www.marxists.org/archive/marx/works/1867-c1/ch32.htm>, last accessed on April 15 2015; Karl Marx, “A Contribution to the Critique of Hegel’s Philosophy of Right” (1844), Marxist.org, online <https://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm>, last accessed on April 15 2015; Marx to J. Weydemeyer in New York (1852), online: Marx/Engels Internet Archive (marxists.org) 2000, https://www.marxists.org/archive/marx/works/1852/letters/52_03_05-ab.htm, last accessed on April 15 2015; Karl Marx, “Critique of the Gotha Programme”(1875), Marxist.org, online <https://www.marxists.org/archive/marx/works/1875/gotha/ch04.htm>, last accessed on April 15 2015; Frederick Engels, “The Origin of Family, Private Property and the State” (1884), online: Marx/Engels Internet Archive (marxists.org) 2000, <https://www.marxists.org/archive/marx/works/1884/origin-family/>, last accessed on April 15 2015; Marx, “The Civil War in France”, second drafts (1871), online: Marxist.org <https://www.marxists.org/archive/marx/works/1871/civil-war-france/drafts/ch02.htm#D2s8>, last accessed on April 15 2015 [Civil Law in France].

⁸⁶ Peter Schran, “On the Organization of Production under Socialism”, in Arif Dirlik & Maurice Meisner, eds, *Marxism and the Chinese experience* (New York: M.E. Sharpe, 1989) 59; see also *supra* note 34; See *supra* note 30.

terminology, that is, “class” and “class struggle” rhetoric.

On the other hand, Marx's ideal prototype of Proletarian State: Paris Commune has enormously impacted the design of constitutional system in the PRC polity. First, the “People’s Congress system”, in fact, was based on Marx’s perspective of “Paris Commune Mode”: that a supreme parliamentary system produced by theoretical universal suffrage⁸⁷.

Apart from the original “Marxism”, CPC is also the protégé of Leninism by accepting Leninism theoretically and practically. The most important contribution from Leninism was the Leninist Doctrine, i.e., Party discipline and the Party/State structure, which have been summarized by Lenin’s own works⁸⁸ and substantial studies⁸⁹. Lenin’s theory of “Vanguard Party”, which can be summarized as: (1) The highly centralized Party Power, organized by the principle of “Democratic Centralism”. (2) The Party is leading by a small group of professional revolutionary.⁹⁰ As we will show in latter part, the traditional

⁸⁷ The Paris Commune Mode include following principles: (1)the combination of legislative and executive powers whose officials approving and removing by universal suffrage. This has impliedly rejected the separation of powers. (2) Denial the principle of judicial independence. Quoting Marx, “the hypocritical independence of judges will be abolished” because “the judicial functionaries were to be divested of that sham independence which had but served to mask their abject subservience to all succeeding governments.” (3) “Genuine universal suffrage”: All public officials must work under public supervision, and people have the right to recall the remove public officials. Also, all public servants should only receive the equivalent of remuneration of ordinary workers in the Commune. See *supra* note 85 [Civil Law in France]; *Manifesto of the Communist Party: Chapter 2* (1848), Online: Marxists.org, <<https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch02.htm>>, last accessed on April 15 2015; See *supra* note 30 at 18-19, 27 [translated by author].

⁸⁸ Democratic system “is to admit that within the state, the minority is subordinate to the majority; is to admit a dominating class or a group of residents systematically exert violence over another class or another group of residents.” Vladimir Lenin, *The Complete Works of Lenin*, 2nd ed (Beijing: renmin chubanshe, 1990) vol 25 at 442 [translated by author]; Vladimir Lenin, *The Complete Works of Lenin*, 2nd ed (Beijing: renmin chubanshe, 1984) vol 13 at 304, vol 15 at 146 [translated by author]; Vladimir Lenin, *The Complete Works of Lenin*, 2nd ed (Beijing: renmin chubanshe, 1984) vol 9 at 448 [translated by author]; Vladimir Lenin, *The Complete Works of Lenin*, 2nd ed (Beijing: renmin chubanshe, 1984) vol 15 at 309 [translated by author]; Vladimir Lenin, *The Complete Works of Lenin*, 2nd ed (Beijing: renmin chubanshe, 1990) vol 29 at 101 [translated by author]; Vladimir Lenin, *The Complete Works of Lenin*, 2nd ed (Beijing: renmin chubanshe, 1990) vol 27 at 244 [translated by author]; Lenin, *Selected Works of Lenin*, (Beijing: renmin chubanshe, 1995) vol 1 at 471[translated by author].

⁸⁹ *Supra* note 38 at 31.

⁹⁰ According to Lenin, this is because “in revolution that we need to keep the consistency and stability of leadership” and “revolution in despotic state require us to reduce the number of members in leaders group to the extent that only include those perceive revolution as their sole career and received professional training of political struggle. This makes our party more difficult to destroy. Lenin, *Selected Works of Lenin* (Beijing: renmin chubanshe, 1995), ed by Central Compilation & Translation Bureau of CPC, vol 1 at 404 [translated

CPC theories and organization basically have followed these two important Leninist principles. For “Proletarian Dictatorship” and Party/State Theory, it is important to note that Lenin has offered justification for Party’s natural and unchallengeable leading role in Communist and Socialist states by Marxist theories⁹¹. Also, Leninism has adopted Marxist’s Paris Commune Mode to establish the Supreme Soviet system, a prototype that the China’s constitutional system directly copied in 1954 Constitution.

From the perspective of constitutionalism, Marxist-Leninism has been exploited by the Socialist State in the 20th century to justify its one-party rule and to reject the constitutional supremacy, “check and balance” system and even the “rule of law”. Indeed, in this sense, Orthodox Marxism become one important part in CPC ideology that is radically run against the Mature Constitutional Model in the 20th Century as mentioned in Chapter 1. Moreover, it is fair to say that political theories from Marx Engels and Lenin have not only formed a considerable part of theoretical basis of CPC constitutional discourse, but also have enormously impacted the original configuration of the constitutional system in PRC polity.

2. Maoist Constitutional Discourses

Mao Zedong is the key of Sinicization of Marxist-Leninist doctrine, but Mao Zedong’s effort of Sinicization of Marxist-Leninist theories is hybrid. On one hand, as Shambaugh commented, that such hybrid is growing integrated in the large garden of Chinese

by author].

⁹¹ See Lenin, *Selected Works of Lenin* (Beijing: renmin chubanshe, 1995), ed by Central Compilation & Translation Bureau of CPC, vol 3 at 150-151, 526 [translated by author]; See Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Kitchener, UK: 2001, Batoche Books) [translated by Eden & Cedar Paul]; Maurice Meisner, “The deradicalization of Chinese Socialism” in Arif Dirlik & Maurice Meisner, eds, *Marxism and the Chinese experience* (New York: M.E. Sharpe, 1989) 341 at 344; See *supra* note 34 at 253-254.

political culture and history long before it encountered Leninism, and the indigenous Confucian political culture was conducive to embracing Leninism⁹². On the other hand, Maoist theories also have incorporated Chinese spontaneous reaction toward Constitutionalism caused by western aggression since the mid-19th century.

For China, the concept of Constitutionalism was roughly introduced by “external force”. Chinese constitutional movement in the 20th century did not begin as intent to circumscribe government power or protect fundamental rights, but as an attempt to modernize the State by revitalizing the national power through constitutional practice. As Zou Pingxue commented, Chinese elites have misinterpreted constitutionalism in modern times. Such comprehension has persisted for a long time and until now such “instrumentalism has still not been fundamentally changed. An obvious example is frequently amending the Constitution.”⁹³ Mao Zedong has made no exception for this. Moreover, he also expressed such “constitutional instrumentalism” in the Marxist-Leninist context. A prime example was Mao Zedong’s articulation in the 1940: “What is constitutionalism? Constitutionalism refers to Democracy... but now the democracy we want, is the “New Democracy”, is New Democratic Constitutionalism...New Democratic Constitutionalism means dictatorship exerted by union of several revolutionary classes against the traitors and reactionaries. So the goal for current constitutional movement is to obtain democratic politics we have not yet achieved, not to admit the fact of democratization.”⁹⁴

⁹² See *supra* note 1 at 6.

⁹³ See *supra* note 39 at 121-122.

⁹⁴ See *supra* note 36.

In the passage above, two sets of equations emerge, reflecting Mao and many Chinese elites' understanding of constitutionalism: first that "constitutionalism" is equivalent to "democracy", and the second is more "Marxist-Leninist": "democracy" is equivalent to "Democracy within the Peoples plus Dictatorship on enemies".

A direct reason for such an interpretation may have come from the need to fight against the KMT government in Chinese Civil War. Ironically, Mao's advocate of "constitutionalism" or "democracy" served as a powerful political propagandizing weapon for attacking "KMT's Party dictatorship and Party/State", a more powerful structure that has been re-built by the CPC later. Mao and CPC used KMT ideological commitment to Constitutionalism as political resources to justify the revolution against KMT Government. Once again, such a unique Chinese meaning of "constitutionalism" cannot be interpreted purely from the western jurisprudence.⁹⁵

The more fundamental reason is that, influenced by instrumentalism since the 19th century, Chinese elites interpreted the idea of "Constitutionalism" according to the state's imminent tasks. In fact, Mao Zedong was not the first politician to publicly equal constitutionalism to democracy in modern China. The Chinese concept of "constitutionalism" was translated from 立憲主義 in Japanese. In late 19th century and early 20th century, Liang Qichao firstly associated with constitutionalism with the parliamentary system, while Yan Fu directly related the constitutionalism with democracy. Sun Yetsen, then, putting forward the "Three People Principle", construed constitutionalism as the ultimate goal to realize democratic rights of citizens under the

⁹⁵ See *supra* note 37 at 66.

principle of “*Minquan*”(democracy)⁹⁶. In fact, for modern Chinese people, influence from Rousseau’s democratic thought has vastly overridden John Locke or John Stuart Mill’s liberalism. Thus the voice of democracy is far too high than voice advocating restriction of democratic power. Indeed, after the May 4th Movement in 1919, “democracy” had become the most legitimate political value⁹⁷. Moreover, the spread of Marxism-Leninist political theory, a radical “democratic theory” has also enshrined the idea of “Democracy”. Thus, it is understandable why Mao Zedong’s “Equation”, an alien interpretation for western liberalists, could be accepted by both ordinary people and social elites in modern China.

Based on this, Mao and his theorists put forward three “Constitutional System Models” basing on his application of “Marxist-Leninist Theories” to China’s context: “New democratic constitutionalism”, “People’s Democratic Dictatorship” and Maoist “Proletarian Dictatorship”.

(1) “New Democratic Constitutionalism”.

The New Democratic Constitutionalism is based on Mao’s “New Democratic Constitutionalism” theory. The CPC, as the vanguard of proletariat, leads other classes including peasants, Petite bourgeoisie, national bourgeoisie and intellectuals. Within the very broad category of “people”, these classes can also enjoy a variety of basic rights and freedoms, including the rights of political participation and the right to vote. On some occasion, the classes even could participate in “coalition government” led by the CPC.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

Although the scope of dictatorship remains as a small scope, still, according to Marxism-Leninist doctrine, these people under “dictatorship” did not have any democratic rights or even fundamental rights ⁹⁸ . However, for Mao Zedong, “New Democratic Constitutionalism” was just a transitional period before entering the second type, “People’s Democratic Dictatorship” in Socialist Stage.

(2) “People’s Democratic Dictatorship”

According to Mao, “Socialist Society” is the “Initial Stage” of the Communist Society, and Communism is considered to be the final destination of the socialist society. In the Socialist stage, “People’s Democratic Dictatorship” replaces the “New Democratic Constitutionalism”. But a major difference between “New Democratic constitutionalism” and “People’s Democratic dictatorship” is that the latter moves closer to the Marxism doctrine, and it mainly serves as a function to help the CPC realize its ideal scenario, the Communist Society. Secondly, people’s rights and freedoms become more limited⁹⁹. Nevertheless, as with the “New Democratic Constitutionalism”, “enemies” under dictatorship are not entitled to enjoy almost any rights.

(3) The Dictatorship of the Proletariat

The third Maoist Constitutional Mode is “Proletarian Dictatorship”. Mao’s concept of “the dictatorship of the proletariat” vastly diverged from orthodox Marxist-Leninist theory.¹⁰⁰ For one thing, under the Maoist Proletarian Dictatorship, the scope of “people

⁹⁸ See *supra* note 48 at 49.

⁹⁹ See *supra* note 48 at 50.

¹⁰⁰ “Mao drew his notion of contradiction partly from Marxist dialectics but also from traditional Chinese philosophy. His ideas concerning classes seem to have originated more clearly in his exposure to Marxism-Leninism, although here too he gave the concept a distinctive Chinese twist.” See Kenneth Guy Lieberthal, *Governing China: from revolution through reform*, 2nd ed, (New York:

(proletariats)” had been narrowed down to working and peasant class, yet the subjects under dictatorship had been massively expanded.¹⁰¹ For another, Maoist version committed more Populism than the original Marxist version. “Maoist dictatorship of the proletariat” had reached its peak during the Cultural Revolution (1966-1976), and even enshrined by the PRC Constitution of 1975 and 1978.

For better understanding the Maoist’s constitutional system, we have listed three indicators from the model of “Mature Constitutionalism”: “Rule of Law”, “Constitutional Supremacy” and “Separation of Power” as showed in the following Table.

W.W. Norton, 2004) at 73.

¹⁰¹See *supra* note 48 at 49.

Table 1 Three “Constitutional Models” in Maoist Era and their Coherency with “Mature Constitutionalism”:

Maoist Constitutional Model	Landmark Document	Rule of Law	Constitutional Supremacy	Separation of Power
“New Democratic Constitutionalism” (1940s-1954)	“The Common Program” (1949)	(1) Generally Upholding the values of Law ¹⁰² (2) Abolishment of the ROC legal system. (3) Maximum scope of “People” and Minimum scope of “Enemies” being suppressed ¹⁰³ . (4) Constitutionally recognizing civil rights and political rights	(1) Enshrining Parliamentary Supremacy (Article 12 of the Common Program) (2) Instrumentalism: Goal of the Constitution (Common Program): “prosperous” China and Socialist transition.	(1) Democratic Centralism (2) Abandonment of Judicial Independence, and Establishment of “People’s Judicial System”
“People’s Democratic Dictatorship” (1954-1966)	“1954 Constitution of PRC”	(1) “Legists View” ¹⁰⁴ (2) Classes under dictatorship ¹⁰⁵ : “those oppose, antagonize or sabotage Socialism” ¹⁰⁶ ; Other belong to category of “People”	(1) Enshrining Parliamentary Supremacy of NPC (2) Constitutional Supervisory power was vested with the NPC (3) Instrumentalism\Legalization:	(1) Democratic Centralism (2) Constitutional Recognition of Judicial Independence, with emphasis on “courts only comply with law.”

¹⁰² Mao put forward a proposition that “Constitution is a zongzhangcheng(总章程, means the collection of general policies)”, which enable CPC guide people through it. “Constitution is a zongzhangcheng, it is the fundamental law. We using such fundamental law to fortify the principle of “People’s Democracy” and “Socialism”, and provide a clear and correct path for all Chinese people, improving the enthusiasm of them.” Analysis and comments of the idea of “zongzhangcheng”, See *supra* note 43 at 7-10 [translated by author].

¹⁰³ “We will exert Dictatorship and absolute rule, oppress enemy of people...while exercise democratic rule within the people. People have the freedom of expression, right of assembly, right of association and other freedom. The electoral rights only grant to people but not the reactionaries.” Mao Zedong, *Selected Works of Mao Zedong*, 2nd ed (Beijing: renminchubanshe, 1991) vol 4 at 175 [translated by author].

¹⁰⁴ The “Legist view” refers to the the ancient Chinese Fajia (法家) School advocating the legal instrumentalism, with special emphasis on criminal sanction.

¹⁰⁵ Professor Tai comments that, the People’s Democratic Dictatorship is in the middle of the other two Maoist constitutional systems, yet there is still different “level” of such “democratic dictatorship”. The broader scope of “people”, the scope of dictatorship become narrower, and such level of “People’s Democratic Dictatorship” move toward “New Democratic Constitutionalism”. On the contrary, if the scope of “people” become narrower, then the scope of “dictatorship” correspondently become broader, and this level of “People’s Democratic Dictatorship” will approach more to the “New Democratic Constitutionalism.” See *supra* note 48 at 56.

¹⁰⁶ “During the socialist construction period, all classes, social strata and groups who agree with, support and participate in socialist construction should be included into the scope of “People”, and all social forces and groups react against socialist revolution, or sabotage socialist construction, should be regarded as the enemy of people. See Mao Zedong, *Selected Works of Mao Zedong*, 2nd ed (Beijing: renminchubanshe, 1990) vol 5 at 244 [translated by author].

Maoist Constitutional Model	Landmark Document	Rule of Law	Constitutional Supremacy	Separation of Power
		(3) "State-granted" fundamental rights ¹⁰⁷ .	The goal of 1954 Constitution is building Socialism.	
Dictatorship of the Proletariat (1966-1978)	"1975 Constitution of PRC" & "1978 Constitution of PRC"	(1) Only "Workers, Peasants and Soldiers" were counted toward "Proletariats", while other classes should be "suppressed". (2) "Dictatorship of Proletariat" became monster swallow up all fundamental rights and constitutional order ¹⁰⁸ (3) Legal Nihilism ¹⁰⁹	(1) Supremacy of CPC (Article 2, Article 16 of 1975 Constitution ¹¹⁰ and Article 2 of 1978 Constitution) (2) Instrumentalism: Goals of 1975 & 1978 Constitution: Realizing Maoist Communism.	(1) "Party led everything" (2) Abolishment of any form of judicial independence

Although Maoism has increasingly become a relic for contemporary PRC, the Mao Zedong era is the most important period forming CPC's political theories, and its vast impact on the PRC political and constitutional development should not be underestimated¹¹¹. Some might argue that "What Mao said was not what he thought", and indeed many instances suggested Mao himself personally did not act in accord with such beliefs. However, as suggested by Michael Dowdle, for "listening constitutional voices", "the fact of the matter is that over the long term, the actual intention of the

¹⁰⁷ "Due to the fact that the Socialist Constitution is in the historical stage of Socialism, classes, class contradiction and class struggle still exists. Therefore, the practice of rights should comply with the need of class struggle." See *supra* note 30 at 35.

¹⁰⁸ Professor Lieberthal has provided a reliable explanation for the motivation of Mao, : Despite Mao's inherent flexibility, the ideology (especially proletariat dictatorship, noted by this article) should be taken seriously. Mao believed that it would be impossible to the world's most populous country solely on the basis of formal government administration. He would have to instill in the people certain principles and a commitment to certain types of authority that would enable him not only to remain in power but also to remold the country over which he ruled. Moreover, in a political system whose technical and human limitations greatly restricted the information available to the leaders and their ability to analyze the consequences of their own policy options, moreover, ideology would be a key tool for ensuring compliance among lower-level officials. See *supra* note 100 at 63.

¹⁰⁹ "Mass yundong (campaign)" is the major form of this. "Yundong were concentrated attacks on specific issues through mass mobilization of the populace. Their broad goals included sociopolitical transformation and economic development." *Ibid* 65-66.

¹¹⁰ Article 16 of 1975 Constitution even stipulated "NPC is a state organ under the leadership of the CPC." Also, according to these two Constitutions, Military were directly led by CPC.

¹¹¹ For example, as observed by Shambaugh, the party-state may have been born by armed revolution led by Maoist strategies. Thus even for today, any full consideration of the development of the Party/State and building of state socialism in China during the period must "bring the soldier back in" to the discussion. David Shambaugh, "Building the Party-State in China, 1949-1965: Bringing the Soldier Back in", in Timothy Cheek and Tony Saich, eds., *New perspectives on state socialism in China* (New York: M.E. Sharpe, 1997) 125 at 147.[Cheek & Saich]

speaker does not really matter in determining the effect of the speech.¹¹² Instead, “It is the interpretation of the listener, not the speaker, which determines the meanings that attach to ideas.¹¹³” For example, we do not and should not deny the constitutional importance that Americans attach to what they call “Jeffersonian democracy”, simply because its founder and namesake, Thomas Jefferson, willfully violated its principles by owning slaves¹¹⁴. What Mao really thought have limited or no impact on constitutional development after 1978 in China, and let alone its influence on today and, of course, future. But his articulation still has important influence on both CPC constitutional theories as well as constitutional practice in today’s PRC polity.

2.1.2 Deng Xiaoping’s “Socialism with Chinese Characteristics”

Deng Xiaoping is a very important turning point from Orthodox Marxist-Leninism and Maoist revolutionary theories to current CPC’s constitutional discourse. For revolutionary generations in CPC survived after the 1978, the Cultural Revolution altered them to the dangers of political leadership unfettered by institutional restraints¹¹⁵. On the other hand, the incongruity between Marxist theory and Chinese reality is officially explained by China’s continued economic backwardness, and the resulting contradiction between the country’s relatively “advanced” productive relations and its low level of productive forces. Thus, not only all energies are to be devoted to developing “modern productive forces”¹¹⁶, but also theorists began to develop new theories for coping with this radical change. Therefore, starting with Deng’s era, “Commodities, which Marx, Engels, Lenin,

¹¹² See *supra* note 41 at 128-129.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Pitman B Potter, *From Leninist discipline to Socialist Legalism: Peng Zhen on Law and Political Authority in the PRC* (Stanford: Stanford University Press, 2003) at 117.

¹¹⁶ Maurice Meisner, “Marx, Mao, and Deng on the Division of Labor in History”, in Arif Dirlik & Maurice Meisner, eds, *Marxism and the Chinese experience* (New York: M.E. Sharpe, 1989) 79 at 110. [Dirlik & Meisner]

Stalin, and Mao all took as the essence of the capitalist mode of production, have been redefined by China's post-Mao rulers as necessary and healthy elements.¹¹⁷ In response, the CPC's political theories regarding the realm of constitutional system has been altered as well. Therefore, after the Cultural Revolution, the "dictatorship of the proletariat" as the representative of the Maoist ideology gradually had become a "negative asset" for the CPC's governance. In this sense, a new theory, "Socialism with Chinese Characteristics", raised by Deng Xiaoping, is actually an official statement to discard the old-fashion "Dictatorship of the proletariat" and Maoist Class Struggle.

Deng Xiaoping is known as actual leader of the CPC after the Cultural Revolution until 1992, the "second generation leader" of PRC, and also the main founder of "Socialism with Chinese characteristics". Under Deng's leadership, "modernization" has taken the place of the "class struggle". In the governing sphere, Deng Xiaoping began to promote the legalization and institutionalization of PRC governance structure, with particular adherence to the "Four Cardinal Principles" to maintain the CPC's authoritarian rule and party/state system. So, under the "silent revolution", Charismatic Authority gradually transfers to the legal domination. Marked by the 1982 Constitution of PRC, Deng and his team had restored Maoist theory of "people's Democratic dictatorship", which has replaced the "dictatorship of the proletariat" in the 1978 Constitution of PRC. Nevertheless, the restored "People's Democratic Dictatorship" has marked great differences from Maoist People's Democratic Dictatorship as noted *infra*.

¹¹⁷ Edward Friedman, "Theorizing the democratization of China's Leninist State", in *ibid* 171 at 182.

1 “From Marxism-Leninist discipline to Socialist Legalism¹¹⁸”

To quote Arif Dirlik’s words, in the 1980s, China had soon abandoned “socialism as an ideology of revolution” and embraced socialism as the ideology of modernization¹¹⁹. To smooth the “Four Modernizations”, in 1980s, immediately after the “people’s democratic dictatorship” theory had been reinstituted, the “legalization and democratization” had become the new official rhetoric. In the Deng Xiaoping era, the State gradually withdrew from the society. Though Deng still launched “Mass Movements” occasionally, such as 1980’s prolonged “Anti-spiritual Pollution Campaign”, undoubtedly “Mass movement” is gradually replaced by the institutionalized and legalized efforts. In fact, when Deng Xiaoping resumed his position in the Party in 1978, he immediately put forward “the Sixteen Character Policy” to “construct the socialist legal system”: “There must be law to rely upon; these laws must be followed; enforcement must be strict; violations must be corrected. (*youfakeyi, youfabiyi, zhifabiyan, weifabijiu*)¹²⁰”.

Furthermore, in 1981 the Central Committee of the CPC issued the *Resolution on Certain Questions of Party History since Founding of the PRC*, stating: “one of the important reason why Cultural Revolution could happen is because we did not ensure the inner-party democracy, nor institutionalize or legalize democracy in the State and Society.¹²¹” It was the first time “legalization and democratization” has been public included into the Party Document. Of course, unlike Mao, Deng’s enterprise was also operated by his comrades as well. For example, Peng Zhen, as secretary of CPC Politics and Law

¹¹⁸ From Leninist Discipline to Socialist Legalism” is the name of book, *From Leninist discipline to Socialist Legalism: Peng Zhen on Law and Political Authority in the PRC*, authored by Pitman B Potter (Stanford: Stanford University Press, 2003). See *supra* note 115.

¹¹⁹ Arif Dirlik, “Revolutionary hegemony and the language of revolution: Chinese Socialism between present and future”, in Dirlik & Meisner, *supra* note 116, 27 at 27.

¹²⁰ Deng Xiaoping, *Selected Works of Deng Xiaoping*, ed by CCCPC Party Literature Research Office, 2nd ed (Beijing: renminchubanshe, 1993) vol 3 at 163.

¹²¹ CPC, *Resolution on Certain Questions of Party History since Founding of the PRC*, 1981.

Committee and later the chairman of the NPC Standing Committee in the 1980s has played a significant role to legalize and institutionalize the Party State. Peng has founded a power base for ongoing institutional development of the NPC. The process of “Legalization and Institutionalization”¹²² of Party/State”, was identified as a process “from Leninist Discipline to Socialist Legalism” by Pitman B Potter¹²³. Following the 1980s, the legal system that was to pursue goals embodied three broad characteristics- formalism, generality, and punishment¹²⁴.

Even after the Tiananmen Incident in 1989, it had been witnessed that Deng Xiaoping still continually pursued the theory of “legalization” and “institutionalization” in following speeches from himself and his protégés. Example includes Deng’s “Southern Tour”, Qiao Shi’s speech in 1993¹²⁵ and 8th NPC’s outline in 1996¹²⁶.

In 1997, Deng Xiaoping passed away, yet this had not suspended or terminated the

¹²² However, even for Peng Zhen who genuinely concern the “legal construction”, Political and legal institutions were not vehicles for popular participation and institutional restraint, but rather were to be mechanisms for policy enforcement by the Leninist vanguard Party. Even Peng Zhen, the advocator of legalism, still held to the requirements of Leninist discipline that all institutions of political authority, including those in the judicial realm, should remain subject to Party control.

For example, The 1982 Constitution enacted dictum “all are equal before the law”. However, it was not so much the protection of citizens from the state; rather, it was to ensure that the state acted in accordance with set procedures and policies rather than the preferences of individuals leaders. See *supra* note 115 at 27, 80, 124.

¹²³ “Under norms of Leninist discipline, power and accountability flow in one direction, as party and state officials responsible only to their superiors have broad authority to direct and sanction subordinates in their organizations and in society at large...The Socialist legalism describes a modality of regulation which combines policy goals of socialism with operational norms.” See *supra* note 115 at 7.

¹²⁴ Potter pointed out that: (1) Peng had noted repeatedly that law were the formal articulation of policy. Laws were to be written down, as formal statements of official norms, and legal institutions were to act according to formally enacted rules. (2) The goals of generality could be achieved when law apply to rulers and ruled alike- the Party itself should do things according to law. Although Party should play an important role in the policy-making processes on which specific legislation was based, Peng held that once enacted, legislation must be enforced generally- clearly indicating Party officials were not beyond the purview of the law.(3) Peng Zhen rely on the punitive force of law, noting on several occasions that law’s role as an instrument of policy was to serve as a basis for punishing violators. “Law is to be a weapon (wuqi) of policy and is to use punishment as the basis for policy enforcement.” See *ibid* at 141.

¹²⁵ In a sign of this stage was in April 1993 Qiao Shi’s speech in the first session of the eight National People’s Congress Standing Committee “the NPC Standing Committee to ensure the effective implementation of the Constitution and the law”. In order to do that, “we should further develop the specific constitutional system and procedure to improve the supervision on the implementation of the constitution.” For the first time, “supervision on implementation of the constitution” was included in the “arsenal” of the CPC political theories. See Fan Jinxue, “Zhizhengdang xianzheng xiuyang fazhan zhi wojian [Comments on development of Constitutional Awareness of Ruling Party]” in Lin Feng, *supra* note 9, 217 at 221 [translated by author].

¹²⁶ In March 27, 1996, the Eighth National People’s Congress approved “Outline of people’s Republic of China National Economic and social development Ninth Five-Year Plan and the Objective of 2010”, which contain the slogan “governing the state in accordance with law, building a socialist rule of law State”. This was the first time CPC announced “rule of law” in the form of a national legal document in PRC history. See *ibid* at 224.

process of transition of CPC political theories. In the same year, the Report of the 15th CPC National Congress raised the slogan of “legalization and institutionalization” by officially putting forward “rule of law” theory: “Governing the State in accordance with law, building a Socialist Rule of Law State¹²⁷”.

Therefore, from “Institutionalization and legalization” to “Rule of Law”, the concept of Law has been incorporated into “Socialism with Chinese characteristics”, as an important instrument to promote modernization. From the viewpoint of Constitutionalism, the slogan is also very important because it might imply a development “from totally unlimited political power toward governance subject to legal restrictions is an important step toward constitutional State.¹²⁸” The CPC’s political theories evolved in Deng’s era has left a considerable space for ongoing constitutional development in the PRC Polity. It is also true that “the only casualty of the ideological activity to accommodate these change may be the concept of socialism itself¹²⁹”, if such “Socialism” refers to the Maoist Revolutionary Ideology.

2. Adjustment of the Relationship between the Party and State in Deng Xiaoping Theory

Deng Xiaoping Theory also involved the adjustment of relation between Party and State.

The first change Deng advocated is that “Party leadership should be subject to formal

¹²⁷“Governing the state in accordance with law, is under the leadership of the party, the people in accordance with the provisions of the Constitution and the law, and through various channels and in various ways to manage state affairs, manage economic and cultural enterprises, and engage in management of social affairs, making sure that all work of the state according to law, and gradually realizing the institutionalization and legalization of socialist democracy, and ensuring the legal system not to compromise because of changes in the leadership, nor because of the change of leaders’ views and attention.” Report on the Fifteenth National Congress of the CPC (2), CPC News (12 September 1997), online: CPC News <<http://cpc.people.com.cn/GB/64162/64168/64568/65445/4526287.html>>, last accessed on April 15 2015.

¹²⁸ Larry Cata Backer, “Gongchandang yu zhongguoshi de xianzheng tizhi: yidang zhuanzheng de xianzheng fazhan lilun [CPC and Chinese constitutional system: Constitutionalism theory under One party Rule”, in Lin Feng, *supra* note 9 181 at 194 [translated by author].

¹²⁹ Arif Dirlik “Postsocialism? Reflections on ‘Socialism with Chinese Characteristics’”, in Arif Dirlik & Maurice Meisner, eds, *Marxism and the Chinese experience* (New York: M.E. Sharpe, 1989) 362 at 380.

law.” For example, as early as 1982, Deng used his own stature to pass the new Party Constitution in the 12th CPC National Congress, which stated the Party’s activities should be circumscribed within the scope of the Constitution and the Law¹³⁰. Thereafter, “separation of Party and government” was put forward in 1986 to 1987¹³¹. According to Deng, “the Party should only handle problems stipulated in Party Discipline, and legal problems should be left to the State and Government”, because “if the Party interfere too much on the legal problems, is not conducive to people to have legal awareness.”¹³² Deng’s protégé, Zhao Ziyang, the general secretary of the CPC Central Committee of the 13th Party National Congress, gave a famous speech regarding the idea of “separation of party from government” in the 1987. Zhao stated that the Party should exercise political leadership but not to become involved in the routine work of the governmental institutions, “the Party’s political leadership is ensuring that the party’s proposition become the State’s Will through the legal process, and through the exemplary role of the party organization and party members to lead the broad masses to implement the party’s line (*luxian*) , principles and policies.”¹³³ In addition, on the preparatory session of Thirteenth National Congress of the CPC, Zhao Ziyang stressed that, “the key of the political reform firstly lies in the separation of Party and government.”¹³⁴ However, unlike statement of “Legalization and Institutionalization”, the discourse of “Separation of Party and Government” did not survive the impact from the Tiananmen incident in 1989. After

¹³⁰ Also, in the same occasion, Hu Yaobang, the Party General Secretary, for the first time in the history of the CPC, put forward that, “the new Party Constitution regarding ‘activities of the party must conducted within the scope of the Constitution and the law’, become an important constitutional principle. The Party led the people to formulate the Constitution and laws, once the law passed by the state organs, the whole Party must strictly abide. See *supra* note 125.

¹³¹ According to Potter’s research, at that time, Deng, Peng Zhen and many senior leaders in the CPC considered that: (1) The Party, should manage economic life and in guiding the cultural and civil affairs of society. If left the economy uncontrolled, Chinese society would quickly devolve into the vicious state of laissez-faire capitalism that seemed to characterize Nationalist China in the 1920-1930s. (2) And the Party/State was to control the reigns of cultural life in order to ensure that people retained a collective ethic, one that would ensure continued fealty to the state even as its primary goal was social welfare. Such socialism was supported by ruling elites wholeheartedly in the post-Mao 1980s era. See *supra* note 115 at 140-141.

¹³² *Supra* note 120.

¹³³ See *supra* note 125 at 128.

¹³⁴ *Ibid.*

1989, the “Separation of Party and Government” seemingly rarely appeared in speech of Party leaders and Party Documents.

3. Party Leadership and Four Basic Principles

On the other hand, as early as 1979, Deng Xiaoping had put forward the “Four Basic Principles” which clearly outlined the boundaries for political reform discourses in China, that the Party’s hegemony and leading position could not be challenged¹³⁵. In fact, Deng never denied this purpose: “the political reform of the Party/State system, is not to weaken the party’s leadership, nor to weaken Party disciplines.” Instead, according to Deng, the purpose of reform is to uphold and strengthen the Party leadership as well as the Party discipline, “In China, uniting hundreds of millions of thoughts and power to engage in socialist constitution, without a party which comprises party members with a high degree of consciousness, discipline and self-sacrifice spirit, without a party can truly represent and unify the masses, without a party exercise unified leadership, it is impossible to imagine. Without such a Party, China will simply fall apart and is unable to achieve any progress.”¹³⁶

Deng’s reasons are fairly straightforward to be understood. First, Deng’s bottom line is under no circumstances are the Party’s sole leadership could be destabilized. Thus adhering to the four basic principles is necessary. Secondly, the leadership of the Party guarantees unity and stability of the state which provide basic security for economic development. Third, any reforms leading to a “chaotic situation” are not an option. Perhaps more fundamentally, the unique historical development of “Constitutionalism”

¹³⁵ Tony Saich, *Governance and politics of China*, 3rd ed (Basingstoke, UK: Palgrave Macmillan, 2011) at 133.

¹³⁶ Deng Xiaoping, *Selected Works of Deng Xiaoping*, ed by CCCPC Party Literature Research Office, 2nd ed (Beijing: renmin chubanshe, 1994) vol 2 at 341-342 [translated by author].

and the unsuccessful constitutional experiences in Republican period had still influenced Deng and other senior Party leaders in the 1980s, that the “Constitutionalism”, “Constitutional Supremacy” or “Check and Balance” are just part of “Western Mode Democracy” may not suitable for China’s condition. Therefore, they refused them wholeheartedly, without hesitation. Thus, it is not difficult to understand Deng’s following famous sentence: “We can not copy American political system... because if China copy multiparty elections or check and balance, it would certainly create chaos (*dongluan*).¹³⁷”

In sum, Deng Xiaoping Theory has replaced the “proletarian Dictatorship” by legalizing and institutionalizing Party/State and tried to adjust the relationship between the party and the state within the CPC political discourse. These adaptations, along with limits from the Four Basic Principles have set the tone for the continuing evolution of CPC’s political theory after Deng’s death. Deng’s “pragmatism”, as demonstrated in his theory of “Socialism with Chinese Characteristics”, has provided a strong ability for CPC to adjust the theory to suit the policy¹³⁸, from the “private property” to market economy, from the rule of law to human rights, from “governing the state in accordance with law” to the newest “governing the country in accordance with the Constitution”. This has offered a more comfortable environment cleared away the ideological obstacles for constitutional development in Post-1978 China, as we will discuss in later parts of the

¹³⁷It is worth noting that “dongluan” (动乱, “chaos” or “chaotic”) is a fully derogatory term in Chinese. In Chinese context, if a State has been referred as “dongluan”, that means the country not only unable to maintain a stable political situation, but also the basic social order or people’s basic rights or interests (even life) could not be guaranteed. Some PRC scholars have offered a further explanation for Deng’s words. “The unfeasibility of check and balance is not suitable for conditions of current China, because it denies the unity of people’s sovereignty, and denies the people’s highest right to determine and circumscribe the supreme power of the state. Applying ‘Check and balance’ would make us running in opposite direction of socialist democracy. See *supra* note 30 at 40 .

¹³⁸ A saying has become prevalent in China’s society since 1990s, “Socialism is a huge box, you could put anything you want.” (社会主义是一个框, 什么都可以往里装。)

Chapter.

2.1.3 Evolution of Political Discourse in Post Deng Xiaoping Era and Constitutionalism

1. Jiang Zemin Era: “Rule of Law” and “Three Represents”

After Jiang Zemin was assigned as the third generation of core of leadership of CPC, Jiang has refined CPC’s “Socialism with Chinese Characteristics” in a new era.

The first notable slogan is “Rule of Law”. In 1999, the CPC Central Committee submitted a “Legislative Suggestion of Constitutional Amendment” to the NPC, to amend the Article fifth of the Constitution with “governing the state in accordance with law”. In January 1999, Jiang further stated: “the first prerequisite to governing the state in accord with law is governing the state in accordance with Constitution.”¹³⁹. At the same time, Jiang also stressed the combination of Rule of Law and Rule by Virtue¹⁴⁰. On the eve before Jiang’s formal resignation of the General Secretary of CPC Central Committee in 2002, his report in the sixteenth CPC National Representatives Congress clearly stated: “the Constitution embodies the unity of the party’s proposition and volition of the people. Any organization or individual is not allowed to have the privileges act beyond the Constitution and Law.” This suggests that, the narrow sense of the idea “constitutional

¹³⁹ In 2001 December Jiang’s second hand, the Chairman of Standing Committee of NPC, Li Peng, indicated that the preamble of the constitution also has the highest legal effect: “the preamble to the constitution is the most concentrated expression of the party’s proposition and fundamental volition of the people... similar with provisions in the Constitution, the preamble has its highest legal effect. Thus violating the preamble of the Constitution is violate the Constitution in most important aspect.” The preamble contains “adhering to the reform and open policy”, as well as “Four Basic Principles”. See *supra* note 125 at 229.

¹⁴⁰ However, once CPC began to emphasize the “rule of law”, a great challenge to political morality of Communist regime has formed. Because in the past, CPC, as “moral authority” has always tried to build the highest moral appeal, and to conduct social mobilization rely on moral incentives. However, the core of rule of law famous individual behavior and legal responsibility, rather than moral stage, which resulted the legitimacy of the regime transit from moral legitimacy to legal legitimacy basic political rights. This might explain why in the period of Hu or Xi, “rule of virtue” has lost its attention for CPC’s leaders, which gradually fading out of the political discourse of CPC. Nevertheless, this does not mean the Communist Party publicly has abandoned the slogan of “rule by virtue”. In fact, in October 2014, the Fourth plenary session of eighteenth National Congress of CPC just mentioned “combination of rule of law and rule by virtue”.

supremacy” has been incorporated into the contemporary CPC political discourse.

Another development in CPC political theory is the “Three Represents¹⁴¹” theory put forward by Jiang Zemin in 2000. In theory, the “three represents” and “two vanguards¹⁴²” which also put forward by Jiang Zemin manifested the transition of the CPC from the “Vanguard Party of Proletariat” to “Vanguard Party of all Chinese Nation”. “Bourgeois” now could become CPC members¹⁴³. The subtext of the “Three Represents” is to remove the ideological barrier to allow the bourgeois to enter the Party and sweep off the traditional ideological bias toward “new social stratum” within the CPC¹⁴⁴. In fact, “Three Represents” was an important effort to restore and reinforce the base of party’s ruling¹⁴⁵. From the perspective of Constitutionalism, the “Three Represents” ideologically included the most peoples and social classes into the scope of “people’s democracy”, which also, if used Maoist phraseology, is a sign manifesting that the “People’s democratic dictatorship” has a strong potential tendency to return “New Democratic Constitutionalism”.

¹⁴¹ “The CPC always represent the requirements for developing China's advanced productive forces, the orientation of China's advanced culture and the fundamental interests of the overwhelming majority of the Chinese people.”

¹⁴² “The CPC is always the vanguard of Chinese working class, and the vanguard of all Chinese nation and Chinese people.”

¹⁴³ As Jiang himself once explained, “the ‘Three Represents’ is conducive for ‘expanding the mass foundation of the Party’, because according to incomplete statistics, the number of private enterprises has reached 176,000 in 2000, and had recruited 2000,000 of the staff. Whether from the view of economic strength, or from the number of private enterprises, they are an important part of our society. If we do not face this reality, nor absorb (争取) this social force, or even intentionally or unintentionally to push them to our opposite, then the consequence will be detrimental to our party. Jiang Zemin, “Kexue duidai makesizhuyi” [Viewing Marxism by Scientific Attitude], in *Selected Works of Jiang Zemin*, ed by CCCPC Party Literature Research Office, Beijing (Beijing: Renmin chubanshe, 2006) vol 3 at 341 [translated by author].

¹⁴⁴ In fact, Zheng Bijian, the executive president of the Central Party School and Jiang Zemin’s advisor, emphasized that the Three Represents was an theoretical attempt to come to grips with: (1) Globalization and the advance of science and technology; the diversification of Chinese society, social organizations, and lifestyles; and lax party organizations and the need to improve the CPC rank and file. Nevertheless, like other ideological campaigns of the post-Mao era, Jiang’s new theory was a codification of policies already under way. See *supra* note 1 at 113.

¹⁴⁵ In practical sense, one could argue that the Three Represents is a “fake ideological expression”, because apparently there is no one in the secular world could “always represent requirements for developing China's advanced productive forces”, while “the orientation of China's advanced culture and the fundamental interests of the overwhelming majority of the Chinese people.” Zhang Boshu, *Jiegou yu jianshe: Zhongguo minzhu zhuanxing zonghengtan* [Deconstruction and Construction: Multiple discourse on China’s Democratic Transition] (Hong Kong: Morningbellpress, 2009) at 133 [translated by author].

2. Hu Jintao's Period: New Constitutional Discourses

Generally speaking, Hu's speeches about "scientific development", the "harmonious society", and "advanced socialist culture", were "largely meaningless to the population at large."¹⁴⁶ However, CPC's political theory in Hu's era, from 2002 to 2012, was marked by increasingly incorporating discourses of Constitution and constitutional mechanisms. For example, in 2002, when Hu Jintao was first elected as the General Secretary of the CPC Central Committee, he mentioned that the Constitution of PRC "has the greatest authority and the highest legal effect", and advocated all (including the CPC) should "uphold the dignity of the Constitution and ensure the implementation of the Constitution."¹⁴⁷ Specifically, Hu Jintao also indicated that, the Party and state should "improve the constitutional supervision mechanism, ensuring any activities violating the Constitution should be corrected timely." Furthermore, Hu listed constitutional responsibilities for constitutional organs in PRC Polity including the NPC, administrative organs and judiciary¹⁴⁸. Importantly, Hu's speech has indicated a change in CPC's view on Constitution that it began to view the Constitution as a protector of fundamental rights rather than "a set of General Rule" as Maoist tradition had viewed it.

¹⁴⁶ See *supra* note 146 at 8.

¹⁴⁷ Hu Jintao, "Zai shoudi gejie jinian zhonghua renmin gongheguo xianfa gongbu shixing ershi zhounian dahui shang de jianghua" [Speech at a rally marking the 20th anniversary of the promulgation and implementation of current Constitution], Xinhua News, online: <http://news.xinhuanet.com/newscenter/2002-12/04/content_649591.htm>, last accessed on April 15 2015 [translated by author].

¹⁴⁸ (1) The NPC and its Standing Committee, should always consider the fundamental interests of the state and the people, fully protect constitutional freedom and rights of citizens during the legislative process; the NPC must assume the responsibility to supervise implementation of the Constitution, resolutely correct any constitutional contraventions; the Standing Committee of the NPC should perform their constitutional to properly interpret the Constitution, issuing the necessary interpretation regarding problems occurred during in the implementation of the constitution.

(2) All levels of local people's Congress and their Standing Committee must guarantee the Constitution are observed and implemented in every region.

(3) State administrative organs, judicial organs and procuratorial organs at all levels should adhere to the constitution and administrate in accordance with law, and should constantly improve the quality of their personnel and the level of legal enforcement.

(4) Any individual or organizations should not have privileges beyond the Constitution and Law.

(5) We must adhere to the leadership of the CPC, Party organizations at all levels and all Party members should play an exemplary role in abiding by the Constitution, and should strictly act in accordance with the Constitution. See *supra* note 125 at at 230-231 [translated by author].

Another development during Hu's era was that "constitutional supremacy" has been highlighted hitherto by the CPC's ritual performance. An important example is that in 2003, for the first time, as a top party leaders, Hu public took the oath as a president of office: "I must fulfill the duties entrusted by the Constitution, through hard work to dedicate the state and people."¹⁴⁹ In another speech, Hu Jintao, for the first time in the history of the CPC, put forward that "without restriction and supervision, it will inevitably lead to abuse of power and corruption." Thus, "to strengthen the restriction and supervision of power is an important task socialist democracy."¹⁵⁰ In 2007 17th Party Congress, Hu's report repeated such view.¹⁵¹ Therefore, by itself, such discourse in Hu's era has moved beyond the Marxism-Leninism orthodoxy of "proletarian sacred character" and Mao Zedong's "proletarian human nature". In Hu's era, corruption brought by unrestricted power forced the CPC political discourse to indirectly admit that the character of "proletariat" is no longer sacred. In other word, the "Vanguard Party", like other parties in the world, also could be eroded by power, and need to be restricted and supervised, although the CPC still explicitly rejected the separation of the powers or multi-party competition.

2.1.4 Xi Jinping Era: Return to "Socialist Rule of Law"

There is more significant change in the CPC since Xi Jinping took over the General Secretary in 2012. In December 2012, Xi delivered a speech during the 30th anniversary celebrations of the 1982 Constitution. During his speech, Xi upheld the protection of

¹⁴⁹ In 2008, when Hu Jintao was once again second elected as the President of the PRC in the Eleventh NPC, Hu repeated this oath. The Wu Bangguo, chairman of the NPC Standing Committee, was also took the oath of office that "we, all the NPC representatives, take the oath to be loyal to the responsibility vested by the Constitution. *Ibid* at 231.

¹⁵⁰ *Ibid* at 233.

¹⁵¹ In this report, Hu emphasized, "we should improve the mechanism of restraint and supervision... ensure that the power being properly exercised, must let the power operating openly and transparently." The restriction and supervision mechanism is through "establishing a power structure that decision-making, executive power and supervisory mechanism could check and supervise each other but remain mutual coordination. *Ibid* at 238.

citizens' rights and freedoms as the essence of the Constitution¹⁵² stressing that the highest legal effect of the Constitution must be the necessity to build a constitutional supervisory system.¹⁵³ Xi, for the first time, also mentioned that "the Party would discipline the Party according to the Constitution of CPC, while governing the State according to Constitution of PRC". Finally, Xi greatly endorsed the development of a fairer and more efficient justice system, and supported the independence of courts stating, "deepen the reform of the judicial system, and guarantee (the courts') to independently and impartially exercise the judicial power in accordance with the law."¹⁵⁴ In 2013, Xi stressed "to strengthen the restriction and supervision of public power, we should cage the power by institutional means."¹⁵⁵ This means the CPC's ideological return to the "rule of law" rhetoric¹⁵⁶. In an early 2014 speech, Xi explicitly abandoned the old pattern of "maintaining stability" previously upheld by Hu Jintao: "Right-defended should be the foundation of stability, and the essence of maintaining stability is protecting rights." The "Harmonious Society" has been replaced by "freedom, quality, justice and rule of law" as part of the "socialism core values." Albeit lacking legal effect, those statements further created a more compatible atmosphere for constitutional development.

¹⁵² "Fundamental rights of citizens...are the core of the constitution." "Only ensure that people enjoy extensive legal rights and freedoms, the constitution can be deeply rooted in the hearts of the people." "History has suggested if the constitution is ignored, weakened or even damaged, people's rights and freedoms cannot be guaranteed."

¹⁵³ "The NPC and its standing committee, and other relevant organs of the state should take on the constitution supervision, improve the quality of supervision mechanism and procedure, to redress unconstitutional actions."

¹⁵⁴ Nonetheless, a long-established view from Mao's period still dominated Xi's speech. For example, the only measure for circumscribing CPC's authority is still remaining an old-school propaganda that the party would "take the lead to observe the constitution."

¹⁵⁵ Xi Jinping, "ba quanli guanjin zhidu de longzi li"[Cage the power by institutional means] (Jan 22, 2013), online: Xinhuanet <http://news.xinhuanet.com/politics/2013-01/22/c_114459610.htm>, last accessed on April 15 2015.

¹⁵⁶ In May 2013, the CPC issue two regulations are considered as important moves to improve the CPC's internal management and sharpen intra-Party supervision: *Regulation of formation of intra-Party rules* and *Provision of record system intra-Party rules and normative documents*. (《中国共产党党内法规制定条例》、《中国共产党党内法规和规范性文件备案规定》) Here stipulated Central CPC organs should conduct constitutional review before issuing any intra-Party rules, and authorize specific CPC organ to repeal any Party rules against the Constitution of PRC. More importantly, as discussed later, the Standing Committee of the NPC officially terminated the Reeducation through Labor system and relevant regulations, which allowed government deprivation of citizen's personal freedom without judicial decision up to four years. These small progresses somehow related to Xi's attitude to the Constitution to some degree. Under the Party/State structure, opinions from CPC elites often play a significant role in "sensitive affairs".

The more recent development was the “Statement on Rule of Law 2.0”. During the “Fourth Plenary Session of Eighteen Party Congress CPC” in October 2014, for the first time the entire Party Plenary discussed the issue of “Rule of Law” for the first time. Xi Jinping and his team further issued policies upholding the rule of law, the constitutional system, power supervision and restriction, the protection of fundamental rights and freedoms, and judicial reform. The Plenary issues *Central Committee of CPC Resolution on Matters regarding Comprehensively Advancing the Rule of Law* (hereafter referred as “*Resolution*”), an endorsement for Xi’s high-profiled commitment to build a “Socialist Rule of Law”. The *Resolution* stated:

(1) The general goal for “governing the state in accordance with law”, is to build a socialist legal system with Chinese characteristics, building a “Socialist Rule of Law State.”¹⁵⁷

(2) Improving the system of constitutional implementation and supervision.

The *Resolution* states, “making every piece of legislation accord with the spirit of the constitution.” Specifically, “The NPC and its Standing Committee should improve the system of constitutional supervision as well as the procedure of constitutional interpretation mechanism.” “The NPC and its Standing Committee should strengthen the

¹⁵⁷That is, “under the leadership of the CPC, adhering to the socialist system with Chinese characteristics, and implementing the Chinese characteristic socialist rule of law theory, in order to form a comprehensive legal system, an efficient legal enforcement system, a strict legal supervision system, a powerful legal protection (on rights) system, and an advanced system of the inner-party regulations. (We should) jointly adhere to and promote the rule of law and governing by law, administrate according to law, adhere to the construction of state, government and society under rule of law, and realize the scientific legislation, strict law enforcement, judicial justice, improve the level of modernization of governing system and capability. In order to realize this goal, we must adhere to the leadership of the CPC, the people’s principal position(人民主体地位), the principle of all equal before the law, the combination of rule of law and rule by virtue, and the suitability of Chinese specific conditions.” CPC News, “Zhonggong zhongyang guanyu quanmian tuijin yifazhiguo ruogan zhongda wenti de jueding” [Central Committee of CPC Resolution on Matters regarding Comprehensively Advancing the Rule of Law], (29 October 2014) online: CPC News <<http://cpc.people.com.cn/n/2014/1029/c64387-25927606-1.html>>, last accessed on April 15 2015.

Filing and Review System, and all the normative documents should be included into the scope of filing and review system, the NPC and its Standing Committee should revoke and rectify unconstitutional and illegitimate normative documents.”

(3) The *Resolution* also suggested setting up a National Constitution Day and a Pledge of Allegiance to Constitution system.

(4) Indeed, for separation of power, the *Resolution* indicates a deepening understanding regarding operation of administrative power¹⁵⁸ and judicial power. With regard to judicial power under the slogan of “justice”, the *Resolution* highlighted a number of measures to protect the independence and impartiality of China’s courts. For the first time, the Resolution put forward, “without statutory matters, or through the due procedures, a judge or prosecutor shall not be transferred or discharged from office, or subject to removal or demotion and other sanctions.”¹⁵⁹

(5) The *Resolution* also entails measures to protect fundamental rights, which could be summarized as follows: On the one hand, the legislature should “strengthen key areas regarding human rights protection in legislation¹⁶⁰. On the other hand, the Resolution

¹⁵⁸ For the administrative power, the *Resolution* states the necessity “to promote the legalization of administrative organization, functions, scope of power, procedure and administrative responsibility, to implement the system of ‘list of governmental power’ (政府权力清单制度) of the government power list. We should strengthen the restriction and supervision of administrative power, improve the accountable fault-rectified mechanisms(完善纠错问责机制).”

¹⁵⁹ Another example was, “we should establish a system to record, public inform (of criticism) and responsibility tracing of leading cadres intervention of judicial activities. Any party and government organs and leading cadres are not allowed to make judicial organs to violate their statutory duty, or conduct activities sabotage judicial impartiality. Judicial organs shall not engage in any activities result from illegal intervention of the party and government organs and leading cadres.” Otherwise, sanctions from party discipline and criminal liability will be incurred. Another measure proposed by the *Resolution* is Protection for judicial personnel exercise judicial duties.

¹⁶⁰ “(The legislature should) strengthen legislative protection of equal rights, equal opportunities and quality before the law, protecting rights of the person, property rights, political rights and other fundamental rights of citizens from possible violation, and guarantee economical rights, cultural rights, social rights of citizens, and realize the legalization of citizens rights protection. (We should) improve the awareness of social respecting and safeguarding human rights, and expand the methods and channels of remedy of civil

advocates to “strengthening the judicial protection of human rights”.

(6) The *Resolution* was not seeking to decrease the interference of the Party, and instead calls for strengthening the unified leadership of the CPC¹⁶¹.

However, as Peerenboom commented, the *Resolution* is, to a great extent, an “old bottle for new wine”. Calling for Rule of Law, Respect for the Constitution, Protection of human rights, Independence of courts, and a Fair and Efficient judiciary is, of course, nothing new¹⁶². Also, some more fundamental problems were failed to be address in the *Resolution*¹⁶³. Nevertheless, the Fourth Plenary Session of the eighteenth Party Congress has made the political commitment of CPC closer to Mature Constitutional Model, offering more compatibility especially for the Rule of Law, constitutional supremacy and judicial development in PRC polity. In fact, the current CPC theory is most coherent with constitutionalism even in the PRC history. As we will explore in next two chapters, significant developments occurred for both the NPC and China’s courts one year after the *Resolution* was issued.

rights.

¹⁶¹ For example, the *Resolution* stated: “strengthening the Party leadership in legislative work, and refine the procedure for Party implement it decision on major issues in the legislative work. Where legislation involving major adjustment on system or policy adjustment, must be reported to the Party Central Committee for further discussion and determination. Constitution Amendment proposed by the Central Committee of the Party should go through the constitutional procedure. Major issues regarding enactment and revision of (ordinary) law must report to the Central Committee of the CPC by the Party Group(党组) of Standing Committee of NPC.”

¹⁶² Randall Peerenboom, “The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?” (August 12, 2014), online: Available at SSRN, <<http://ssrn.com/abstract=2479716>>, last accessed on April 15 2015 at 9.

¹⁶³ For example, as the *Resolution* states, “law is an important instrument for governing the state”, the view of legal instrumentalism still dominates the CPC legal discourse, rather than the rule of law concept in western jurisprudence. Another instance is, according to the *Resolution*, at the present stage the “legislative task” is to realizing the cohesion between legislation and procedure of decision-making, ensuring every major perform in accordance with law, and guaranteeing the legislation could accommodate the need of reform and economic-social development.”

Table 2 Evolution of CPC political theories after 1978 and Constitutionalism:

“Generation of CPC Leadership”	Rule of law	Fundamental rights	Supervision and Restriction of power	Constitutional supremacy
Deng Xiaoping’s Era (1978-1992)	(1) “Proletariat Dictatorship” was marginalized; transition from “class struggle” to “all equal before the law” ¹⁶⁴ ; (2) “Institutionalization” and “Legalization” ¹⁶⁵ (3) “Party observe the law”(1978-1986;1986-1992) “Separation between Party and the Government” (1986-1989) ¹⁶⁶ .	(1) Explicitly rejecting the concept of “Human Rights”, Condemning “Human Rights” as a weapon used by “peaceful evolution” by the West; (2) First official discussion on “fundamental rights”	(1) Explicitly rejecting the idea of “separation of power”; (2) Emphasizing the “political consciousness of Proletarian Party”, impliedly suggests Party would not eroded by Power;	(1) Restored the supremacy of Constitution (2) Upheld the Supremacy of the NPC. (3) Instrumentalism: the goal of Constitution 1982: Open and Reform, “Four Basic Principles”
Jiang Zemin’s period (1992-2002)	(1) From “rule by law” to “Socialist rule of law”; (2) Emphasizing the combination with “Rule by Virtue”. (3) Judicial Reform: Professionalism	(1) Discourse on Human Rights in the late 1990s; (2) Commence to systematically and widely discuss “fundamental rights” From 2000 ¹⁶⁷	(1) Explicitly rejecting separation of power, check and balance, multi-party competition, Bicameral system ¹⁶⁸ . (2) Discourse on Circumscribing administrative power”.	(1) Supremacy and the Constitution and Supremacy of the NPC (2) Beginning advocate, “implementing the Constitution” and the issue of “constitutionality”. (3) “Four Basic Principles”
Hu Jintao’s Period (2002-	(1) From “governing the state in accordance with law” to	(1) “Human rights” with “Chinese characteristics” ¹⁶⁹ .	(1) “Absolute power lead to absolute corruption” (2) Rejecting “Western-	(1) Highest Legal Effect of Constitution. (2) Supremacy of the

¹⁶⁴ Equality before the law nonetheless signaled important conclusions about the changing character of class struggle and the transition to a rule-based system of governance that would replace the campaign style of rule associated with Mao and the doctrine of permanent revolution. In this regard, the rights of citizens were made dependent on behavior rather than class, and the notion of class struggle itself came to be reconstructed. See *supra* note 115 at 124.

¹⁶⁵ Basically, the CPC, since 1982 Constitution was promulgated, sign of entering legal stage has been manifested. The 1982 Constitution has come out of the struggle style, and turned to experience summary of experiences. Unexpectedly, the rule established by the 1982 Constitution was not being sabotaged by the 1989 Tiananmen Incident, and controversy between “reformists” and “conservatives” in 1990s also had not been upward to the level of constitutional discourse. See *supra* note 38 at 105.

¹⁶⁶ However, as mentioned above, the fundamental reform has been rejected. Saich comments “Since fundamental political reform would lead to decrease in the party’s power, it has been strongly resisted. This resistance led to the dismissal of two general secretaries, Hu Yaobang in 1987 and Zhao Ziyang in 1989.” See *supra* note 135 at 129.

¹⁶⁷ Han Dayuan, “Jiben quanli gainian zai zhongguo de qiyuan yu yanbian” [Origin and Evolution of the Concept of Fundamental Rights in China] (2009) 6 China Legal Science 15 at 25 [translated by author].

¹⁶⁸ The People, “Zai Xuexi Dengxiaoping lilun gongzuo huiyishang de jianghua [Jiang Zemin’s Speech on Working Meeting of learning Deng Xiaoping’s Theories]” (December 29, 2000) online: <<http://www.people.com.cn/GB/channel1/10/20000529/80720.html>>, last accessed on April 15 2015.

¹⁶⁹ As concluded by Professor Tai, “Human rights” with Chinese characteristics has the following five features: (1) In the text of the Constitution, there is no single clause regarding “restriction on restriction”, which means government has no restriction when limiting

“Generation of CPC Leadership”	Rule of law	Fundamental rights	Supervision and Restriction of power	Constitutional supremacy
2012)	“governing the state in accordance with the Constitution”; (2) Judicial Professionalism to Judicial populism	(2) Vastly expanding the scope and content of fundamental rights in CPC’s political theories.	style” separation of power and “check and balance” ¹⁷⁰ (3) Constitutional interpretation and supervision mechanism	NPC (3) “Four Basic Principles”
Xi Jinping’s Period (2012-now)	(1) “Rule of Law 2.0” (2) “Taking Constitution Seriously” (3) Further judicial reform: independence of courts; fairer and more efficient Justice System	(1) “Fundamental Rights of citizens” is the core of the Constitution; (2) Call for Administrative, legislative and judiciary Protection of Human Rights;	(1) “Cage the power by institutional means”; (2) “Strengthen the Constitutional implementation and supervision”	(1) Party leadership and authoritarian claim (2) Supremacy of Constitution; (3) NPC Supremacy

2.2 Party Organization and Party/State Structure: Determinant and Product of Constitutional Development in China

In the following sections, we will continue our discussion of the CPC Party structure and the Party/State in the one party dictatorship system, both of which are important to the

Human Rights. Without such “restriction on restriction” is in line with the principle of “democratic centralism”. (2) According to the Article 33 of the Constitution, when exercising the fundamental rights, the Constitution imply that citizens should first fulfill their duties before enjoying their rights. (3) Economic rights prior to other human rights (4) Emphasis is on cultural relativism rather than universalism. (5) So far the fundamental rights in the Constitution of PRC is non-justiciable, the Chinese citizens could not file the litigation to challenge government actions they believe infringed their constitutional rights, nor through an established organ exert constitutional review. See *supra* note 48 at 79-80.

¹⁷⁰ In 2011, Wu Bangguo, the Chairman of NPC Standing Committee, spoke at the Four Session of the Eleventh NPC Standing Committee work report, comprehensively describing CPC constitutional view in Hu Jintao’s period: “the socialist legal system with Chinese characteristics is the only path toward “the realization of the great revival of the Chinese nation.” He also mentioned eight establishments through the form of “the Constitution and the law”: (1) establishing the fundamental system and the basic task of the state. (2) Establishing the leadership of the CPC. (3) Establishing guiding position of the Marxism-Leninism, Mao Zedong thought, Deng Xiaoping theory and “Three Represents”. (4) Establishing the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. (5) Establishing the system of people’s Congress. (6) Establishing that of all state power belongs to the people, and citizens enjoy the rights and freedoms widely granted by law. (7) Establishing the system of Chinese People’s Political Consultative Conference under leadership of the CPC, and the system of ethnic autonomous areas and basic level autonomous system. (8) Establishing public ownership as the basis and the development of multi ownership economy, and establishing “to each according to his or her contribution” as the basis and coexistence of varieties of modes of distribution system. In addition, he also put forward the “Five not allow” (五不搞), namely “under China’s conditions, we do not allow multi-party competition, do not allow in the pluralism of ideology, do not allow the separation of three powers and bicameral system, do not allow federalism, do not allow entire privatization. See Wu Bangguo, “Women bugao duodang lunliu zhizheng” [We would not adopt Multiparty rotational system, Federalism or Privatization]” (10, March, 2011) online: Xinhuanet <http://news.xinhuanet.com/politics/2011-03/10/c_121170495.htm>, last accessed on April 15 2015.

institutional environment for constitutional development in the PRC.

Although the CPC power structure and its party/state system have strong institutional inferences from Leninist Party Dictatorship and former USSR practices, it has indeed developed a style different from that of the Soviet Union. This is especially true for post-1978 China¹⁷¹. It have been pointed out, “Party structure still runs on Soviet hardware¹⁷²”. At the top of the system, the CPC has adopted the Leninsit Discipline what Lenin prescribed ‘as much centralization as possible’, allowing self-appointed professional revolutionaries like himself to dictate downwards to a working class considered incapable of rising above their day-to-day struggles¹⁷³.

After the PRC was founded in 1949, Mao had continually exercised his absolute rule until 1978. In 1949-1978, the entire power structure of PRC was built on the political power, rather than law and institution similar to the Soviet Union of the 1930s. Apart from three Constitutions in 1954, 1975 and 1978, there was almost no development in the realm of legal Construction before 1978. Without any real institutionalized power, it is impossible to form any structural basis for constitutional supremacy. Therefore, what will mainly be discussed here is the Party structure and Party/State after 1978. However, the formal Party/State structure in the PRC was set up since the Maoist era¹⁷⁴ and institutionally speaking, it was still considered as one of the major legacies passed down by Maoist era. More than a century after the model’s invention and two decades since

¹⁷¹ Although the formal Maoist system borrowed heavily from that of the Soviet Union, it also drew inspiration from China’s imperial past, the GMD, and the base-area experiences. Examples are ample, such as “United Front” and Chinese People’s Political Consultative Conference (CPPCC). See *supra* note 100 at 77.

¹⁷² See *supra* note 146 at 12.

¹⁷³ See *Ibid*.

¹⁷⁴ Although Mao severely undermined the integrity and legitimacy of those Party/State structures with political campaign such as the Great Leap Forward and the Cultural Revolution.

East Bloc fell apart, the core of Chinese system, still bears a remarkable resemblance to Lenin's original designs¹⁷⁵.

It should be noted that the post-1978 Party organization is both a “product” and a determinant of constitutional development. In particular, the Tiananmen Incident in 1989 and the collapse of “East Bloc” and former Soviet Union has caused the CPC to increasingly adapt to the new circumstance. Shambaugh has summarized six adaptive measures taken by the CPC: (1) Improve public governance and be more responsive to societal demands.(2) Revitalize local-level party and state organs. (3) Make the government and party more transparent and law-bound. (4) Reduce corruption and dramatically improve the quality of cadres. (5) Establish a clear set of property rights, and (6) Find some kind of coherent and persuasive vision to replace its discredited official ideology¹⁷⁶. The evolution and current configuration of Party organization, is a corresponding structure to lead these adaptive measures.

Since 1978, the CPC ruled the state by the Party/State system until today, though it underwent significantly changes. Generally speaking, the Party/State structure is both hierarchical (or called vertical) and horizontal.

Vertically, the core of Party power is located in Beijing, followed by the provincial level, the prefecture or city, the county, and the township and village. In each level, horizontally, there are a small party committee exercises centralized power on other state

¹⁷⁵ See *supra* note 146at 12.

¹⁷⁶ *Supra* note 1 at 38, 101-102.

organs, yet still be responsible to comply with their superior within the Party hierarchy. Also, Party cells are embedded within state organs and governmental bodies. At the center, the major party organs are, in ascending order of importance: the National Party Congress, the Central Committee, the Politburo, and the Politburo Standing Committee as well as the Secretariat of the Party¹⁷⁷. Noteworthy, as we will discuss in Chapter 4, the “Horizontal-Hierarchical” structure has enormously impacted the development of China’s courts.

2.2.1 Organizational Structure and Political Power Mechanism of CPC

1. The National Party Congress (NRC) and Central Committee of the NRC (CC)

According to the Party Charter, in theory there is a National Representative Congress of CPC (NRC) holding the ultimate power within the CPC. The NRC has been designed as a cumbersome organ including a large number of delegates meeting over such a short space of time mean that it is rarely, if at all, that anything of consequence is seriously debated¹⁷⁸. Nevertheless, the symbolic function of the NRC is extremely important.¹⁷⁹

¹⁷⁷ See *supra* note 100 at 77.

¹⁷⁸ The First Party Congress was held in 1921 marking the foundation of CPC, and the most recent Congress is 18th Congress. The meeting of NRC is held in every five year, and each NRC was only last virtually one or two week(s) without any exception since 1921. Moreover, from the 8th Congress in 1956 to now on, the number of delegates in the NRC has been increased to 500 or so, and in most of time after 1978, it contains around 2000 delegates.

¹⁷⁹ In summary, these functions are: (1) Meeting of the Party Congresses per se is major events, which manifest important ‘milestones’ in party history. For example, each Congress solidifies the central political tasks for the party. For instance, the 16th Congress in 2002 formally permitted private sector entrepreneurs to join the CPC and become officials, and the 18th Congress in 2012 has marked the continuous reform policy. (2) The National Party Congress has the largest membership and “representativeness” within the party. (3) Policy debates among the leaders are often affected by the need to reach a consensus in time to convene an upcoming Congress. (4) Party Congresses also provide the occasion for appointments (or reappointments) to top party posts and to the Central Committee, and as a result, providing a display of power and unity. Besides, the Discipline Inspection Commissions, which are important agencies in the attempt to re-establish a system for dealing with discipline and monitoring abuses within the party, was formally elected by the Party Congress, yet it actually is subject to the command of Standing Committee of the Politburo, for the head of Discipline Inspection Commissions is a member of Standing Committee. In many occasions, it occurred severe criticism for overstepping the national judiciary organs’ authority to deal with corruption and other criminal cases in judiciaries’ daily works. See *supra* note 135 at 114; see also *supra* note 100 at 174.

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By extension of the configuration and function of the NRC, there is a smaller body called the Central Committee of the NRC of the CPC (CC) that is also stipulated by the Party Charter. However, just like the NRC, the CC is another organ with little real power, despite lots of vested responsibilities by Party Chapter¹⁸². But with few exceptions, the CC plenums discuss and announce policies rather than deciding them. Even debates seem to have become livelier, but again plenums are convened primarily to approve a party draft document. Nevertheless, membership in the CC usually holds some other position of great importance¹⁸³, and it acts as a kind of enlarged board of directors for the Party in

¹⁸⁰ The First Party Congress was held in 1921 marking the foundation of CPC, and the most recent Congress is 18th Congress. The meeting of NRC is held in every five years, and each NRC was only last virtually one or two weeks without any exception since 1921. Moreover, from the 8th Congress in 1956 to now on, the number of delegates in the NRC has been increased to 500 or so, and in most of time after 1978, it contains around 2000 delegates.

¹⁸¹ In summary, these functions are: (1) Meeting of the Party Congresses per se is major events, which manifest important 'milestones' in party history. For example, each Congress solidifies the central political tasks for the party. For instance, the 16th Congress in 2002 formally permitted private sector entrepreneurs to join the CPC and become officials, and the 18th Congress in 2012 has marked the continuous reform policy. (2) The National Party Congress has the largest membership and "representativeness" within the party. (3) Policy debates among the leaders are often affected by the need to reach a consensus in time to convene an upcoming Congress. (4) Party Congresses also provide the occasion for appointments (or reappointments) to top party posts and to the Central Committee, and as a result, providing a display of power and unity. Besides, the Discipline Inspection Commissions, which are important agencies in the attempt to re-establish a system for dealing with discipline and monitoring abuses within the party, was formally elected by the Party Congress, yet it actually is subject to the command of Standing Committee of the Politburo, for the head of Discipline Inspection Commissions is a member of Standing Committee. In many occasions, it occurred severe criticism for overstepping the national judiciary organs' authority to deal with corruption and other criminal cases in judiciaries' daily works. See *supra* note 135 at 114; see also *supra* note 100 at 174.

¹⁸² Theoretically, each CC member is formally chosen by a Party Congress, and the CC was responsible for the NRC and when the National Congress is not in session, the Central Committee carries out its resolutions, directs the entire work of the Party and represents the Communist Party of China in its external relations, and of course, chose a new CC. In reality, each five-year cycle of the NRC also has a series of plenums of the Central Committee that since the mid-1990s have been held more or less regularly once every year. However, like the NRC, the Central Committee convenes infrequently (once or twice a year), and has hundreds of members (which had nearly one hundred members until 1966, closer to two hundred members through the 1970s, and over three hundred members since the 1980s to now). Due to such short period of plenary in each year and the size of the committee, the CC also held little real power since the Maoist era.

¹⁸³ Usually, CC members receive a number of special privileges and have access to inside information on party affairs. The CC substantially functions in three aspects: (1) A place vested a number of formal powers, including electing the Politburo and its

China¹⁸⁴. Thus the CC is a good indicator for trends in the political system of PRC.

2. Politburos and Standing Committee of Politburo

The real decision-making body is neither the NRC or CC but the Politburo and its Standing Committee. In theory, according to the Party Charter, it is the Politburo and its Standing Committee that are “responsible for” the CC. The Politburo and its Standing Committee have functioned continuously since 1956. Both the Politburo and its Standing Committee are elected by the CC in plenary session, and the Politburo and its Standing Committee exercise the functions and powers of the Central Committee when the CC is not in session.

The Politburo, also functioning as a committee, typically has fourteen to twenty-four members and is the “Command Headquarter” of the CPC. The Politburo contains the most powerful leaders or power elites in the Party and State.¹⁸⁵ Thus, power at the top has been highly concentrated in a very small number of individuals. Roughly twenty-five to thirty-five persons wield ultimate authority in the executive, legislative, and judicial spheres. Politburo members set the general policy direction for the economy and diplomacy and have been preoccupied in recent years with China’s towering

Standing Committee and the general secretary. (2) A transmission belt passing down policy proposals and receiving ideas concerning their feasibility and implementation. See *supra* note 100 at 78; See *supra* note 135 at 114.

¹⁸⁴ See *supra* note 146 at 12.

¹⁸⁵ Lieberthal divided the members in Standing Committee of the Politburo into three types of people. The key generalists are those at the very top of the system who may be considered the equivalent of the chief executive officer or president of a major corporation. These individuals, includes the General Secretary of the CPC and the premier of the government. The bridge leaders are more narrowly specialized than are the key generalists. Each is responsible for helping to develop policy within a certain sphere. Those bridge leaders are equal to vice presidents in charge of major functions. Specialized leaders have control over individual important bureaucracies. They include the heads of Organization Department, the Ministry of Foreign Affairs, and so forth. Generally, each person in the Politburo also holds at least one other substantive position and has special responsibility in one or another field, such as propaganda and education or finance and economics. See *supra* note 100 at 175, 212 and 214.

challenges¹⁸⁶. Nevertheless, membership in the Politburo is not itself a full-time job. Some members head distant provinces such as Guangdong and, presumably, miss most Politburo meetings.

The most powerful inner circle of the Politburo is the Standing Committee, a small body with four to nine members that seems to meet weekly. Following the 18th Party Congress in 2012-2017, the number of members has been narrowed from nine to seven. Before 2002, these meetings were not announced publicly. An “Interlocking Directorates” exists in the core of the political power of the CPC. The official highest-ranking individuals such as the General Secretary are the Politburo Standing Committee members. That is, key party officials themselves directly take charge of state bodies. For example, the CPC Politburo includes the government premier, the head of the legislature, the president, the head of the CPPCC, all three vice premiers, and the top figures in the military¹⁸⁷. The head of court, however, is generally not included in the Politburo. The reality is that the Politburo is the highest collective authority in the party.

The Party Charter has rendered virtually unlimited power to the Politburo and its Standing Committee¹⁸⁸ as the Politburo and its Standing Committee are the most important organs of the party and are at the center of the decision-making process. Moreover, “recommendation” Probation” and “Nomination” of the CC members and Central Commission for Discipline Inspection of the Communist Party of China, two important bodies responsible for the NRC, are “always” under the leadership of Politburo

¹⁸⁶ See *supra* note 146 at 13.

¹⁸⁷ See *supra* note 100 at 239.

¹⁸⁸ Combining Article 21 & 22 of the current edition of *the Constitution of CPC*, 1982.

and its Standing Committee.¹⁸⁹

3. General Secretary and Secretariat of the CPC

The Secretariat of the CC and “General Secretary of the CC of the CPC are very important top Party organs today. Formally, the Politburo has a staff under it called the Secretariat. In theory, the Secretariat was to handle the day-to-day work of the party, becoming its administrative nerve center¹⁹⁰. In practice, however, it places the Secretariat in an extremely powerful position, as it supervises the regional party organs and the functional departments of the party that should, in theory, be responsible directly to the CC and the Politburo¹⁹¹. Its members also oversee the preparation of documents for Politburo consideration and turn Politburo decisions into operational instructions for the subordinate bureaucracies¹⁹².

Nowadays, the duty of the General Secretary is to convene (and probably preside over) both the Politburo and its Standing Committee and preside over the work of the Secretariat¹⁹³. Officially, the General Secretary is the highest-ranking official within the CPC and must also be chose from a Standing Member of the Politburo, and must also be theoretically elected by the CC according to the *Party Constitution*. Nevertheless, unlike

¹⁸⁹ Qiushi, “Xin yijie zhonggong zhongyang weiyuanhui he zhonggong zhongyang jilv jiancha weiyuanhui danshengji” [The Nativity of New Members of Central Committee of CPC and Central Discipline Committee] (15 November 2012), online: Qiushi <http://www.qstheory.cn/zywz/201211/t20121115_194165.htm>, last accessed on April 15 2015 [translated by author].

¹⁹⁰ And the Politburo and its Standing Committee would be freed to concentrate on taking important decisions on state affairs and international issues. Also according to Article 22 of the Party Charter, the Secretariat of the Central Committee is the working body of the Politburo of the CC and its Standing Committee. The members of the Secretariat are nominated by the Standing Committee of the Politburo and are subject to endorsement by the CC in plenary session.

¹⁹¹ See *supra* note 135 at 117.

¹⁹² *Supra* note 100 at 175.

¹⁹³ The current position of General Secretary, on the other hand, was supposed to replace the position of “Chairman” of the CPC that Mao Zedong served for a long time. After Mao’s death, the position of Chairman had been removed from the Party Charter in 12th NRC in 1982. This is to prevent anyone from rising above the party as Mao Zedong had done, that the Chairman became the dictator in the party.

the former “Chairman”, the General Secretary now convenes and holds the meetings of the Politburo and its Standing Committee. However, the General Secretary does not enjoy ultimate power as the former Chairman when making decisions in these meetings. CPC reports and studies have revealed that decisions on cardinal affairs are made by the majority in Politburo and Politburo meetings.

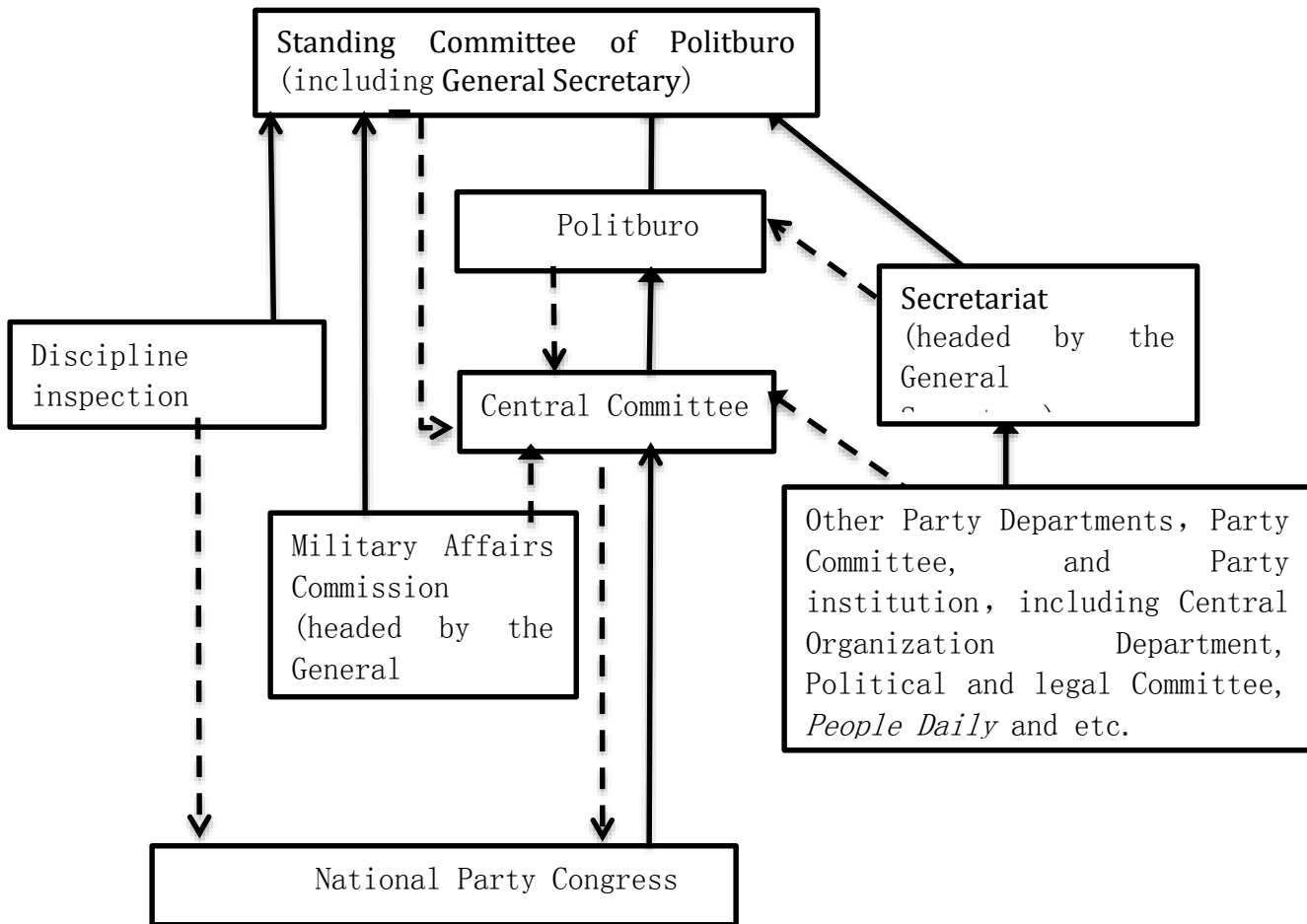
4. Other structures of CPC

Importantly, the Military Affairs Commission is in charge of the People’s Liberation Army. It directly listens to the Standing Committee of the Politburo, yet is namely subordinated to and nominated by the CC. On the other hand, although the Central Committee is a body has no real power, departments formally under Central Committee departments exercise a great deal of power on the State’s affairs and various issue areas. These departments have various responsibilities such as the Rural Work Department, the Propaganda Department and the Organization Department.¹⁹⁴ The actual organization of the central party is vastly more complex than the basic outline. Numerous additional bodies have been established for particular purposes. Also, there are a number of organizations and relationships that do not appear on any chart but are important for understanding power and control¹⁹⁵.

¹⁹⁴ For example, The Central Organization Department plays a vital role in selecting senior leaders and overseeing training. Basically, the Department oversees that CPC’s cadres’ appointments, these cover all senior ministry appointments, senior judicial appointees, heads of major stat-owned enterprises, top university presidents and media, and provincial leaders. See *supra* note 135 at 121-123.

¹⁹⁵ Those leadership groups, including what Saich referred as “gateway” (*kou* 口 in Chinese, that link the elite to a functional area within the party and state system), and what Lieberthal identified six “system” (*xitong* 系统 in Chinese, which means six main senior leadership groups functional bureaucracies are grouped together, including Party Affairs, Organization and Personnel, Propaganda and Education, Political and Legal Affairs, Finance and Economics, and the Military, and all of these heads are members of the Politburo or its Standing Committee.).” However, as the institutionalization and legalization develops, some of those groups had declined in importance. Besides, some central party bodies, such as the Central Advisory Commission, which existed only from 1982 to 1992 and was used as a kind of way station to full retirement for leaders, have been the product of specific political needs at particular historical periods. At last, formal government structure sometimes reversely intrudes the Party Bureaucracy realm. An obvious example is a triangular relationship between party, PLA, and State Council exists- rather than simply a party-army relationship, the State Council now exercise authority over the military’s finances, and it has legal oversight (via the 1997 National Defense Law) over a wide variety of military activities. See *supra* note 100 at 177, 218-234; See *supra* note 135 at 143-144 and *supra* note 1 at 165.

Figure 1 Theoretical and actual shape of CPC formal structure and political power mechanism



Substantially responsible for: —————→

Theoretically responsible for: - - - - -→

2.2.2 Overview of Party's Control on PRC Constitutional Structure

As observed by McGregor, for general Chinese, “the Politburo was a distant body, bloated with power, but devoid of character and personality.¹⁹⁶” For the general Chinese population, however, the CPC has several channels to control state organs, as a most important feature in a “Party/State”. The division of roles between the Party and government is more than just perplexing for outsiders. The Party is omnipresent in the country’s politics, with the benefit of remaining largely unobserved itself¹⁹⁷. However, among these channels, in this part we mainly discuss the principle of “Democratic Centralism” and the principle of “Party Control Cadres”, two principles for the CPC to rein over the state organs, as most important “organic form” of influence in China’s constitutional development.

As of 2007, the CPC possessed approximately 3.6 million local-level party organizations across the PRC. The CPC must, therefore, be thought of primarily as an enormous vertical organization that penetrates state and society from top to bottom. This is the essence of Leninism: penetrating into localities, social and professional organs, and establishing party cells within them¹⁹⁸. These party organizations could be divided as “Leading Party Members’ Group (*dangzu*, hereafter referred as LPMG)” system, as well as the Party Committee (*dangwei*) system, main channels that enable the Central Party to have control of state organs and other institutions. The LPMG is a small group solely consisting of Party members of every state organ, institution and organization. The members of LPMG are assigned and appointed by their equivalent party committees and

¹⁹⁶ See *supra* note 146 at 8.

¹⁹⁷ See *supra* note 146 at 17.

¹⁹⁸ *Supra* note 1 at 134.

“must comply with” the equivalent Party Committee. At each local level, the LPMG is directly responsible to the local “Party Committee”. Each “Party Committee” directly listens to its superior Party Committee. At the central level, all LPMGs in state organs have to comply with the leadership of the CPC Central Committee, and as mentioned, the Politburo and its Standing Committee.

Since the very early period of the CPC, the Chapter IX of the *Party Constitution* clearly provides for the LPMG system, as does the current Party Chapter of the Party¹⁹⁹.” Through the Party Committee and LPMG System, the CPC Central Committee has formed a “top-down²⁰⁰” process to control the state organs. In reality, the LPMG system has been embodied as the principle of “Party Control Cadres” and “Democratic Centralism”²⁰¹.

1. The Principle of “Party Control Cadres”(dangguan ganbu)

The CPC’s “comprehensive leadership” of the State was first guaranteed by the principle of “Party Control Cadres.” The fundamental principle of personnel administration laid down in the 1920s that “the Party Control cadres” has continued to guide organization

¹⁹⁹ The current version of CPC Constitution, revised in 2012, reads:

“Article 46. A leading Party members' group may be formed in the leading body of a central or local state organ, people's organization, economic or cultural institution or other non-Party unit. The group plays the role of the core of leadership. Its main tasks are: to see to it that the Party's line, principles and policies are implemented, to discuss and decide on matters of major importance in its unit, to do well in cadre management, to rally the non-Party cadres and the masses in fulfilling the tasks assigned by the Party and the state and to guide the work of the Party organization of the unit and those directly under it.

Article 47. The composition of a leading Party members' group is decided by the Party organization that approves its establishment. The group shall have a secretary and, if necessary, deputy secretaries. A LPMG must accept the leadership of the Party organization that approves its establishment. Xinhuanet, “The Constitution of CPC” (18 November 2012), online: Xinhuanet, <http://news.xinhuanet.com/english/special/18cpnc/2012-11/18/c_131982575_14.htm>, last accessed on April 15 2015 [translated by author].

²⁰⁰ See *supra* note 30 at 343-344.

²⁰¹ Also, the Party also has the absolute leadership on the Military through the principle of “Party command the Gun” (党指挥枪原则), which is out of the scope of discussion on this thesis.

work since 1949²⁰². The “Party cadre management and Control” is actually a specific systematic mechanism ensuring the leadership of the CPC, a constitutional principle.

The crux of the “Party Control Cadres” is the Party’s Organization Department, as the “institutional heart of a Leninist party system”.²⁰³ The system allows the Party to control “the appointments, transfer, promotion and removal of practically all but the lowest ranking officials.”²⁰⁴ There are three main categories of party personnel assignments: the *nomenklatura* system; the *bianzhi* system; and ordinary party committee assignments. As summarized by Shambaugh, the *nomenklatura* system is a list of leading position in both the Party Organs and the constitutional structure of the State²⁰⁵. The only “list of names” exposed by an academic in the University of Hong Kong, showed that Party in the 1990s was only able to directly controlled about 5000 key party and government posts²⁰⁶. The *nomenklatura* system is administrated by the CPC Organization Department. The *bianzhi* system is a State Council administrative office. The *bianzhi* is a list of the authorized number of personnel and defines their duties and functions in government administrative organs (*guanli jiguan*), state enterprises (*guoyou qiye*)²⁰⁷, and service organizations (*shiye danwei*). According to 2004 statistics, the *bianzhi* system totals 33.76 million personnel. The last category of personnel managed by the CPC Organization Department is those in leading positions of the 168000 party committees nationwide. Through these three

²⁰² John P. Burns, “The People’s Republic of China at 50: National Political Reform” (1999) 159 *The China Quarterly* 580 at 582.

²⁰³ David Shambaugh, *China’s communist Party—Atrophy and Adaptation* (Washington, D.C.: Woodrow Wilson Center Press, 2008) at 141.

²⁰⁴ Richard McGregor, *The Secret World of China’s Communist Rulers* (London: Allen Lane, 2010) at 78.

²⁰⁵ The *nomenklatura* system was inherited from the Soviet Communist Party. It is a list of positions for approximately 2500 party officials at the rank of minister in central-level organs or governor and party secretary in China’s thirty-one provinces and four centrally administered municipalities, and an additional 39,000 officials at the bureau level whose appointment must be reported to the Central Committee. *Supra* note 1 at 141.

²⁰⁶ See *supra* note 204 at 80-81.

²⁰⁷ The organization department’s responsibility for choosing the bosses of about fifty of the largest state enterprises make it relatively easy for it to play stern parent with these companies. *Ibid* at 89.

personnel control systems, the Organization Department manages its cadre corps- and through them the 70-plus million party membership²⁰⁸.

Moreover, after 2000, the principle of “Party Control Cadres” has become more “institutionalized”. Since the promulgation of the Regulations on the Selection and Appointment of Party and Government Leading Cadres in July 2002, the Organization Department has stepped up its evaluation of all party cadres. All party personnel must have annual appraisal reviews, and are evaluated according to three criteria: professional merit and moral integrity, professional achievements, and whether they are accepted by the “masses”. In some cases, cadres are also judged on a “GDP index”, that is, how much gross domestic product, or GDP, grew annually during their tenure in their region. In 2005, the CPC issued a more comprehensive and systematic set of regulations to guide the appraisal process, which specify in great detail how personnel appraisals should be conducted and according to which criteria, what merits promotion, and how problem cases should be handled²⁰⁹. Thereafter, the rules for appointments have been codified in more than seventy articles read more like legislation. Promotions are tied to length of service, education levels and other factors. The economic growth, investment, the quality of the air and water in their localities, and public order all count in benchmarking performance.²¹⁰

An inner-Party normative document, *Regulation on Selection and Appointment of Cadres in Party and State* (*Dangzheng lingdao ganbu xuanba ren Yong tiaoli*, thereafter referred

²⁰⁸ *Supra* note 1 at 141.

²⁰⁹ *Ibid* at 142.

²¹⁰ See *supra* note 204 at 81.

to “*Regulation on Cadres*”) which issued by the CPC Central Committee in 2002 and revised in 2014, provides a comprehensive normative basis for implementing the principle.

Section 1 of Article 2 of current *Regulation on Cadres* provides that, “Selection and Appointment of Cadres in the Party and State, must be adhere to the Principle of Party Control Cadres.”²¹¹ Article 4, on the other hand, stipulates the scope of cadres under control and management of the CPC Central Committee, which applies to the selection and appointment of leading cadres in CPC Central Committee, Standing Committee of NPC, the State Council, the Chinese People’s Political consultative Conference, Discipline Inspection Commission of CPC, the SPC and SPP. The Regulation on Cadres also applies to leading cadres in local levels (above County-level) Party Committee, Standing Committees in each level of People’s Congresses, government, local Political Consultative Conference, local Discipline Inspection Commission, local People’s courts, and local people’s Procuratorates. Moreover, the Article 4 of Regulation on cadres also provides “Selection and appointment of leading cadres in other committees and institutions based on Civil Servant Law of the PRC, and Labor Union, Communist Youth League of China, Women’s Federation, also refers to this Regulation.” Finally, Article 4 also stipulates, “selection and appointment all non-CPC members leading cadres and all cadres of division level(处级干部) non-leading cadres, refers to this Regulation.”²¹²

Some PRC scholars have summarized the principle of Party Control Cadres in two ways.

²¹¹ CPC, *Regulation on Selection and Appointment of Cadres in Party and State*, 2002, last amended 2014.

²¹² See *ibid.*

First the Central CPC has the power to appoint and manage cadres in the Party and State. Second, the scope of the principle includes grading management and appointment almost all cadres in different levels of governing structures, institutions, and organizations²¹³. These two aspects are still true for the new revised *Regulation on Cadres*, which provides an extensive scope for application of such Regulation, *de facto* including all the Party/State cadres above the county level, all the cadres of CPC, and all government official above the level of division, and all non-CPC members cadres in leading positions.

However, according to Article 10, Section 2 of the Constitution of the CPC, all positions within the Party should be elected. So how does the Central CPC manage elections within the Party? If examining the overall design of inner-party election system of the CPC, it vastly resembles the election of the People's Congresses electoral system (or more precisely, the latter modeled the former). That is, through the "Primary Election Process", in which formal candidates should be generated from a list of names prepared by the equivalent or superior level of Party Committees²¹⁴ in state level is the Central CPC. When the elections in the Party Congress formally begin, the elections usually become nominal. Even in many inner-party elections, there is only one candidate for one position. Unlike the elections in People's Congresses, the election results in lower party organizations should be reported and be approved by their superior party organizations after the elections²¹⁵. This reflects that, within the party, superior leader cadres have the power to appoint cadres in their subordinate party organization. In the scale of the entire

²¹³ Xu Xianglin, "Danguan ganbu tizhixia de jiceng minzhu shigange" [Trial Reform of Grass-Root Democracy under the principle of Party Control and Manage Cadres] (2004) 1 Zhejiang Academic Journal 107 at 107 [translated by authority].

²¹⁴ See Article 11, 22, 27, 29, 30 of CPC Constitution.

²¹⁵ Lin Feng, "Zhongguo de lixian zhilu-ruhe cong lixian zouxiang xianzheng" [The Path of Constitutionalism for China- From Constitution to Constitutionalism], in Lin Feng, *supra* note 9, 243 at 267 [translated by author].

country, the Central CPC has the ultimate power to appoint cadres in their lower levels through the principle of “Party Control and Manage Cadres”.

The existence of such an arrangement can also be found in state structure. At the central level, the Central CPC controls the head of the state structures mainly through a major function of the NPC that is electing or deciding heads of the following organs of the state: (1) The President and Vice President of the PRC; (2) The Premier in the State Council; (3) The Vice Premiers, State Councilor, Ministers and heads of all Committees, the Auditor General and the Secretary General in the State Council. (4) The Chairman and other members in the Central Military Commission; (5) The president of the SPC and the SPP. Just like the elections taken within the CPC and NPC elections, elections in these positions also have to go through the “Primary Election Process”, in which the Central CPC first renders a “list of candidate”, and then process to “single-candidate election”²¹⁶.

However, the Principle of Party Control Cadres has been declined in recent years. Because of China’s size or other organizational obstacles, the Central Party now has difficulty monitoring or responding to subordinate activity. These dynamics provide the constitutional apparatus in China with a significant degree of constitutional autonomy, even in the shadow of the CPCs formal domination²¹⁷. Dowdle’s research has indicated that, since the 1990s, party structures have atrophied greatly. In the NPC and elsewhere, party organs are increasingly being captured by the very institutions they are supposed to

²¹⁶ The biggest difference between elections in central and local level is the central level election usually only contain one candidate for each position, whereas in principle that elections of main leaders in local levels are “multi-candidates elections” with some exceptions of “one-candidates elections”. However, the reality is, under the principle of “Party Control and Mange Cadres” and “Democratic Centralism”, in many “multi-candidates election”, the Party Committee and Central CPC also unofficially and internally determined the outcome of elections before elections.

²¹⁷ See *supra* note 49 at 62.

regulate. Rather than ensuring that the corresponding constitutional entity conforms to CPC dictates, party cells now infrequently serve to promote the corresponding constitutional entity's interests within the CPC. For example (and as discussed in Chapter 3), the NPC now has increasingly gotten rid of the "rubber stamp" stereotype with the development of civil awareness and gradual democratization. Furthermore, many important constitutional departments, including all of the specialized departments in the NPC, have no structural parallel within the CPC. Perhaps more tellingly, these parallel structures are becoming increasingly inconsequential as their constitutional counterparts gain force²¹⁸. A prime example is the CPC now does not have its former authority to determine in and out of elites in "all spheres" especially considering Chinese society has become more pluralistic today. Finally, the decentralization under the reforms has increased the chances of localism, and the central CPC may have lost large degree of power and control on local affairs. As Dowdle has observed, "the growing fragmentation of China's political society and the CPC's relative difficulties adapting to this fragmentation" cause an increasing proportion of "China's political discourse and bargaining to take place in the constitutional apparatus, rather than in the party apparatus." This, in turn, causes society to depend more on the constitutional apparatus as a unique forum for political discourse, resulting in an ever-growing constitutionalization of the political environment²¹⁹. From the author's own experience, in Shenzhen, one of the most advanced and largest coastal cities in China, nowadays Party may have final words on party bureaucracy and governmental system, higher position in national-funded

²¹⁸ For example, the political emergence of the NPC appears to have been accompanied by a corresponding atrophy of the Party's structural counter- part, the Chinese People's Political Consultative Committee (CPPCC). Several studies find the party's capacity to over- see judicial decision making also to be decreasing markedly. All this suggests that the institutional redundancies that once worked to arrest the development of the constitutional state are now working to atrophy the CCP's own parallel structures. *Ibid* at 68-69.

²¹⁹ *Ibid* at 75.

enterprises, as well as non-profit government-controlled organizations such as some cardinal personnel in universities. In other circumstances, such as private firm or joint-venture enterprise, or even sometimes the university professors, the Party generally has no saying in any appointment or dismissal of personnel, which vastly contrasted with situation in Maoist era, when the CPC tightly controlled appointment and dismissal in all country.

Nevertheless, the principle of “Party Control Cadres” still has retained as a powerful tool for the Central CPC to control the appointment and removal process of leading Party cadres and governmental official.

2. Principle of “Democratic Centralism”

“Democratic Centralism” is a cardinal principle that the CPC has always stressed as a “fundamental organized principle” in both Party bureaucracy and State structure. Notably, the principle was not invented by Marx or Engels, but came from the Leninist Discipline.²²⁰ In fact, the classical definition of “Democratic Centralism” was rendered by Mao Zedong, as four points: “individual is subordinate to the organization, the minority is subordinate to the majority, the lower Party organizations are subordinate to the higher Party organizations; and all the constituent organizations and members of the Party are subordinate to the National Congress and the Central Committee of the Party.” These four points then have been enshrined into Section 2 of Article 10 of the Party

²²⁰ In 1919, for the first time, Lenin put forward the “principle of Centralism” in Article 5 of The Charter of the Third International, in which he summarized it into three sub-principles: (1) Party apparatus are elected. (2) Party organ periodically reports their works to electors. (3) All subordinates should be absolutely comply with their superior. Thereafter, most “Leninist” Party upheld “centralism” or “democratic centralism” as their organic principle. See He Huahui and et al, *Renmin daibiao dahui de lilun yu shijian* [Theory and Practice of People’s Congress’ system] (Wuhan: Wuhan University Press, 1992) at 51-53 [translated by author].

Constitution. Apart from the Party organizations, “Democratic Centralism”, as one of the constitutional principles, has also been applied to all state organs. The 1954 Constitution first stipulates said principle²²¹, while the 1975, 1978 and 1982 Constitutions have inherited the principle of Democratic Centralism.

In fact, the principle of “Democratic Centralism”, in reality, does not mean the genuine combination between democracy and centralism. Instead, it just stands for centralism with democratic embellishment. The Principle comprises four kinds of relations “Individual-Organization; Minority – Majority; Lower Party Organization—Higher Party Organization; and “all constituent organization -- the central Party”. Apart from “the minority is subordinate to the majority”, which has a democratic nature, the other three relations inherited its deep roots from Centralism. Generally speaking, the principle of Democratic Centralism means that all party members’ activities have to be operated with the top-down organization. This organization has a clear outer boundary separating it from outsides (individual to organization), and a strictly hierarchy structure was formed internally (lower to upper; local to central). Finally, small committees including a small numbers of elites in the top level apply to the “minority is subordinate to the majority”.

Understanding this, the principle of Democratic Centralism is no longer mysterious. The principle could be simplified as: once the top but smallest “committee” makes a decision, the whole party (including lower and local bodies) and all of the Party members, as “individual”, should unconditionally comply with such decision.

²²¹ See Cai Dingjian, *Zhongguo renmin daibiao dahui zhidu* [The People’s Congress system], 3th ed (Law Press: Beijing, 1998) at 85 [translated by author].

Therefore, from NPC to elsewhere, we could have the similar observation that, through the democratic centralism principle, the CPC, as the solely ruling party in PRC, have exerted great power to control of most of the national wide and important matters, and this kind of leadership could be implemented through the legislative, administrative and judicial power of the state, determining political, economic and cultural affairs to a great extent. This is one of the most important features of the Party/State system, also as one important context for constitutional development in China.

However, akin to the Principle of “Party Control Cadres”, the principle of “Democratic Centralism” also continually declines in post-1978 Era.

The first reason is, the advocate of collective leadership. Collective leadership is designed to avoid the tendency towards one-person rule inherent in such a hierarchically organized structure. The Article 10, Section 5 of *Party Constitution* stipulates: “Party committees at all levels function on the principle of combining collective leadership with individual responsibility based on division of work. All major issues shall be decided by the Party Committees after discussion in accordance with the principle of collective leadership, democratic centralism, individual consultations and decision by meetings. The members of the Party committees should earnestly exercise their functions and powers in accordance with the collective decisions taken and division of work.”²²²

²²² Liethetal considers that collective leadership means “a distribution of power that tends to give major vested interests increased influence over elite decisions. The outside interests may be institutional sectors such as military or geographical locales. However, these interests almost certainly include independent groups or organizations of citizens.” See *supra* note 100 at 157.

More importantly, as we will see in the latter part of the thesis, the institutionalization of the Party State, the increasing professionalization of state affairs, institutional politics and constitutional development in the PRC all now has enormously altered the terrain in which the CPC applied the Principle of Democratic Centralism.

2.3 Legalization and Institutionalization of the Party/State and Liberalization and Pluralism of The Chinese Society

After Deng Xiaoping put forward the slogan of legalization and institutionalization in 1978, a thirty-year construction of Socialist Legal System commenced. This ongoing process has rendered an increasing institutionalization of the structure of party/state resulting in the progressive legalization of the Party's exercise of political power. Conversely, the retreat of the party/state from the society has also resulted in increased pluralism within Chinese society, with a considerable amount of liberalization.

2.3.1 Legalization and Institutionalization of The Party/State

In Mao's last decade nearly all institutions in PRC experienced enormous disruption. In Deng's era, meetings and procedures in these institutions became more systematical and predictable. More rational bureaucratic rule has replaced campaigns²²³. For example, the Party Congress has met every five years since 1977. Central Committee plenums began by the early 1980s to meet on a fairly regular basis each fall. The NPC is supposed to be elected anew every four years and to hold a plenum once each year. After Deng's death in 1997, these criteria still have been observed. It appears that the Politburo, the Secretariat,

²²³ See *supra* note 202 at 582-583.

and the State Council also began to meet on a regular basis in the 1980s.²²⁴ In fact, the institutionalization also has impacted the alternation of the most powerful figures in the CPC. Undergoing potential tragedies that struggles to succeed an all-powerful core leader can produce, Deng therefore almost immediately set out to put into place the building blocks of a stable, predictable succession²²⁵. Thus, Deng had made several attempts to institutionalize the “issues of succession” by more regularized and predictable procedures. A prime example of this is Deng’s abolishment of the life tenure of leading cadres.

As early as 1980, under the auspices of Deng Xiaoping, the CPC Politburo issued a *Decision on Prohibiting Old Comrades Incapable of Work to Become Candidates of Representatives of 12th Party Congress and Members in Central Committee*, which prohibited revolutionary patriarchs with venerable age to be “elected” as members in CPC National Congress and CPC Central Committee. This has prevented the “revolutionary generation” from retaining their formal position in the supreme power circle. The only exception was “Eight Elders”.²²⁶ Nevertheless, Deng had used his own personal authority to persuade other senior leaders to step down²²⁷. In November 1989, although still holding enormous personal authority, Deng resigned as chairman of the Central Military Commission, and the rest of “Eight Elders” also had completely retired,

²²⁴ *Supra* note 100 at 152.

²²⁵ *Ibid* at 150.

²²⁶ “Eight Elders”, “八大元老”, was the eight elders members (revolutionary generations) of CPC who held substantially power in 1980s-1990s. They were: Deng Xiaoping, Chen Yun, Li Xiannian, Peng Zhen, Yang Shangkun, Bo Yibo, Wang Zhen, Song Renqiong.

²²⁷ At that time. Then in 1982, the Central CPC, along with the State Council, established the retirement system for old cadres. Accordingly, CPC Central Advisory Committee was founded, as a transitional mechanism for eventually abolishing the system of life tenure in leading posts. In 1987, before the Thirteenth National Congress of CPC was held, Deng Xiaoping, Chen Yun, Li Xiannian, as “semi-retired”, resigned their membership in the CPC Central Committee, but still holds certain position. Deng Xiaoping as chairman of the Central Military Commission, Chen Yun served as chairman of the Central Advisory Commission, Li Xiannian served as chairman of the National Committee of Chinese People Political Consultative Conference.

resigned all their position in Party and State²²⁸. When Deng Xiaoping and Chen Yun passed away, the “retirement system” had become a systematic convention after the mid-1990s, evidenced by then no top leading elites had successfully retained their position as life tenure²²⁹. In 2006, the CPC Central Committee issued “*Temporary Provisions on term of Leading Cadres in the Party and State*” which expressly abolish all forms of life-tenure.²³⁰ The document had marked that life-tenure of supreme leaders system, a political tradition lasting for thousands of years in China, had been eventually and formally abolished.

Another example for institutionalization and legalization of Party/State is the change of position in the top of the Party/State has begun to respond constitutional requirement. This in turn has made the alternation of supreme power more predictable and opener. This development began in 1990s, when the ongoing process of institutionalization and legalization gradually drove the changes in higher leadership in both Party and State began to be consciously constrained by the constitutional and legal requirement. An obvious example is the Ninth NPC in 1998 promoted Zhu Rongji to premier and

²²⁸ Jiang Yiwen, “Dengxiaoping feichu lingdao zhiwu zhongshen zhi shimo” [History of Deng Xiaoping’s abolishment of life tenure of leading cadres] (Apr 6, 2011), Online: People.cn <<http://dangshi.people.com.cn/GB/14317188.html>>, last accessed on April 15 2015 [translated by author].

²²⁹ For instance, after the sixteenth Party Congress (October 2002) and Tenth National People’s Congress (March 2003), strict retirement norms were enforced- over 61 percent of the Central Committee were sent into retirement, with thirteen of twenty-one Politburo members also retiring. As new 198-member Sixteenth Central Committee (plus 158 alternates) was elected in their place, headed by Hu Jintao as the new general secretary of the CPC. As a result of the personnel changes, 16 of the Politburo’s 25 members were new to the body; 6 of the 9 members of the Politburo Standing Committee were new; 7 of the 8 members of the Party Secretariat were new; all the 5 main Central Committee departments (Organization, United Front, Discipline Inspection, International and Propaganda) were new; 4 of the 5 State Council vice premiers and all 5 of the state councilors were new... In sum, this was the largest, most thorough turnover of the party elite since it came to power in 1949. The fact that it occurred peacefully and according to institutional procedures, absent a purge, is also a noteworthy indication of the institutionalization and regularization of inner-party norms. *Supra* note 1 at 152-153.

²³⁰ “Each term for cadres serving as leading position in the party and government is five years. Cadres above the county level including the central level who serves as principal leading position(正职领导职位) in party apparatus, government, People’s Congresses, Political Consultative Conference, Discipline Inspection Commission, Courts and Procuratorates, should not holds the same position after two terms, and should not serve as any same level leading positions after a total of 15 years.” The People, “Dangzheng lingdao ganbu zhiwu renqi zanxing guiding” [Temporary Regulation on Office Term of Cadres in Party\State] (August 7, 2006), online: People.cn <<http://politics.people.com.cn/GB/1026/4671266.html>>, last accessed on April 15 2015 [translated by author].

confirmed Li Peng as the new head of the NPC. Li had to step down as premier because he had served in that position for two terms, the maximum period allowed by the constitution. Reflecting changes in the Chinese system as a whole, Li's job change in 1998- 49 years after the founding of the PRC- was the first by a top leader in response to constitutional requirements²³¹.

However, for a Leninist Party, the process of institutionalization is of course, not cost-free. For instance, the Party Organization Department is plagued by a constant tension that bedevils most political systems. The Politburo has striven to professionalize the selection of top officials through the department, while undermining the process at the same time by fixing appointments in favor of loyalists and relatives²³².

The process of institutionalization and legalization has resulted in considerable part of Party/State structure to be institutionalized and legalized as well. McPherson has defined the idea of the rule of law include the notion that (1) the rules are pre-fixed and preannounced, (2) all are equal before the law and no man is above the law, (3) fixed formal procedures that are characterized by "consistency, predictability, calculability", (4) protection of capital/property, (5) limits to corruption, (6) a correct level of regulation, (7) transparency and accountability, and (8) proportionality²³³. If based on this standard, China's Party/State system in today has reached most of these indexes. In this sense, the overall constitutional development in China now has achieved the stage what Peerenboom called "thin version of rule of law" that may lacks "liberal democratic

²³¹ *Supra* note 100 at 211.

²³² See *supra* note 204 at 75.

²³³ Stephen L. McPherson, "Crossing the River by Feeling the Stones: The Path to Judicial Independence in China" (2008), 26 Penn St. Int'l L. Rev. 787 at 790.

meaning of thick version of rule of law²³⁴”. Likewise, even if the CPC did not fully accept the idea of “thick version” of constitutionalism embracing liberal democratic constitutional values, the Party/State system still could be regarded as accepting the “thin version” of constitutionalism.

Nevertheless, China’s political institutions impose few real constraints on the top leaders and this is especially true regarding the position of “core leader.”²³⁵ China is still led by self-selected elites who are not periodically tested by election. Nevertheless, these developments have demonstrated that the institutionalization and legalization of “Party/State” brought by Deng Xiaoping has turned Maoist personal dictatorship to authoritarian legalism, where authoritarian rules have to observe formal constitutional limit. Moreover, in such transition, the Charismatic Authority of the revolutionary generation has been superseded by legal authority and accountable government²³⁶ which could respond to people’s voices by political-social means. For now, this seems to strengthen the leadership of the CPC rather than impairing it.

Apart from the institutional development of the constitutional structure such as NPC or China’s courts, the process of institutionalization and legalization of the Party/State also has brought limited elections at the basic level since the late 1980s. The so-called “grassroots” democracy, refer to elections in local Party organizations and local People’s Congress.

²³⁴ *Supra* note 47 at 2-6.

²³⁵ *Supra* note 100 at 149.

²³⁶ However, care must taken that China’s top leaders’ willing to respond to popular opinion is as a matter of choice or tactics, not out of obligation or because they fear removal in a democratic election. Kevin J. O’Brien, “Villagers, Elections, and Citizenship in Contemporary China” (2001) 27:4 *Modern China* 407 at 413.

First, such limited democracy manifested by reforms in the grassroots level election of Party Congresses. The second reform relates to election of leaders in village Party branches. The third reform is related to the township and county party committee election. The main point is direct election of members and Secretary of Party Committee in these levels²³⁷. Importantly, these inner-party electoral reforms were conducted with the permission of the Organization Department of the CPC Central Committee.²³⁸ Apart from the democratic development within the party, limited progress also has been made with respect to the People's Congress direct election in the township and County election, with the development of legalization and institutionalization. Indeed, the 1982 Constitution only provides the People's Congress direct election at the township and County level²³⁹. With the passage of the revised *Organic Law of Villagers Committees* in November 1998, elections have entered another stage. Self-government has finally shed its trial status and the pace of institutionalization has picked up. Election procedures have been clarified.²⁴⁰ Cai Dingjian has commented that, "overall, although after 4 revisions in 25 years, the current 'electoral law' has made further progress, the direct election of representatives of people's Congress still limited to the township and county levels. The

²³⁷ 163 News, "Chengdu kai quanguo xianhe: 639ming dangyuan zhijixuanju zhendangwei shuji" [Breakthrough in Chengdu: County Party Committee Secretary directly elected 639 Party members] (Dec 10, 2003) online: 163 News <http://news.163.com/2003w12/12396/2003w12_1071016179570.html>, last accessed on April 15 2015 [translated by author].

²³⁸ Since 2002, the Article 29 and Article 30 of the revised Party Constitution provides the direct election of leading position in the grassroots level party organizations. Some scholars in Party School regarded this as a gradual way to expand the democratization inner the Party (党内民主). According to them, the direct election in grassroots level is an important step for the eventual direct election within the Party organization as well as an important step for the democratization of PRC. See Zhou Tianyong, Wang Changjiang & Wang Anling, eds, *Gongjian: shiqidahou zhongguo zhengzhi tizhi gaige yanjiu baogao* [Going for Hard: Report and study of Chinese political reform after the 17th National Party Congress] (Wujiaqu, China: xinjiang shengchan jianshe bingtuan chubanshe, 2008) [translated by author].

²³⁹ In December 1982, thanks mainly to Peng Zhen's urging, villagers' committees were written into the Constitution as elected, mass organizations of self-government (article 111). A 1983 Central Committee circular also instructed that elected VCs should be set up, that they should actively promote public welfare and assist local governments, and that implementing regulations should be drawn up in light of local conditions. See Kevin J. O'Brien & Lianjiang Li, "Accommodating 'democracy' in One-Party State: Introducing Village Elections in China" (2000), 162 *The China Quarterly*, Special Issue: Elections and Democracy in Greater China 465 at 467. Also the 1979 "Electoral Law" has been revised in 1982, 1986, 1995 and 2004, but the fundamental legal framework of 1979 was sustained.

²⁴⁰ *Ibid* at 487.

present China is still dominated by an indirect and low degree democratic election system²⁴¹. Nevertheless, it have been witnessed that many progress have been made, such as the wide existence of multi-candidates in these “grassroots” level’s election²⁴².

In fact, CPC leaders had viewed the implementation of any type of direct elections in China as unrealistic in the early period of PRC²⁴³. However, after the Cultural Revolution, as a part of “legalization and institutionalization”, necessity to launch political reform was recognized and promoted, though limited. The 1989 Tiananmen Incident resulted in a more tied political environment, whereas after 1992, Deng’s Southern Tour loosened it and the electoral system continued to be addressed. For example, the 2004 Decision of CPC 16th National Congress acknowledged the importance of building a democratic system. From the perspective of constitutional development, local elections are designed to increase support for the legitimacy of the Party, and grassroots democracy is understood to be fully compatible with strong state control.²⁴⁴

2.3.2 Liberalization and Pluralism of The China’s Society

Admittedly, the current Party/State structure, even having attained a certain degree of institutionalization and legalization, has still employed an array of controls to assert its

²⁴¹ Cai Dingjian comments, “Socialist democracy has made historical progress, but Chinese people still has further expectation on democratic development. Today Chinese people have their different understanding on democracy different understanding, which inconsistent to the “Party Control and Manage Cadres”. On the one hand people increasingly call for election could be in accordance with the law and legal procedure, ensure the elections could reveal authentic public will; on the other hand, the reality that (Party) require the outcome of elections should be comply with the Party committee and Party leaders, organized control the elections become more and more common and usual. These have resulted in increasing difficulty for electoral works so that the electoral practice is now far from the expectations of people.” See *supra* note 221 at 30-31.

²⁴² See *supra* note 215 at 252-257.

²⁴³ For example, in 1953, Deng Xiaoping announced that because most people were unfamiliar with national policies and the names of state leaders, subjecting top Party and government functionaries to a popular vote was impossible. *Supra* note 236 at 411.

²⁴⁴ In this context, the self-government program is best seen as an effort to rejuvenate village leadership by cleaning out incompetent, corrupt and high-handed cadres, all for the purpose of consolidating the current regime. *Supra* note 239 at 488-489.

dominance over society in China. However, a wide variety of indicators suggest that the CPC, as an institution, has been in a state of progressive decline in terms of its control over various aspects of the intellectual, social, economic, and political life of the nation. Shambaugh points out that the CPC's traditional instruments of control-propaganda, coercion, and organization have all atrophied and eroded considerably over time, despite remaining effective tools of party control²⁴⁵. As intoxicating as these changes have been for the Chinese people, the retreat has also paradoxically empowered the authorities. The Party has been able to maintain its own secret political life, directing the state from behind the scenes, while capturing the benefits and the kudos delivered by a liberalized economy and a richer society at the same time²⁴⁶. As a result, although still authoritarian, the Chinese government is no longer totalitarian in either its views or its practices. The government can repress major challenges to its authority, but generally seeks to entice the population to do its bidding. This requires that the authorities seek to understand popular desires. More importantly, the government has accepted the notion that large areas of social existence lie outside of the realm of politics and thus should be left for individuals to shape for themselves.²⁴⁷ The liberalization and pluralism of Chinese society could at least be summarized as the following aspects:

First, Party/State has gradually retreated its role from the society and ordinary people's life. In the city, the *Danwei* (unit) system, built in the early 1950s to control the urban populace²⁴⁸, has declined significantly, except for a small number of Party bureaucracy

²⁴⁵ *Supra* note 1 at 3.

²⁴⁶ See *supra* note 204 at 27.

²⁴⁷ See *supra* note 100 at 201.

²⁴⁸ On July 16, 1951, the Ministry of Public Security, with State Council approval, issued "Regulations Governing the Urban Populations." The present regulations divided urban households into six categories with regulations governing each: residential

and government organs. Instead, an increasing number of people have entered private enterprises, international corporations and multinational companies. The middle class has progressively grown in the metropolitan areas and large cities, but still tends to view the state as a source of opportunity and seek more effective ways to develop its ties with it. In rural areas, a large number of peasants have entered the coastal areas to become migrant workers since 1990s. Localization of the Party/State system structure in rural areas where reform has occurred has increasingly intensified which, in turn, has significantly weakened the Party/State's pre-1978 role as a "unified leadership" in rural society. This is especially true for rural regions in coastal provinces such as Guangdong.

Secondly, as a result of economic reform, the country has witnessed years of high economic growth and rising living standards. China has also undergone rapid urbanization and industrialization. Besides this, literacy rates have also risen sharply²⁴⁹. "Participating in the market" has replaced the "participating in politics". Market interests have taken the place of "Politics in Command". Like many Asian states or area, the visible hand of the state and the invisible hand of the market, far from being contradictory, are made to complement and reinforce each other²⁵⁰. On the whole, the state is now satisfied politically if citizens do not engage in organized activity to oppose the authorities. In return, most ordinary Chinese choose to tacitly avoid discussing

households, industrial and commercial households, public residents (living in hotels, inns, etc.), floating household, temple households, and aliens. Article 5 stipulated, "all those who move should first notify the local public security organ of change of residence, cancel the census record of the former abode, and apply for a change-of-residence permit." Similarly, after any people, people were required to "report to the local public security organ to enter their names in the census record within three days of arrival. When available, a change-of-residence permit should be submitted; if not, other relevant documents should be submitted instead." For the first time, a national wide mechanism was established to monitor urban population movement and residence, both long and short term. For example, visitors of three days or longer were required to register with a public security substation (article 6), and hospital and hotel residence were similarly registered (Article 7). Significantly, responsibility for registration and control were vested in the public security bureau. See Tiejun Cheng & Mark Selden, "The construction of spatial hierarchies: China's Hukou and Danwei Systems", in Cheek & Saich, *supra* note 111, 23 at 28-29.

²⁴⁹ *Supra* note 202 at 583-584.

²⁵⁰ See *supra* note 204 at 28.

political issues publicly, and in this way share a similarity to populations under other authoritarian regimes. “All about business”, market thinking and market participation overwhelm the desire of political participation and interest in politics.

Third, the concept of “all people equal before the law” has generally replaced the Maoist “class-differentiation” in Chinese society. Unlike in the past, a person cannot be presumed guilty and subject to harsher treatment simply by virtue of their political position. Moreover, it gives individuals of talent, regardless of their parentage, a chance to do well in the contemporary PRC making it one of the most important social changes of the reform era. One glaring exception, however, involves the offspring and relatives of the top officials who were rehabilitated after the Cultural Revolution. These individuals have entirely been able to utilize their political connections to build economic empires and to insulate themselves from the normal risks of economic failure.²⁵¹

Fourth, Chinese citizens now have a wider range of freedom of expression than before including access to a variety of sources of information not fully controlled by the party/state. This freedom reiterates the repetitive cycle of loosening and tightening the propaganda apparatus since the 1980s. Therefore, especially since the late 1990s, the traditional media are pushing the government to pay more attention to problems that has failed to address effectively. More importantly, along with the popularization of Internet, ordinary people in China can access and search for variety of information especially those are non-political, and the Internet has become important intermediary for public discourse. For the younger generation, the influence of the Internet may be much greater

²⁵¹ *Supra* note 100 at 304-305.

than the traditional propaganda in the educational institution they attend. In fact, the Party/State's inability to regulate the Internet has gradually and substantially reduced the effectiveness of internet regulation and control²⁵².

Fifth, regarding public participation, the post-1978 China has moved from a state-led, political campaign-oriented "isolated stage" toward a multi-participation stage in "open China"²⁵³. In the pre-1978 "isolated China", most public participation was state-led, political campaign-oriented "Public Participation", meaning public participation was totally regarded as part of political propaganda and education, and its primary function is to make the "masses" be more response to Party policies. In other words, the endogenous feature of "input" of public participation has been "alienated" into "output"²⁵⁴, and the people were mainly regarded as the instrument for implementing Party Policies. This has been changed with the beginning of the "open China" after 1978. In "open China", there were three types of public participation that continue to exist in China today: (1) state-led, Issue-Specific Public Participation²⁵⁵ (2) Spontaneous, issue-specific, group-based public participation²⁵⁶ (3) Spontaneous, issue-specific, individual-based public participation²⁵⁷. In other words, public participation in current China society has its own

²⁵² See Hu Ling, "Zhongguo wangluo yanlun biaoda de guizhi" [China's Regulations on online expressions], in Fu & Zhu 389 at 411 [translated by author].

²⁵³ *Ibid* at 400-401.

²⁵⁴ *Ibid*.

²⁵⁵ *Ibid* at 397-399.

²⁵⁶ Relatively, the economic-interest groups may have more recourses and bargaining power when participate in government decision-making process. In the contemporary China, empirical researches has showed that economic enterprises and their alliances participate in the decision-making process through in-depth. See Scott Kennedy, *The Business of Lobbying in China* (Cambridge, Mass: Harvard University Press, 2005) at 163-164.

²⁵⁷ When citizen, as an individual citizens fail to influence the government decision process, and fail to become a member of particular powerful interest groups, they often go through non-conventional path to influence the government decision. One of them is "aggressive participation", including spontaneous protests, strikes, demonstrations and etc. Although these activities are regarded as "high risk" due to it may potentially challenges the political authorities, even are regarded as "illegal", but these activities become more common in current China. Another way for individual citizen participating is via the Internet. See Fu Hualing & Richard Cullen, "Climbing the Weiquan Ladder: A Radicalizing Process for Weiquan Lawyers"(2011) the China Quarterly, 205:3 40; Also see supra note 252 at 401-403.

“breathing space” and increasingly differentiates itself from the Party/State structure. Yet, such variations may be foreign to the Western context, especially in those cases involving nonofficial or religious organizations.

The sixth aspect is the development of nongovernmental organizations (NGOs). After 1978, the level of NGOs varied a great deal²⁵⁸. Nevertheless, foreign to the Western wisdom of “separation between state and society,” NGOs in China adapted themselves into the Party/State, which rendered a closer relationship and some collaboration between the Governing structure and NGOs.

Indeed, the major reason(s) for the six liberations and pluralism of society probably are not spontaneous. Rather, result from the Party/State’s total and increasing retreat from non-political aspects of Chinese society.

In addition to these changes, ongoing institutionalization and legalization of the Party and the State has generated unexpected yet enormous challenges the Party has to face. Under the “new condition of Market-economy”, the CPC itself no longer enjoys the sense of discipline and commitment among its members that typified its earlier days. Today many Chinese regard party membership primarily as a ticket to career advancement. China is evolving away from its revolutionary century and the CPC must cope with an increasingly self-aware, mobile, modern, and differentiated population. For example,

²⁵⁸ Liethetal concludes such development as following: (1) Some underground Christian churches and other religious organizations apparently have been tolerated by many local governments. (2) Environmental and other advocacy groups have sprung up. Some sympathetic officials even use their own units to register the group and provide it with protection. (3) Tens of thousands of voluntary groups- professional societies, hobbyists’ clubs, affinity organizations, school alumni groups, and so forth- have formed throughout China, typically with little or no real government supervision or interference. See *supra* note 100 at 200-201.

with new social and professional groups have proliferated rapidly across China, existing party committees have lost much of their relevance and appeal at the local level. To rebuild the local Party Apparatus, the CPC effort has made local level party committees more responsive and relevant to local interests²⁵⁹. Another result is that the Party itself now has to adapt to its changing environment. Unlike in the mid-1950s, the Party is more “middle class” and its leaders are better educated and more highly differentiated. Public officials with higher capabilities are performing new functions in an environment in which the law has become increasingly important. Government decision-making is increasingly based on rational considerations as authorities struggle to develop the economy in a market. There has been less adaptation in the links between state and society²⁶⁰.

Furthermore, liberalization and pluralism also have encouraged constitutional development. For example, as we will see in Chapter 3, “representation of different social stratum” is increasingly enhancing the constitutional status of NPC. On the other hand, the continuous shaping and reshaping process of China’s society has rendered the possibility that the social awareness stream might be able to combine ideas such as the rule of law, human rights, publicity power supervision and restriction that the Central CPC has also advocated in recent years. At this stage, any absolute and arbitrary judgment may be too soon to predict.

²⁵⁹ *Supra* note 1 at 134-135.

²⁶⁰ See *supra* note 202 at 593-594.

2.4 Concluding Remarks

First, in this chapter, we have analyzed the changing ideology and political theories of the CPC, from “anti-constitutionalism” to more coherent constitutional discourses in post 1978 China. The most recent development of the CPC’s political theories was The *Resolution* on Fourth Plenary Session of CPC Eighteenth National Congresses in October 2014, upholding the slogan of “Socialist Rule of Law”. The *Resolution* is the peak of Party ideology and most coherent with the idea of Constitutionalism in the Party history so far.

Indeed, once constitutional discourses such as the rule of law, or constitutional supremacy are consistently stressed by an authority, these discourses will follow their own independent path to gain intellectual authority and will be no longer controlled by the Party. As Pitman Potter pointed out in *Riding the Tiger*, once a principle of law is enunciated it becomes part of the public domain and opens to uses that the regime may not be able to control²⁶¹. This has been confirmed by the evolution of CPC political discourses in the last 37 years. Today, the potential conflict between the intellectual authority of constitutionalism and Party political legitimacy is increasing. We may not be able to predict the future development of CPC ideology, but at least, it is highly unlikely that the current constitutional discourse would be set back to the Maoist “Dictatorship of the Proletariat”. Likewise, restoring extreme autocratic rule or Maoist personality cult is also implausible. A simple example is that today’s CPC regards the “General Secretary of Party” as a primary leader, rather than the supreme leader.

²⁶¹ See Pitman B Potter, *Riding the Tiger* (1994) 138 China Quarterly 325 at 325-326.

The second observation in this chapter is the structural burden from Party Control and the Party/State System in post-1978 China. Simply put, the organization of the Party, is “centralism”. We have then demonstrated two principles allowing the CPC to control the PRC’s constitutional system: “Party Control Cadres” and “Democratic Centralism”. These, indeed, have displayed the authoritarian feature of the Party/State. Such an authoritarian-natural feature of a Leninist Party structure, of course, is incoherent with the Mature Constitutional Model. Nevertheless, we have observed that both “Democratic Centralism” and “Party Control Cadres” are declining for various reasons.

In the third part of this chapter, we also analyze the constitutional driving forces: institutionalization and legalization of the Party/State, liberalization and pluralism of the China’s society. Notably, constitutional development in China may be hard observe also due to the influence of Chinese political tradition. Tong Zhiwei has pointed out that many constitutional problems in modern China also may not be solved by an openly confrontational approach, but “through internal consultations and other informal ways to resolve²⁶².” A prime example is the 2003 “Sun Zhigang Incident”, in which an unconstitutional act was corrected by internal negotiation²⁶³. In sum, after 37 years of reform, the legalization and institutionalization of the Party/State has achieved a remarkable progress. More importantly, social pluralism and liberalization have provided important public resources for constitutional development in the context of intellectual authority. A Grand Justice in Taiwan, Su Yeong-chin (蘇永欽), commented that a “civil-

²⁶² Liu Songshan, “Weixian shenchare de lengsikao” [‘Cold Reflection on the heat debate of Constitutional Review’] (2004) 1 Faxue 36 at 41. [translated by author]

²⁶³ In fact after Sun’s death have been publicized, the social public opinion is based on the relevant provisions of the Constitution and the “legislation law” to strongly criticize the unconstitutional nature of “Custody and Repatriation Regulation” which issued by the State Council in 1982 and request the NPCSC to review the constitutionality of the “C&R Regulation.” However, the NPCSC did not commence the procedure of constitutional review, yet the State Council initiatively to abolish the C&R Regulation. Undoubtedly, the NPCSC and the State Council or their LPMGs must undergo communications and negotiations, although they have not been publicly reported or revealed. *Supra* note 82 at 134.

law moment” has emerged in the society of Mainland China. Although Mainland China has not experienced what Bruce Ackerman calls a “constitutional moment”, a “civil-law moment” has emerged.²⁶⁴ The overall constitutional development in the PRC thus greatly depends on the extent to which China’s society dictates constitutional authority. In short, the evolution of the Party/State and changing society in current China has not only, by itself, been an important product of China’s constitutional development, but it also serves as most important determinant for the institutional development of PRC constitutional organs. This will be demonstrated in the next two chapters.

²⁶⁴ Justice Su observed “once Mainland China begin to move toward market economy, this moment can not be avoided. In legislative realm, from Contract Law to Property Law, “most of grey areas (state-led factors) reserved in socialist market economy” have been vastly wiped out, and this “silent revolution” has *de facto* transformed the constitutional system. Su Yongqin, “Zhongguo yujing zhong de xianfa shike” [Constitutional Moment in China’s Context], in in Lin Feng, *supra* note 9, 2 at 15 [translated by author].

Chapter 3: NPC with Dual-Hats: A Proto-Parliamentary Development

As we have seen in chapter 1, when applying any principle from the “Mature Constitutional Model” to the PRC’s parliamentary structure, a relevant framework is not easily to be found. The reason, simply put, is the particular structure of the National People’s Congress (NPC), China’s national parliamentary organ²⁶⁵. In the current constitutional system, NPC is not only perceived as a legislative body, but as a symbol of the sovereign power of the PRC. Also, unlike most parliaments or congresses in other constitutional systems²⁶⁶, the power of the NPC is considered as “supreme, unlimited, and inalienable.” Thus, the NPC is also the highest constitutional body in the NPC’s government structure²⁶⁷. The 1982 Constitution of the NPC reconfirmed its power in Articles 2, 57, 58 and 62.²⁶⁸ Hence, the constitutional stature of the NPC is inherently in conflict with the principle of constitutional supremacy²⁶⁹. On the other hand, the supremacy of the Constitution has also been declared in Article 5 of the Constitution of

²⁶⁵ NPC is the parliament in China, with “Chinese characteristics” of course. There are at least two reasons that support this observation: (1) Organization and functions: NPC is theoretically a representative organ, which means its deputies are formally “elected”, and the main function of NPC is legislative. Also, from the organic view, the modern NPC contains a parliamentary leadership apparatus, specified committees, and involves the role of political parties (with huge differences when compared to Western liberal-democratic constitutional systems, certainly). (2) Self-proclaim. A good example is that the NPC is now a member of the Inter-Parliamentary Union, IPU, and in 1996 it held the 96th conference in Beijing, China. See *supra* note 221 at 118-121, 135.

²⁶⁶ Here is a brief comparison between the NPC and a parliamentary body in the Western-style liberal-democratic constitutional system: (1) The NPC upholds the “organic principle” of “Democratic centralism”, while the Western parliamentary body enshrines the wisdom of “separation of power” in varying degrees. For example, judiciaries are generally not required to be “responsible to” the parliamentary body in the West. Also, there are few Western constitutional documents that directly provide a parliamentary body with the unlimited power to determine all matters as long as the parliamentary body considers them “necessary”. (2) Representative system. The members in a Western national representative organ, especially the lower house in a bicameral legislature, are generally directly elected by constituents. In the PRC, however, deputies were “indirectly elected” by the local People’s Congress. Also, the NPC has its Standing Committee, which is rare in a Western parliamentary body. Furthermore, ordinary members in the NPC are part-time, rather than full-time like their counterparts in Western parliament or congress. (3) The NPC is vested with the power of “recall” (bannian), which is also uncommon in the West, where the principle of accountable government is prevailing. (4) The leadership of the Political Party operates outside of the constitutional structure for the NPC, whereas in the Western constitutional system, political parties operate the legislature internally. See *ibid* at 118-121, and 135-139.

²⁶⁷ See *supra* note 70 at 53.

²⁶⁸ Article 2 provides that “All power in the People’s Republic of China belongs to the people. The National People’s Congress and the local people’s congresses at various levels are the organs through which the people exercise state power,” while Article 57 states that “the National People’s Congress of the People’s Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People’s Congress, and Article 58 states that “the National People’s Congress and its Standing Committee exercise the legislative power of the State.” Also, Article 62 (15) directly gives unlimited decision-making power to the NPC, “the National People’s Congress exercises the following functions and powers: ...(15) to exercise such other functions and powers as the highest organ of state power should exercise.” These articles ensure the dual-role of the NPC as the symbol of the sovereign (People) and the highest legislative body, at least in the dimension of the formal constitutional system of the PRC.

²⁶⁹ See *supra* note 30 at 171.

the PRC.²⁷⁰ Therefore, there is a consensus among theorists in China that the Constitution simultaneously has established both the supremacy of the NPC and the supremacy of the Constitution. In other words, the Constitutional Supremacy in China's parliamentary context is embodied by the Supremacy of the NPC. As I will demonstrate in the latter part of this chapter, the unification between the legislative review and constitutional review have illustrated a combination between constitutional supremacy and parliamentary supremacy for the NPC, at least in the sense of the PRC's formal constitutional system. Therefore, in this chapter we mainly focus on the development of the NPC, an organ simultaneously wearing the hats of parliamentary supremacy and constitutional supremacy.

The NPC was long viewed as a “rubber-stamp” from the 1950s until the 1970s by observers²⁷¹, but the institutional development of the NPC since the late 1970s has demonstrated that “the NPC came to occupy a new position in China and the political system, though still illiberal, was not unchanged by reform²⁷².” Also, as illustrated later, such an “illiberal but vibrant” role was not only retained, but also strengthened in some aspects in the 1990s and the 2000s. As we will examine in this chapter, the ongoing constitutional development of the NPC has become significant since the 1980s, and it should be noted that such “development” by no means indicates what Dowdle called a “mature constitutional system”²⁷³ as exemplified by states in North America or Western

²⁷⁰ Paragraphs 3 and 4 of Article 5 read “No laws or administrative or local regulations may contravene the Constitution. All State organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and other laws. All acts in violation of the Constitution or other laws must be investigated.”

²⁷¹ For instance, prior to 1978, the NPC's total permanent support staff never exceeded a dozen. *See supra* note 70, at 1, 3–4.

²⁷² Kevin O'Brien, *Reform without liberalization—China's National People's Congress and the Politics of Institutional Change* (Cambridge University Press: New York, 1990) at 157.

²⁷³ As discussed in Chapter 1, China serves as a prime example for constitutional development in authoritarian regime. But “few question that China's constitutional and legal systems fail to evince most of the defining features of constitutionalism or the rule of

Europe. Nor will such “development” guarantee the future liberalization or democratization in the PRC policy. However, before continuing our discussion on the constitutional development of NPC, two caveats should be added:

First, research has shown that the theoretical design²⁷⁴, historical basis²⁷⁵ before the 1978, as well as ideological justification²⁷⁶ has given the NPC its “rubberstamp” status. Simply put, Marxist-Leninism, ideological grounds, and Chinese historical experiences and from both Republican legislatures and CPC regimes before 1949 have created current institutional features and inherent weaknesses of the NPC. These have led to cumbersomeness when the NPC session (mainly the plenary session) exercises its constitutional functions: (1) Large Chamber Size²⁷⁷; (2) Brief and Infrequent Plenary Sessions²⁷⁸; and (3) Lack of Professionalism²⁷⁹. Therefore, the NPCSC, a “parliament

law.” See *supra* note 49 at 2 & 7.

²⁷⁴ See *supra* note 221; See *supra* note 220 [translated by author]; Zou Pingxue, *Zhongguo Daibiao Zhidu Gaige de Shizheng yanjiu* [Empirical studies on China's representative system reform] (Chongqing: Chongqing chubanshe, 2005) [translated by author] [Empirical studies]; Jianfu Chen, “Coming full circle: Law-making in the PRC from a historical perspective” in Jan Michiel Otto etl. Eds, *Law-making in the People's Republic of China* (Hague: Kluwer Law International, 2000) 19 [Coming full circle]; Albert H. Y. Chen, “Socialist law, civil law, common law, and the classification of contemporary Chinese law”, in Jan Michiel Otto etl. Eds, *Law-making in the People's Republic of China* (Hague: Kluwer Law International, 2000) 55 [SCCC]; Tu Siyi, “Sulian sifa linxianfa zhi suweiai zhidu he zhongguo wusi xianfa zhi renmin daibiao dahui zhidu” [Soviet System in Stalin Constitution in U.S.S.R. and People's Congress System in 1954 Constitution of PRC], in Fu & Zhu, *supra* note 70, 85 [translated by author] [U.S.S.R. and 1954 Constitution].

²⁷⁵ See *supra* note 221; *Coming Full Circle*, *ibid.*, at 19; Kevin J. O'Brien, “China's NPC: Reform and its Limits” (1988), 13:3 *Legislative Studies Quarterly* 343 [Reform and its Limits]; *supra* note 272; Perry Keller, “Sources of Order in Chinese Law” (1994), 42:4 *The American Journal of Comparative Law* 711. [Sources of Order]

²⁷⁶ See *supra* note 221; *Empirical Studies*, *supra* note 274, *supra* note 220; *supra* note 70; *supra* note 38; and *supra* note 48.

²⁷⁷ The first issue is the large chamber size of the NPC sessions. In order to create a mosaic of society that accommodates for their breadth (*guangfanxing*), progressiveness (*xianjinxing*) and representativeness (*daibiaoxing*), designation of choosing the NPC deputies have been applied for rather than going through an open and comparative nomination and election proces. Because the “breadth”, “progressiveness” and “representativeness” all have to be taken account, the total members of the NPC deputies are usually around 3000. In 2015, the total number is 2987. This large chamber size has also been the world's greatest chamber for a parliamentary body. Obviously, it is impossible and impractical for all deputies to have adequate time and opportunity to speak and debate in the Plenary Session. For example, provided the total number of the NPC deputies is 3000, if everyone speaks for 10 minutes, it will take two months in total. Thus the delegates group and sub-group meetings are held for communicating and debating issues from the plenary session. However, even in these group meetings, the speeches and debates are still severely limited. Thus, such a large chamber inevitably lacks sufficient parliamentary debates or speeches, a vital element for both the legislative and supervisory task of the NPC. See *Empirical Studies*, *supra* note 274 at 25; Kevin J. O'Brien, “Agents and Remonstrators: Role Accumulation by Chinese People's Congress Deputies”, 138 *The China Quarterly* 359 [Agents and Remonstrators]; See *supra* note 221, *supra* note 272, and *supra* note 70; Current number of NPC delegates, see NPC, “Daibiao didai [Deputy area]” online: NPC <<http://www.npc.gov.cn/delegate/delegateArea.action>>, last accessed on April 15 2015 [translated by author].

²⁷⁸ The second institutional disadvantage is that of the brief and infrequent plenary sessions. Since the 1980s, most annual NPC plenary sessions only lasted 2-3 weeks, while 10-20 important motions or bills should be reviewed and voted in each plenary session. In fact, the duration of the NPC plenary session is the shortest in the world. Usually, a parliamentary body will last at least 4 months annually. And from the 1st NPC (1954) to 12th NPC (2015), the longest record is 26 days, while the shortest was only 5 days. In recent years, the NPC plenary session was usually held for approximately 10 days. An inevitable result is that every piece of motion or bill including important basic legislation are shortly reviewed and rashly voted. For instance, according to the agenda of the 2015 NPC plenary session, there were less than 12.5 total hours for the plenary sessions to review and vote the draft of revised Legislation Law, a

within the parliament” has taken this role to become the real legislative body that exercises most of supervisory power of the NPC²⁸⁰, despite not explicitly being allowed to do so according to *1982 Constitution*. In order to further strengthen the competence of the NPCSC, the *1982 Constitution* and *Organic Law of People’s Congress* also established special committees²⁸¹ and supporting offices²⁸² for the NPCSC that

draft which stipulated fundamental principles of legislative procedure and contained an important debate whether the types and rates of taxation should be determined only by NPC laws rather than leaving it to the discretion of administrative bodies.

Empirical studies, supra note 274 at 61-63 [translated by author]; NPC, “Dishierjie quanguo renmin daibiao dahui disanci huiyi richeng” [The Agenda of 3rd session of 12th NPC], online: NPC <http://www.npc.gov.cn/npc/xinwen/2015-03/04/content_1909113.htm>, last accessed on April 15 2015 [translated by author].

²⁷⁹ The third weakness is the lack of professionalism. The deputies in the NPC are amateurs rather than full-time representatives. Thus most ordinary deputies lack the time and expertise for engaging in legislative or supervisory activities and other duties performed in the NPC sessions. The main reason behind this arrangement is more than the orthodox Marxist view advocating “part-time representative” could even explain. Rather, it is because the deputy in the NPC is not considered a professional representative like their counterpart in the West. Deputies, however, are more expected to be a “link (*niudai*)” or “bridge” between the leadership to the citizenry by design. Serving as regime agents, they represent state authority, explain the pattern of state extraction and justify allocations. On the other hand, deputies are also expected to be advocates: they are charged with reflecting mass opinions and bringing regional and group demands to the attention of decision-makers. In fact, the practice of “part-time representatives” has been recognized by the *Law of the People’s Republic of China on Deputies to the National People’s Congress and Deputies to Local People’s Congresses* (revised in 2010, *Deputies Law*). For example, Article 4 of the “Deputies Law” states that “Deputies shall perform the following duties: playing an exemplary role in abiding by the Constitution and the laws and...assisting the implementation of the Constitution and the laws.” Article 5 stipulates, “Deputies’ work carried out according to the provisions of this Law, when the people’s congresses at the corresponding levels are in session, and their activities conducted according to the provisions of this Law, when the people’s congresses at the corresponding levels are not in session, shall all constitute the performance of their functions as deputies. Deputies shall not be separate from their own production and work. When attending the sessions of the people’s congresses at the corresponding levels, and participating in the performance of their duties organized uniformly when the people’s congresses are not in session, deputies shall make good arrangements of their production and work and give priority to the performance of their duties as deputies.” Nevertheless, the practical effectiveness of it may be questionable. For instance, in a survey conducted by East China Normal University, even in Shanghai, the most developed area in China, only 0.2% of underrepresented social stratum had sought help from deputies in People’s Congress (including NPC deputies). See *Empirical studies*, supra note 274 at 51; *supra* note 221; *supra* note 272; See also Drafting group of Deputies Law ed, *Zhonghua renmin gongheguo quanguo renmin daibiao dahui he defang geji renmin daibiao dahui daibiaofa shiyi* [Explanation of Deputies Law] (Beijing: zhongguo minzhufazhi chubanshe, 2002) [translated by author]; *Agents and Remonstrators*, supra note 277 at 365-369.

²⁸⁰ The Post-Mao NPCSC indeed owes its initial development to the 1982 Constitution and *Organic Law of People’s Congress* (*Organic Law*). The Organic Law, enacted in 1982, set out the basic framework of the NPCSC. In 1987, the Organic law was supplemented by a more detailed Standing Procedural rule for the NPC Standing Committee. See *supra* note 221 at 235-236; See *supra* note 70; Reform and its Limits, supra note 275 at 363.

²⁸¹ Currently there are nine special Committees, including Nationalities Committee, Law Committee, Finance and Economic Committee, an Education, Science, Culture and Public Health Committee, Foreign Affairs Committee, an Overseas Chinese Committee, Internal and Judicial Affairs, Environment Protection and Resources Conservation Committee, and Agriculture and Rural Affairs Committee. Also, additional special committees could be set up by the NPC if necessary.

²⁸² Working and administrating bodies of the NPCSC, simply put, include the Secretariat and General Office, Legislative Affairs Commission (LAC), Budgetary Affairs Commission, Hong Kong SAR Basic Law Committee, Macao SAR Basic Law Committee, and Delegates’ Credentials Commission. Also, each special Committee has their own supporting offices. Importantly, the LAC has the Administrative Office, the Office for Criminal Law, the Office for Civil Law, the Office for Economic Law, the Office for State Law, the Office for Administrative Law, the Office for Recording and Examining Laws, and the Research Office. Also, each Room has their own research staff and is entitled to seek for recommendations from external legal experts such as the major Law Faculties of many Universities. Legal experts have been included to offer suggestions or even participate in the drafting process of legislation. Examples are abundant, but the most significant legislation includes the Administrative Litigation Law, the Company Law, the 1996 amendments to the Criminal Procedure Code, the 1997 amendments to the Criminal Code, and the draft legislation law. This is in sharp contrast to the standard drafting practice of most administrative organs which still prefer to draft legislation in-house, perhaps with the assistance of one or two outside advisors. LAC and the Research Department also has its own general office, and its hiring is not subject to the CCP’s nomenklatura system. Thus, it enjoys significant independence with regard to hiring and staffing, which allows it to field a particularly educated and professional staff. See NPC, “Legislative Affairs Commission”, online: <http://www.npc.gov.cn/englishnpc/Organization/2007-11/20/content_1373187.htm>, last accessed on April 15 2015 [translated by author]; NPC, “Budgetary Affairs Commission”, online: NPC <http://www.npc.gov.cn/englishnpc/Organization/2007-11/20/content_1373188.htm>, last accessed on April 15 2015 [translated by author]; see also *supra* note 49 at 52; *supra* note 221. See also NPC, “Quanguo renda changweihui de banshi jigou he gongzuo jigou” [the supporting and working officials of NPCSC] (1,

subordinated the leadership of the Presidium during the NPC sessions by bestowing responsibility on the NPCSC when the NPC was not in session. In short, compared to the NPC, the NPCSC is a more bureaucratic²⁸³, and professional²⁸⁴ organ but is not a democratic legislature²⁸⁵. As summarized by Ming Xia, the relationship between the NPC and the NPCSC can be explained as follows: the plenary is a huge ship; the delegation meetings are numerous separate compartments; the standing committee is its crew; the chairmen group is the captain. The plenary session mainly fulfills the role of legitimizing the power and position of the NPCSC.²⁸⁶ In fact, the development of the NPC is unbalanced between the constitutional development of the NPC session and the institutional development of the NPCSC, which should be noted when examining the constitutional development of the NPC.²⁸⁷

Mar, 2009), online: NPC <http://www.npc.gov.cn/huiyi/dbdh/11_2/2009-03/01/content_1475563.htm>, last accessed on April 15 2015 [translated by author].

²⁸³ The bureaucratic feature of the NPC refers to the fact that since it was formed in the 1980s, the NPCSC operation more closely resembles an administrative decision-making organ rather than a representative body. For example, as noted above, the NPCSC is headed by Chairmen, and the Chairmen's meeting is entitled to set up and oversee the agenda for both the Standing Committee and, indirectly, the NPC Plenary Session. This gives the Chairmen and Chairmen's meeting a great deal of de facto veto power over all legislative proposals, including motions submitted to the NPC. However, though the powers of the Chairmen and Chairmen meetings are considerable, such "bureaucratic features" are, of course, far less powerful than that of administrative bodies. See Ming Xia, "China's National People's Congress: Institutional transformation in the process of regime transition" (1998) 4:4 *The Journal of Legislative Studies* 103 at 117-118; See *supra* note 70 at 26-27.

²⁸⁴ The second feature of the NPCSC that distinguishes it from the NPC is professionalism. As noted above, the 1982 Constitution prohibits members in the NPCSC from having a position in the executive branch and other branches of the government. For example, since the 6th NPC in 1983, over one-half of members of the NPCSC are full-time and reside in Beijing. On the contrary, there are only 6% "full-time deputies" in the NPC since 1983. Thus, the NPCSC is more like a professional legislature in the PRC constitutional system. On the other hand, "the NPCSC's ability to draft laws and oversee the government [rests] with its staff." Thus, starting from the 1990s, members in the NPCSC have become younger and better educated, and their last positions before entering the NPCSC are more prestigious. In fact, more NPCSC members are former ministers, party secretaries and governors. See Empirical studies, *supra* note 274 at 56-58; See *supra* note 272 at 152; and *supra* note 283 at 118-119.

²⁸⁵ Thirdly, the NPCSC is still not an electoral democratic legislature. Until now, both the Constitution and Electoral Law have still limited direct election to the level of county and village, thus the deputies in the NPC are elected indirectly by multiple-level People's Congresses. As analyzed by Zou Pingxue, there is also a so-called "Agency-Cost" that occurs during the People's Congresses' elections. Every indirect election actually adds to the potential risk that representatives indirectly elected by the principal (in this case, constituents) may depart from the original entrustment by the constituents. Thus, when members of the NPCSC are elected by the NPC, apparently they lack the original information entrusted to the constituents. Thus, it is impractical for ordinary people to supervise them. The embarrassment here is that ruling elites and the mainstream theory claim that democracy in People's Congress is manifested by its broad representation and large chamber, while they also admit the cumbersomeness of the NPC is not suitable for democratic decision-making, thus a smaller and more flexible Standing Committee is needed. Consequently, even this self-contradicting explanation intended to legitimize the NPCSC could reveal that the NPCSC is not a genuine democratic parliamentary institution. See Empirical studies, *supra* note 274 at 39-40, 80-82.

²⁸⁶ *Supra* note 283 at 114-115.

²⁸⁷ For example, with respect to legislative power, an uneven pattern of gaining institutional maturity and expanding jurisdiction between the NPC session and the NPCSC emerged. A prime instance of this is the distinction between Basic Laws and Ordinary Legislation. The Plenary Session's legislative competence is limited to "basic" legislation, over which it enjoys exclusive legislative jurisdiction. The question is how to determine whether to treat a particular legislative matter as a basic law or as an ordinary law. Under the framework of the new revised Legislation Law, laws "materially influencing either governmental operations or the

Secondly, many PRC theorists regard the NPC's powers as fourfold: legislative power, power of decision (*juedingquan*), power of appointment and removal, and power of supervision²⁸⁸. However, if adopting the integrated historical-structural approach, rather than being merely "structural" or "functional"²⁸⁹, and following Dowdle, Tanner and Brien, we roughly divide the constitutional authority of the NPC into two categories: legislative power and supervisory power²⁹⁰. The reason is that, broadly speaking, power of decision is essentially a type of legislative determination, i.e. the power to appoint and remove high-ranking officials is essentially one supervisory function of the NPC. Thus, this chapter contains the following parts: (1) the development of the NPC's legislative authority, and (2) the evolution of the NPC's supervisory power. (3) Factors behind NPC Development; and (4) Conclusion.

constitutional rights of citizens should be regarded as basic laws." However, the NPCSC have the constitutional conferral as well as institutional flexibility that enable it to freely determine whether a legislative matter is an ordinary law, and infrequent NPC sessions generally have no real power to say nay to such discretion. Consequently, the NPCSC has progressively increased its legislative jurisdiction by classifying various matters into its list of "ordinary law", and sometimes such expansion also trespasses the exclusive legislative realm of NPC Plenary Sessions. A recent example is when the NPCSC passed a Revision to Law of the PRC on Lawyers in 2012, which contained a clause that substantially contradicted the Criminal Procedural Law. Also, in 2010, the NPCSC directly revised the Deputy Law of the PRC and triggered strong criticism for a Revision that was lacking legislative competence and directly intruded on the legislative jurisdiction of the NPC session.

Jan Michiel Otto & Yuwen Li, "An overview of law-making in China", in Jan Michiel Otto *supra* note 274, 1 at 13[*Overview of Law-Making*]; Perry Keller, "Legislation in the People's Republic of China" (1989) 23 UBC Law Review 653 at 661[Legislation in the PRC]; see also *See supra* note 70 at 30-31; Li Buyun, "Explanations on the proposed law on law-making of the PRC" in Jan Michiel Otto etl. *supra* note 274, 157 at 161-162[*Explanations*]; See Qianfan Zhang, "Quanguo renda wuquan xiugai daibiaofa" [The NPCSC lacking authority to revise Deputy Law] (Sep. 10, 2010), online: Caijing < <http://www.caijing.com.cn/2010-09-10/110518031.html>>, last accessed on April 15 2015 [translated by author]; Yan Lin, "Zailun quanguo renda changweihui de jibenfalv xiugaiquan" [rethink the Power of the NPCSC to Revise the Basic Laws] (2011), 1 Jurist (China) 1 at 1-2 [translated by author].

²⁸⁸ Power of Decision means that the NPC, as the supreme state organ, has unlimited power and jurisdiction in determining which matter it intends to involve itself. The NPC performs such power through (1) Resolution (*jueyi*), the confirmation of fait accompli; and (2) Decision (*jueding*), the legislative documents have a normative effect based on the legislative discretion of the NPC. Power of appointment and removal refers to the function that the NPC has the highest position to elect, remove (*chezhi*), recall (*bamian*), dismiss (*mianzhi*) higher officials and exercise other powers of appointment and removal for high officials in all other state organs. See *supra* note 221 at 267, 320, 323 & 342; also see *supra* note 220 at 5, 7, 164-171.

²⁸⁹ According to Nelson Polsby and Kevin O' Brien, structuralists focus on legislature itself and functions they specifically account for (i.e., in China, the NPC itself); functionalists examine rule-making bodies across the entire political system and institutional interrelationships (i.e., in China, the NPC, State Council and maybe CPC). But "in an important sense", they are both looking for functions performed by the institution itself. Neither is well suited to "identify institutional and systemic change", because "one provides a cross section at a given moment, the other lacks a sense of system." A historical-structural analysis, on the other hand, provides an analysis across institutions to complement an analysis of the history, ideologies, structure, and power relationships within each institution. See *supra* note 272 at 8-11. However, unlike O'Brien, this thesis focuses more on the "structural" components while the "historical" method is only supportive and complementary. Over thirty years of development of the NPC has resulted in a more "stable" pattern than a "rapidly changing legislature" that O' Brien observed in the 1990s.

²⁹⁰ See *supra* note 272 at 74-79; O'Brien divides it into three categories: law-making, institutional supervision, and personal oversight. In Kevin J. O'Brien, "Chinese People's Congresses and legislative embeddedness—Understanding Early Organizational Development" (1994) 27 Comparative Political Studies 80 at 97; See *supra* note 70 at 97; See *supra* note 70 at 53.

3.1 Constitutional Development of The NPC's Legislative Power

Indeed, much has been written about the NPC operation and how its exercise its national legislative power²⁹¹. In order to examine the development of NPC, Perry Keller relies on the law itself and the law-making process, with special emphasis on quality of legal language on NPC's legislations²⁹². Tanner, for example, focuses on interplay between three major "arenas" of lawmaking institutions in PRC polity: the State Council, the CPC Central (including the Politburo), and the apparatus of the NPC²⁹³. Other scholars have also provided important perspective to study NPC's development²⁹⁴. In this chapter, these remarkable observations and methodologies would be adopted to discuss constitutional development of NPC's legislative competence.

However, few have addressed the recent institutional development of NPC, nor how the new Passed Revision of Legislative Law of PRC (RLL) strengthen the legislative competence of the NPC. In this section, we will review and analyze the NPC's development from an "irrelevant rubberstamp"²⁹⁵ to an "important constitutional organ", and explain several points that NPC's legislative authority would be (or have been) enhanced by the RLL.

²⁹¹ See *Explanations*, supra note 287 at 160; See also See supra note 221 at 271-272 ; supra note 220 at 5, 7 and 123; It has long been accepted that the present PRC legislative system can be described as "unitary, two level, [and] multi-layered (*yi yuan, er ji, duo ceng*)" since the 1980s. Firstly, it is a unified system, in as much as the NPC legislation may in principle extend to any subject matter. Secondly, legislative authority is divided between central and regional levels of authority, within which there are further distinctions concerning the exercise of legislative powers. See *Source of Order*, supra note 275 at 732; supra note 220 at 6.

²⁹² Perry Keller, "The NPC and the making of national law", in Jan Michiel Otto etl. supra note 274, 75 at 76.

²⁹³ Murray Scot Tanner, "How a Bill Becomes a Law in China: Stages and Processes in Lawmaking" (1995) 141 *The China Quarterly*, Special Issue: China's Legal Reforms 39 at 39.

²⁹⁴ For example, Tanner roughly divided the NPC's "legislative process" into five main phases: agenda-setting, interdepartmental assessment, approval by senior politicians, parliamentary debate and passage procedure and implementation. Jan Michiel Otto and Yuwen Li have also distinguished eight stages in the NPC process of law-making, namely (i) agenda-setting; (ii) drafting (iii) wide discussion (iv) interdepartmental consultation; (v) political (party) leaders' approval 'in principle'; (vi) decision-making in People's Congresses; (vii) publication and registration, and (viii) implementation through executive regulations.

See *ibid* at 40-41; Jan Michiel Otto, "Conclusion: A Comparativist's Outlook on Law-Making in China", in Jan Michiel Otto etl., supra note 274, 215 at 225.

²⁹⁵ See supra note 50 at 348.

3.1.1 Overview of The Development of The NPC Legislative Authority

Stage 1: the 1978-1980s

In the first stage from 1978 to 1989, the NPC mainly sought to institutionalize itself by “reifying its constitutional authority.” Important development of the NPC in this stage mainly included the following: (1) In 1978, the Legislative Work Commission (the predecessor of today’s Legislative Affairs Commission, or LAC) was set up in order to help rationalize China’s corpus of laws and regulations, which had fallen into great disrepair during the Cultural Revolution. (2) The NPCSC also re-established the General Office Research Department for researching issues assigned by the Standing Committee Chairmen. (3) Also in the late 1970s, the Plenary Session formed several specialized committees in order to help it achieve greater expertise in certain key legislative and constitutional areas²⁹⁶. (4) Overall staffing levels for the NPC thus grew rapidly during the 1980s²⁹⁷. However, until the mid-1980s, the NPC was still “politically irrelevant”. It mainly operated as a “rubber stamp” for legitimating executive and party initiatives²⁹⁸.

With the drafting of the *1982 Constitution*, development was manifested in the NPC’s internal work procedures. As mentioned above, the *1982 Constitution* and *Organic Law* laid out for the first time the basic institutional parameters for the NPC’s legislative authority. Legal drafting resumed in 1979. From 1979 to 1989, the NPC and its Standing Committee passed eighty-eight laws, amended and revised twenty laws, and made forty-

²⁹⁶ Like the Standing Committee itself, these specialized committees were constituted as continuously standing bodies, thus providing the NPC with greater institutional permanence.

²⁹⁷ For example, when the legislative work commission was first formed in 1979, it supported a permanent staff of 54. By the end of the 1980s, the NPC’s total support staff had grown to over 2000. See *supra* note 70 at 4-6.

²⁹⁸ In this era, all meaningful political decisions were formulated by either the State Council (China’s executive branch) or the CPC, and then forwarded to the NPC for pro forma approval. The NPC had no staff or significant internal resources. See *supra* note 50 at 348.

five legal decisions²⁹⁹. More importantly, since the late 1980s, the NPC began exerting increasing influence on Chinese political decision-making. Specifically, the NPC developments in the late 1980s had initiated many constitutional developments of the NPC's legislative power that has strong linkage with the NPC's development today.

First, the NPC started to regain legislative drafting responsibilities from the State Council. During the 1980s, the development of the legislative authority of the NPC was largely owed to senior Party leaders who encouraged legislative deliberation during legal drafts³⁰⁰. Accordingly, the NPCSC returned draft bills received from the State Council or Central Committee on several occasions. In 1983, the NPCSC voted down a draft law submitted to it by the State Council. This was the first time the NPC ever challenged the State Council's legislative draft³⁰¹. Most notably, in 1986, Standing Committee members spoke on national television against a draft of the bankruptcy law and remanded the bill to the Law Committee for further revisions³⁰². The NPC's Law Committee began to revise and edit all bills submitted to the legislature, and these revisions or editions were sometimes substantial³⁰³. In the late 1980s, the NPC took a draft *Administrative Procedure Law* that the State Council had originally intended to focus on the problem of administrative corruption, and reworked it into an instrument for supervising a much

²⁹⁹ See *supra* note 272 at 158.

³⁰⁰ Party leaders, such as Peng Zhen, decreed that when major articles of a draft were "rather controversial" and "many Standing Committee members held different opinions," voting should be postponed and no effort should be made "to try to force the bill through." See *supra* note 272 at 163.

³⁰¹ See *supra* note 70 at 6.

³⁰² Two examples include that (1) The state-owned enterprise law went through multiple drafts over three years and was debated four times by the NPCSC before it was released for public discussion and was finally passed by the NPC in April 1988. (2) A law concerning villagers' committees was tabled twice in 1987 after a "heated debate" and an expression of "sharply differing opinions" in both the NPC and the NPCSC.

³⁰³ In three noteworthy cases, when the Law Committee extended the coverage of the patent law from inventions to new models and exterior designs and required collective enterprises to share patents, it altered provisions of the inheritance law concerning widow's rights and heirs who did not support bequeathers, and it added several sets of compromise amendments to the bankruptcy law. See *supra* note 272 at 163.

broader range of administrative behavior³⁰⁴.

Second, deputies in the NPC also began to openly refuse considering bills submitted by the CPC itself. Delegates began to challenge Party-backed platforms, such as China joining the WTO. They began to challenge and affect policy-making in other constitutional branches³⁰⁵. The NPC delegates also had developed impressive legislative skills in forcing open policy debates through various tactics, including delaying tactics, tabling a draft, or what Dowdle called “salami tactics” by manipulating a law’s place on the NPC agenda³⁰⁶. Starting in 1987, an increasing number of dissenting votes had been observed. In the 1988 plenary session, Huang Shunxing, a NPCSC member, gave an impromptu speech against one bill awaiting the final vote. He became the first deputy to openly object a motion in the plenary session³⁰⁷.

Third, in the 1980s, as a national law-maker, the NPC occasionally resisted central initiatives and provided a forum for bargaining and negotiating. As a matter of fact, it also served to clarify and elaborate general directives and to coordinate a law-making process that involved individuals and groups scattered across a number of organizations³⁰⁸. This was manifested intensively by the NPC Plenary Sessions. But this did not mean that the plenary session had lost its political relevance. Rather, its political symbolic meaning had

³⁰⁴ Among the NPC’s changes was the authorization – over State Council opposition – of judicial review of administrative actions of the subordinate State Council organs, as well as the private actions of individual administrative actors. See *supra* note 70 at 7.

³⁰⁵ See *supra* note 50 at 348.

³⁰⁶ One fascinating influence strategy, which might be dubbed legislative “hostage-taking,” was used in 1986-87 to force a reopening of the debate on the State Enterprise Law and the Factory Manager Responsibility System (FMRS). After a bitter NPC debate on the law in spring 1985, the State Council implemented the controversial FMRS on its own for almost two years under its temporary legislation authority. But in November 1986, the NPC made the State Council ransom its prized Bankruptcy Law by making its implementation conditional upon prior NPC approval of the Enterprise Law. Over the next 16 months, the Enterprise Law was subjected to NPC debate four more times. *Supra* note 293 at 58-59.

³⁰⁷ *Supra* note 283 at 116.

³⁰⁸ See *supra* note 272 at 164.

invited deputies, political dissidents and ordinary people to use it to draw attention to their demands. As a result, the plenary session had become more assertive internally and more attractive externally³⁰⁹.

Stage 2: the 1990s

After 1989, the NPC developed continuously, and even the Tiananmen Demonstration and its resulting political retrenchments did not significantly curb the NPC's growth³¹⁰.

The first development in this period was an increase in negative votes and absent votes that extended to the realm of basic law. For example, Delegates were also able to introduce and push through a highly controversial change in the draft amendments to the *Criminal Procedural Law*³¹¹. Also, the objection against other ordinary laws also increased. For instance, over a quarter of the delegates also failed to support State Council proposals for a draft *Banking Law* and a draft *Education Law* in 1995 sessions³¹².

Secondly, in the 1990s, the NPC's development had transformed itself into a more formidable constitutional body than in the 1980s. This allowed it to begin to seize control of legislative development and to further gain back legislative jurisdiction from the State

³⁰⁹ *Supra* note 283 at 116.

³¹⁰ For example, between 1980 and 1997, the support services of the NPC grew from a staff of 100 to a staff of over 1000. When the central government experienced broad staffing cuts in the latter half of the 1990s, the NPC staff was not affected. See *supra* note 50 at 348.

See *ibid* at 6.

³¹¹ The NPC's original draft, which greatly liberalized criminal procedure in China, met concerted opposition from the Ministry of Public Security (MPS). The MPS is one of the most powerful organs in China, and possesses great influence with CCP leadership. (The MPS's objections focused primarily on a strong antipathy towards an amendment provision abolishing administrative detention, a widely used procedure that allowed local security organs to incarcerate persons indefinitely without trial and without access to a lawyer.) Despite this, the amendments passed by the NPC were virtually identical to the original drafts so strongly opposed by the MPS. See *ibid* at 8-9.

³¹² See *ibid* at 8.

Council³¹³. A very important example of this is the first Legislative Plan drafted by NPC itself³¹⁴ in 1991.

The third development in this area was that delegates also began to become increasingly assertive in introducing their own items into the NPC's legislative and political agenda³¹⁵. In 1990s, it is significant to note that these developments in delegate behavior increasingly brought the delegate body into conflict with the NPC's own leadership³¹⁶. Also in the 1990s, the NPC also witnessed the growing of lobby between the deputies and institutions, especially those also holding other positions in government³¹⁷.

Fourthly, the growing prestige associated with the NPC further testifies to its increasing role in China's political environment. In contrast to earlier decades, when a position in the NPC was generally a meaningless honorific, in 1997, strong competition broke out within the CCP Politburo over who would be nominated for the Chair of the NPC

³¹³ The State Council's hegemony began to erode in 1992, when the NPC threatened drafting economic reform legislation itself unless administrative drafters started taking greater account of the NPC's concerns. Such threats became promises in 1993, when the NPC Standing Committee refused to consider a draft Company Law submitted to it by the State Council, and instead drew up its own draft Company Law which it passed in December of that year. See *ibid* at 7.

³¹⁴ Also in 1993, the NPC drew up for the first time its own legislative plan. This plan not only listed the pieces of legislation the NPC would consider, but also dictated who should draft each piece of legislation. In doing so, the NPC gave unprecedented drafting responsibilities to its own support services, with the most notable beneficiaries being the CLA and the special standing committees. One of the first casualties of this new plan was the State Council's draft securities law. The NPC plan had assigned responsibility for drafting the securities law to the Economic and Finance Committee (one of the special standing committees), despite the fact that the State Council had been working on its own draft of this law for some two years. Ultimately, the NPC refused to consider the State Council's existing draft, and the State Council had to develop a whole new draft working in conjunction with the Economic and Finance Committee of NPC. See *ibid* at 7-8.

³¹⁵ Examples from the 1990s include repeated attempts by delegates to press the Standing Committee to introduce a draft Euthanasia Law and a law protecting laid-off workers. During the 1997 Plenary Session, one delegate from Sichuan even arranged for a textile worker laid-off from a state-owned firm to address a meeting of NPC delegates, in order to dramatize the plight of such workers. Twice during the 1996-97 term, large groups of NPC delegates independently petitioned the party for changes in national policy. See *ibid* at 10.

³¹⁶ The delegate body's willingness to challenge the NPC leadership over the draft criminal law amendments is only the most visible manifestation of a trend that dates back to the late 1980s. Delegates have also challenged or otherwise gone against the wishes of the NPC leadership on issues such as educational spending, lack of women delegates, lack of supervisory legislation, and nominations for NPC positions. In spite of this, the NPC leadership has continued to encourage delegate independence, even after losing the battle over the criminal law amendments in 1997. As discussed below, the fact that the NPC leadership would continue to promote a force which increasingly opposes the leadership's own attempts to control it strongly evinces a significant constitutional component to the NPC's development. See *ibid* at 11.

³¹⁷ See *ibid* at 34-35.

Standing Committee³¹⁸.

Stage 3: the Era of *Legislation Law*

After 2000, it was seen that the NPC were able to masterly exploit support from the CPC policies to expand its power. In 1999, while the Constitutional Amendment containing the slogan of “Rule of Law” had enjoyed great support from the Party and been passed, the NPC had further expand its authority power by the intellectual authority of the “socialist rule of law”. Therefore, in 2000, the *Legislation Law*, as a milestone for the development of the NPC legislative authority, had been passed. This is a very common strategy of the NPC. For example, in the economic realm, in order to enter the WTO in 2001, the NPCSC revised its *Law on Foreign-funded Enterprises* and *Customs Law* as the expanse of administrative power.

Secondly, the legislative authority of the NPC continued to triumph in battles with the State Council. The first was the NPC’s attempt to rein authorized legislative power by the *Legislation Law* in 2000. In 2003, the NPC triumphed again in the drafting process of the *Administrative License Law*. According to an official report³¹⁹, the law was first drafted by LAC in 1996, and the drafting task was then transferred to the Legislative Affairs Office of the State Council (LAO), in order to list the Law into the Legislative Plan of the

³¹⁸ In 1997, fierce political competition broke out over who would head the NPC over the next five years, a competition that was eventually won by Li Peng, the second-most-powerful man in the CPC. The fact that the second-most-powerful man in China would fight for a position in the NPC leadership suggests that the NPC had indeed become relevant in China’s political system. Moreover, a number of persons left prestigious positions in the State Council to assume positions in the NPC. In 1995, Cao Geping left his post as Chairman of the State Council’s National Environmental Protection Commission to become the first Chairman of the NPC’s Special Standing Committee on the Protection of the Environment and National Resources, bringing with him much of his EPC staff. In 1997, Jiang Chunyun, then Vice Premier of the State Council and a close associate of Jiang Zemin, left his position on the State Council to become a Vice Chairman on the NPC’s Standing Committee. See *supra* note 50 at 348. See also *supra* note 49 at 4-5.

³¹⁹ Xinhuanet, “Xinwen beijing: xingzheng xukefa chutai de qianqianhouhou [Background News: Story behind the Administrative License Law]” (28 August 2003), online: Xinhua Net <http://news.xinhuanet.com/zhengfu/2003-08/28/content_1048857.htm>, last accessed on April 15 2015 [translated by author].

9th NPCSC. The LAO continued the drafting process through vast investigations, interdepartmentally counseling, and seeking frequent advice from domestic and international scholars. The drafted law was passed by State Council in 2002, but unusually vetted four times (13 months total for time spent) by the NPCSC. The Law was eventually passed by the NPCSC in 2003 but the original draft of the *Administrative License Law* was vastly changed by the NPCSC³²⁰. The *Administrative Coercion Law* in 2011, for which the LAC took over the drafting authority from LAO³²¹ in 1999, and vetted five times by the NPCSC, including collecting over 3800 suggestions from academe and society³²². The *Administrative Coercion Law*, by the way, is a recent example revealing that the NPC is capable of gathering wide support from society when drafting a law on its own³²³ that contains strong constraint on executive bodies³²⁴. A more recent example was the new Revision to *Administrative Procedure Law* in 2014, in which the NPC asserted a great deal of legislative power on administrative affairs.

Third, attempts were also made by the NPC to strengthen its power and authority. This

³²⁰ According to the official report regarding the drafting process of the law, there were over 40 revised parts in the drafted law on the 4th discussion in the NPCSC meeting before the law was eventually passed.

³²¹ The Legislative Affairs Office (LAO) of the State Council was created in 1980, by its nature, an assistant and counsel to the leaders of the State Council in government legal affairs, and a working body assisting the Premier in handling legislative affairs and other legal matters related to the government. The LAO's first task is to review and revise draft laws and draft administrative regulations prepared by various departments, and to submit them to the State Council. For example, the Law on Fire Control adopted by the NPCSC in June 1998, was primarily drafted and prepared by the Ministry of Public Security. Secondly, the LAO organizes the drafting of certain important laws and administrative regulations. An example of this is the Law on Administrative Reconsideration (1999). Finally, the LAO handles the legislative interpretation of administrative regulations, and matters relating to the unification of the legal system. In view of the above, we can conclude that the LAO plays a very important role in law-making within the State Councils. The LAO is also responsible for inter alia, 'law interpretation', for inspecting the implementation of laws by administration, for interdepartmental coordination in implementation and evaluation of laws, for registration of central and local laws and rules, as well as for the publication of legislation and its authorized translation. See *Overview of Law-Making*, *supra* note 287 at 7; and also see Li Shishi, "The State Council and Law-making", in Jan Michiel Otto etl. *supra* note 274 at 96-97.

³²² Jiang Ming-an, " 'Xingzheng qiangzhifa' de jiben yuanze he xingzheng qiangzhi shedingquan yanjiu" [Basic principles and setting of administrative coercion in Administrative Coercion Law], 32:11 faxuezhazhi [Law Science Magazine] 6 at 6-7 [translated by author]. See also NPC, "Xingzheng qiangzhifa lifa shierzai toudi" [twelve-year Legislative process of Administrative Coercion Law], (Jul 01 2011), online: NPC <http://www.npc.gov.cn/npc/xinwen/lfgz/2011-07/01/content_1662367_2.htm>, last accessed on April 15 2015 [translated by author].

³²³ Another example of this is the revision to the Individual Income Tax Law. The revision was prepared by Budgetary Affairs Commission of NPCSC, and collected more than 230 thousand suggestions and advice from society. Apparently this is a tactics to neutralize pressure from relevant revenue collection government bodies. See NPCSC Working Report 2013, online: NPC <http://www.npc.gov.cn/pc/12_1/2013-03/21/content_1789750.htm>, last accessed on April 15 2015 .

³²⁴ For instance, Article 10 provided that "no regulatory documents other than laws and regulations may set administrative compulsory measures", which prohibited all departments including the Ministry of Public Security to do so.

was indicated by the *Supervisory Law* in 2006. The Law institutionalized and further specified the supervisory methods of the NPC. However, the law was eviscerated because it had removed “constitutional supervisory” and “constitutional committee” clauses provided by the original draft³²⁵. Nevertheless, the drafting process of the law spanned over 20 years, and the fact that the law was drafted by the NPC’s own staff to some extent did show that the NPC had become a stronger constitutional player, though the State Council and CPC still had great influence on the NPC’s legislative activities³²⁶. Perhaps the newly revised *Budgetary Law* of 2015 is a case more worth looking at. The new revision to *Budgetary Law* had gone further for it clearly sought to eradicate the legal basis for arbitrary expenditure and any deviation from the budgetary plan approved by the NPC.

Finally, it has also been witnessed that the NPC is more capable to pass most controversial and progressive legislations, especially in recent years. The first row of Legislative Plans in 2003, 2008 and 2013 tell us that only about 40% in 10th and 12th NPC legislative proposals, and less than 30% of them in 11th NPC³²⁷ were drafted by the LAC and other NPC bodies. However, began with the late 1990s, NPC was the drafter for most progressive and controversial legislative initiatives³²⁸. In 1999, for example, the

³²⁵ Caixin, “Quanguo gongshanglian jianyi zhiding ‘xianfa jiandufa’” [The ACFIC suggest to enact Constitutional Supervision Law] (05 March 2015) online: Caixin <<http://china.caixin.com/2015-03-05/100788495.html>>, last accessed on April 15 2015 [translated by author].

³²⁶ Xinhuanet, “Quanguo renmin daibiao dahui changwu weiyuanhui gongzuo baogao (quanwen)” [NPCSC Working Report, 2008 (full text)] (21 March 2008) online: Xinhuanet <http://news.xinhuanet.com/newscenter/2008-03/21/content_7831807_5.htm>, last accessed on April 15 2015 [translated by author].

³²⁷ Xinhuanet, “Shijie quanguo renda changweihui lifa guihua” [the Legislative Plan of 10th NPCSC], online: Xinhuanet <http://news.xinhuanet.com/zhengfu/2004-01/09/content_1268128.htm>, last accessed on April 15 2015 [translated by author]; NPC, “Shiyijie quanguo renda changweihui lifa guihua” [the Legislative Plan of 11th NPCSC] (Oct. 29, 2008), online: NPC <http://www.npc.gov.cn/npc/xinwen/sywxw/2008-10/29/content_1455985.htm>, last accessed on April 15 2015 [translated by author]; NPC, “Shierjie quanguo renda changweihui lifa guihua” [the Legislative Plan of 12th NPCSC] (Oct.31 2013), online: NPC <http://www.npc.gov.cn/npc/xinwen/sywxw/2013-10/31/content_1812101.htm>, last accessed on April 15 2015 [translated by author].

³²⁸ See *supra* note 70 at 64-65.

NPC session passed a controversial yet very important *Contract Law*³²⁹. In 2004, with the support from the CPC, the NPC passed the 4th Amendment of the *1982 Constitution* which, most importantly, contained the enshrinement of human rights protection³³⁰. In addition, the debate on the *Property Law* in 2006 in both the NPCSC and Chinese society was a case of proposed legislation not making it through the NPC as initially expected³³¹. The *Property Law* was eventually passed in the 2007 NPC session. While 13 years of drafting processes by NPC's staff and invited scholars from universities, and debates in 7 NPCSC sessions³³² have proven that the NPCSC is capable of drafting extremely sophisticated legislation, the heated debate on constitutionality of *Property Law* has further highlighted the fact that the NPC has become the crux in Chinese legislative system for passing controversial and progressive legislation. The more recent examples include *Electoral Law* in 2010, *Administrative Coercion Law* in 2011, amendment to *Administrative Procedure Law* in 2014, and now the RLL in 2015.

In 2010, the NPCSC claimed that “the objective of building [a] Socialist legal system with Chinese Characteristics [had] been accomplished.” There were 236 Legislations passed by the NPC and the NPCSC and 690 Regulations passed by the State Council. Also, the NPCSC had “completely sorted out current laws, administrative regulations and local regulations” that made the NPC leadership conclude, “we have basic laws to depend

³²⁹ Peter Howard Corne, “Creation and Application of Law in the PRC” (2002), 50:2 *The American Journal of Comparative Law* 369 at 379.

³³⁰ Xinhuanet, “Shijie quanguo renda changweihui yinianlai lifa gongzuo chenshu” [Concise Report on Annual Legislative Works of 10th NPCSC] (09 March 2005) online: <http://news.xinhuanet.com/newscenter/2005-03/09/content_2672984.htm>, last accessed on April 15 2015 [translated by author].

³³¹ See *supra* note 135.

³³² Xinhuanet, “Shijie quanguo renda ji qi changweihui yinianlai lifa gongzuo jianshu” [Concise Report on Legislative Works of 10th NPCSC] (11 March 2007) online: <http://news.xinhuanet.com/misc/2007-03/11/content_5831820.htm>, last accessed on April 15 2015 [translated by author].

on every corner of the entire system in China³³³.” Thus, after 2010, the main tasks for the NPC’s legislative works seemingly turned toward revising current versions of legislations. For example, in 2012, of the 19 legislative bills passed by the NPC and its Standing Committee, 16 of them (84%) were revisions to legislations.³³⁴ In 2013, this trend was sustained. For the NPCSC, it revised 21 legislations yet only enacted 2 new laws³³⁵. In 2014, the number of revised legislations was 10 with the passing of only 2 new legislations³³⁶.

According to the latest report from the NPCSC in March 2015, the “key” for the NPCSC’s legislative works is to improve the quality of law. A new plan was provided by the report, and the measures include: (1) Strengthening constitutional supervisory institution using the new drafted legislation of Constitutional Supervisory procedure³³⁷ and through a Filing and Review system. (2) Listing several areas for enacting further legislations, such as Revised *Securities Law*, *Electoral Law*, etc. (3) Emphasizing the “leading role” of the NPC and its Standing Committee. Noteworthy is that this involves institutionalizing public participation on legislative activities, and an experts-involvement

³³³ Xinhuanet, “Shouquan fabu: quanguo renmin daibiao dahui changwu weiyuanhui gongzuo baogao” [NPCSC Working Report 2011] (18 March 2011) online: <http://news.xinhuanet.com/politics/2011lh/2011-03/18/c_121203794.htm>, last accessed on April 15 2015 [translated by author].

³³⁴ NPC, “Yirenweiben yushijujin: quanguo renda ji qi changweihui 2012 nian lifa huimou” [Annul Legislative Review of NPC and its Standing Committee] (08 March 2013) online: <http://www.npc.gov.cn/pc/12_1/2013-03/08/content_1769376.htm>, last accessed on April 15 2015 [translated by author].

³³⁵ Zhang Dejiang, “Quanguo renmin daibiao dahui changwu weiyuanhui gongzuo baogao—2014 nian 3 yue 9 ri zai di shier jie quanguo renmin daibiao dahui dierci huiyi shang” [NPCSC Working Report, 2014] (09 March 2014) online: NPC <http://www.npc.gov.cn/npc/dbdhhy/12_2/2014-03/17/content_1856100.htm>, last accessed on April 15 2015 [translated by author].

³³⁶ People, “Quanguo renmin daibiao dahui changwu weiyuanhui gongzuo baogao (quanwen shilu)” [NPCSC Working Report, 2015] (08 March 2015) online: <<http://lianghui.people.com.cn/2015npc/n/2015/0308/c394314-26657015-2.html>>, last accessed on April 15 2015 [translated by author].

³³⁷ It should be noted that the “All-China Federation of Industry and Commerce” (ACFIC), the half-governmental background organization that is mostly comprised of entrepreneur members, filed a motion to the NPC Chairman group in a NPC session this year (2015). The main idea in the motion is to encourage the NPC to pass the “Constitutional Supervision Law”. A large portion of the motion seeks to establish the constitutional review system that empowers a specific organ within the NPC to vet the constitutionality of statutes including laws promulgated by the NPC itself and other regulations, and governmental actions. Also, statutes declared as “unconstitutional” must be void or rectified, and relevant government officials should be liable for unconstitutional governmental actions. Caixin, “Quanguo gongshanglian jianyi zhiding ‘xianfa jiandufa’ ” [The ACFIC suggest to enact Constitutional Supervision Law] (March 05, 2015) online: Caixin <<http://china.caixin.com/2015-03-05/100788495.html>>, last accessed on April 15 2015 [translated by author].

system according to the NPCSC's recent report³³⁸. Last but not the least, perhaps the new RLL would inspire greater motivation for strengthening the NPC's legislative authority, if the events of 2000 are recalled when the original *Legislation Law* was promulgated.

Therefore, as the legislative power of the NPC continued to grow since the 1980s after the passage of *Legislation Law*, especially when the NPCSC leadership claimed that "Socialist Legal System with Chinese Characteristics" had been "accomplished" in 2010, the "NPC's leading role in legislative activities" and "improving the legislative quality³³⁹" was most frequently emphasized.

Table 3 The Legislations and Revised Laws Passed by NPC Session and NPCSC (2003 -2015)³⁴⁰

	Reviewed and passed by NPC Session	Vetted and passed by NPCSC meeting
2003	N/A	Vetted 12, passed 10
2004	4 th Amendment of the Constitution	Vetted 33, passed 25
2005	Anti-Secession Law	Vetted 24, passed 18
2006	N/A	Vetted 24, passed 14
2007	Property Law; Enterprise Income Tax Law	Passed 18
2008	N/A	Vetted 15, passed 9
2009	N/A	Vetted 22, passed 14
2010	Revision to Election Law	Passed 16
2011	N/A	Vetted 24, passed 14
2012	Revision to Criminal Procedural Law	Passed 19 (16 of 19 were revised laws)
2013	N/A	Passed 23 (21 of them were the revision to legislation)
2014	N/A	Vetted 20, passed 12 (10 of them were revised law), 8 Legislative Interpretations
2015	Revision to Legislation Law	

³³⁸ See *supra* note 336.

³³⁹ A good example is "unpublished 'legal' instruments" which, formulated by State Council and local government departments, are neither promulgated, issued nor even included in an internal document series in the 1980s and 1990s, and had almost vanished after the 2000s. See *supra* note 329 at 393-394.

³⁴⁰ Data collected and organized based on Annul Reports from NPCSC, 2003-2015.

3.1.2 Legislative Development and RLL in 2015

After the CPC's slogan of "Rule of Law 2.0" in the Party 4th plenary has been raised in 2014, the NPC Plenary Session passed the RLL in March 2015. The new RLL manifests and recognizes efforts to strengthen the legislative authority of the NPC at the expense of the State Council's legislative power. Additionally, the new revision seeks to improve NPC Law-making process through greater transparency and public participation.

First, the RLL does not currently conceal the ambition to rein the administrative legislative power. According to a report from NPCSC, the primary objective of the RLL is to "improve the quality of legislation", and strengthen the leading role of the NPC and its Standing Committee in the legislative process.³⁴¹

Secondly, to largely get rid of the old school "experimental reforms prior to NPC legislation", the RLL stipulates that any future reforms should have a legal basis in legislation. In the 1980s and 1990s, "the proposition that certain subject matters are reserved to the NPC is undermined by the use of subordinate regulations to implement experimental reforms"³⁴². In the RLL, however, the NPC took the CPC's recent commitment to the "Rule of Law" as a shield to take over the power "to determine whether to suspend the implementation of portions of law in a specific area regarding administrative affairs"³⁴³ a right previously assumed by the hand of the State Council.

³⁴¹ Xinhuanet, "Guanyu 'zhonghua renmin gongheguo lifafa xiuzhengan (caoan)' de shuoming (quanwen)" [Explanation about Draft of Legislation Law (full text)] (08 March 2015) online: <http://news.xinhuanet.com/2015-03/08/c_1114563179.htm>, last accessed on April 15 2015 [translated by author].

³⁴² The best example is the enactment of the Company Law in 1993. Before the enactment of the national Company Law in 1993, these measures permitted the local resolution of problems related to the emergence of joint stock companies and also paved the way for national legislation. Whilst this approach to law reform has many practical advantages, it clearly weakens the NPC's claim to legislative supremacy. See *supra* note 275 at 736.

³⁴³ Xinhuanet, "Guanyu 'zhonghua renmin gongheguo lifafa xiuzhengan (caoan)' de shuoming" [Statement regarding Revision to the Legislation Law of the PRC(Drafted Version)] (March 8, 2015, online: Xinhuanet <http://news.xinhuanet.com/2015-03/08/c_1114563179.htm>, last accessed on April 15 2015 [translated by author].

Thirdly, the RLL strengthens the limit on entrusted legislation. In the *Legislation Law* 2000, entrustment clauses were generally very ambiguous, thus granting the administrative body virtually unlimited rulemaking discretion. The only limitation was that the administrative rule or regulation could not infringe upon the spirit of applicable law and the Constitution³⁴⁴. Moreover, Article 8 and Article 56 of the *Legislation Law* 2000 provided that the State Council can issue administrative regulations on any matter that falls outside the scope of matters preserved by the NPC, or can even enact regulations regarding matters within Article 8 if delegated such authority by the NPC.³⁴⁵ Therefore, in order to tackle chronic problems caused by vague and broad authorization, the new RLL added provisions stipulating that authorization should be conferred only when clarification of the objective, scope, items and duration (maximum term of 5 years) of the authorizations were clear. The RLL also requires that the authorization included principles that the authorized bodies would observe, and further requires the authorized bodies to report details of empowerment to authorizing bodies (Article 4 and 5 of the RLL). This final return to the Suggested Draft of 1997 of Legislation Law is an important aspect revealing a recent development of NPC's legislative authority.

Fourthly, Article 25 of the RLL directly “breaks into” the realm of Legislative Power of the State Council, by explicitly requiring the State Council annual Legislative Plan to be in accordance with the NPC Legislative Plan and annual Legislative Project (*niandu lifa*

³⁴⁴For example, in the original version of Article 10 of the PRC Legislation Law promulgated in 2000, the provision provides that an enabling decision shall specify the objective and scope of authorization. This does not go as far as Article 13 of the Specialists' Suggested Draft of 1997, according to the Expert Explanation draft, that delegations of power had to be not only specific, with the object, and scope clearly defined, but also specify the procedures for ensuring purpose, content and supervision procedures. See also *supra* note 329 at 374.

³⁴⁵ See *supra* note 329 at 381.

jihua). And also Article 25 also stipulates that the NPC should “supervise” and “direct”(*ducu zhidao*) the State Council when drafting its Legislative Plan, in the name of “unified Legislation”. Despite this, the RLL stipulates that the State Council should enact specified regulations if the NPC legislation demands said regulations. The Legislative Plan made by the State Council should be in accordance with the NPCSC’s version. In short, these stipulations are seemingly part of an effort to strengthen the NPCSC’s legislative competence. In addition, Article 26 of RLL demands that the State Council shall “open” its legislative process to NPC deputies, society and citizens, as a remedy for the chronic nontransparent administrative legislative process. For example, it requires the State Council to open a draft of administrative regulations to the public unless the laws provided otherwise. However, in return, the RLL also gives back some “lost territory” to the State Council on procedures when drafting important administrative legislations.³⁴⁶

Moreover, the RLL also attempts to rein administrative legislative power by imposing restraints on tertiary legislation, i.e., departmental rules (*bumen guizhang*) and local government rules (*defang zhengfu guizhang*). Articles 31 and 32 of the RLL stipulates that, concerning departmental rules stipulate that without NPC legislations or State Council’s regulations, a ruleshall not contain any clause that reduces the rights of citizens (or organizations), nor shall it add any extra obligations to any citizen or organization. Likewise, without laws or secondary regulations, local government rules shall not contain provisions that curtail citizens or organizations’ rights, nor shall it add any extra obligations to any citizen or organization. Nevertheless, as a compromise, Article 32 also

³⁴⁶ Xinhuanet, “Lianghui shouquan fabu: Zhonghua renmin gongheguo lifafa” [Authorized Promulgation: Legislation Law of the PRC], (March 18 2015), online: Xinhuanet <http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-12/29/content_1891927.htm>, last accessed on April 15 2015 [translated by author].

provides an emergency power to local governments that permits an enactment of rules within a non-renewable maximum period of two years when faced with an imminent situation regarding administrative affairs. But, when the period expires, these temporary rules shall be replaced by local regulation enacted by local people's congresses or its standing committee.

Another important development in the RLL seeks to enhance the transparency and public participation of the legislative drafting process. First, Article 53 specifies the roles that the LAC and special committees play in the legislative process. It provides that the LAC and special committees of the NPCSC should participate in the initial process of legislative drafts. In statutory proposals including other drafters, the LAC and special committees should play an organic role. Secondly, Article 36 of the RLL also provides that if legislative proposals involve specialized knowledge, drafters should hold a public hearing to allow and invite relevant representatives from grassroots, specialist, academic institutions or social organizations to participate in the legislative process. The reports from such Hearings should be reported to the NPCSC. Thirdly, according to Article 37, the RLL stipulates that all unclassified legislative drafts should be published to seek suggestions from the public and the published time should not be less than thirty days. Lastly, the results should also be made public.

Article 42 of the RLL draft, for the first time, adds that in the NPCSC vetting process, chairmen could choose to list one or several important clause(s) for a separate vetting process and adopt additional voting by the NPCSC plenary meeting. This special process

for vetting and voting important clauses does not impact the passage of the entire legislative bill. Surely, this would make the NPCSC seem more like a genuine legislative body.

Last but not the least, the RLL stipulates, “Taxation types, Taxation rates and other Taxation systems shall only be determined by Law.” This can be considered progress in light of past NPC Legislation that played no role in taxation. Even currently, almost all taxation statutes were enacted by regulations, rules, or even “red-head documents” from local CPC organs.

It is almost without question that this new Revision will bring about another opportunity for the NPC’s development (but mostly, the NPCSC’s legislative competence) by enhancing the legislative competence of the NPC as well as curbing administrative legislative power. However, the real question is by how much will the RLL, legislation lacking justifiability, effectively ensure that all constitutional bodies are substantially bound? Moreover, in what way will it allow the NPC to successfully rein the traditionally powerful legislative authority of the State Council, departments, or local governments? In the effort to improve the quality of legislations there are too many questions that remain unanswered.

3.2 From Hearing Report to Filing and Review System: The Development of Supervisory Power of The NPC

As noted above, from 1954 to 1977, the NPC failed to perform any supervision conferred

by the Constitution³⁴⁷. As its legislative authority, the turnaround occurred in the *1982 Constitution*, which granted the NPCSC primary responsibility for constitutional enforcement, and specified NPC supervision along with organic laws promulgated subsequently. With the explicit rejection of Check and Balance system in the 1980s³⁴⁸, commitment to legislative supremacy dictated an NPC-based supervisory system. After 2000, the *Legislation Law* and other statutes officially formed a Filing and Review System, by which Legislative Review became a practical and detailed function of the NPCSC.

In this part, we will first briefly review the framework of the supervisory power of the NPC and its Standing Committee. Furthermore, we will highlight that in the 1980s to 1990s, for the supervisory power of the NPC, the main focus was the reviewing and vetting process in the NPC plenary session and NPCSC meeting. After entering the “Era of Legislation Law” in 2000, however, the primary attention would be paid to the new Filing and Review system, a continuously developing supervisory with several old institutional obstacles.

According to the *1982 Constitution* and relevant legislations of the PRC, the NPC, in

³⁴⁷ As observed by O’Brien, “few investigatory committees were set up after the mid-1950s and recall and appointment of top state officials took place at party initiative, sometimes without the formality of NPC voting. The NPC always passed the NPCSC, Supreme Court, and Procurator’s reports unchanged and never revoked a decision made by the supreme state executive organ, the State Council. As far as we know, on no occasion did the NPC or its committees have a formal, open disagreement with, or attempt to force its will on, any subordinate body. As an organization, the NPC made few efforts to illuminate problems in other state organs. By and large, deputies were unfamiliar with government work and lacked sufficient data to draw conclusions. The only well-informed deputies were typically administrators themselves, who had little incentive to open their agencies to legislative scrutiny. High officials could act as they pleased and were immune from deputy criticism.” See *supra* note 272 at 77-78.

³⁴⁸ Constitutional analysts defended this decision primarily on theoretical grounds, explaining that in China’s unified state system, the scope of legislative supervision was greater than that of judicial supervision because NPC powers were greater than that of any judicial organ. See *ibid* at 77-78.

theory, had several main supervisory powers³⁴⁹, in line with its stature as “supreme state organ” in the PRC. The supervisory functions of the NPC could be divided as “supervision on implementing law” (“*zhifa jiandu*”, hereinafter “SOIL”) and “supervision on legislative affairs” (“*lifa jiandu*”, hereinafter “SOLA”).

1. Supervision on implementing law

The first part of the supervisory power of the NPC is the power to supervise state organs during the process of implementing law. It originated from the *1982 Constitution* and was specified by *Several Provisions Regarding the Supervision on Implementation of Law* issued by Qiao Shi’s NPC in 1993 as well as the *Supervision Law* in 2007. According to these statutes, SOIL includes: (1) Supervision on executive activities, such as budgetary supervision and ratification of treaties. (2) Supervision on judiciary, which mainly includes the process of NPC vetting reports from highest judicial organs that is SPC and SPP³⁵⁰. These methods for exercising such two powers could be mainly summarized by the following: Working Reports, Powers of Interpellation (*zhixunquan*)³⁵¹, Investigation (*wenze diaocha*), Examination of Implementation of Laws (*zhifa jiancha*), Power of Appointment and Removal (Recall, Dismissal [*chezhi*] and Removal [*mianzhi*])³⁵², Supervision on Judiciary, and a later development of Budgetary Supervision³⁵³.

³⁴⁹ See *supra* note 220 at 193-198.

³⁵⁰ See *supra* note 221 at 382-389, 398-404.

³⁵¹ Interpellation refers to the power that the NPC forces the personnel in state organs to answer inquiries from the NPC deputies or NPCSC members, as specified by the 1982 organic law (art. 16, 17) and the Constitution (art. 73). However, in the name of simplified procedures, the 1982 organic law (art. 21) and 1989 rules of procedure stipulated that proposals, criticisms, and opinions would no longer be presented in the form of bills, but would be submitted to the General Office of the NPCSC, which would refer them to concerned departments. See *supra* note 272 at 146.

³⁵² “Recall” means the delegates in the NPC and its Standing Committee “call back” any government officials in state organs for any reason, a theoretical power that stems from orthodox Marxism. “Dismissal” refers to removing one from her position for the officials violating the laws or inner-party regulation. “Removal” also refers to “dismissal”, but it is due to competence or working ability rather than illegal activities. See *supra* note 221 at 403-404 [translated by author].

³⁵³ Dowdle concluded six aspects in SOIL. They are Budgetary Supervision, Works Report, Congressional Interrogatories (Interpellation), Investigation, Appointment and Removal procedure and Supervision of Courts. See *supra* note 70.

2. Supervision on Legislative Affairs

Another part of the NPC's supervisory power, "Supervision on Legislative Affairs" means that the NPC and its Standing Committee is vested with supreme power to review legislation, administrative regulations and other normative documents, in order to determine the constitutionality, legality and reasonableness of these legislative documents. The main objective of "Supervision on Legislative Affairs" seeks to secure the unified legal system of the state and ensure the consistency between Constitution and other statutes³⁵⁴.

3.2.1 Development of Supervision on Implementing Law

In this part, we will briefly examine the NPC's first part of authority, i.e., SOIL, which was particularly prominent in the 1980s to 1990s, and also have certain impacts after 2000.

1. Working Reports

Working Reports is one principal way by which the NPC monitors the activities of the other constitutional bodies. Constitutional practice now requires that Annual Work Reports be given to the Plenary Session by the State Council, the SPC, the SPP, and the NPCSC. These Working Reports both review the organ past year's activities and outline the organ's major policy initiatives for the upcoming year. The NPCSC also hears "Specialized Working Reports" and "Interim Working Reports" provided by the State Council, ministries or other constitutional organs in the event of important developments

³⁵⁴ See *supra* note 221 at 381-382.

or major policy changes³⁵⁵.

In 1979, the NPC's legislative supervision was resurrected. In 1979, deputies could only admonish dishonest and unethical leaders³⁵⁶, however, several "courageous" nay votes were cast at the 1986 NPC against the Supreme Court and Supreme Procurator's Working Report³⁵⁷. In 1989, every government report faced opposition and 40% of NPC deputies opposed or abstained on a State Council proposal to delegate law-making power to the Shenzhen Special Economic Zone's People's Congress³⁵⁸. And in 1988, the NPC took excerpts from passages in the premier's government Working Report and criticized state officials for immorality, incompetence, and mistaken priorities³⁵⁹. However, in May and June 1989, the limits of rationalization were vividly displayed when NPCSC petitioners and NPCSC Chairman Wan Li proved unable to convene a special session of the legislature to revoke martial law and instead gave their blessing to the Tiananmen suppression³⁶⁰. Nevertheless, the Suppression in 1989 did not significantly set back the pace of development for NPC's legislative supervision in the 1990s. Starting from the 1990s, there was relatively low approval of governmental or judicial reports. For example, the delegates of the NPC independence that manifested itself at the 1995 Plenary Session surfaced against the 1996 Plenary Session. Also, delegate independence was just as evident during the 1997 Plenary Session³⁶¹.

³⁵⁵ See *supra* note 70 at 95.

³⁵⁶ See *supra* note 272 at 97.

³⁵⁷ *Reform with Limits*, *supra* note 275 at 359.

³⁵⁸ See *supra* note 272 at 143.

³⁵⁹ *Ibid* at 165.

³⁶⁰ *Ibid* at 179.

³⁶¹ Unprecedented numbers of delegates again failed to support the work reports of both the Supreme People's Court and the Supreme People's Procurate (44% in the case of the Supreme People's Procurate's working report). Nearly half of the delegates voted against the annual work report of the procurator-general, the largest negative vote in NPC history. This dissent prompted the Supreme People's Court to form a special investigation commission to look into the problem of judicial corruption, the principal source of the delegates' concerns. See *supra* note 80, at 9; See *supra* note 49 at 3; *supra* note 135 at 157-158.

Delegates were also highly critical of the State Council's work report³⁶². Furthermore, in the 1990s, the biggest success of the dissenting voices was the temporary halting of the project to build a huge dam across the Yangzi River that would have major social, economic and environmental consequences. Opposition was shown by the fact that 274 delegates voted against the motion while a further 805 abstained – a record at the time in NPC voting. In total, one-third of deputies did not support the Three Gorges Project in 1992³⁶³. Also, since 270 delegates criticized this project during the meeting, consideration for construction was to be delayed until 1995 at the earliest.

Although the full NPC has gone even further to reject any governmental report or proposal, this has been retained as a very important yet common way to draw attention from governmental organs, and to express independent voices in authoritarian environment. After 2000, votes to abstain or oppose are no longer considered secret as they can now be found on various websites and in other governmental-funded open presses³⁶⁴.

2. Interpellation

Interpellation refers to the power that the NPC uses to force the personnel in state organs to answer inquiries from NPC deputies or NPCSC members, as specified by the 1982

³⁶² In 1997 this is particularly focusing on the State Council's lack of attention to the plight of agricultural workers and laid-off employees of state-owned enterprises. Their criticisms resulted in numerous amendments to the State Council's stated policy goals in these areas. See *supra* note 70, at 9.

³⁶³ See *supra* note 135 at 116, 156.

³⁶⁴ For example, in 2007, the SPC report received 359 “nay” votes while in 2008, the number rose to 521. In particular, negative votes in 2013 against the SPC report were 605, when it was 429 in 2012 and 390 in 2014. Also interesting, in 2013 the Government report received the highest negative votes since 2006, and it was nearly 8 times greater than in 2006 and 2 times greater than in 2011. Sohu, “Quanguo renda bimuhui shang de fandui piao: zuigaojian duoyu zuigaofa [Negative votes in final session of NPC: SPC received more nay votes than SPP]” (14 March 2014), online: <<http://news.sohu.com/20140314/n396577084.shtml>>, last accessed on April 15 2015.

Organic Law (Article 16, 17) and the *1982 Constitution* (Article 73).³⁶⁵ The interpellation must be approved by the Presidium before it may be sent to the recipient organ³⁶⁶. If the petitioning delegates or groups are not satisfied with the respondent's response, they could only request that the Presidium allow them to submit a follow-up interrogatory³⁶⁷. Therefore, the result of interpellation is a pattern of "response-following-response", rather than entering any voting process or otherwise forcing a change in governmental activities related to the subject of interpellation whatsoever³⁶⁸.

Thus, it is not surprising to see there were only two "Interpellations" that occurred in the NPC so far, the 1980 "Bao Gang Interpellation" and the 2000 Yan Tai Shipwreck³⁶⁹. Also, until now, no interpellation has been introduced in the NPCSC³⁷⁰. Apparently, Interrogatories appear to be the least used and least developed of the NPC's supervisory powers³⁷¹.

3. Investigation

The current Constitution gives both the NPC Plenary Session and the NPCSC the power to set up investigation committees. Committee members must be selected from among

³⁶⁵ However, in the name of simplified procedures, the 1982 organic law (art. 21) and 1989 rules of procedure stipulated that proposals, criticisms, and opinions would no longer be presented in the form of bills, but would be submitted to the General Office of the NPCSC, which would refer them to concerned departments. See *supra* note 272 at 146.

³⁶⁶ *Supra* note 80, at 97.

³⁶⁷ *Ibid.*, at 98.

³⁶⁸ See *supra* note 220 at 225.

³⁶⁹ However, in 1989, two interpellations occurred in local People's Congress that may have had much more impact than interpellations in NPC. In particular, in 1989 Hunan People's Congress, a vice-provincial governor had been interpellated by 177 deputies and later had been recalled by the People's Congress. Mi Shaolin & Li Yubo, "Dui wanshan woguo zhixun falv zhidu de sikao" [A thought on improving the Interrogatory system in China] (Mar. 18, 2014), Qiushi Theory, online: <http://www.qstheory.cn/lq/xszzh/201403/t20140318_331517.htm>, last accessed on April 15 2015 [translated by author]. Also, until 2010, according to Sun Ying's research, since 1979, in different levels of all people's congresses, there were 92 Interpellations. And the peaked were late 1980, mid 1990 and 2000. See Sun Ying, "Renda zhixun qidong yaojian de leixinghua fenxi" [A characterized Analysis of Initiate requirement of Interrogatory of People's Congress], in Fu & Zhu, *supra* note 70, 369 at 374-375 [translated by author].

³⁷⁰ *Empirical studies*, *supra* note 274 at 87 [translated by author].

³⁷¹ The impotency of this particular power is well evidenced by the incomplete nature of its attendant procedures. In fact, given the tight scheduling of both the Plenary Session and the Standing Committee, it is difficult to conceive how such a petition could actually result in a "hearing" of any sort. In See *supra* note 70, at 99.

the NPC delegates. Committees are comprised of a director, several vice directors, and several members. The committee also has the authority to hire its own research staff. The NPCSC may also form investigatory committees³⁷².

These investigatory committees have been an important and effective method among the NPC's supervisory activities since the 1990s. As of the early 1990s, the NPC could only conduct one or two such investigations per year. By 1996, the NPC had over 30 special investigation committees in operation. In particular, the NPC was also able to discipline other political actors through the use of parliamentary investigations³⁷³. In 2003 and 2004, parliamentary investigation into higher-ranking officials who were responsible for “SARS” has even forced the Central CPC to issue a temporary *Inner-Party Regulation for leading Cadres to Resign, Inner-party Experimental Supervisory Regulation* and *Inner-party Disciplinary Regulation* in 2004 and 2005³⁷⁴.

The NPC's ability to successfully pursue its parliamentary investigations has important implications for China's overall constitutional development³⁷⁵. However, there are at least two shortcomings: first, it is based on spontaneous reactions to important matters rather than institutional consistency. Second, it cannot guarantee the result of an investigation mainly due to the lack of a means for enforcement.

4. Power of appointment and removal

³⁷² *Supra* note 80, at 100.

³⁷³ For example, NPC investigation into educational funding consistently has reminded the State Council of its 1994 pledge to increase education funding to 4.2% of GDP by the year 2000. *Ibid.*, at 4 & 99.

³⁷⁴ Dong Heping, “Guanyu zhongguo xianzheng gaige lujing he buzou de sikao” [A thought regarding path and stage of Constitutional reform in China], in Lin Feng, *supra* note 9, 153 at 172 [translated by author].

³⁷⁵ *Supra* note 80, at 103-104.

The PRC Constitution provides two processes by which the NPC Plenary Session places persons in high constitutional office: election and confirmation³⁷⁶. The actual selection process is dominated by the CCP, of course, and the NPC has the least control. This is because these are the NPC functions that most overlap with the CCP's core institutional responsibility: overseeing the *nomenklatura* system³⁷⁷. Nevertheless, delegate development has left its mark in this area as well. In fact, negative votes have become more commonplace and the NPC has also been willing to express its disapproval of candidates for vice-premier positions whom it feels lack competence and are clearly being appointed for factional reasons. In fact, as central positions only have one candidate, negative votes can tell much about a candidate's popularity³⁷⁸. Moreover, as indicated by Dowdle, such development has caused the CCP to consider modifying its own selection procedures to give NPC delegates more input into its choice of candidates³⁷⁹.

As early as the 1980s, angry deputy speeches became a common occurrence in small-group meetings at NPC plenary sessions in 1979, 1981, 1985 and 1987³⁸⁰. In 1988, Zhou Gucheng's continued nomination as vice-chairman and chairman for a special committee was boycotted by a large number of deputies because of his age (90). In 1993, Li Peng received 330 negative votes plus 220 abstentions in his re-election as premier. Another nominee for state councilor, Li Tieying, received 859 negative votes, which was a record

³⁷⁶ The distinction is based on who formally nominates the candidates: candidates for elected position are formally nominated by the NPC Presidium; candidates presented for confirmation are nominally nominated by organs outside the NPC. For both elections, nominees are elected or confirmed by a simple majority of the full delegate body. See *supra* note 70, at 104-105.

³⁷⁷ *Supra* note 80 at 104.

³⁷⁸ For example, while Li Peng received 2290 (85%) of the votes at the Ninth NPC, Zhu Rongji received 2890, with only 60 abstaining or voting against. At the eleventh NPC in 2008, two people seen as close to Jiang Zemin received the highest rate of no votes and abstentions. In the Ninth NPC, the candidate for chief prosecutor received only 65% of the votes. Many voted against him because of his age (66) and a career as minister of railways was not the best legal training. See *supra* note 135 at 157-158.

³⁷⁹ *Supra* note 80, at 104.

³⁸⁰ See *supra* note 272 at 165.

high. By the 1995 Plenary Session, for example, NPC delegates began showing assertiveness even greater than that which caused significant party alarm. At that session, over one-third of the delegates failed to support the CCP's nominee for Vice Premier, Jiang Chunyun. Also, following such large delegate opposition, the CCP considered amending its nomination procedures so as to allow the NPC to vet the CCP's considered nominations before the official nomination list is set³⁸¹. Besides, the deputies also cast votes against their own NPC leadership. In the 1998 election, Li Peng had the lowest approval rate (88.5%, 2,616 yea, 200 nay, 126 abstentions) from the deputies in comparison with all his predecessors³⁸². These tactics were still carried out by NPC deputies until recently. In 2013, one important reason why the President of SPC, Wang Shengjun had been replaced was because the SPC had continually received the lowest approval rate from 2008 to 2013. Another more prominent example in recent years was the list of personnel in Environment Protection and Resources Conservation Committee, in 2013, which received 850 negative votes and another 125 abstained votes from NPC deputies, which means more than one-third of the total delegate body said "nay" to the Environment Committee³⁸³.

With regards to the removal of persons from constitutional office, only the Plenary Session has such power. Motions to remove may be sponsored by the Presidium, by three or more delegate groups, or by 10% or more of the delegate body. Motions must provide

³⁸¹ *Supra* note 80 at 8.

³⁸² Approval rate was 97.4 percent for Wan Li, 97.6 percent for Qiao Shi, and also lagged far behind Tian Jiyun (approval rate 98.6 percent, 2,941 yea, 41 nay, 0 abstentions). *Supra* note 283 at 117 [translated by author].

³⁸³ QQ, "Renda huanbaowei renyuan mingdan biaoju 850 piao fandui 125 piao qiquan" [Personnel list of Environmental Protection Committee of NPC received 850 negative notes and 125 abstained votes] (Mar 16, 2013), QQ.com, online: <<http://news.qq.com/a/20130316/001132.htm>>, last accessed on April 15 2015 [translated by author].

reason for removal. Removal motions are submitted and decided by the Presidium³⁸⁴. So far, the NPC has yet to ever consider a proposal for removal³⁸⁵.

5. Budgetary Supervision

In China, National Budgets are traditionally set by the State Council. The NPC only reviews the draft version of that budget and offers recommendations. The NPC and NPCSC also monitor the implementation of budget. Nevertheless, for a number of structural reasons, how the NPC's oversees the budget remains far from satisfactory. Even if the recommendations from the Budgetary Committee (before 1998 was offered from the Economic and Finance Committee) are approved by the NPC, the State Council is still free to adopt or ignore them because the State Council's budgetary reports only describe a preliminary version of the budget. The final draft is not completed until the Plenary adjourns. Moreover, even once finalized by the State Council, neither the budget nor the state plans are regarded as legally binding. The State Council may and often does decide to deviate significantly from the original budget and/or plan in the process of implementation³⁸⁶.

However, the new revised *Budget Law* was passed in 2014 and took effect in 2015. It provides that the NPC approved budgetary plan could not be adjusted without legal process prescribed by laws. All expenditures from government branches, governmental departments, and units should be circumscribed within the approved budgetary plans.

³⁸⁴ *Supra* note 80, at 107-108.

³⁸⁵ However, numerous provincial people's congresses have developed more robust procedures for removal, which include providing the Standing Committee with the power of removal, and extending the power of removal to a wider array of governmental officials. One occasion, as noted above, in 1989, deputies in Hubei Provincial People's Congress had successfully removed the vice-provincial governor. See also *supra* note 80 at 107-108.

³⁸⁶ *Supra* note 80, at 90-93.

Any items not listed in the budgetary plan shall not be spent.”(Article 13) Also, “any revenue-collected bodies shall not raise additional revenue, or pre-levy revenue for budgetary purpose.”(Article 55) ³⁸⁷

Nevertheless, the main obstacle for the NPC’s supervised budget may come from the institutional structure. “The current procedures for handling the State Council's budgetary reports to the Plenary Session and follow-up reports to the Standing Committee do not provide the NPC much opportunity or ability to directly affect the development and implementation of the national budget. In addition, most of the delegates are unfamiliar with basic economic and accounting concepts, and thus lack the means to adequately evaluate the reports they are asked to review.³⁸⁸” Nevertheless, these reports do provide substantial information to allow the NPCSC and NPC deputies to monitor the State Council’s budgetary activities³⁸⁹, and provide real opportunity to detect when these activities might not conform to legal mandates³⁹⁰, especially after the new *Budget Law* has been implemented in 2015.

6. Supervision on judiciary

The current Constitution also gives the NPC and its Standing Committee the power to supervise the judiciary. Other than listing to their report as noted above, in the past the NPC and its deputies were also vested with (or even encouraged to exert) the authority to review the handling of a particular case for procedural errors or errors of legal

³⁸⁷ NPC, Revision to Budget Law of PRC, 2014.

³⁸⁸ *Supra* note 80, at 94-95.

³⁸⁹ *Ibid* at 94-95.

³⁹⁰ A recent example is in 2015 NPC plenary sessions, some deputies with economic backgrounds have used the budget report to raise inquiries regarding some budgetary expenditures in 2014. Chinanews, “Xinyusuanfa shishi, ‘paoshou’daibiao chixiang” [‘attacker’ become famous after implementation of new Budget Law] (Mar. 11, 2015), online: Chinanews <<http://www.chinanews.com/gn/2015/03-11/7118086.shtml>>, last accessed on April 15 2015 [translated by author].

interpretation³⁹¹ in all levels of courts. This was called “supervision on individual cases” (*ge'an jiandu*). However, after the CPC issued Document No.9 in 2005³⁹² and the *Supervision Law* was passed in 2007³⁹³, the leadership has substantially and silently shifted the focus of supervision from individual cases supervision to “institutional supervision”. Thus, “supervision on individual cases” has been largely abandoned by the NPC and NPCSC³⁹⁴. Instead, for now the main method for the NPC and its Standing Committee to supervise judicial organs is by requiring that the SPP and SPC issue interim work reports as well as yearly reports to the NPC. These reports are more “ritual” rather than substantial, because once again, there have yet been any reports formally vetoed by the NPC or NPCSC.

Additionally, there are other practically insignificant legislative forms for SOIL, including yearly investigations of law enforcements (*zhifa jiancha*), and systems of “connecting deputies” (*lianxi daibiaozhidu*), “people’s complaint letters and visits” (*renmin qunzhong laixin laifang*) system³⁹⁵. Also, as noted above, the most recent development for SOIL is the *Supervision Law* enacted in 2007, which took over 16 years from initial draft to enactment. However, although the *Supervision Law* specified the jurisdiction and procedure for SOIL, as pointed out by a Chinese scholar, “the spirit behind the *Supervision Law* is ‘Supervision with Chinese Characteristics’, rather than

³⁹¹ Back then, “the NPC actually ‘supervises’ thousands of such cases each year. Most of the time, such ‘supervision’ consists simply of asking a particular court to look into a complaint sent to the NPC by a delegate or an ordinary citizen. These complaints are routinely forwarded by the NPC’s Internal and Judicial Affairs Committee to the Supreme People’s Court according to codified guidelines for its juridical supervision issued by NPCSC in 1989.” See *supra* note 80, at 109.

³⁹² The full name of Document No.9 in 2005, is *Several Opinions regarding Further Strengthening functions of NPC deputies and NPSCS system from NPCSC Party Group*, Article 15 of No.9 emphasizing the role of judicial organs and forbid NPC that CPC, “Supersede executive power and judicial works of government and judiciary” online: CPC <<http://cpc.people.com.cn/GB/64162/71380/102565/182142/10993401.html>>, last accessed on April 15 2015 [translated by author].

³⁹³ The Law eventually passed by NPC does not contain *ge'an jiandu* as initially suggested by the draft version.

³⁹⁴ In some provinces and cities, the local regulations of case-basis supervisions even have been formally abolished. Example included Jiangsu (abolished in 2008) and Qingdao (2005).

³⁹⁵ *Supra* note 221 at 463-478.

‘check and balance’.³⁹⁶ In fact, as indicated by Peerenboom, which still is the case after 13 years, “while all of these means are potentially useful, they all have inherent limitations...the main reason, despite formal powers, supervisory organs have played only a marginal role in limiting administrative misbehavior.³⁹⁷” In a word, they simply just lack sufficient independence and adequate authority to monitor the governments.

3.2.2 SOLA and The Development of Filing and Review System

As noted above, the ongoing development of the NPC in “the Era of Legislation Law” is mainly revealed by the Filing and Review system, the main method of “SOLA”.

3.2.2.1 Evolution of Filing and Review System

According to Article 62 (2) of the *1982 Constitution*, it is both the task and competence of the NPC to supervise the maintenance of the Constitution (or to see that the Constitution is observed). Alongside this, Article 67 charges the Standing Committee of the NPC with the interpretation of and, once more, the supervision of the observation of the Constitution: the NPCSC must annul any administrative legislation of the State Council which is in conflict with the Constitution or with a law (Article 67(7)), and any local regulations and rules from the institutions of the provinces, autonomous regions and municipalities under direct administration which are in conflict with the Constitution, laws or administrative regulations (Article 67(8)). In this regard, all administrative legislation of the State Council (compare Article 92 of the Constitution) and lower authorities (Constitution, Article 100) must be reported to the NPC³⁹⁸.

³⁹⁶ See *supra* note 125 at 217-218.

³⁹⁷ See *supra* note 47 at 414-416.

³⁹⁸ Jan Michiel Otto & Yuwen Li, “An overview of law-making in China”, in Jan Michiel Otto etl. *supra* note 274, 1 at 15.

In fact, “Filing” has long existed in China’s legal system. It originally referred to a procedural action whereby lower government procedurally put own-enacted legal documents on record³⁹⁹. However, such “Filing” has no whatsoever connection with “Review”(shencha)⁴⁰⁰. The two words had no connection until 1990 when the State Council enacted *Regulations on the Filing of Rules and Regulations (fagui guizhang bei'an guiding)*⁴⁰¹.

The milestone was the Legislation Law in 2000 that established the “Filing and Review” system via a national “Basic Law” passed by the NPC Plenary Session. Chapter Five of Legislation Law was titled “Application and Filing” that stipulates details of the “Filing and Review” system. Thereafter, based on (4) of Article 88 of the Legislation Law, the State Council re-issued the *Regulations on the Filing of Rules and Regulations* (2002, No. 337), which specified the process for State Council to review rules filing by departments of State Council and local governments. In 2004, the NPCSC set up a new “Filing and Review Office” under the LAC that is specifically responsible for filing and review. In 2005, the NPCSC further revised the inner rule of *Filing and Review Procedure for Administrative Regulation, local Regulation, Autonomous Regulation and Special Economic Zone Regulations* (hereafter “FR Procedure”) for further specifying the Filing and Review system. Moreover, the 2007 Supervision Law also contained a Chapter

³⁹⁹ For example, the Article 100 of the current Constitution demands local regulations should be reported to the NPCSC for the record (bei'an).

⁴⁰⁰ Wang Kai, “Bei'anshencha: zhongguo de weixianshencha [Filing and Review: Constitutional Review in China?]”, in *Fu & Zhu*, supra note 70, 267 at 267 [translated by author].

⁴⁰¹ Article 5 provides that, “the LAO shall be responsible for filing and reviewing administrative regulations, local government rules and departmental rule. The “Review” was fourfold according to Article 6: (1) Whether local regulations contradict with Laws and Administrative Regulation. (2) Whether Departmental Rules contradict with Laws and Administrative Regulation. (3) Determining whether conflict existing between different departmental rules, or between departmental rule and local regulation. (4) Ensuring the enactment of departmental rules in accordance with legal procedure and normative requirement.

Five of “Filing and Review”. However, in *Supervision Law*, the “Filing and Review” became the “pure Review” because almost all articles in the Chapter seeks to specify the “Review” system (4 out of 6 total articles in the Chapter) rather than stipulating “Filing” system like *Legislation Law* in 2000. The *Supervision Law* confers the NPCSC an enlarged power to review and annul judicial interpretation “contravening with laws” from SPC and SPP⁴⁰². Also, in *Supervision Law*, the scope of review was further extended to “Decision”, “Resolution” or orders from People’s Congress and government in lower levels.

Accordingly, the system of “Filing and Review” has basically been established through *Legislation Law*, *Supervision Law* and other statutes after 2000.

3.2.2.2 Structure and Operation of Filing and Review System

1. Organs for Filing and Review

Organs for filing and review refer to bodies responsible for filing and review. According to current statutes, NPC and its Standing Committee, State Council, and local People’s Congresses as well as local governments are responsible for filing and review. However, only NPCSC and State Council have detailed processes for Filing and Review⁴⁰³, and for the purpose of this thesis, the following content is divided into “NPCSC” and “State Council”, whereas special attention will be paid to the NPCSC.

According to Article 5 (2) of the FR Procedure, upon receiving a normative document for

⁴⁰² Article 31 of the *Supervision Law* provides that “Any interpretation of the SPC or SPP regarding the specific application of laws in the judicial or procuratorial work shall be reported to the Standing Committee of the NPC for filing within 30 days upon promulgation.”

⁴⁰³ *Supra* note 400, at 276-277.

filing, the General Office of the NPCSC (or Filing and Review Office if petition for reviewing legislation is filed by citizens or organizations) should transfer such normative document to special committees of the NPC for review. If special committee considers the normative document contravene the Constitution or Laws, then the special committee must seek for approval from Secretary-General of the NPCSC. If the Secretary-General also reckons that the normative document contradicts a law or the Constitution, then the “suggestions” could be forwarded to relevant bodies that enacted such normative document. If relevant bodies refused to alter or annul the normative documents in accordance with the “Suggestion”, then special committees, along with the Law Committee could submit Formal Suggestions based on results of review to the Chairmen’s Meeting. The Chairmen’s meeting, however, could decide whether or not to submit the Formal Suggestions to the NPCSC meeting for vote. Therefore, although the NPCSC meeting has the final say during the process of the NPCSC review, in reality the Secretary-General and Chairmen meeting substantially control the process. The Secretary-General determines whether it is unconstitutional or contravenes with laws, while the Chairmen meeting decides if they will bring the issue to the floor of the NPCSC meeting⁴⁰⁴.

The second review body on the national level is the State Council. The Regulations on the Filing of Rules and Regulations in 2002 formalize the reporting and review system for rules and regulations at the various levels; this includes those specified by the State

⁴⁰⁴ Also, the Organic Law of NPC enables the chairmen meeting to become the crux of NPCSC. First, the Secretary-General is usually held by Vice-Chairman of NPCSC. Second, the NPCSC meeting held every second month while the Chairmen meeting is vested with the authority to “operate day-to-day works” of NPCSC. And such arrangement is regarded as the manifestation of “Democratic Centralism Principle”. See *supra* note 400 at 276-277.

Council⁴⁰⁵. However, with the passage of the new RLL, the State Council may consider them to further review the current “Regulations on the Filing of Rules and Regulations”.

2. Scope of Filing and Review

Normative documents (*guifanxing wenjian*) are the “subjects” of Filing and Review system, but not all normative documents can be filed and reviewed. Generally speaking, normative documents can be divided into:

(1) Primary Legislations: Laws promulgated by NPC and NPCSC.

(2) Secondary Regulations:

Secondary regulations first contain Administrative Regulations (*xingzheng fagui*) enacted by the State Council. Specifically, there is three sub-categories of “Administrative Regulations” enacted by the State Council: Empowered Legislation (*falv shouquan lifa*), Enumerated Legislation (*zhiquan lifa*) and Authorized Legislation (*lifa jiguan shouquan lifa*).

Another kind of secondary regulations are Local Regulations (*difangxing fagui*). According to both the Constitution (Art. 100) and RLL, Local Regulations refer to regulations enacted by People’s Congresses (and their Standing Committees) in Provinces, Autonomous Regions, Municipalities (*zhixiashi*) and Cities with districts

⁴⁰⁵ The Rules (*guizhang*) of local people's governments of provinces, municipalities directly under the central government and autonomous regions are reported to the equivalent level People's Congress and the State Council for filing. The enactments of people's governments of the cities in which the provincial or autonomous zone seat of government is located, as well as those of the people's governments of 'quite big cities' designated by the State Council, are reported for filing to the State Council, the provincial or autonomous zone level (as appropriate) people's congress standing committee, the provincial or autonomous zone people's government, and the people's congress standing committee at the same level as the administrative organ that issued the rules in question. See *supra* note 329 at 422.

(*shequdeshi*, in the original version of Legislation Law in 2000 was “comparatively larger cities”, *jiaodadeshi*). Besides, local regulations also include Autonomous Regulations (*zizhi tiaoli*), and Special Regulations (*danxing tiaoli*) enacted by autonomous areas and also in theory includes, Laws in Hong Kong and Macao SAR.

(3) Tertiary Rules:

Tertiary Rules refer to Departmental Rules and Local Government Rules, which have made up the largest number of total Legislations in the PRC. Based on Constitution and Legislation Law, the departments and commissions of State Councils could enact Departmental rules, and provincial, autonomous regional, municipal governments, and government in cities with districts (before the RLL were “comparatively larger cities”) could enact local government rules.

(4) Judicial normative documents:

According to Article 6 of new revised “Provisions of the SPC on the Judicial Interpretation Work” in 2007, judicial interpretations may be made in four forms, “Interpretation”(*jieshi*), “Provision”(*gui'ding*), “Reply”(*pifu*) and “Decision”(*jueding*). Also, Interpretations issued by SPP are also judicial normative documents. However, seemingly the new RLL only includes “Interpretation” into the scope of Filing and Review.

(5) Other Normative Documents:

Other normative documents have been excluded from “legislation” yet have binding

effect. For example, besides those mentioned above, normative documents enacted by administrative bodies also include: Order (*mingling*), Administrative Decision (*jueding*), Announcement (*gonggao*), Publication (*tonggao*), Notice (*tongzhi*), Circular (*tongbao*), Motion (*yi'an*), Report (*baogao*), Asking for instructions (*qingshi*), Response (*pifu*), Opinion (*yijian*), Letter (*han*), and Minute of Meeting (*huitan jiyao*)⁴⁰⁶. Therefore, the scope of Filing and Review, however, does not cover all normative documents listed above. The scope includes all Legislation and Judicial Interpretations (SPP and SPC interpretations). All other normative documents, especially those issued by administrative branches, are not in the scope of Filing and Review.

3. Standard of Review

The Standard of “Review”, however, was established by the *Legislation Law* in 2000⁴⁰⁷. According to Article 87 of the RLL, Article 30 of Supervision Law and Article 10 of Regulations on the Filing of Rules and Regulations, there are three standards for review: “Constitutionality”(*hexianxing shencha*), “Legality”(*hefaxing shencha*) and “Reasonableness”(*helixing shencha*).

For review standard of “Constitutionality”, although the detail remains ambiguous, we could still divide it into two broad categories basing on common consensus in the PRC scholarship: the formal standard and substantial standard.

⁴⁰⁶ See Article 8 of Procedures for Regulation of Handling Official Documents in the Party and State Organs. Central Government of PRC, “Dangzheng jiguan gongwen chuli gongzuo tiaoli” [Regulation of Handling Official Documents in the Party and State Organs] online: Central Government of PRC <http://www.gov.cn/zwggk/2013-02/22/content_2337704.htm>, last accessed on April 15 2015 [translated by author].

⁴⁰⁷ Mo Jihong, “Zhongguo falv fagui hexianxing shencha de biao zhun” [the Standard of Constitutional review in Chinese Law and Regulations], in Lin Feng, *supra* note 9, 95 at 109 [translated by author].

The formal standard, includes:

(1) Consistency with the Constitution.

“Consistency with the Constitution” refers to the enactment of Laws or Regulations that should be either explicitly provided by the Constitution, or contain a statement of “according to the constitution”⁴⁰⁸. (2) Invalidity would be applied to legislations beyond empowered scope, which was established by both the *1982 Constitution* as well as the *Legislation Law*. First, the NPCSC could not enact basic laws, which would otherwise exceed the scope of its power. Second, during adjournment of the NPC, the NPCSC could revise basic laws that shall not violate basic principles of the law being revised. Third, Article 8 of *Legislation Law* reserved several items that could only be stipulated by the NPC and NPCSC Legislations, as well as an open clause that “other affairs on which laws must be made by the NPC or its Standing Committee.” (3) The legislative procedure should be in accordance with the Constitution. For instance, a legislative motion should receive over half positive votes of NPC or NPCSC delegate body in order to be passed⁴⁰⁹.

The substantial standard, on the other hand, states that all legislations should be in accordance with the principle and substantial contents of the Constitution. It could be summarized by the following sub-standards:

(1) Be consistent with the “Four Basic Principle”, which was stipulated in the permeable of the 1982 Constitution; (2) Be consistent with the “Democratic Centralism”, which was provided by the Article 3 of the Constitution. (3) Be compatible with the spirit of “rule of

⁴⁰⁸ *Ibid* at 109.

⁴⁰⁹ *Ibid* at 110-113.

law” (Article 5) and should not violate the principle of Human Right Protection (Article 33). (4) Be consonant with “Reform and Open Policy” enshrined by Preamble of the 1982 Constitution⁴¹⁰.

It should be noted that, as stated above, under the current PRC constitutional structure, the scope of Constitutionality review actually excluded the Legislation from the NPC both in theory and practice, because in theory the “Supreme will of the Constitution” (Constitutional Supremacy) and “parliamentary will” (Parliamentary Supremacy) of the NPC had been unified, and in practice the Constitutional review stipulated by Legislation Law did not exclude the review of NPC Legislation.

For the review of “Legality”, the most important standard is that “higher level Legislations prevail over lower level Legislations.” This is based on Article 96 of the revised Legislation Law wherein Legislations should be altered or annulled if “provision of the legislation of lower levels contravene those of the legislation of upper levels.”

However, the main difference between review of Constitutionality and review of Legality is that the benchmark for reviewing “Legality” does not include the “Constitution”. Still, the main purpose for both the standard of “Constitutionality” and “Legality” is coherent, i.e., to ensure the consistency and unification of the legal system⁴¹¹.

The third standard for review is “reasonableness”, which manifested itself by the phrase

⁴¹⁰ *Ibid* at 113-114.

⁴¹¹ *Supra* note 400 at 293.

“inappropriateness” (*bushidang*) in Legislation Law, such as Article 96 (4) of the RLL. The critical question in here is the definition of “inappropriateness”. Indeed, the LAC has offered a scholarly explanation in the 1990s, that such “inappropriateness” refers to: (1) Measure or Standard that is clearly impractical; (2) Enormous disparity between rights and obligations; (3) For state organs, vast imbalance between their duties and powers; and (4) Undue or lenient penalty⁴¹².

4. Procedure for filing and review

For the purpose of this thesis, we will mainly introduce the procedure for filing and review in NPCSC, which according to *Legislation Law* and other statutes, consists of six steps in total:

(1) Receiving normative documents

All review is based on normative documents that have already been filed by their enacted bodies. There are three ways to initiate the reviewing process. First, legislative bodies submit normative documents enacted by them. In such case, the Bureau of Secretaries of General Office should directly put these documents on record. Second, upon the formal request for review from the State Council, Central Military Commission, SPC, SPP, and provincial people’s congresses, the Bureau of Secretaries of General should also receive the request and also put it on record. Third, when other state organs, social organizations, enterprises and public institutions, or citizens petition NPCSC for reviewing any normative document, the LAC in NPCSC should receive the petition but nothing is

⁴¹² Qiao Xiaoyang & Zhang Chunsheng ed., *Xuanju fa he defang zuzhi fa shi yi yu jie da* [Interpretation and Response on Electoral Law and Local Organic Law] (Beijing: Law Press, 1994) at 94 [translated by author].

known about how the LAC treats these petitions.

(2) Reviewing

In first or second circumstances as noted above, the Bureau of Secretaries should transfer the filed legislation to the LAC and special committees for review. In the third circumstance, if accepts petitions from citizens or organizations, the LAC should review petitioned legislations by itself⁴¹³. During the review, the LAC or special committee could seek explanation from enacting bodies, or consult with enacting bodies. And then it could offer an informal suggestion. If the enacting bodies accept the suggestion and alter the legislation, then the process of review ends.

(3) Offering Formal Suggestion

In the case that the enacting bodies refuse to accept the informal suggestion or provide explanation, and if the petition is reviewed by LAC, then the LAC should transfer its report to special committees provided the Secretary-General has approved the report. If the request is reviewed by a special committee, then it is also subject to approval from the Secretary-General, who must then forward it to the LAC. If both the LAC and special committees agree that the reviewed legislation is unconstitutional, contradicts other laws, or is inappropriate, then the Secretary-General should determine whether the special committee should provide a formal suggestion and send it to the enacting bodies. Otherwise the reviewed legislation should be put on record if refused by the Secretary-General.

⁴¹³ *Supra* note 400 at 304.

(4) Response

After receiving the formal Suggestion from the special committee, the enacting bodies should respond to the special committee within two months regarding whether it would alter or abolish the problematic clause or the entire legislation. The special committee should then forward the response to the General Office of the NPCSC, and the General Office should submit the response to the Secretary-General.

(5) Providing reviewing result for Chairman Meeting

If the enacting bodies refuse to alter or annul the relevant clause or legislation after receiving the formal suggestion from the special committee, then the special committee could submit a motion to Chairmen's Meeting for annulling the reviewed legislation, again provided it has been approved by the Secretary-General. The Chairman meeting then determines whether it should submit it to the NPCSC meeting for vetting.

(6) Notice

The General Office could, based on its own discretion, notify state organs, social organizations, enterprises, public institutions or citizens who requested or petitioned for reviewing normative documents.

In addition, the procedure for State Council to review normative documents has been also provided by statutes, but for some reviewing bodies such as local people's congresses, concrete procedures largely remain blank or enacted by themselves⁴¹⁴.

⁴¹⁴ For example, for *Difangxing guizhang* and other normative documents that conflict with higher law can be annulled by a higher administrative organ to the enacting body. Article 59-3 of the Local Organic Law stipulates that the local people's governments at

3.2.2.3 Evaluation of Practical Effect of The Filing and Review System and New Development in The RLL

1. Assessing the effectiveness of Filing and Review

Crone once commented on the legal consistency of China's legal system, stating "the Chinese legal system is riddled by inconsistency, both between enactments of different status in the legislative hierarchy, and between those of the same status."⁴¹⁵ We could see this is also true for the Filing and Review system.

For the Constitutional review, there was only one occasion historically when the NPC openly declared constitutionality of a law, and that was in 1990 *Decision on 'Basic Law of Hong Kong SAR of PRC'* in which the NPC confirmed the constitutionality of the Hong Kong SAR⁴¹⁶. As noted above, the main purpose for both review on constitutionality and legality is to ensure the legislations in lower levels would not contravene higher-ranking legislations, where the standard of "reasonableness" is more like a minor value.

As observed by some scholars, reviews have been conducted by responsible organs to tackle conflicting enactments. It has been reported that by late 1990, ten thousand of these regulations had been declared invalid. Indeed, regular screening for inconsistency in enactments at the relevant levels had been made obligatory⁴¹⁷. The report from NPCSC

various levels above the county level shall 'alter or annul inappropriate orders and directives of its subordinate departments and inappropriate decisions and orders of the people's governments at lower levels.' Accordingly, higher administrative organs have the right to investigate and invalidate abstract administrative acts of lower administrative organs. Whether this function is actually carried out, however, is a different matter altogether. See *supra* note 329 at 425.

⁴¹⁵ *Ibid* at 411.

⁴¹⁶ *Supra* note 407 at 109.

⁴¹⁷ See *supra* note 329 at 424-425.

in 2003 revealed that over 3700 legal documents from the State Council and Local People's Congresses have been filed and reviewed by NPCSC from 1998-2002, and "Special Committees have provided suggestion for rectification for those contravened Constitution and NPC Laws."⁴¹⁸ The 2009 Report of NPCSC revealed 475 Normative Documents have been reviewed in 2008, and accepted 86 petitions for review from organizations and citizens⁴¹⁹. In 2010, for the first time the NPCSC disclosed the detail of results from 2000 to 2009. In ten years, the NPCSC, State Council, and local People's Congress altered 107 Administrative Regulations (107 out of 690 in 2010, 15%), and there were an additional 7 administrative regulations that were annulled. For local regulations, 1417 out of 8600 have been altered (16.4%), and an additional 455 of them have been annulled (5%)⁴²⁰. More recently, both in 2013 and 2014, the NPCSC has begun to "actively review" (*zhudong shencha*). In 2013, the NPCSC had "actively reviewed" 19 new administrative regulations enacted by the State Council in 2013, and 32 Judicial Interpretations. Such review is based on "article by article" (*zhutiao shencha*)⁴²¹. In 2014, the NPCSC reviewed 12 Administrative Regulations from the State Council, 15 Judicial Interpretations from SPP and SPC, and a review also conducted by "article basis" according to the 2015 Report. This most recent NPCSC Report also included a plan to "strengthen specified systems for Constitutional Interpretation" in 2015, and commit to maintain the effort to "Filing and Review", in order to "alter and annul normative

⁴¹⁸ Xinhuanet, "Working Report from NPCSC" (Mar. 21, 2003) online: Xinhuanet <http://news.xinhuanet.com/newscenter/2003-03/21/content_791909.htm>, last accessed on April 15 2015 [translated by author].

⁴¹⁹ Xinhuanet, "NPCSC Working Report" (Mar.16 2009) online: Xinhuanet <http://news.xinhuanet.com/misc/2009-03/16/content_11019386.htm>, last accessed on April 15 2015 [translated by author].

⁴²⁰ Xinhuanet, "NPCSC Working Report" (Mar.17 2010) online: Xinhuanet <http://news.xinhuanet.com/politics/2010-03/17/content_13187044.htm>, last accessed on April 15 2015 [translated by author].

⁴²¹ NPC, "NPCSC Working Report" (Mar. 9, 2014) online: NPC <http://www.npc.gov.cn/npc/dbdhhy/12_2/2014-03/17/content_1856100.htm>, last accessed on April 15 2015 [translated by author].

documents contracting with Constitution and Law”⁴²².

Nevertheless, if looking at the “big picture”, the overall actual effect of the entire Filing and Review System is, however, dissatisfactory. Such dissatisfaction is extended from central reviewing organs to local Filing and Review system. In the central level, many normative documents exist outside the scope of the review system. On a local level, this has become more problematic. According to Wang Kai’s research, although most provinces have established a filing and review system to some extent, reports have revealed that in many provinces, there are less than one hundred normative documents filed per year, and the result of these review, are also not very satisfactory⁴²³.

Several reasons account for the ineffectiveness of the filing and review system.

First, whether review is taken seems to be left to the discretion of the Standing Committee and the State Council in circumstances when such an inconsistency is brought to their attention⁴²⁴. Moreover, the prerequisite of review is “filing”, which is also left to the discretion of enacting bodies, yet the current system lacks any means to address this circumstance.

Second, both deputies from the NPC or NPCSC members are not from a background that equips them with the expertise to conduct supervision⁴²⁵, thus in reality the Legislation

⁴²² People, “NPCSC Working Report”, (Mar. 8, 2015) online: People.cn <<http://lianghui.people.com.cn/2015npc/n/2015/0308/c394314-26657015.html>>, last accessed on April 15 2015 [translated by author].

⁴²³ For example, in all normative documents received by Henan Provincial People’s Congress and provincial government, only 2% of them were found problematic. Moreover, reviewing reports from some provinces that did not even mention the result of the review at all. Furthermore, even for “problematic normative documents”, seldom of them will be annulled. For example, in Chongqing, only 1 out of 51 “problematic documents” was abolished. See *supra* note 400 at 313 [translated by author].

⁴²⁴ See *supra* note 329 at 423-424.

⁴²⁵ For example, in 2015, according to an informal statistic, there are only 76 of out of 2965 (2.5%) NPC deputies that have strong

Law and other statutes appoint the LAC and special committees as substantial working organs for the Filing and Review system. However, as noted above, the Secretary-General may lack enough expertise to undertake such a responsibility, yet he or she has the final say to determine the constitutionality, legality and reasonableness of the submitted normative document.

Third, there are still many procedural loopholes in the filing and review system despite several statutes having been enacted to improve the system. For example, as noted above in step three, a formal suggestion would be provided only if both LAC and special committees agree that the reviewed legislation was unconstitutional, contradicted other laws or was inappropriate. What if a disagreement developed between the LAC and special committees? For another, in step Five, if the enacting bodies still refuse to alter or annul the normative documents, *Legislation Law* states the NPCSC is vested with the power to annul the law. However, it is based on the precondition that the Chairmen Meeting decides to submit to the floor of the NPCSC meeting. If the Chairmen Meeting rejects to do so, then according to current statute, there is nothing that the NPCSC could do to reverse the decision from the Chairmen Meeting.

Fourth, what Corne remarked is still true today, that “the methods customarily utilized by the Standing Committee for enforcing its decisions are also inadequate. The usual method is for the Standing Committee to issue an internal directive to indicate to the body responsible for the unconstitutionality that an amendment is necessary. However, there is no system in place by which the NPCSC can actually rescind enactments that contravene

legal backgrounds (including lawyers, judges, prosecutors and legal scholars).

the basic principles and spirit of the Constitution⁴²⁶”, as well as other “inappropriate legislations”.

Fifth, regarding petitions from citizens or social organizations, according to the *Legislation Law* in 2000, whether to notify the result of review is also left to the discretion of the NPCSC. In other words, the NPCSC could choose not to notify the citizens or social organizations about the reviewing result. In addition, although in practice the LAC is responsible for accepting petitions for reviewing normative documents from citizens or social organizations, ambiguities and vagueness still exists in many issues, such as the criterion for acceptance, and the right of appeal if the LAC refuses to accept the petition.

Last but most imminently problematic, is the unordered and complex arrangement of the system of filing and review. For example, the review of “constitutionality” and “legality” are illogically mingled in the system⁴²⁷. This may be due to the fact that the main purpose of the filing and review system is to reorganize and ensure the consistency of the legal system. Perhaps for this reason, the Filing and Review system has been designated to various constitutional bodies. First, the NPCSC, the authentic national legislative organ has been vested with the power to review part of administrative legislation and judicial interpretation. Secondly, the State Council retained a great deal of authority to alter or annul legislations enacted by lower administrative subordinate bodies. Thirdly, the higher

⁴²⁶ See *supra* note 329 at 421-422.

⁴²⁷ As pointed out by Qin Qianhong and Ye Haibo, the lower level (tertiary rules) normative documents (such as local government rule) became the main body of those infringed basic rights, which should be subject to review comparing with NPC Law or even Administrative Regulations enacted by State Council. Therefore, the improper fuse of constitutionality and legality became a institutional obstacle for reviewing tertiary rules. See *supra* note 30 at 406-407 [translated by author].

government or people's congresses above the level of county have gained the power to conduct their own review and filing. The "subject", "standard", and procedure are all different for each reviewing body. This configuration, however, has brought about a scattered jurisdiction, separate benchmark and complex process for the reviewing system, leading to inefficiency, stalling and enormous disjunction between power and responsibilities for the entire review system.

In sum, we could conclude that legislative review (including "constitutional review") has been indeed established in China after 2000, and it is continuously developing particularly in more recent years. However, note should be taken that the current filing and review system seems to be extremely complex, ambiguous and inefficient. Perhaps, setting up more unified and organized constitutional bodies under the NPCSC that is vested with centralized power for legislative review is a prime way to improve the system of SOLA in the future.

2. New RLL and change in Filing and Review system

Apart from enhancing legislative power of NPC, the RLL also attempts to strengthen the system of Filing and Review.

First, the title of Chapter Five "Application and Filing" has been renamed as "Application and Filing and Review", emphasizing the stature of Legislative Review.

Secondly, it has re-stressed the role that special committees and LAC play in the filing and review system. Article 99 of the RLL stipulates that the special committees and other

working organs of the NPCSC (mostly refers to the LAC) could (but not must) actively review normative documents that were put on record. Also, Article 102 explicitly stipulates that special committees and the LAC are the bodies responsible for notifying state organs, organizations or citizens of the result of the review in the final step of the review process. But still, the result of the review “could be” but not “should be” notified.

Thirdly, the RLL has further specified the process of review. According to Article 100 of the New RLL, after the LAC or relevant special committee of the NPCSC offer suggestions of the problematic normative documents, and if enacting bodies accept suggestions by altering or annulling the normative documents, then the case of review should be considered “closed” (*shencha zhongzhi*) by the Legislation Law.

On the other hand, Article 100 of the RLL has also clarified an ambiguity in the circumstance where, if the enacting bodies refuse to change or abolish the normative documents after receiving a formal suggestions from the LAC and special committees, then the LAC and special committees *should* (in original text is *could*) submit a motion to the Chairmen meeting, and the Chairmen meeting *should* determine whether to bring the motion to the NPCSC meeting. Nevertheless, it still equips the Chairmen Meeting of the NPCSC with the final determining power, but not the LAC or special committees.

Finally, in line with the 2007 *Supervision Law*, the RLL also stipulates that Interpretation from SPP and SPC should be put on record and be subject to review by the NPCSC within thirty days after the issued date.

Table 4 Filing and Review System of PRC (the system under the RLL in 2015)

Normative Documents and enacting body		File to	Review	Reviewing Body
Basic Law promulgated by the NPC Plenary Session		N/A	N/A	N/A
Laws and legislative Decisions promulgated by the NPCSC		N/A	Alter or annul inappropriate Decisions	NPC
Administrative Regulations enacted by the State Council		NPCSC	Annul administrative regulations, decisions or orders contravene the Constitutions or other Laws	NPCSC
Local Regulation enacted by People's Congresses and their Standing Committees in Provinces, Autonomous Regions and Municipalities		NPCSC and State Council	Annul Local regulations or decisions contravene the Constitution, Laws or Administrative Regulations	NPCSC
Local Regulation enacted by People's Congresses and their Standing Committees in Cities with districts		NPCSC and State Council, yet reported by Standing Committees of People's Congress in relevant provinces or autonomous regions	Annul inappropriate Local Regulation	Standing Committee of People's Congress in Relevant Provinces
Autonomous regulations and separate regulations formulated by autonomous prefectures and autonomous counties		NPCSC and State Council, but reported by Standing Committees of People's Congress in relevant provinces or autonomous regions	Annul any autonomous regulations and separate regulations contradicting the basic principles of Constitution, laws or State Council administrative regulations	NPC and NPCSC
Departmental Rules enacted by State Council departments and commissions		State Council	Alter or annul inappropriate departmental rules	State Council
Local Government Rules enacted by local governments	Local Government Rules enacted by Provincial, Autonomous Regional, and Municipal Government	State Council, Standing Committees of People's Congress at the same level	Alter ⁴²⁸ or annul inappropriate local government rules enacted by local governments	State Council, Standing Committee of People's Congresses at the same level
	Local Government Rules enacted by governments in cities with districts	State Council, Standing Committees of People's Congress at the same level and Provincial level		State Council, Standing Committee of People's Congresses at the same level, and government in provincial or autonomous

⁴²⁸ Standing Committee of People's Congresses at the same level could not alter, but only annul local government rules at the same level. See Art. 97 (5) of the RLL.

Normative Documents and enacting body		File to	Review	Reviewing Body
				regional level
Empowered or authorized Legislation		Empowering or authorizing bodies	Annul any of the regulations formulated by an authorized organ that transcends the authorized limits of power or contravenes the authorized purpose, and when necessary, may revoke the authorization	Empowering or authorizing bodies

3.3 Factors Behind The NPC Development

As noted earlier, even after the beginning of the 1980s, it was reasonable to view the sporadic NPC meetings as rubberstamps for the CPC⁴²⁹. However, after that developments that occurred over several decades the NPC had gained the position as an important constitutional player and the highest legislature in the PRC constitutional system. Before concluding, we will briefly analyze several important factors accounting for the NPC's ongoing development.

3.3.1 Initial Development of The NPC: “Network Approach”

Undoubtedly, the main factor for early development of the NPC in the 1980s and early 1990s was the result of the efforts of party leaders, named as the “Network Approach” by Ming Xia⁴³⁰. In early post-Mao era, NPC owes much of its growing power and influence to the succession of powerful individuals who have served as Chairmen of the NPCSC, including Peng Zhen, Qiao Shi and Li Peng⁴³¹.

⁴²⁹ “The Party waves a hand to order, the government uses □a hand to work, the NPC raises a hand to pass.” The NPC was only one of several insignificant junior partners infrequently used to support the highly centralized Chinese party state. See *supra* note 283 at 104-105 [translated by author].

⁴³⁰ Barred from both bureaucracy and a market mode of governance, the NPC had to navigate through a hybrid mode to satisfy the expectations of the top leadership and to achieve their own goal of institutionalization. This is the network approach. *Ibid* at 113 [translated by author].

⁴³¹ Similarly, as discussed by many scholars, the NPC has benefited from the flow of retired ministers and other influential officials

Most likely, observers would seldom argue that the NPC owed much of its first institutional development in the late 1970s to the primary endeavor of conservative party leader Peng Zhen⁴³². “Peng Zhen sought to convert the NPC into an institutional base from which he could temper the reform policies of Deng Xiaoping.”⁴³³ In 1982, because it became clear that he would not be elevated to the Politburo Standing Committee of CPC, Peng turned to use the NPC Standing Committee as a power base⁴³⁴. Also, for Peng Zhen, his miserable experience as one of the first victims of the Cultural Revolution also reinforced his commitment to “socialist democracy and legalism”⁴³⁵. Therefore, Peng’s measures included promoting the role and importance of the NPCSC, because Peng’s position gave him a direct interest in promoting the institution of which he was in charge. Peng also strengthened the place of the constitution and the law as foundations for political and organizational arrangements, as well as argued in favor of a stronger role for the NPC⁴³⁶. Under Peng Zhen’s leadership, the NPC passed seven important laws in 1979 and the new constitution in 1982, and laid down a solid foundation for the NPC, making it the supreme power organ in China, and leaving room for expansion of its power⁴³⁷. Peng added an important foundation for further development of the NPC, as well as China’s legal system⁴³⁸, which as Potter noted, drew from Leninist Discipline and

who have taken positions on the Standing Committee. See *supra* note 292 at 75.

⁴³² And of course, these powerful old party cadres also included Yang Shangkun, Chen Pixian, Xi Zhongxun and other senior party leaders.

⁴³³ Three of its leaders (Peng Zhen, Chen Pixian, and Xi Zhongxun) were also Politburo members who used the legislature and its committees as an organizational base to augment their power. *Reform and its limits*, *supra* note 275 at 352; see also *supra* note 80.

⁴³⁴ See *supra* note 115 at 128-129.

⁴³⁵ For example, Pengzhen consistently advocated the rural level elections of People’s Congress. However, it should be noted that Peng Zhen’s singular enthusiasm for grassroots elections and villagers’ committees can be traced to this era and his experiences in the Jin-Cha-Ji Border Region. See *supra* note 239 at 184-185.

⁴³⁶ See *supra* note 115 at 128-129.

⁴³⁷ The most notable example was in 1986 when the NPCSC sent the proposed Bankruptcy Law back to the Law Committee for revisions.

⁴³⁸ It is not inappropriate to view him as the chief architect of Chinese legislative and legal development. When he died in 1997, he was praised as ‘the major founder of our socialist legal system’. *Supra* note 283 at 105-106.

Socialist Legalism⁴³⁹.

Similarly, when Qiao Shi was elected the NPC Chairman in 1993, he advocated the ‘rule of law’ slogan as the most visible legacy from the eighth NPC⁴⁴⁰. Under the Leadership of Qiao Shi, the authority of NPC continued to expand. Because Qiao Shi, a deputy party secretary whose portfolio and organizational base was the People’s Congress improved the prestige of the congress, legislative jurisdiction was respected, and Party leaders heard the voice of congresses and congresses reliably implemented party decisions⁴⁴¹.

Likewise, when Li Peng took over the position of NPC Chairman in 1998, he entitled his inauguration speech ‘Work Hard for Strengthening Socialist Democracy and Legal System, and Pushing on the Rule of Law⁴⁴²’. Thus the strength of the institutional linkage between the NPC’s authority and the reforms from the 1980s to 1990s is particularly evident in the case of these Chairmen. However, noticeably, during the early development of the NPC, seemingly low political standing placed congress leaders in a quandary⁴⁴³.

Therefore, as commented by O’Brien, in a authoritarian political system where personalism runs deep, influential and well-connected leaders who possess power

⁴³⁹ See *supra* note 115 at 128-129.

⁴⁴⁰ ‘Rule of law’ was introduced to the discussion on the establishment of a market economy in the people’s congresses. This consensus was formed within the circle of people’s congresses: ‘Market economy is to demonstrate social rules through laws, to lead and regulate social behavior by legal authority. In essence, market economy is an economy under the rule of law.’ *Supra* note 283 at 104-105.

⁴⁴¹ *Supra* note 290 at 93-94.

⁴⁴² Interestingly, while Li Peng was Premier of the State Council, he showed little interest in promoting rural electoral reforms; he consistently resisted NPC calls for faster rural electoral reforms. Since becoming Chairman of the NPC Standing Committee, however, he has begun advocating for more rapid expansion of these reforms. As commented by Ming Xia, “if where you sit determines how you stand, his change of tune also indicates the autonomous role and institutional importance of the NPC.” See *supra* note 49 at 184-185; see also *supra* note 283 at 107.

⁴⁴³ For instance, one reason that NPC Chairman Wan Li’s legislature could not effectively supervise Premier Li Peng’s State Council was that Li outranked Wan in the party hierarchy and Li chaired meetings that Wan only attended. Thus, formally subordinate organizations with higher-ranking leaders could easily deflect people’s congress supervision and frustrate lawmaking and personnel oversight. See *supra* note 290 at 92.

accumulated in a different arena and in different areas are essential to early organizational development⁴⁴⁴. The early NPC in the 1980s and 1990s provided prime evidence for the “Network Approach” for development of immature parliament by drawing prestige from the leading figures.

3.3.2 Influence from Institutionalization and Legalization of The Party/State

The overall development is also derived from the institutionalization and legalization of the Party/State and the retreat of the CPC. Unlike the network approach, this is also true for the recent development of the NPC.

As discussed in Chapter 2, the process of institutionalization and legalization of the Party/State commenced in the late 1970s. In the early 1990s, such institutionalization was made overt by the internal party document No.8 issued in 1991 in which the CCP set out explicit normative limits on its own authority to oversee legislative drafting for the first time⁴⁴⁵. Perhaps more importantly, the fact that the CPC did not want to formally intervene in constitutional operations⁴⁴⁶ was also a large extent of constitutional development in the PRC.

The 1982 State Constitution reflected an attempt to free the state sector from the grip of

⁴⁴⁴ *Supra* note 290 at 95.

⁴⁴⁵ *Supra* note 80 at 13-14.

⁴⁴⁶ From a constitutional perspective, what is important is not party control *per se*, but the means of control. Even in the most liberal of constitutional systems, controlling political parties exercise great say in setting policy goals for legislative development, shaping the legislative agenda, and determining who gets what office within the legislature. The British House of Commons, for example, has not passed or acted upon any proposal opposed by the controlling party since before the Second World War. Ultimately, however, any constitution is merely a document. The true force of constitutional principle comes precisely from the fact that most political actors and institutions do not want to breach constitutional mandates, not from the fact that they “can’t.” See *supra* note 80 at 15-17; see also *supra* note 135 at 154.

the party. Thus, the power of the party was played down in the Constitution⁴⁴⁷. In the mean time, the NPC had been strengthened as an organization with the Party retreat from the formal constitutional operation. The NPC had become institutionalized as seen in its higher number of dissenting votes on legislation and personnel appointments. Today, absolute support is so rare that the Party has to “accept a looser form of control than in the Maoist days⁴⁴⁸.” The supporting proof is that policy debates conducted during the sessions and voting for candidates of higher state positions has now become far from unanimous. Without directly challenging the hegemony of the CPC, deputies in the NPC could argue a different opinion from the Party in many issues and were even free to vote against policies or motions indirectly supported by the Party organ. Numerous examples of this have been openly reported by the press and online media in China⁴⁴⁹.

3.3.3 Functional Shift from “Rubberstamp” to Vibrant Legislature

The current NPC has become a parliament for displaying the legitimacy of Party/State, integration of pluralist interests, as well as a place for implementing party policy through legal processes. The function of social mobilization, which mostly manifested in the 1980s, had gradually faded. These unique functions have granted the NPC an irreplaceable position in the constitutional system of the PRC, and also have provided the NPC with a powerful driving force for its ongoing development.

1. Supporting the political legitimacy of the Party

⁴⁴⁷ The 1982 Constitution, as noted above, attempts to deal with the party/state relation. Though the practical result may not be satisfactory, as noted by Saich, reference to the party as the ‘core of leadership’ was dropped, and mention of party control now appears only in the preamble, where its leading role is acknowledged in the ‘Four Basic Principles’. See *supra* note 135 at 150.

⁴⁴⁸ *Ibid* at 154.

⁴⁴⁹ A more recent example is the clause that “rate of taxation shall only be determined by laws” was reverted back to the Revised Legislation Law after many NPC deputies publically criticized the third draft of RLL deleting such clause in the NPC plenary session in 2015. Noticeably, the deletion of the clause was backed by revenue-collection agency as well as CPC leaders.

Undoubtedly, the NPC serves as a constitutional symbol for maintaining and supporting the legitimacy of the Party and the constitutional system of the PRC.

Initially, this was driven by the experience of the Cultural Revolution, so named the “Cultural Revolution syndrome”⁴⁵⁰. As a part of “reestablishing the authority of socialist legalism” and “preventing the tragedy of Cultural Revolution”, strengthening the NPC, the highest national legislature and supreme state organ, was typically shown in the *Party Constitution* and *1982 Constitution* that re-promulgated right after the Cultural Revolution⁴⁵¹. Moreover, trust and confidence in the Communist system caused a legitimacy crisis in the CPC, thus law was seen as a means to simply imply a rejection of class struggle, and to safeguard against arbitrary behavior. Thus the enhancement of legislature authority would help the leadership undertake ambitious modernization plans and gradually transform suspicion into active support⁴⁵². Thirdly, a strengthened legislature would contribute to political stability for maintaining legitimacy. A national assembly that lived up to its name would check wayward government leaders and disperse influence.⁴⁵³ Lastly, a legitimate legislature that is able to enact foreign investment and trade law was also seen as a prerequisite for attracting needed foreign investment in the earlier post-Mao era⁴⁵⁴.

2. A forum for integrating various interests.

⁴⁵⁰ Apart from political turbulence, the dismal Chinese economy was at the brink of collapse in the late 1970s. To restore China's economy, Deng called on more laws to be made. For the purpose of serving economic change, the NPC needed to be strengthened. See *supra* note 283 at 110.

⁴⁵¹ Tong Zhiwei, “Zhongguo xianzhi fazhan de zhongduanqi pinggu” [Evaluation of short term and medium term of Constitutional development in China] in Lin Feng, *supra* note 9, 123 at 126 [translated by author]; Also see *supra* note 220 at 125-126.

⁴⁵² See *supra* note 272 at 158.

⁴⁵³ *Reform with Limits*, *supra* note 275 at 347.

⁴⁵⁴ Perry Keller, *supra* note 275 at 713.

As noted above and in Chapter 2, with the retreat of the CPC and the accompanying withdrawal of its control from the NPC, other entities and interests have stepped in to fill the vacuum. As the only central-level constitutional institution whose members are not selected directly by the central level CPC⁴⁵⁵, as was observed by Keller, the NPC had become a forum in which different interests could be mustered in support of, or opposition to, particular legislative proposals⁴⁵⁶. Utilizing the NPC as an arena, various interests could display themselves, be integrated into the law-making process and even be able to negotiate with each other. Dowdle pointed out that one way in which the NPC's representational schemata facilitated delegate pluralism was through its long-standing practice of reserving sub-rosa delegate slots in the NPC and on the NPCSC for persons from different social stratum to promote their unique constituent interests⁴⁵⁷. In this sense, like other legislature in the world, allowing pluralist interests to manifest themselves in the law-making process⁴⁵⁸ is a very important institutional development of the NPC.

Moreover, for the central decision-makers, the NPC serves as an important means in which it enables them to accommodate these interests. This unique function gives the NPC important leverage in China's political environment as a "structural bridge" that links other parts in the constitutional-political apparatus⁴⁵⁹.

⁴⁵⁵ *Supra* note 80 at 18.

⁴⁵⁶ *Supra* note 292 at 90.

⁴⁵⁷ Since the 1990s, more socially-oriented interests was communicated in this platform, focusing on issues such as labor rights, environmental protection, consumer protection and the protection of women and children. Also, it provides regional interests a unique opportunity to send persons to Beijing who is more responsive to their own regional needs than to the wishes of central-level policymakers. *Supra* note 49 at 169-172; see also *supra* note 80 at 18.

⁴⁵⁸ NPC has also developed a number of internal procedures and practices that facilitate and encourage interest group representation. Over half the seats on the Standing Committee, for example, are by tradition assigned to regional as well as specified professional and social entities, such as the All-China Women's Federation and All-China Labor Federation. *Ibid* at 19.

⁴⁵⁹ See *supra* note 50 at 354; See also *ibid* at 18.

Third, recently, the NPC has allowed a place for different interests to negotiate with one another⁴⁶⁰. A more recent example of this is the fierce debate on whether the Rate of Taxation should be incorporated into the new Revision to *Legislation Law* in 2015⁴⁶¹.

In short, the post-Mao NPC signified official recognition of social diversity. Pluralists interest from different sections of Chinese society, regions and different parts of government now could use the NPC Plenary Session or even NPCSC Meeting to display themselves, communicate with central decision-makers and negotiate in some specified issues. From this perspective, the NPC closely resembles a deliberate consultant arena capable of comprising a greater variety of interests in authoritarian regime than an electoral policy-debate parliament in Mature Constitutional System.

3. From social mobilization to legalizing Party policies

In the early stages of the post-Mao era, social mobilization was a noteworthy main method for the NPC to help the Party with implementing policies. Deputies are more like missionaries than representatives⁴⁶². For the majority of people who lacked political power, the NPC was one of many means used to demonstrate for citizens the aims and concerns of the leadership. “By explaining and defending policies in an attempt to

⁴⁶⁰ A study by William Alford and Benjamin Liebman in 2001 showed that the NPC and other political actors encouraging the formation of a quasi-private environmental-protection lobbying organization as a means of gaining influence during the drafting of air pollution control legislation. See *supra* note 49 at 166-167.

⁴⁶¹ The change has been traced in these news: People, “Renda changwei fagongwei: sanshengao shanchu ‘shuili’ bingfei daotui” [LAC of NPCSC: Deletion of ‘Rate of Laxation only could be legally determined’ in the third draft is not a backward step] (10 March 2015) online: People.cn <<http://lianghui.people.com.cn/2015npc/n/2015/0310/c393680-26665922.html>>, last accessed on April 15 2015; People.cn, “shuili fading ni xieru lifafa caoan, xiangguan tiaokuan ceng 3ci bianlian [Legal Determination of the Tax Rate would be incorporated in the draft of Legislation Law, and the clause had been changed for three times]” (Mar. 13, 2015), , online: People.cn <<http://finance.people.com.cn/n/2015/0313/c1004-26686813.html>>, last accessed on April 15 2015; Tencent, “Shuishou fading zhongyu jiannan queren” [The Principle of ‘Legal Determination of Tax Rate’ has been eventually entrenched] (15, Mar. 2015), online QQ.com: <<http://news.qq.com/a/20150315/011979.htm>>, last accessed on April 15 2015.

⁴⁶² Legislative leaders and staff brought into the policy process are generally welcome. They may suggest good ideas, carry out technical tasks associated with converting party policy into law, sift outmost incompetent and unpopular leadership personnel choices, and draw attention to units that violate law or ignore policy, or point out unrecognized problems via inspections and investigations. See *supra* note 290 at 90.

mobilize consent, NPC deputies have acted as buffers, softening demands and shielding policy makers from discontent.⁴⁶³ This traditional function, however, declined with the development of NPC legislative authority.

After 1978, even the CPC found that Party norms were not suitable to regulate every aspect of social life. It was up to the law to handle the details of the guidelines of the Party⁴⁶⁴. As a result, the old-fashioned function and social mobilization of the NPC had inevitably declined. One could find few pieces of news in today's China press or online reports that depicted the "missionary role" of NPC deputies. Rather, particular emphasis is now placed on how deputies voice different views from the official proposals or government reports in the NPC plenary session. Even attempts to rationalize the policies are following the new fashion that was packed by legal language and detailed statistics. As discussed in Chapter 2, the CPC seems to actively respond to such new tendencies, as evidenced by the *Report of 4th plenary session of the 18th Central CPC*.

3.4 Concluding Remarks

China's parliamentary system is indeed a complex system, yet revolves around the parliamentary supremacy. Under such a system, the NPC wears two constitutional hats. As China's highest legislative body, the NPC sets the legislative agenda and enacts and amends the laws and the constitution.⁴⁶⁵ As China's highest constitutional body, it formally exercises the highest supervisory power.

⁴⁶³ *Supra* note 272 at 84-87.

⁴⁶⁴ Strictly speaking, another reason is that the party norms are only relevant to Party members, and non-Party members could theoretically argue that they are not obliged to follow it. With the law, however, the Party can profit from an entire system of juridical instruments, which are convenient tools to push forward Party leadership. See Harro Von Senger, "Ideology and Law-making", in Jan Michiel Otto et al. Eds, *Law-making in the People's Republic of China* (Hague: 2000, Kluwer Law International) 41 at 53.

⁴⁶⁵ *Supra* note 80 at 53-54.

We have also seen demonstrated that the legislative authority of the NPC has transformed from an “irrelevant rubberstamp” to a stronger constitutional organ with certain legislative competence since 1978. We have examined several important developments such as increasing “ownership” of NPC-led legislation, increasing transparency, expansive public participation and raising professionalism. Yet, substantial obstacles⁴⁶⁶ still prevent the current NPC from growing as an authentic supreme legislature like the modern British Parliament. We have also examined the recent development of the NPC legislative power, specifically the passing of the RLL in 2015 that will surely continue to enhance the legislative authority of the NPC.

On the other hand, we have also examined the development of the supervisory power of the NPC by discussing the SOIL and SOLA system. Generally speaking, in the 1980s and 1990s, the development of SOIL was more prominent, while SOLA was basically underdeveloped. We examined the development of SOIL from Working Reports, Power of Appointment and Removal, Interpellation, Investigation, Budgetary Supervision and

⁴⁶⁶ Regarding the current legislative power of NPC, criticisms have been incurred especially for the lower proportion of NPC (and NPCSC) legislations to Secondary regulations and Tertiary rules, although in 2010, the NPCSC claimed that the NPC laws have reached “every corner of the country. In comparison with secondary regulations and tertiary rules, NPC laws only occupy a small ratio among all “normative documents”. In 2010, there were 236 Legislations promulgated by the NPC and NPCSC, while 690 Administrative Regulations were enacted by the State Council and 8600 local regulations. In addition, a statistic from 2008 revealed that the number of departmental rule was 43078, and the number of local government rules was 65049. Admittedly, after the 20th century, many constitutional systems have entered the era of “administrative legislation”, when the number of administrative legislation began to massively outnumber the parliamentary legislation. But as pointed out by Qin Qianhong and Ye Haibo, the western “administrative legislation” era has the basis from either: Check and balance; powerful constitutional review system; strictly procedure for authorized legislation observed; or advanced hearing process for legislation, etc. But in China, none of these elements have been comprehensively observed and some do not exist. For example, until 2015, there were only 3 types of taxations stipulated and regulated by the NPC Laws. The rest of them were based on Administrative Regulations, local Regulations, departmental law (e.g. customs duty) and even local government rules (for example, in specified rules for implementation). Another specific instance is land-transferred regulation in Guangdong Province several years after the Legislation Law was passed. Originally, the Land Administration Law was revised by NPC in 2004, while the State Council enacted Document No. 28 that stipulated that the land that belonged to rural collective organization could be “legally transferred,” which directly contradicted with the Land Administration Law. However, according to Document No.28 in 2005, the Guangdong Provincial government enacted a local government rule allowing the direct transference of rural land. The detail of the Incident of Land Administration Law, see See *supra* note 30 at 280-283; see also Chinanews, “18ge shuizhong jin 3 ge you renda lifa, zhuanjia huyi shuishoufading yuanze ruxian [Only 3 types of Taxation stipulated by NPC Laws, Specialist appeal to incorporate the principle of ‘Taxation determined by Law’]” (27 December 2014), online: Chinanews <<http://www.chinanews.com/gn/2014/12-27/6917161.shtml>>, last accessed on April 15 2015.

NPC's Supervision on Judiciary. We have found that some of these powers have been greatly developed, whereas some might still remain severely underdeveloped. SOLA, on the other hand, has developed more rapidly after the Legislation Law took effect in 2000. The NPC promulgated the Legislation Law as a milestone for the development of SOLA. The Legislation Law in 2000 (revised in 2015), together with the later promulgated legislations has laid down the legal base of NPC-led Filing and Review system⁴⁶⁷.

The current system of the People's Congress has prevented any reform contravening the theoretical dual-Supremacy of the NPC. A prime example is the debate on establishment of a new constitutional body undertaking constitutional supremacy.⁴⁶⁸

Nevertheless, as noted in Chapter 1, for an "evolving" or "changing" constitutional system, the most appropriate way of evaluation is a pragmatic conception of development that focuses on processes of constitutional learning rather than on constitutional structure per se that greatly expands the role and its contributions. The pragmatist ideology argues that, wherever in society one finds an active interest in learning, one is likely to find the seeds of constitutionalism⁴⁶⁹. From a comparative perspective, as both observed by both

⁴⁶⁷ However, as noted above, the current filing and review system seemingly serve as a complementary role rather than functioning as a mature constitutional (legislative) review mechanism. Moreover, unlike other parts in the Revision to Legislation Law in 2015, the new Revision contains very conservative clauses in regard to the Filing and Review system.

⁴⁶⁸ From the 1990s to today, there have been three main suggestions for improving the filing and reviewing system within the current configuration of constitutional system of the PRC: (1) Establishing a Constitutional Committee to be specifically responsible for constitutional review, as suggested by the draft of Legislation Law submitted by scholars in 1997. (2) Setting up a Constitutional Court under the SPC. (3) Forming a Constitutional tribunal within the SPC. However, all of these proposals have been openly or presumably rejected. The crux is the theoretical compatibility between People's Congress system and Constitutional Reviewing bodies, which refers to the potential conflict between supremacy of the NPC and the stature of constitutional reviewing body once it is set up. Because if future reform still adheres to the current People's Congress system, i.e., maintaining the dual-supremacy of the current legal status of the NPC, then proposals (2) and (3) would not be accepted, because the combination of supreme State power and constitutional-making organs results in a non-challengeable legal position of the NPC for other state organs, including the SPC or other judicial bodies. As pointed out by Qin Qianhong and Ye Haibo, this has also caused most PRC scholars to turn to proposal (1) and to repeatedly demonstrate and argue for a specialized constitutional reviewing body under NPC structure. As one of the Consequences, "progress has yet to be made in theory or practice. Thus, in the future, the ongoing development of the NPC would perhaps present a greater challenge for China, that whether such dual-supremacy comprised of both sovereign power and highest legislative power, should be circumscribed and in what way.

See *supra* note 30 at 176-178; Li Buyun, "Explanations on the proposed law on law-making of the PRC", in Jan Michiel Otto etl. *Supra* note 274, 157 at 172-173.

⁴⁶⁹ See *supra* note 49 at 199-200.

Dowdle and O'Brien, today the structural features of the NPC today surprisingly resemble the initial developments of parliamentarianism in medieval Europe, pre-17th Century British Parliament⁴⁷⁰ or Medieval Parliaments⁴⁷¹ to some extent. The common feature for these parliamentary organs is their cooperative nature⁴⁷² and non-combative role. Moreover, it is also surprising to compare the current NPC to those of contemporary Western parliaments. Most of the standard complaints leveled against the NPC's operations are just as easily leveled against many Western parliaments.⁴⁷³

In fact, apart from the early supportive role from senior party leaders in its early development, the authority of the NPC was promoted by, in fact, institutionalization of the State as well as the NPC's unique structural functions in the constitutional structure of the PRC⁴⁷⁴. In a very abstract sense, "limited constitutionalism" is indeed also an

⁴⁷⁰ In England, early popular assemblies in Europe before the 17th century served as congeries of institution formed and convened to strengthen the King's authority and to engage in positive actions. It is ahistorical to speak of separation of powers and checks and balances much before the 17th century, but attention has fallen on early popular assemblies as congeries of institution formed and convened to strengthen a king's authority and to engage in positive action. Medieval representative bodies are now seen to be organizations that cooperated with all but the most unreasonable monarchs in the tasks of state building—participants in government that began as instruments of royal rule and only slowly evolved from curial and consultative gatherings to consent-granting bodies. *Supra* note 290 at 82-83.

⁴⁷¹ Medieval parliamentary was a solution to address the aristocracy's interest in an environment where the King's position was hegemonic. These institutions were not seen as acting in opposition to the king, but rather as cooperative, consultative bodies. It was from their cooperative, advisory nature that they gained their legitimacy. They existed comfortably in a political system that took the concurrent existence of a political hegemony (in the form of a church and/or a king) for granted. As demonstrated by the events leading up to the confrontation at Runnymede in England in 1215, conflicts within the aristocracy threatened to undo the bonds of fealty between lord and vassals on which the European feudal system was founded, notwithstanding the king's hegemonic position within that system. One solution to this problem was to establish institutions in which vassals could articulate corporate consent to royal policies: Hence were born the first parliaments. See *supra* note 49 at 192-193.

⁴⁷² If viewed from the perspective of representation, deputies were neither trustees nor delegates. Thus, a similar arrangement in the NPC resembles the British Parliament before the 17th century, where there was a symbolic contact between subjects. For example, the British Parliament, as late as Henry VIII's reign, was the King's parliament, while the French parliamentary body resembled the same non-threatened role as their English counterpart. They were mainly devoted to: (1) improving communication, cooperation, and policy implementation, but (2) also engaged in occasional, corrective action. *Supra* note 272 at 82; See also *supra* note 290 at 83-84.

⁴⁷³ For example, in most parliamentary systems, including those of the UK, Canada, and Japan, top legislative and constitutional posts are determined by the controlling party, and are merely "rubber-stamped" by the party-controlled parliament. Party platforms also have a great, and in many instances, controlling effect on legislative development. If the NPC rarely voted down an executive or party sponsored bill, the same can be said for the UK, Japan, and many other Western parliamentary systems. In fact, the NPC plays a much more active institutional role in China's legislative development than does the Japanese Diet or the British House of Commons. Between 1955 and 1993, the NPC actually voted down more pieces of executive sponsored legislation (1) than either of these two parliaments (2). Since 1995, the CPC has suffered 25% or more defection rates among NPC delegates in seven instances. By contrast, as noted above, no similar breakdowns in party discipline have occurred in any contested parliamentary vote in either Britain or Japan since the Second World War. *Supra* note 80 at 123; also see *supra* note 49 at 194.

⁴⁷⁴ As pointed out by Ming Xia, "the power of the NPC does not derive from its autonomy from and contestation with other power players; rather it comes more from its ability to affect what can be done and to define the themes for national debate and decide the focus of public attention, and from its central position within the political structure, especially to provide legitimacy to the regime and

important function of the NPC to support Party legitimacy, just like the role that limited democracy, and “rubberstamp parliament”, i.e., the National Assembly and Legislative Yuan played from the 1950s to 1980s in authoritarian Taiwan⁴⁷⁵. In short, “proto-parliamentary” development of the NPC does not imply mature democracy, nor does it guarantee the constitutional transition. Instead, under authoritarian conditions, acceptance and exploitation of subordination may be a means to achieve organizational development.⁴⁷⁶ Even a seemingly “rubberstamp parliament” could develop itself in an authoritarian environment, by using the political hegemony of the Party as its basis to increase its constitutional status. In fact, a similar tactic has been adopted by China’s court but in a different manner. In the next Chapter, we will examine the judiciary’s role in the constitutional system with “Chinese characteristics”, specifically, how the court develops its constitutional meaning under the current authoritarian rule and the “system of People’s Congress” in the PRC.

mandates to individual officials. The expansion of the function and power of the NPC has many aspects.” *Supra* note 283 at 104-119.

⁴⁷⁵ Andrew J. Nathan, “The Legislative Yuan Elections in Taiwan: Consequences of Electoral System”(1993), 33:4 *Asian Survey* 424; see also, Yangsun Chou and Andrew J. Nathan , “Democratizing Transition in Taiwan ”(1987) 27:3 *Asian Survey* 277; and also Ambrose King Yeo-Chi, *Zhongguo zhengzhi yu wenhua* [Chinese Politics and Culture] (Hong Kong: Oxford University Press, 2013).

⁴⁷⁶ See *supra* note 290 at 102.

Chapter 4: Pragmatic Approach and “Adjudicative Independence”: PRC Courts Under the Dual-Supremacy of NPC and Authoritarian Environment

Currently, there are a total of approximately 3500 courts⁴⁷⁷ and over 12,000 basic-level tribunals in the PRC. The system of Chinese courts is basically a four-level hierarchical system. As of 2013, the number of judges is near 200,000⁴⁷⁸. As of 2014, the lowest level is the Basic People’s Courts consisting of 3177 courts at the county or district level⁴⁷⁹. The next level is the Intermediate People’s Court with 409 courts that operate over prefectures and cities in the PRC⁴⁸⁰. Above it, there are 31 Higher People’s Court operating at the provincial levels. At the top of the structure is the Supreme People’s Court (SPC), located in Beijing.

Much of the research has covered China’s court system, its organization and operation. The most prominent feature of the operations of PRC Courts is the administrative-managerial system. The system operates within each court, illustrated by each court’s Adjudication Committees roles⁴⁸¹ and by influences from senior judges.⁴⁸² Another indicator of the administrative-managerial system is the “Judicial Disciplinary

⁴⁷⁷ SPC, “Gigou [Structure]”, online SPC <<http://www.court.gov.cn/jigou.html>>, last accessed on April 15 2015; Court, see also Map Baidu, online <<http://baike.baidu.com/court>>, last accessed on April 15 2015; See also Eric C. Ip, “the Supreme People’s Court and the Political Economy of Judicial Empowerment in Contemporary China”(2011) 24:2 Colum. J. Asian L. 367 at 405.

⁴⁷⁸ Xinhuanet, “Zuigaofa: woguo faguanrenshu yijin 20wanren [SPC: the total number of judges in China is nearly 200,000]”(Jul. 25, 2013), Xinhuanet, online <http://news.xinhuanet.com/legal/2013-07/25/c_116690034.htm>, last accessed on April 15 2015.

⁴⁷⁹ Chinacourt, “quanguo fayuan weibo zongshu da 3636 ge, siji fayuan weibo tixi jiancheng [The total number of Weibo operated by courts has reached 3636 in the whole country, Four level Courts’ Weibo system has been constructed]”(Dec. 04, 2014) Chinacourt, online <<http://www.chinacourt.org/article/detail/2014/12/id/1497173.shtml>>, last accessed on April 15 2015.

⁴⁸⁰ *Ibid.*

⁴⁸¹ Donald C. Clarke pointed out three basic trial organizations forms in courts are all under the general authority of the Adjudication Committee and the court president. See Donald C. Clarke, “Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments”(1996) 10: 1 Columbia Journal of Asian Law 1 at 11-13 [*Civil Judgments*]; Xin He’s research shows that the non-transparent operation of the Adjudication Committee has allowed the higher-ranking personnel in the courts to arbitrarily rule behind closed doors without hearing cases or opinions from other judges. Black Hole, *supra* note 486 at 682 [*Black Hole*].

⁴⁸² Other have pointed out that influence from senior judges evidences another aspect of such administrative tendency. The administrative rank of judges has been very important within the court, with senior judges exercising considerable influence over the outcome of cases and the promotion of junior judges. Even in developed areas such as Shanghai, which has one of the best-trained and most highly compensated courts, senior judges exert influence over junior judges within the courts. See *supra* note 47 at 319; What Kind, *supra* note 488 58 at 73 [What Kind]; *supra* note 233 at 798.

Systems⁴⁸³” operating as a hierarchical relationship between higher courts and lower courts⁴⁸⁴. In addition, another inherent feature of China’s courts is the enormous disparity between local courts in Eastern and Western China. Research from Mei Ying Gechlik and others have already identified that courts are developed and prominent in coastal areas,⁴⁸⁵ while ill-equipped and seriously underfunded in Western regions.⁴⁸⁶ These features have depicted a “conventional image” of China’s courts.

PRC courts, as other constitutional organs, began to significantly develop in the 1980s.⁴⁸⁷

In the Ren Jianxin and Xiao Yang Era from 1988 to 2007, professionalism became the

⁴⁸³“Judicial Disciplinary Systems” evolved from the administrative responsibility system. Chinese Communist Party authorities use responsibility systems (*mubiaoguanli zeren zhi, zeren zhuijiu zhi*) to evaluate, reward, and discipline a wide range of officials. These systems set specific performance targets in different fields that local cadres must meet. These may include economic development goals, birth control targets, and social order statistics. Success in meeting these goals results in financial and career rewards. Failure leads to fines and career sanctions. As a result, judges in lower courts tend to rely on an “ill-defined system” where the advisory requests (*qingshi*) to solicit the views of higher courts and judges in regards to making decisions for pending cases. Carl Minzner, “Judicial Disciplinary systems for incorrectly decided cases: the Imperial Chinese Heritage Lives on”(2009) 39 N.M. L. Rev. 67 [*Judicial Disciplinary System*].

⁴⁸⁴ Carl Minzner, “Judicial Disciplinary systems for incorrectly decided cases: the Imperial Chinese Heritage Lives on”(2009) 39 N.M. L. Rev. 63 at 63; *Black Hole*, *supra* note 486 at 708.

⁴⁸⁵ For instance, according to Mei Ying Gechlik’s research, courts in Shanghai, one of the wealthy cities in the PRC, local courts are subject to less interference from the local government or the Party organ in routine cases; the more independent judiciary is due to its relatively high salary and increased funds for training allocated by the Shanghai government. Also, judicial corruption is generally less serious than courts in many underdeveloped parts. In addition, the prosperity of Shanghai generates higher legal awareness in the city, and ordinary people pay more respect toward judges. For details, see Mei Ying Gechlik, “Judicial Reform in China: Lessons from Shanghai” (2005) 19 Colum. J. Asian L. 97; Study from Minxin Pei, Zhang Guoyan, Pei Fei, and Chen Lixin has revealed that in a large number of commercial litigations in Shanghai, influence from party organs or government officials does not appear to have been a significant factor. In these relatively run of the mill commercial cases, most of the attempted influence comes from the parties, either directly or indirectly through their lawyers and other social acquaintances of the judges. See Minxin Pei, Zhang Guoyan, Pei Fei, and Chen Lixin, “A Survey of Commercial Litigation in Shanghai Courts”, in Randall Peerenboom Ed., *Judicial Independence in China: Lessons for Global Rule of Law Promotion*. (New York: Cambridge University Press, 2010) 221 at 233 [*Randall Peerenboom ed.*].

⁴⁸⁶ This is largely because, in comparison, considerable support from local bureaucracy could be attained in wealthy coastal areas and larger cities, whereas in underdeveloped areas, the court may not receive much assistance from local administrative bodies and people’s congresses. This huge disparity also resulted in different levels of local protectionisms between Eastern and Western China. For example, Balme observed that many local judges in western China generally do not have a strong common legal culture. Grassroots judges still work in the Danwei and the extremely decentralized administration of the judiciary makes it harder for local judges to work independently. The most direct threat to judicial independence has been the decentralized system of distributing judicial funds. When grassroots judges are not paid, the courts have few means to address the problem. Local rural judges are often called “basket judges” or “generalist judges” as they have to preside over a full spectrum of legal issues rather than being able to specialize in particular kinds of cases, as is common in more urban courts. Thus, a lack of professionalism and the absence of independence are systemic impediments in local courts in Western China. See Stephanie Balme, “Local Courts in Western China”, in Randall Peerenboom ed. *supra* note 485, 154; He Xin’s research showed that underdeveloped areas with a relatively lower income also give leaders in the courts that use the Adjudication Committee a greater incentive to control and thus they are less willing to delegate authority to individual judges. See *Black Hole*, *supra* note 486 at 710.

⁴⁸⁷ After the implementation of the PRC’s first comprehensive criminal code in January 1980, China’s courts began to seek a proper identity for themselves in China’s polity, and in the 1980s, judicial reforms were taken to develop a modern adversarial trial system as well as rules of evidences, which were deemed necessary to resolve the civil and commercial disputes arising from China’s transformation from a planned to a market economy. However, for much of the period since the beginning of legal reforms in 1978, courts have remained minor actors in the China’s polity and Party/State. See Chris X. Lin, “A Quiet Revolution: An Overview of China’s Judicial Reform”(2003) 4:2 Asian-Pacific Law & Policy Journal 255 [*Quiet Revolution*]; Benjamin L. Liebman, “China’s Courts: Restricted Reform”(2007) 21 Colum. J. Asian L. 1 at 4 [*Restried Reform*].

primary goal for SPC and China's courts. This has been written about extensively in the research.⁴⁸⁸ From 2008-2012, Wang Shengjun's court upheld "Populism"⁴⁸⁹ while preserving the efforts of professionalism. Much has been written about this⁴⁹⁰.

In this chapter, we will try to map the institutional development of PRC courts China's polity, with a central focus on the how the SPC struggles from the "dual-supremacy" of the NPC, and how the Chinese courts have gained incremental authority by adopting a strategy that interplays with the CPC. This chapter argues that both the SPC and the courts are pursuing "Adjudicate Independence" rather than "Judicial Independence", which is possibly overlooked if viewed from the standard of "Mature Constitutionalism", or in this case, the criteria of "Judicial Independence".

There are six parts in this Chapter: (1) Recent Party judicial Policy; (2) Judicial independence in China's context; (3) Courts under the Parliamentary Supremacy of the NPC; (4) Courts under the political leadership of the CPC; (5) The model of "Adjudicative Independence"; and (6) Conclusion.

⁴⁸⁸ Primary Materials: See SPC Annul Reports in NPC from 1999 to 2008. Secondary literatures: See *supra* note 477; and *Restricted Reform*, *supra* note 487; Xin Chunying, "What kind of judicial power does China need?"(2003), 1 Int'l J. Const. L. 1; Qianfan Zhang, "the People's Court in Transition: The prospects of the Chinese judicial reform"(2003), 12: 34 Journal of Contemporary China 69 [Court in Transition]; *Judicial Disciplin System*, *supra* note 483; Stephanie Balme, "Local Courts in Western China", in Randall Peerenboom ed. *supra* note 485, 154 [Courts in West China]; Fu Hualing & Richard Cullen, "From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China" in Woo, Margaret Y. K. & Gallagher, Mary E, Chinese Justice: Civil Dispute Resolution in Contemporary China (New York: Cambridge Press, 2011) 25 [From Mediatory]; *supra* note 233; see *supra* note 47.

⁴⁸⁹ The word "Populism" is defined broadly as promoting judicial responsiveness to and incorporation of public opinion, and often tied to non-adjudicatory methods of dispute resolution—as a guiding SPC doctrine. The SPC's advocacy of this doctrine actually began in the later Xiao Yang era, but few would dispute that such advocacy has intensified after Wang's appointment. The doctrine has led to, most prominently, stronger emphasis on mediation as a favored dispute resolution method and higher sensitivity towards popular opinion. Much of this agenda seems to push in the opposite direction of legal formality, professionalism, and judicial independence. See Taisu Zhang, "the Pragmatic Court: Reinterpreting the Supreme People's Court of China"(2012), 25:1 Columbia Journal of Asian Law 1 at 6.

⁴⁹⁰ Primary material: SPC Annul Reports from 2008 to 2012; "Zuigaorenminfayuan yanjiushi zhuren huyunteng-renminfayuan anli zhidao zhidu de goujian [Hu Yunteng, Director of Research Office of SPC: Building of Guiding Cases system in People's Courts](Jan, 05, 2011)" Legaldaily.com.cn, online <http://www.legaldaily.com.cn/fxy/content/2011-01/05/content_2427655.htm?node=21429>, last accessed on April 15 2015; Secondary Literature: Susan Trevaskes, "Political Ideology, the Party, and Politicking: Justice System Reform in China"(2011) 37:3 Modern China 315 [Political Ideology]; Susan Trevaskes, "Mapping the Political Terrain of Justice Reform in China" (2014), 2:1 Griffith Asia Quarterly 18 [Mapping Terrain]; Randall Peerenboom, "Introduction", in Randall Peerenboom ed. *supra* note 485, 1 [Introduction]; See *supra* note 489.

4.1 Recent Judicial Policies of CPC: “Rule of Law” and “Fairer and More Efficient Justice System”

After December 2012, the new party leadership headed by President Xi Jinping began to return to an emphasis on building Socialist Rule of Law⁴⁹¹. Under these circumstances, Zhou Qiang, who held a Master’s degree in Law and was the secretary of Xiao Yang in the 1990s, was appointed as the president of the SPC in 2013.

In November 2013, the Party Congress published an outline of a new Justice System Reform Plans (*Party Plan*), and the SPC then issued the *Fourth Reform Plan of People’s Courts (2014-2018)*(*SPC Fourth Plan*). It was revised in February 2015 after the 4th Plenary of 18th CPC in October 2014 issued a further reform agenda toward “Rule of Law 2.0”. The *SPC’s Fourth Plan* basically coordinates with the *Party Plan* in 2013 and 2014:

(1) 2013 *Party Plan* advocated guaranteeing that judicial powers and prosecutorial powers are exercised according to the law independently and fairly. In the *SPC Fourth Plan*, the SPC urged a litigation system in which procuratorate investigation should pay respect to adjudicate process.

(2) The Party Plans both in 2013 and 2014 advocated for “promoting the unified management of human resources in provincial and lower courts”⁴⁹². The *SPC Fourth Plan* provided that in the following year the courts would coordinate with other organs to

⁴⁹¹ *Mapping Terrain*, *supra* note 490 at 30-31.

⁴⁹² Most notably, the Decision calls for more centralized management of the judiciary in terms of funding for the courts and judicial appointments, and will more tentatively raise the possibility of a system where jurisdiction is not tied to an administrative region. Centralized funding and regional courts have been proposed as a way of overcoming local protectionism for decades.

build centralize funds for local courts into provincial level⁴⁹³.

(3) A large stride was taken by the SPC to strike local protectionism and was backed by the *Party Plan*'s initiative for "exploring the establishment of judicial jurisdiction systems that are suitably separate from administrative areas, guarantee the uniform and correct implementation of state laws."⁴⁹⁴

(4) The *Party Plan* also "recommended" establishing judicial personnel management systems that conform to professional characteristics, completing mechanisms for the uniform recruitment of personnel. The *SPC Fourth Plan* then provided more detailed measures for uniform recruitment of personnel⁴⁹⁵.

(5) The Party also decided to reform the system of Adjudication Committees within courts so that an officer would preside over cases that the officer was responsible for case decision-making⁴⁹⁶. The *SPC Fourth Plan* set the primary measure as giving more authority to the presiding judges and collegiate panel. This implied a more limited role would exist for adjudicative committees⁴⁹⁷.

⁴⁹³ *Supra* note 162 at 10.

⁴⁹⁴ Specifically, the Court first set up two "Circuit Courts" in Shenyang and Shenzhen to hear and judge inter-jurisdictional, complex and important cases set forth in the SPC Fourth Reform Plan. Second, the SPC Plan also provided an initiative for "exploring [the] proper way to set up trans-regional courts", to deal with trans-regional litigations, important administrative, environmental disputes and other cases that were vulnerable to influence from local protectionism. Third, the SPC plan also provided some administrative cases would be heard by Intermediate People's Courts. See "zuigaorenminfayuan guanyu quanmian shenhua renminfayuan gaige de yijian-renmin fayuan disige wuniangaigegangyao(2014-2018)[SPC's Opinions regarding comprehensively deepening reforms on people's courts]" (fafa (2015) No.3) (Feb. 4 2015), Chinacourt.org, online <<http://www.chinacourt.org/law/detail/2015/02/id/148096.shtml>>, last accessed on April 15 2015.

⁴⁹⁵ It includes: Recruiting judges from lower courts, lawyers and legal scholars; establishing a unified procedure to select judges under the leadership of SPC; setting up a separate wage system for judges, etc.

⁴⁹⁶ *Mapping Terrain*, *supra* note 490 at 31-32.

⁴⁹⁷ For example, the SPC Plan specifies that the "Adjudicate Committee" should mainly discuss the applications of laws, except for important or complex cases involving diplomatic relationship, public safety or social stability. See *supra* note 162 at 10

(6) Another important part for the *Party Plans* in both 2013 and 2014 was to improve transparency by encouraging open trials and open prosecutions, recording the court procedures improving judicial reasoning in court judgments and promoting access to court documents⁴⁹⁸, in order to prevent judicial corruptions. The *SPC Fourth Plan*, then enhanced judicial transparency by encouraging open trials, open judgments, open information for judicial enforcement. The main method was to provide all these documents online.

(7) The SPC also enormously exploited the CPC effort to promote judicial autonomy and authority at the expense of administrative organs. The 4th Plenary of 18th Party Congress in 2014 advocated a system to “record leading cadres who interfere specific cases” and hold responsibility, but no specific measures were provided. The SPC Plan, however, set forth a more detailed procedure to implement such system⁴⁹⁹.

(8) In addition, the *SPC Fourth Plan* may provide opportunities for Chinese citizens to use courts as fora for raising rights-based grievances⁵⁰⁰. The new *SPC Fourth Plan* seeks to accept public interest litigation, despite its attempt to rein public litigations with the assistance from procuratorate.

⁴⁹⁸ *Mapping Terrain*, *supra* note 490 at 31-32.

⁴⁹⁹ For example, it provided that such record would be available for “parties and their attorneys.” The SPC also took a further step, explicitly stating that “without legal basis and due procedure”, “judges could not be transferred, dismissed, or degraded or be subject to other sanctions.” The SPC Plan also includes the scheme to set up Judge Disciplinary Committees in central and provincial levels to openly hear judge misbehavior or disobedience. Additionally, under the slogan of “administration in accordance with Law”, the SPC Plan committee seeks to design a system to enforce principal officials to appear before the courts. See *supra* note 494.

⁴⁹⁹ It includes: Recruiting judges from lower courts, lawyers and legal scholars; establishing a unified procedure to select judges under the leadership of SPC; setting up a separate wage system for judges, etc.

⁵⁰⁰ It had been pointed out that China’s court in general is not very receptive to hearing public litigations on matters such as class actions or public interest lawsuits. Also, previously the Party-state also appears increasingly wary of such efforts, and has imposed new restrictions on lawyers and on public interest litigation. See, for example, *Restricted Reform*, *supra* note 487 at 34

The future of legal reforms largely depends on how these reform schemes in Party and SPC Plans are implemented. However, as pointed out by Peerenboom, most of the reforms involve partially completed reforms that were ongoing for years, a situation that is simplified by the phrase: “old bottle for new wine”⁵⁰¹. Moreover, although the *SPC Fourth Plan* provides a somewhat more detailed reform agenda, it does not address the need for deep structural reforms⁵⁰². Nevertheless, it is clear that the Party authority is still used by the SPC to overcome various significant institutional and ideological barriers to procedural fairness and institutional efficiency and to maneuver out of longstanding problems in institutional management, arbitrary justice and in the punitive culture of justice administration⁵⁰³. These developments and challenges have raised important questions of “Judicial Independence”.

4.2 Judicial Independence in China’s Context: What is Wrong with “Global Standard” for Assessing “Independence” in China’s Courts?

In this part, we will demonstrate the need to build a more “compatible” idea for measuring the PRC courts’ path towards “independence” within the big picture of China’s current constitutional system and political environment. The static standard of “Judicial Independence”, as an important underlined principle of Mature Constitutionalism, might not be that suitable for measuring development in China’s courts. We demonstrated it by arguing that the PRC courts have considerable independence as well as developmental potential for such independence in a large extent.

⁵⁰¹ These include addressing legal inconsistency by: improving the file and review system; improving the enforcement of judgments; improving the quality of legislation and opening up the legislative process to public participation through notice and comment provisions and more hearings; strengthening the professional qualifications of judges and the ethical standards of lawyers; expanding legal aid and public legal education campaigns; resolving overlapping jurisdictional conflicts and reducing bureaucratic protectionism; and reining in administrative discretion and holding government officials accountable for their actions. See *supra* note 162 at 12-13.

⁵⁰² *Ibid.*

⁵⁰³ *Mapping Terrain*, *supra* note 490 at 33-34.

It goes without saying that by the “Global Standard” based on some mature constitutional system, courts in China are not only lacking independence, but also constitutionally anti-judicial independence when considering the Chinese constitutional arrangement. For example, in the World Justice Project Rule of Law Index (WJP index), indexes of a “lack of independence of the judiciary from the government’s power” when trying civil and criminal cases were 8.6 and 9.2 in China 2014 (10 being very serious), seemingly Chinese courts cannot possibly independently judge any civil-cases and routine criminal cases in practice⁵⁰⁴. In fact, just like the WJP index, in many “Global Standards”, “most provisions are abstract and hortatory, others are tautological. Some are both.”⁵⁰⁵ Another example is the Global Judicial Integrity Principles (JIP) “based on both exhaustive global research and practical in-country experience captured in a series of International Foundation for Electronic Systems white papers and country-specific State of the Judiciary Reports”, which included 18 indexes⁵⁰⁶. Again, if adopting the JIP standard, it seems that judicial independence is almost non-existent in PRC courts. In fact, although “international best practices may serve a useful heuristic purpose for legal reformers in some circumstances⁵⁰⁷”, the problem with a global standard is its tendency to deny cultural and political difference. Generally, it recommends unified standards, as they are

⁵⁰⁴ WJP, “China”, WJP Rule of Law 2014, online: WJP <<http://data.worldjusticeproject.org/#index/CHN>>, last accessed on April 15 2015.

⁵⁰⁵ Randall Peerenboom, “Judicial Independence in China: Common Myths and Unfounded Assumptions”, in Randall Peerenboom ed., *supra* note 485, 69 at 72.

⁵⁰⁶ These indexes include: (1) Guarantee of judicial independence, the right to a fair trial, equality under the law, and access to justice. (2) Institutional and personal/decisional independence of judges. (3) Clear and effective jurisdiction of ordinary courts and judicial review powers. (4) Adequate judicial resources and salaries. (5) Adequate training and continuing legal education. (6) Security of tenure. (7) Fair and effective enforcement of judgments. (8) Judicial freedom of expression and association. (9) Adequate qualification and objective and transparent selection and appointment process. (10) Objective and transparent processes of the judicial career. (11) Objective, transparent, fair, and effective disciplinary process. (12) Limited judicial immunity from civil and criminal suit. (13) Conflict of interest rules. (14) Income and asset disclosure. (15) High standards of judicial conduct and rules of judicial ethics. (16) Objective and transparent court administration and judicial processes. (17) Judicial access to legal and judicial information. (18) Public access to legal and judicial information. Keith E. Henderson, “Halfway Home and a Long Way to Go”, in Randall Peerenboom ed. *supra* note 485, 23 at 25.

⁵⁰⁷ Antoine Garapon, “A New Approach for Promoting Judicial Independence” in Randall Peerenboom ed. *supra* note 485, 37 at 37.

uncontroversial⁵⁰⁸. Thus, the importance of understanding local politics and of appreciating the tension between local politics and global principles of judicial integrity should be stressed⁵⁰⁹. Hence, a more proper way may be to perceive “Judicial independence” as a multifaceted concept, because the extent and nature of judicial independence varies widely from country to country, even among liberal democracies with well-functioning legal systems⁵¹⁰.

In fact, most global-standards approaches are too closely linked to the mature western constitutional system, especially in the American perception of politics. For example, in China, the hierarchical structure of the state power flows downward from the NPC on the top, but without three separate branches as in the United States. “The Chinese way of resolving the contradiction between one source of power and the independence of the judiciary is not so strange for a continental lawyer. Also, the CPC leads in a general and abstract way, not on specific issues”⁵¹¹. With respect to the personal independence of judges, the United States grants judges life tenure, most others only provide for a fixed term. Legal systems also differ with respect to the degree of internal independence. Courts tend to be more hierarchical in civil law countries than in common law countries. For instance, the views of senior judges may carry more weight in practice if not according to law. Senior judges in civil systems may also exercise greater control over important administrative matters like the assignment of cases and personnel issues⁵¹² such as German judges and Japanese judges. For China, merely using this “global

⁵⁰⁸ Even the French and American judicial systems between two economically developed Western liberal democratic countries. See *ibid* at 38.

⁵⁰⁹ *Ibid* at 51.

⁵¹⁰ See *supra* note 505 at 71-72.

⁵¹¹ See *supra* note 507 at 42-43.

⁵¹² See *supra* note 505 at 73-74.

standard” that is based on the mature constitutional system to measure and evaluate the PRC courts may blind one’s eye to the changing independence in China’s courts in a “developing constitutional system” as demonstrated in Chapter 1. Peerenboom once summarized a set of eight common myths and unfounded assumptions regarding China’s courts as follows: (1) Universal agreement on a unitary model of judicial independence. (2) Clear methodological standards for measuring judicial independence. (3) Normative stage of development of judicial independence. (4) The more independence the better. (5) Judicial independence lacking in all types of cases in China. (6) Independence is impossible within China, an authoritarian Party/State. (7) The CPC is the main source of interference with the courts in China. (8) Sudden democratization could lead to judicial independence in China⁵¹³.

The “best lens for understanding the development of the Chinese judiciary⁵¹⁴”, is to largely abandon a subjective evaluation based on a mature constitutional system, and focus on the changing dynamics in China’s context descriptively rather than following a perspective approach. For instance, we borrowed Fu Yulin and Peerenboom’s framework to examine the overall independence of China’s courts, basing on systematic perspective and a cases-basis.

Institutionally, one could analyze independence of China’s courts from the perspective of collective independence/personal independence and internal independence/external independence. It is witnessed that the collective independence of the Chinese courts has

⁵¹³ *Ibid* at 69-70.

⁵¹⁴ Zhu Suli, “The Party and the Courts”, in Randall Peerenboom ed. *supra* note 485, 52 at 64.

been strengthened through increased budgets, more streamlined and efficient processes, and efforts to increase the authority of the courts⁵¹⁵. From the 1990s, the governments in different levels have allocated more funding for the judiciary. In particular, courts in coastal areas have more financial resources than courts in other areas⁵¹⁶. With an increasing number of total cases that China's courts handled (about 1,566,000 in 2014⁵¹⁷), in all four reform plans from SPC, the SPC has encouraged a greater use of simplified and summary procedures in civil and criminal and administrative trials⁵¹⁸. As earlier as 2004, 63.6% of total cases were heard using simplified procedures⁵¹⁹. The authority of courts has also increased. This is evident in the high rate of administrative litigation cases where courts quash administrative agency decisions or a case is withdrawn after the agency changes its decision⁵²⁰. Although the success rates of plaintiffs in administrative cases decreased from 30% in 2004 to about 10% in 2014⁵²¹, plaintiffs are much more successful in Mainland China than in administrative litigation in Taiwan's Administrative Courts⁵²².

Personal independence refers to the ability of judges to decide cases independently in accordance with law and without interference from other parties or entities⁵²³. As

⁵¹⁵ See *supra* note 505 at 74.

⁵¹⁶ For example, generally a Judge in the Shenzhen Intermediate Court has an annual income of 150,000 RMB (about 25,000 USD) after tax in 2014, while the average income of the entire country is about 48,000 RMB in 2014.

⁵¹⁷ Working Report of SPC (Mar.20, 2015), NPC, online <http://www.npc.gov.cn/npc/dbdhhy/12_3/2015-03/20/content_1930946.htm>, last accessed on April 15 2015.

⁵¹⁸ "Renmin fayuan disige wuniangaigegangyao(2009-2013) [Outline of the Third Reform Plan (2009-2013)]" (fafa (2009) No.14) (Mar. 17, 2009), Chinacourt Org, online <<http://old.chinacourt.org/public/detail.php?id=350101>>, last accessed on April 15 2015.

⁵¹⁹ Working Report of SPC (Mar.14, 2005), NPC, online <<http://www.npc.gov.cn/npc/oldarchives/dbdh/dbdh/common/zw.jsp@label=wxzlk&id=336787&back=1&pdm=dhwj.htm>>, last accessed on April 15 2015.

⁵²⁰ See *supra* note 505 at 75.

⁵²¹ Xinhuanet, "Pinglun: mingaoguan shengsolv xiajiang xuyao zhidu huajie [Comment: Systematic changes should be used to solve the decreasing success rate in Administrative cases]" (Nov. 06, 2014) Xinhuanet, online <http://news.xinhuanet.com/yzyd/legal/20141106/c_1113139108.htm>, last accessed on April 15 2015.

⁵²² "Mingang guoshuiju, shengsu jin bapa [Only 6% success rate in administrative litigation regarding taxation]" (Mar. 17, 2015) Chinatimes.com online <<http://www.chinatimes.com/newspapers/20150317000376-260102>>, last accessed on April 15 2015.

⁵²³ See *supra* note 47 at 298.

discussed later, judges in China feel less pressure from organs outside the courts because the party and people's congress retain veto power in the appointment and promotion process; hence, they rarely exploit it. However, local government becomes the main sources of interference. Nevertheless, judges are also not often sanctioned and dismissed for political reasons, and when they are impeached, it is generally for legitimate reasons such as negligence or corruption⁵²⁴. According to the SPC Annual Working Reports, from 2001 to 2014, there were 8168 judicial personnel in total who were subject to criminal penalties and other inner-party sanctions. Regarding internal independence, as noted above, the Adjudicate Committee in each court has great say over cases, and the situation is getting worse especially in basic courts in western China⁵²⁵. However, beginning with the *Second SPC Reform Plans*, the SPC has put forward several agendas to change the situation in recent years⁵²⁶, though huge debates about how much these reforms have changed still goes on.

External independence indicates the degree of China's courts' independence from outer forces such as Party, people's courts, local government, or procuratorate. Influences from some of these organs are discussed in latter parts. But here, we still have to briefly stress that at the current stage, unlike "vertical" and "horizontal" power holders, inferences from Party and People's Congresses should not be overstated. Instead, not only is interference from Party and People's Congresses on cases rare, but both are important

⁵²⁴ *Introduction*, *supra* note 490 at 14.

⁵²⁵ See *Black Hole*, *supra* note 486.

⁵²⁶ Noteworthy is how we can also see that the revised Fourth Reform Plan of SPC in 2015 contained a set of important measures to ensure the individual independence of judges. For example, measures that judges' sanction and degrade should be heard by special Judges Disciplinary Committee in national and provincial levels. Nevertheless, there have been severe debates about the personal influences of senior judges in China's courts. Supporters argue that review by more senior judges is necessary in light of the low level of competence of some judges. They also suggest that the system reduces corruption. Some claim that the system enhances the independence of the judiciary because the adjudicative committee, which includes the president and other high-ranking party members within the court, may be better able to resist outside influences than more junior judges. On the other hand, critics complain that under the current system the judges who decide the case are not the ones who hear it. See *supra* note 505 at 78.

institutional resources taken for advantage by China's courts to push back external pressure exerted by government, procuratorate, and even social pressure such as media.

Furthermore, the second Analytical Framework works according to the types of cases. If based on cases type, then the sources and impact of interferences are varied.

The first category is pure political cases and politically sensitive cases⁵²⁷. For these cases, “inaction” is a common reaction from China's courts that refused to hear or judge. Such “action”, according to Liebman, is “understandable”, because refusing to deal with controversial topics could protect the courts from more extensive criticism from the public, yet doing so reinforces courts' limited power to resolve significant public grievances⁵²⁸. Further, if forcing the courts to hear socioeconomic cases for which they are unable to provide an effective remedy may undermine any trust and confidence in China's courts⁵²⁹, considering the strongest external pressure in these cases may come from Party/State and/or the public. Nevertheless, although political or politically sensitive cases may take the form of criminal, civil, or administrative cases and considering the Chinese courts handle more than 15 million first-instance cases a year, only a small fraction of them are political or politically sensitive⁵³⁰.

Although generally in politically sensitive and socioeconomic cases China's courts lack

⁵²⁷ *Ibid* at 94.

⁵²⁸ *Restricted Reform*, *supra* note 487 at 28.

⁵²⁹ According to Fu Yuling, Fu Hualing and Peerenboom, the “pure political cases” are those directly challenging the authority of the ruling regime, while Political sensitive cases affect sociopolitical stability, economic growth, China's position in the world, or broad international interest. It had been pointed out courts would unlikely gain the authority to handle politically sensitive cases and ability to provide an effective remedy in many socioeconomic cases independently in recent future. See Fu Yulin & Randall Peerenboom, “A new Analytic Framework for understanding and promoting Judicial Independence in China” in Randall Peerenboom ed. *supra* note 485,95 at 133.

⁵³⁰ *Ibid* at 96.

the independence to hear and judge, it is incorrect to conclude that the Chinese judiciary is unable to decide any case independently, especially for commercial cases and other routine civil, administrative, or criminal cases⁵³¹. In these “routine” cases, interference mostly comes from parties in civil and commercial cases, social media, lawyers, or senior judges in courts and Adjudicate Committees. In criminal cases, the primary pressure may come from prosecutors, whereas in administrative cases, mostly local government and public influence China’s courts. In addition, local protectionism and judicial corruption may play their part in some cases. Therefore, in these “routine cases”, it is safe to say that China’s courts have to face several main sources of interferences just like courts in other civil-law countries or jurisdictions. For example, a study on Commercial litigations in Shanghai’s courts⁵³² demonstrated that although courts in developed areas in China, such as Shanghai, are generally but greatly increasing their competence and autonomy, at least for the application of corporate and commercial law⁵³³, there is ample evidence that the People’s Courts voluntarily reject cases when they perceive a political problem⁵³⁴. Therefore, while claiming that China’s courts lack meaningful independence, these observers may usually have political and political sensitive cases in mind⁵³⁵. As commented by Peerenboom, there is therefore a need to move beyond simplistic black and white portrayals based on regime types. Courts in authoritarian states may enjoy

⁵³¹ See *supra* note 505 at 86.

⁵³² The study based on a review of more than 1000 Company Law-related disputes reported between 1992 and 2008 and extensive interactions with PRC officials and sitting judges, evaluates how the Shanghai People’s Court system has fared over 15 years in corporate law adjudication. Nicholas Calcina Howson, “Corporate Law in the Shanghai People’s Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State” (2010) 5 East Asia Law Review 303 at 303.

⁵³³ Specifically, the study has shown the multiple ways in which the autonomy of the Shanghai People’s Courts is expressed: (a) judicial implementation of the Company Law or corporate law principles without statutory or bureaucratic authorization, or departing from such authorization; (b) application of the law and remedies using common law or equity court-like powers; (c) refusal to apply badly-formulated corporate law to *de facto* partnerships; (d) articulation and protection of an autonomous sphere for commercial firms and market activity; and (e) application of corporate law with significant authority, often to invalidate or instruct re-arrangement of privately-ordered contractual or business arrangements. *Ibid* at 329.

⁵³⁴ This was exemplified by the People’s Courts’ nationwide refusal starting in 2005 to adjudicate creditor claims on non-performing loans transferred to China’s asset management companies and then resold to third party purchasers. This coordinated refusal was sourced in lower-level Court fears that such cases might implicate one of transitional China’s hot-button issues: the theft of state assets. *Ibid* at 415.

⁵³⁵ See *supra* note 529 at 132.

considerable independence, although usually over a limited scope of issues⁵³⁶.

To be sure, “judges have not been passive actors in the unfolding drama⁵³⁷”. In the next two parts, we will see China’s courts have responded strategically to pursue institutional interests, increase the status, authority, and independence of judges under the “Supremacy of the NPC,” as well as the “political leadership of the CPC”.

4.3 Courts Under The Dual-Supremacy of The NPC

4.3.1. Constitutional Underpins of Courts

Constitutionally, the SPC is one of four state institutions officially subordinated to the NPC. The *1982 Constitution* designated the SPC as the “highest adjudicative organ of the state” rather than “supreme judicial organ” of the state. Also, in Article 128, the Constitution stipulated that the SPC should be answerable to the NPC. In theory, China’s courts must accept the superintendence of the legislature “in order to continue to enjoy that independence⁵³⁸”.

As mentioned in earlier chapters, this arrangement was also largely derived from the Marxist-Leninist doctrines where, in socialist states, all powers should be vested in the legislature as the supreme legal expression of the will of the ruling class. In such a configuration, the formal legislative-judicial relations resemble the relationship between parents and children in traditional Chinese culture, whereby the latter must obey, respect,

⁵³⁶ *Introduction*, *supra* note 490 at 3.

⁵³⁷ *Ibid* at 15.

⁵³⁸ See *supra* note 477 at 377.

and support the former⁵³⁹. Constitutionally speaking, the SPC has no right to question the NPC and it is clear that the SPC was not, at least by constitutional designers, intended to play an important role in legislation or constitutional interpretation⁵⁴⁰. This is also logically determined by the Constitutional Principle “Democratic Centralism”. As mentioned before, the model for the *1982 Constitution* has enormous historical linkage with the 1936 Stalin Constitution in USSR⁵⁴¹. Like the Soviet Constitution, the principle of “Democratic Centralism” also applies to the China’s courts. As pointed out by Tu Siyi, the *1982 Constitution* was based on the *1954 Constitution of PRC* and has provided an equal legal stature for both the SPC and SPP. Moreover, it has revealed an insufficient understanding of the neutral and independent nature of courts⁵⁴².

Therefore, it is unlike the Western notion of judicial independence, which is linked to a system of checks and balances where judicial power is derived directly from the constitution. In China, courts are established by the authority of People’s Congresses, which is the source of all power, even for the Constitution itself⁵⁴³. Thus, it is not surprising that Article 126 of the *1982 Constitution* provides that the “people’s courts exercise adjudicate power independently, in accordance with the law, and are not subject to interference by any administrative organ, public organization, or individual,” and that the very meaning of exercising adjudicate power independently is that courts are to be free from some power holders, but not from, in particular, People’s Congresses’

⁵³⁹ Anthony R. Dicks, “Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform”(Mar., 1995) 141 *The China Quarterly* 82 at 86-87.

⁵⁴⁰ NPCSC member Xin Chunying portrays relations between the legislative, executive, and judicial branches of the Chinese polity by the analogy of “One Mother and Two Sons. The NPC, as the “mother”, has paramount and unchallengeable authority over all other branches, the “sons”. See *supra* note 477 at 378.

⁵⁴¹ Noteworthy, the Stalin Constitution did not provide that the courts should be responsible to the National Legislature, which revealed a strong traditional influence from Western judicial culture respecting the independence of judiciary.

⁵⁴² See *U.S.S.R. and 1954 Constitution, supra* note 274, at 97-98.

⁵⁴³ *What Kind, supra* note 488 58 at 69.

Supervision. The NPC influences the judiciary through its roles in the appointment and approval process. It also exercises various forms of supervision. Every year, the SPC must submit a Working Report to the NPC for review. People's Congresses may also address inquiries to the courts regarding general issues, although they seldom do⁵⁴⁴.

This particular constitutional design has theoretically blocked the possibility of constitutional litigation, judicial review, or judicial interpretation for courts in the PRC. Although Article 5 of the *1982 Constitution* stipulates that all acts that violate the Constitution must be investigated, and no organization or individual has the privilege of being beyond the Constitution, no provision in the *1982 Constitution* has mentioned the responsibility of the courts in ensuring the implementation of the Constitution. Rather, the duty to supervise the implementation of the Constitution is conferred to the NPC and NPCSC. However, in the following part, we will show how China's courts, especially the SPC struggles for incremental judicial authority under the dual-supremacy of the NPC pinpointed by the PRC Constitution.

4.3.2 Judicial Interpretation and Judicial Review: Counter-Attack from China's Courts

As in many civil law countries⁵⁴⁵, courts in China do not have the formal power to make law. However, although the NPCSC theoretically monopolizes the power of legislative interpretation over national law, it rarely issues these interpretations⁵⁴⁶. A few dozen

⁵⁴⁴ See *supra* note 505 at 81.

⁵⁴⁵ For detailed discussion on these civil-law states' courts, see *supra* note 47 at 316.

⁵⁴⁶ Perhaps it is simply impractical for the Committee, which is convened bi-monthly, to carry out the task of interpretation when it has already been overloaded with legislative task. In practice, all requests for interpretation of national laws to the Standing Committee are referred to the LAC of the NPCSC. However, the LAC itself is not a legislative authority nor is it vested with the power for legal interpretation; thus, its interpretation has not legal effect, though it is used as guidance in practice. See Jianfu Chen, "Appendix 1: Unanswered question and unresolved issues: comments on the law on law-making" in Jan Michiel Otto etl. Eds, *Law-making in the*

legislative interpretations have been issued since 1955 and only four times since 1996⁵⁴⁷. Also, so far no constitutional Interpretation has been issued by the NPCSC or NPC, despite the fact that the Constitutional Interpretation Law is currently working by the NPCSC. An article describes the inadequacy⁵⁴⁸ of the NPCSC legislative interpretation with the following metaphor: “It is like a window opened too high on the wall. Unfortunately, no one can reach it because there is no ladder.”⁵⁴⁹

Notwithstanding, it is impossible for any legal system to operate without legal interpretation. Thus, in 1955 and 1981, the NPCSC issued, twice, the *Resolution on Strengthening Legal Interpretation Works (Resolution on Interpretation)*, which empowered the State Council, the SPC and the SPP to issue their own specific interpretations in the name of “strengthening the legal interpretations⁵⁵⁰”. Armed with this delegation of interpretive authority, the SPC developed the habit of complementing national legislation with judicial interpretations to suit judicial practice. Thus, the SPC interpretations are more specific and can be applied directly to cases at hand and binding on lower courts in subsequent specific cases. Technically speaking, according to the *1981 Resolution on Interpretation*, China’s courts are only allowed to interpret law within the boundary of original legislative intent set up by the NPC, and such judicial interpretative

People’s Republic of China (Hague: 2000, Kluwer Law International) 235 at 249.

⁵⁴⁷ See *supra* note 47 at 317.

⁵⁴⁸ The failure of the NPC Standing Committee to develop its legal interpretive work is caused, for the most part, by the large volume of new legislation that it must consider in its bi-monthly sessions.” *Legislation in the PRC*, *supra* note 287 at 667.

⁵⁴⁹ In one example, a foreign business in Beijing was put into a rather difficult situation by conflicting regulations issued by two administrative agencies. When the business petitioned the State Council to review the regulations pursuant to the Law on Legislation, they waited for over year without receiving a response. *Quiet Revolution*, *supra* note 487 at 275-276.

⁵⁵⁰ Nevertheless, it should be noted that while NPC “Resolution”(*jueding*), as a form of legislative interpretation made by the NPC Standing Committee, must be strictly enforced by all levels of People’s Courts and may be cited in legal documents, another “interpretation”, which commonly issued by the LAC, is never cited by the courts but sometimes form the basis of SPC standard opinions. *supra* note 329 at 397-398; see also *Supra* note 80 at 54.

power is limited to the SPC⁵⁵¹ but not lower courts. Indeed, the SPC makes laws more directly in a variety of ways, including the issuance of official opinions, explanations or other forms of interpretation of laws, and the publication of model cases⁵⁵². However, in accordance with China's complex division of responsibility for legal interpretation, the SPC may only issue interpretations of primary legislation. Consequently, when a problem arises concerning the interpretation of a secondary or tertiary regulation, the courts must defer to the issuing body in matters of interpretation⁵⁵³. Also, gradually China has developed a constitutional convention that the SPC is responsible for feeding legal draft to the NPCSC in the legislative process for laws that relate to adjudicate works, such as the *Organic Law of People's Courts and Civil Procedure Law*⁵⁵⁴.

Noteworthy, with the *1981 Resolution on Interpretation*, both the SPC and SPP were authorized to issue interpretations of laws binding on the lower courts and procuratorate, but the interpretative power of the SPP was limited to the procuratorial aspects of criminal law and criminal procedure. Interestingly, the two bodies have the same legal status under the Constitution and on occasion issue interpretations jointly regarding criminal justice⁵⁵⁵. However, Ji Weidong's research has revealed the variation between

⁵⁵¹ SPC issued the Several Provisions on Judicial Interpretation in 23 June 1997, which confines the judicial interpretations within the SPC only.

⁵⁵² Nevertheless, the power of courts to make law is much more limited than in a common-law precedent-based system. See *supra* note 47 at 316-317.

⁵⁵³ And administrative lawmakers ultimately enjoy a near proprietary right to control the regulations they have issued. See *Supra* note 342 at 752-753.

⁵⁵⁴ It has been pointed out that the legislative drafts prepared by the SPC were accepted and passed as law with few amendments by law-makers. Rules of civil procedures were regarded as highly technical, and the CCP, and the legislature for that matter, were content to leave the drafting and consultation to the SPC itself. From Mediatory, *supra* note 488) 25 at 27.

⁵⁵⁵ Where differences in opinion arise between the court and the procuratorate, there is provision for the Standing Committee of the NPC to be the final arbiter. Differences in interpretation do occur, an example being the debate between the two organs of the meaning of certain provisions of the Criminal Procedure Law of 1996. The Procuratorate countered with accusations that the Supreme People's Court frequently exceeded its power of interpretation anyway. The result was a stalemate, the dropping of the article on judicial interpretation and the retention of the status quo. See *supra* note 329 at 397, 409.

the procuratorate and courts in contemporary China's context⁵⁵⁶, and now Chinese procuratorates appear before the court as a party to a dispute, observe the rules of the court, and obey the court's orders⁵⁵⁷.

From 1949 to 1978, the SPC had little or no role in judicial interpretation. Statistically, barely three Interpretations that could be classified as economic law were issued by the SPC during this period⁵⁵⁸. It was not until the mid-1990s, regarding social exchanges and the promotion of economic development, that the SPC interpretative power became a critical influence⁵⁵⁹. In 1997, the SPC issued a landmark *Several Provisions on Judicial Interpretation*, which self-declared that the judicial interpretations “also have the effect of law”. But the SPC's interpretations are in a much more detailed form than the original law⁵⁶⁰, dealing with it almost article by article⁵⁶¹. It also provided that lower courts must cite Judicial Interpretations in their judgments where appropriate. This holding directly contradicted the Organic Law and NPCSC decisions. Furthermore, as affirmed in the Legislative Law (2000), only Legal Interpretations enacted by the NPCSC could carry the effect of law⁵⁶².

⁵⁵⁶ With the ongoing judicial reforms, institutional interferences and supervision from procuratorate had been continually shrunk apart from criminal cases. For example, currently procuratorate may only make a “plea” to judgments from courts in lower levels, “to show respect for courts in the same level”. Moreover, started from the 1990s, judicial reform in China became increasingly focus on the enhancement of authority of courts rather than procuratorate. For instance, in 1994, the SPC issued a Decision to manage the courtroom's rule. And the Decision demand that the judges entering courts by separate corridor while procurators should stand up when judges entering the courts or reading her judgments. Ji comments such little but significant adjustment on courtroom's rule indeed evidenced the increasing authority of courts but the decline of authority of procuratorate. Ji Weidong, “Zuigaorenminfayuan de jueise jiqi yanhua [The role of SPC and its Evolution]”(2006) 1 Tsinghua Law Journal 4 at 13-14.

⁵⁵⁷ See *supra* note 505 at 83.

⁵⁵⁸ See *supra* note 477 at 396-397.

⁵⁵⁹ *Ibid* at 389.

⁵⁶⁰ SPC's interpretations sometimes go beyond the narrow limits of judicial interpretation and often resemble legislative interpretation even since the 1980s. The earlier example is *Thorough Implementation of the General Principles of Civil Law*, passed by the Judicial Committee of the Supreme People's Court in 1988. See *Legislation in the PRC*, *supra* not 287 at 667.

⁵⁶¹ For example, the 270-article civil procedure law came into effect in April 1991. An interpretation containing 320 articles was issued by the SPC in July 1992. Similarly, the 156 article General Principles of Civil Law came into effect in January 1987 and by April 1988, the Supreme Court had issued its own comprehensive 200 articles interpretation. Also see administrative litigation law, succession law, marriage law, and criminal law. See Jianfu Chen, “Appendix 1: Unanswered question and unresolved issues: comments on the law on law-making” in Jan Michiel Otto etl., *supra* note 274, 235 at 250.

⁵⁶² Noteworthy, in 1997 Expert Draft of Legislation Law, the leading drafter Li Buyun mentioned that the NPCSP 1981 Interpretation

Nevertheless, the SPC reaffirmed essentially the same principles in the 2007 *Provisions of the Supreme People's Court on the Judicial Interpretation Work*. This landmark Provision formalized a new procedural regime for producing Judicial Interpretations⁵⁶³. The SPC handed down as many as 542 Interpretations from 1983 to 1998, and under the Chair of Xiao Yang, between 1998 and 2009, the SPC handed down 264 publicly accessible and binding Judicial Interpretations⁵⁶⁴. All areas of substantive law were covered⁵⁶⁵ and the Court handed down rulings in nearly all important regulatory fields as well⁵⁶⁶. This figure does not include the vast number of other SPC statements, such as responses to lower courts through informal telephone inquiries that can exert strong persuasive authority over local courts' decision making⁵⁶⁷. Additionally, in the name of "judicial democratization", the Court allowed state organs, social groups, and even citizens the right to apply for interpretations on specific issues, especially those not presently regulated by primary legislation⁵⁶⁸. Importantly, the SPC stated that its judicial

"is too general to be applicable to the current urgent necessity of building China's legal system." The Expert Draft provides that "judicial interpretation of law should be limited to only the issues of implementation of a law or regulation and only in a literal way, and that each cases should be submitted to the Standing Committee for registration (Art 88); but at the same time it provides as well that the SPC and the SPP have the power to make interpretations not only on issues regarding application of laws in particular cases or types of cases, but also on issues regarding particular application of a law or a type of law." Such provisions in the Expert Draft, Li believed, would maintain the integrity of the legal system of the country. See Li Buyun, "Explanations on the proposed law on law-making of the PRC", in Jan Michiel Otto et al. *supra* note 274, 157 at 169-171.

⁵⁶³ The article 6 of the 2007 Provision divided the forms into four sub-categories: "Interpretation"(Jieshi), Provision(Guiding), Reply (Pifu), Decision (Jueding). Judicial interpretations on the specific application of a certain law in the trial work or the application of law in the trial of the cases of a certain category or a certain kind of problems shall be made in the form of "interpretation". Judicial interpretations on the formulation of the norms or opinions, which are necessary for the trial work on the basis of legislation spirit, shall be made in the form of "provision".

Judicial interpretations on the requests for instructions on the specific application of law in the trial work by the higher people's courts or the Military Court of the PLA shall be made in the form of "Reply".

The amendment or abolishment of judicial interpretations shall be made in the form of "decision".

⁵⁶⁴ See *supra* note 477 at 396.

⁵⁶⁵ For example, contracts law, torts, company law, criminal and criminal procedural law, administrative law, Marriage Law, etc.

⁵⁶⁶ These areas include housing and property, the stock exchange, intellectual property, maritime disputes, internet governance, securities regulation, listed companies, "Taiwan-related litigation," antitrust, insurance, alternative dispute resolution, "labor disputes, state compensation, market regulation, environmental pollution, collective litigation rights, corruption control, capital punishment, and international trade, etc. See *Ibid*.

⁵⁶⁷ For instance, in 2005 alone, the SPC issued 15 formal Interpretations, 443 informal answers to lower courts, 71 statements in response to NPC and State Council directives, 35 news bulletins, and 28 judicial guidelines on a wide array of social and economic concerns, such as armed robbery, illegal gambling, rural land use, state compensation for land takings, food and medicine quality, deceptive advertising, commercial fraud, and the rights of creditors.

⁵⁶⁸ See *supra* note 477 at 393-394.

interpretations “have the force of law”, thereby, at least as far as the people’s courts are concerned, placed its interpretations above State Council administrative regulations, local regulations and local rules⁵⁶⁹. Such an approach of “self-empowerment” adopted by the SPC has been sustained from the 1990s until now, and resembles the incremental approach taken by the Taiwanese judiciary in the Authoritarian era⁵⁷⁰, when the court gradually but steadily increased its authority by creating judicial “potential power”.

Of note, not only in practice did the SPC push the limits of its delegated authority by issuing a number of general interpretations of key laws⁵⁷¹, but also many SPC interpretations stretched the boundary of “judicial interpretation”, and occasionally even created legal rules that contradicted the original legislation⁵⁷². In addition, according to some researchers, the SPC Interpretations have brought parts of judicially enforceable law closer to international practice⁵⁷³. Some SPC’s Interpretations also provided additional guides for the society⁵⁷⁴. The SPC’s Judicial Interpretations even fill in gaps

⁵⁶⁹ See *supra* note 329 at 409-410; However, it should be noted that in 1991, however, the Supreme People's Court announced that courts would henceforth give discretionary juridical effect to NPC resolutions, thus putting them on a juridical par with State Council interpretations. In fact, the Supreme People's Court now seems to regard at least some NPC statutory interpretations as having even greater weight than administrative interpretations. See also *supra* note 80 at 84.

⁵⁷⁰ For detailed discussion on the case of authoritarian Taiwan, see Chen, Albert H. Y., “Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan, A Special Issue Commemorating the 10th Anniversary of the Hong Kong Special Administrative Region” (2007) 2 Hong Kong LJ 647; see also Tom Ginsburg, *Judicial Review in new Democracies: Constitutional courts in Asian Cases* (Cambridge University Press, 2007).

⁵⁷¹ For example, a 2007 Interpretation narrowed the gap between the Chinese arbitration framework and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) by allowing the nullification of portions of awards contrary to arbitration agreements. *Ibid* at 400.

⁵⁷² For example, in 2003, the Liaoning Provincial High Court referred to the SPC the question of whether a man, who unknowingly had consensual sexual intercourse with a girl under the age of fourteen, had committed rape. Article 236 of the Criminal Law punishes an individual who has intercourse with a girl under the age of fourteen only if he is aware of the victim's age. In its Reply, the SPC established a concept similar to the Anglo- American judge-made doctrine of *mens rea*: to be convicted, the accused must have had the intention to commit an offense. Therefore, the Court dismissed the charge of rape. This decision has indirectly changed bureaucratic policy towards the protection of young females. See *supra* note 477 at 399.

⁵⁷³ For example, a 2007 Interpretation narrowed the gap between the Chinese arbitration framework and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) by allowing the nullification of portions of awards contrary to arbitration agreements. *Ibid* at 400.

⁵⁷⁴ In 2007, the SPC injected into the nascent statutory antitrust regime additional rules on what constitutes false advertising—for example, belittling competitors, asserting half-truths, misrepresenting facts and scientific evidence, and using ambiguous language. While exaggerated advertising is not *prima facie* illegal, the Court obligated lower courts to consider an advertisement's target audience, content, impact on daily business, and the extent of public attention before determining whether it constitutes unfair competition." These factors served as clear legal guidelines for companies preparing to advertise their products. *Ibid*.

within the law during a state of emergency⁵⁷⁵. Today, it has become the case at times that what is binding in Chinese courts is not national law but SPC interpretations⁵⁷⁶. The SPC's competence to issue abstract Interpretations on primary legislation, a power not enjoyed even by the highest courts of many other jurisdictions⁵⁷⁷, effectively usurped the legislative function and the legislative supremacy of the NPC.

After the 2000s, the NPC seemed to make a concession by officially acknowledging the judicial interpretative power of the SPC. When in 2005, the NPCSC enacted the first Procedures for Filing and, reviewing judicial interpretation of law, it stipulated that the SPC should file every Judicial Interpretation to the NPCSC for "reference" within a month of being handed down. Thereafter, in NPC-drafted *Supervision Law* in 2007 and RLL in 2015, "judicial interpretations" are noticed but must be filed to the NPCSC for record and shall be subject to legislative review. However, it is seemingly that these Statutes might actually have empowered the SPC in several ways. They not only have reflected the NPC's recognition of the tremendous rulemaking powers wielded by the SPC and the political necessity of applying an external check to the Court's increasingly autonomous decision making, but also bars the NPCSC from striking down judicial interpretations prior to consulting with the Court⁵⁷⁸. It is important to note that, as of 2015 the NPC has yet to publically declare any Judicial Interpretation unconstitutional.

On the other hand, constitutionally speaking China's courts does not have the power to

⁵⁷⁵ During the severe acute respiratory syndrome ("SARS") epidemic of 2003, the SPC guided lower courts on dealing with new types of criminal offenses, such as the production of fake medicine and the intentional spreading of infectious diseases. See *Ibid* at 400-401.

⁵⁷⁶ *From Mediatory*, *supra* note 488 at 27.

⁵⁷⁷ See *supra* note 477 at 396-397.

⁵⁷⁸ Ironically, lawmakers have petitioned the SPC for more Interpretations on several occasions. A recent example is NPC delegate and Beijing procurator Zhou Guangquan's public request to the SPC to issue a Judicial Interpretation limiting the scope of the "defamation of public authority" offense, a sanction available to government officials who wish to purge political dissidents. *Ibid* at 402-403.

review even executive regulations for illegality (including unconstitutionality)⁵⁷⁹. However, the “judicial review” in the PRC does exist, though under the current constitutional arrangement the main method adopted by China’s courts is to refuse to enforce a regulation or rule that contradicts national law rather than directly quashing legislations. The main goal of such “judicial review” is keeping secondary regulations and tertiary rules in line with Primary Laws enacted by the NPC or NPCSC.

Such judicial review also developed after the 1980s that had never existed in the pre-Deng era⁵⁸⁰. Even in a judicial interpretation issued in 1986, the SPC still discouraged any form of ‘judicial review’⁵⁸¹, because Article 67 of the PRC Constitution conferred the exclusive power for the NPCSC to have responsibility for supervising the implementation of the Constitution⁵⁸². However, since the 1980s, the SPC has increasingly encouraged lower courts to exercise their *de facto* power to review regulations or rules that contravene with the NPC legislations. In 1986, the SPC issued a document, in which the SPC interpreted Article 100 of the Constitution to mean that local regulations inconsistent with national law should be reported to the local people’s congress for annulment⁵⁸³. It was witnessed that the SPC exerted such power by reaffirming “judicial review” that was

⁵⁷⁹ *Supra* note 80 at 54.

⁵⁸⁰ For example, in 1955, SPC has issued an interpretation that discouraged lower courts to cite constitutional provision in criminal cases. SPC, “Zuigaorenminfayuan guanyu zai xingshi panjuezhong buyi yuanyin xianfa zuo lunzuikexing de yiju de fuhuan [The Supreme People’s Court’s Reply concerning the Lack of Propriety of Citing the Constitution as the Basis of Judgment and Sentence in Criminal Cases]” (July 30, 1955), online: Chinacourt.org <<http://www.chinacourt.org/law/detail/1955/07/id/142.shtml>>, last accessed on April 15 2015.

⁵⁸¹ In 1986 judicial interpretation, the SPC states that laws, administrative regulations, local regulations and autonomous regulations can be cited as legal grounds for judicial decisions but no mention is made of the Constitution. Therefore, some scholars argue that according to this interpretation, the Constitution cannot be directly cited as grounds for a judicial decision by the courts. SPC, “Zuigaorenminfayuan guanyu zhizuo falvwenshu ruhe yinyong falvguifanxingwenjian de pifu” [The Supreme People’s Court’s Reply Concerning How to Cite Laws and Regulations by People’s Courts in Making Legal Documents]” (Oct. 28, 1986), online: Chinacourt.org <<http://www.chinacourt.org/law/detail/1986/10/id/5706.shtml>>, last accessed on April 15 2015.

⁵⁸² The majority view maintains that constitutional judgments should be made by the representative agency, which reflects the people’s will. The SPC, which is not a representative organ, must be constrained in its acts because it lacks a democratic basis of its power. Mo Jihong, “The Constitutional Law of the People’s Republic of China and its development” (2009) 23 Colum. J. Asian L. 137 at 177.

⁵⁸³ “The people’s courts may take these local rules and local regulations as legal sources, carefully research them, and correctly apply them when handling economic disputes and cases within the jurisdiction of these courts. If some local laws are found (by the people’s courts) to contravene the Constitution, laws and administrative regulations, they should be reported to the people’s congresses of the province and its standing committee.” See *supra* note 329 at 428-429.

referred by lower courts in the 1990s.⁵⁸⁴ In particular, the SPC also exploited the NPC legislation to empower the judiciary. A prime example of this is Article 53 (1) of *Administrative Procedure Law* of the PRC that stipulated that “in handling administrative cases, the people’s courts shall take, as references”, administrative regulations, local regulations, departmental rules, and even local governmental rule. Qin Qianhong and Ye Haibo pointed out that the phrase “reference” logically implies “review” before making any decisions, yet China’s courts still lack legal authority annul secondary regulations and tertiary rules⁵⁸⁵.

In 1991, the SPC issued “Experimental Interpretations” for Administrative Procedure Law, which extended the power of judicial review to cases involving “abstract” administrative decisions⁵⁸⁶. In 1993, the SPC issued another landmark judicial interpretation that did not permit lower courts to apply local regulations that contravened NPC Laws or Administrative Regulations. Then, in 2000, the “Experimental Interpretation” was replaced by *Interpretations of the Supreme Court on Certain Issues Concerning the Application of the Administrative Procedure Law of the PRC (Fashi 2000 No.8)*. Article 1 of this *Interpretation* deleted the word “concrete” and stated that “administrative acts” was within the scope of administrative litigation. In 2008, the SPC

⁵⁸⁴ For example, in 1993, the SPC declared a Fujian Province Regulation that granted provincial authorities excessive and arbitrary powers to seize fishing vessels to be “inapplicable in the judicial process”. A 1994 decision reaffirmed the position that whenever courts encounter local ordinances inconsistent with national laws, they are bound to follow the latter. In 1995, the Court circumscribed the Sichuan government’s powers to manage highways by declaring that Article 5 of the provincial congress’s Public Roads Management Ordinance was inapplicable. In 1997, the SPC’s Administrative Tribunal struck down portions of a Baotou City rule on the grounds that it was “not supported by national laws and administrative regulations,” and thus could not confer legality on the defendant agency’s action. In light of the proliferation of commercial transactions, the Court decided in 1999 that local regulations, which too often privilege provincial interests, would no longer serve as a legal basis for rescinding contracts. See *supra* note 477 at 420-421.

⁵⁸⁵ See *supra* note 30 at 415-416.

⁵⁸⁶ Specifically, Article 5 of 1989 Administrative Procedure Law limited the scope of judicial review into “concrete administrative acts” which refers to specified governmental decision in cases. However, the SPC Experimental Interpretations had extended the power of judicial review to those administrative decisions on property rights, even though the binding effect of these administrative decisions are non-specified or “abstract”.

further expanded the scope of the ALL by ruling that administrative inaction is a ground for review. Additionally, Judge Zhao of the SPC's Administrative Tribunal hinted that the Court would support the reviewability of abstract administrative acts and the inclusion of public interest grounds for complaints in future amendments to the ALL⁵⁸⁷.

As Peerenboom points out, China is not a unique civil-law country in providing inherent authority to the executive branch or local governments in denying the courts the authority to review only specific administrative acts⁵⁸⁸. Corne commented that:

The reality is however that the courts do in fact indirectly judge the validity of administrative rules and other normative documents, because in the process of deciding whether to apply a particular administrative rule or regulatory document, the court is making a *de facto* determination of validity. A court will unavoidably make some sort of determination of the legality of a rule when it considers whether or not it should use the rule for reference, and as such, such determination will hinge on the rule's compliance with laws and regulations⁵⁸⁹.

However, the SPC lacks the constitutional authority to even interpret the text of the PRC Constitution, thus it never acts as constitutional reviewer like their counterpart in matured civil-law constitutional systems such as contemporary German, France or Taiwan. The constitutional drafters mainly limit the function of the SPC as a pure “supreme

⁵⁸⁷ See *supra* note 477 at 423.

⁵⁸⁸ In Belgium, for example, regular courts and administrative tribunals may refuse to follow an administrative regulation inconsistent with higher law but have no authority to strike it down. In the Netherlands, administrative courts are not allowed to annul administrative regulations or law, but may refuse to follow either in a particular case. See Randall Peerenboom, “Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China” (2002) 23:2 Mich J Int'l L 477.

⁵⁸⁹ See *supra* note 329 at 428.

adjudicative organ” that deals with cases or appeals falling into its jurisdiction⁵⁹⁰.

Thus, the correlation between the SPC and the NPC would still largely circumscribe the external development of China’s courts as a powerful constitutional protector. As aforesaid, in the People’s Congress system, the PRC courts should be responsible to the legislature and be subject to legislative supervision, which is reflected by appointment and removal, and the working reports system as discussed in Chapter 3. The constitutional ceiling for the current SPC is prohibition on judicial reviewing on Constitution and legislation, or even other secondary regulations and tertiary rules. The clear rejection of “judicial review on abstract administrative acts” in the PRC *Administrative Procedure Law* has already revealed such logic⁵⁹¹. On the other hand, though the SPC has been vested with interpretative power on matters strictly related to “adjudicative works”. However, as noted earlier, the SPC has always been quite aware of these factors, and it struggles to improve the judicial authority from “dual-supremacy” of the NPC through incremental approaches. In addition, the Judicial Interpretations became a weapon for the SPC to unify system of China’s courts and fortify its judicial authority⁵⁹².

In the following part, by examining and discussing two important cases in early 2000, we will review the attempts by China’s courts to break the fence of NPC Supremacy in the early 2000s, and we will argue that these two cases had orientated the SPC to set the judicial activism back to the pragmatic path of pursuing “adjudicate independence”.

⁵⁹⁰ Ji Weidong, “Zuigaorenminfayuan de jueise jiqi yanhua[The role of SPC and its Evolution]”(2006) 1 Tsinghua Law Journal 4 at 7-8.

⁵⁹¹ *Ibid* at 14-15.

⁵⁹² There are three apparatus for binding local courts: (1) Providing unified judicial interpretations. (2) Supervising lower courts and maintaining disciplines. (3) Implementing responsible and administrative-managerial system. See *ibid* at 11-12.

4.3.3 Case Studies: Constitutional Attempts by China's courts

1. “*Qi* Case”

“*Qi* Yuling Case” was a milestone case in 2001 because the SPC, for the first time, had cited a Provision from Constitution in Judicial Interpretation.

In *Qi* Case, plaintiff, Qi Yuling was admitted by a higher education institution in 1990, whereas Defendant, Chen Xiaoqi fraudulently got a hold of Plaintiff Qi's notice of admission. In 1998, Qi discovered the truth and sued Chen in the Zaozhuang intermediate People's Court. The difficulty for the court in the first trial was that the civil Law in PRC does not explicitly provide the civil right to receive education but they still judged in favor of Qi⁵⁹³. However, the plaintiff Qi was not satisfied, and later filed an appeal in the Shandong Higher People's Court. After reviewing and augmenting the facts of the case, the appellate court noted that the case presented a “knotty question of the application of the law” which required by law that the SPC should provide an explanation to the lower court. The matter was therefore referred to the SPC, which then replied, as a Judicial Interpretation entitled *An answer on the subject of the civil responsibility engaged when the basic right, guaranteed by the Constitution, of a citizen to receive an education, has been violated by violating his right to his own name (Qi Interpretation)*. The Interpretation, in which for the first time the SPC in a case cited Article 46 of the PRC Constitution as the basis for the right to education, went as follows: “Citizens of the People's Republic of China have the duty as well as the right to receive education. The

⁵⁹³ Shen Kui, “Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's ‘First Constitutional Case’”(2003) 12 Pac Rim L. & Pol'y J 199 at 216.

state promotes the all-round moral, intellectual and physical development of children and young people.⁵⁹⁴ Moreover, this case and *Qi Interpretation* was collected in the Gazette of the SPC of the PRC.

For our discussion, the most important significance of *Qi*'s case was not only how the case had helped the courts in China to re-locate its own position in the constitutional framework of "People's Congress system", but also constitutional discourses produced by the case and *Qi Interpretation*. Academic debate regarding this case centered on the normative question of whether the Constitution could or should be judicialized. The debate intensified when the supporting argument came from the Grand Judge and Presiding Judge of the SPC Civil Tribunal, Huang Songyou. His article to uphold the *Qi Interpretation* was published in the *People's Court Daily*⁵⁹⁵.

Huang openly admitted that the *Qi Interpretation* was intended to set an example for all PRC judges of explicitly using the Constitution in legal reasoning, and he understood that "it would be a critical decision in the protection of constitutional rights" According to Huang, he found it to be a "totally embarrassing situation" because in the actual judicial practice in China, the Constitution does not serve in any way as a direct legal base for the decisions of the courts of justice. He pinpointed the main reason as lying in the misconceptions reinforced by "the rather negative perception that it is essentially a political rather than a judicial document, and "a set of general rules (*zong zhangcheng*),

⁵⁹⁴ See Robert J. Morris, "China's *Marbury*: Qi Yuling v. Chen Xiaoqi - The Once and Future Trial of Both Education & Constitutionalization"(2012) 2 Tsinghua China Law Review 273 at 283.

⁵⁹⁵ Huang Songyou, "Xianfa sifahua jiqi yiyi: cong zuigaofayuan jintiande yige 'pifu' tanqi [Judicialization of Constitution and its Significance: Discussion on Today's "Answer" of the Supreme People's Court]", *People's Court's Daily* (Aug 13, 2001), at B1, online: Chinacourt <<http://oldfyb.chinacourt.org/public/detdet.php?id=27083>>, last accessed on April 15 2015.

which provide the State with a basic organizational charter”. Worth noting is Huang’s article in 2001 that reiterated a speech he took up in 1999 for strengthening the “concrete” application of the Constitution⁵⁹⁶. Secondly, Huang cited the U.S. Supreme Court decision *Marbury v. Madison* to support his contention that “judicialization is a long-standing international trend that the PRC should also follow.” Huang’s explanation, which was backed by President Xiao Yang, seemingly sought to eliminate the “ideological obstacle to the application of the Constitution.”⁵⁹⁷

However, two months after Huang Songyou, the main official supporter, was removed from office, in late December 2008, the SPC officially withdrew the *Qi Interpretation* in a terse statement saying only that it was “no longer in use.” The *Qi Interpretation* was abolished along with other interpretations that the SPC decided to abolish judicial decisions prior to the end of 2007 (7th series)⁵⁹⁸. Among these 27 total interpretations abolished in the “7th series”, *Qi Interpretation* was the only one that the SPC did not render any specific explanation⁵⁹⁹. Thus the exact reasons for the abolishment of *Qi Interpretation* remain unknown. The most influential speculation is that the activist courts

⁵⁹⁶ In that speech, Huang emphasized the following: “We must adopt even more energetic measures to reinforce the effectiveness of the guarantee of the application of the Constitution, include a concrete system to consolidate the application of the Constitution, extend the routine measures to supervise the application of the Constitution, and correct unconstitutional phenomena in time, give concrete application to all of the provisions of the Constitution”. Huang immediately asserts that an important way of realizing the last point is to introduce the provisions of the Constitution directly into the judicial process. Stephanie Balme, “the Judicialisation of Politics and the Politicisation of the Judiciary (1978-2005)” (2005), 5:1 *Global Jurist Frontiers* 1 at 32-33.

⁵⁹⁷ See *supra* note 477 at 432. Nevertheless, as pointed out by some scholars, that unlike *Marbury*, which had provided a famous dictum that “an act of the legislature repugnant to the Constitution is void”, Huang notably omitted any reference to the much more famous, and inflammatory, sentence in *Marbury*: “it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. For example, Morris summarized that, firstly the Court did not find any statute contravene the Constitution in the cases and hence void the statute, and secondly the SPC was merely applying a provision of the Constitution as if it were a civil statute, rather than “interpreting” it. *Supra* note 594 at 292.

⁵⁹⁸ Generally speaking, these abolished judicial decisions will have no legal effect on further cases, but decisions already applied in litigations of the following cases will remain to have effect.

⁵⁹⁹ In the column for “reasons for being abolished” by far the majority of them state that “the situation has already changed and it will no longer be applicable” or “the law has already been amended” as the reason for the abolition, and it is therefore not to be applied again. “Zuigao renmin fayuan guanyu feizhi 2007 niandi yiqian fabu de youguan sifajieshi de jue ding [Decision on Abolish relevant Judicial Interpretations (7th Series) issued prior to the end of 2007]” online: Chinacourt <<http://old.chinacourt.org/html/article/200812/24/337161.shtml>>, last accessed on April 15 2015. See also See *supra* note 594 at 290.

had trespassed the constitutional domain and directly offended the NPC's authority as the highest legislative organ as well as the State Organ⁶⁰⁰. In any case, for the too aggressive SPC and courts in China who were without a solid institutional authority and intellectual basis, it was not surprising that it adopted a self-restrained strategy by abolishing the *Qi Interpretation* seven years later.

Although the *Qi Interpretation* has been repealed, the SPC did create some powerful tools but did not deploy them. In such a civil case, it challenged a particular administrative agency "with a limited legal pedigree and in doing so positioned itself to be seen as working on behalf of the sovereign the NPC to protect its commands from the subtle subversion by its appointed agents⁶⁰¹". It should be noted that the *Qi Interpretation* has also opened the door for Indirect Constitutional Interpretation (*hexianxing jieshi*). These tactics, unlike the *Qi Interpretation* that directly quoted the Provisions in the Constitution, indirectly applies the constitutional meaning or spirit to specified cases when applying ordinary NPC Laws. In other words, when considering the reason behind the cases, the SPC and lower courts actually take the Provision or spirits of Constitution into account⁶⁰². For example, even after the *Qi Interpretation* has been repealed, in one published case judged by the SPC in late 2008, *Shima Village Committee (Lecheng Town, Leqing City, Zhejiang Province) v. Zhejiang Shunyi Property Development Limited*, the SPC introduced a constitutional judgment without directly citing the Constitution⁶⁰³. In

⁶⁰⁰ Perhaps the rapid growth of constitutional judicial review in Hong Kong drew Beijing's attention to it around the time that the Supreme Court of Hong Kong SAR struck down an administrative decision after reviewing the constitutionality of it. Hong Kong's case has likely alerted Party-State rulers to the possibility that if the SPC were allowed to interpret the Constitution, the same phenomenon might also spread to other parts of the PRC. See *supra* note 477 at 432-433.

⁶⁰¹ See *supra* note 594 at 296-297.

⁶⁰² See Zhang Xiang, "Meiyou weixianshencha de xianfashiyong [Constitutional Application without Constitutional Review]", in Fu & Zhu, *supra* note 70, 253 at 254.

⁶⁰³ The SPC held that all village committee decisions involving the general interests of villagers, such as the residential development

another 2008 Interpretation, the SPC instructed lower courts to defend the “democratic rights of peasants to know, participate, express, and superintend” with all available means of adjudication without directly mentioning the word “Constitution”⁶⁰⁴. In addition, the Court suggested a number of measures that local judiciaries could take to broaden the scope of village autonomy, improve peasants’ legal awareness, and make the judicial process more accessible to those in need⁶⁰⁵. For the local courts, such tactics also have been adopted. For example, according to a collection of interviews conducted by Stephanie Balme with grassroots judges in a rural area of Western China, local judges in rural areas do directly or indirectly cite the provisions or spirits from the Constitution⁶⁰⁶. Nevertheless, it should be noted that the *Qi* case has made the SPC and China’s courts return to the pragmatic strategy of incrementally increasing its authority without directly challenging the supremacy power of the NPC, and they even continuingly conducted *Hexianxing jieshi*.

On the other hand, the *Qi* Case marked the first time that scholarship and the public in China had paid attention to the importance of the review of constitutional problems by the Judiciary, as well as the nature of constitutional interpretation⁶⁰⁷. After the *Qi Interpretation* had been issued, Huang’s article brought about many supporters in Chinese society and scholarships⁶⁰⁸. Of course, some opponents of the *Qi* case opposed courts’

of property, must be scrutinized and approved by the villagers' conference, which consists of at least half of all villagers above the age of eighteen. It is uncertain whether and how this highly symbolic ruling can be implemented throughout the immense territories of the PRC, but it does represent an attempt to assert constitutional principles through case law as opposed to judicial interpretations. See *See supra* note 477 at 427.

⁶⁰⁴ SPC, “Guanyu wei tuijin nongcun gaige fazhan tigong sifabaozhang he falv fuwu de ruogan yijian” [Several Opinions on Pushing Forward the Reform and Development of Peasant Villages with the Provision of Judicial Safeguards and Legal Services], 2008.

⁶⁰⁵ See *supra* note 477 at 427.

⁶⁰⁶ Stephanie Balme & Michael W. Dowdle, “Ordinary Justice and Popular Constitutionalism in China”, Balme & Dowdle, *supra* note 62, 179.

⁶⁰⁷ *Supra* note 582 at 177.

⁶⁰⁸ Available on the internet, this text was subsequently widely commented on in specialized magazines with a very large audience,

challenge against the NPC Supremacy⁶⁰⁹. However, for our discussion, the crux is not to evaluate the pros and cons but rests on these debates themselves. For example, ordinary Chinese people and legal scholarship began to widely discuss judicial review and the idea of “constitutionalism”⁶¹⁰ after the *Qi* Case. In short, without exaggeration, the *Qi* Case had increased the court’s legitimacy in both institutional authority and intellectual authority.

In this sense, the *Qi* case also reminds us of the development of Council of Grand Justices (CGJ) in Taiwan before democratization. After a judicial review issued by CGJ had been ignored by the government in an earlier year of authoritarian era⁶¹¹, the judiciary was backed from the “frontline” and took an incremental approach to increase its authority by reviewing routine matters such as civil cases, and avoided directly challenging the Party/State and the parliamentary system⁶¹². However, perhaps the meaning of the *Qi* case should not be overstated because even comparing it with the CGJ in authoritarian era, the SPC still remained in the preliminary stages and had more limited constitutional power. For example, it was a constitutional competence for CGJ to

such as *Minzhu yu fazhi* and *Nanfang zhoumou*, as well as in the principal academic journals, which have since 2001 seen an average threefold increase in the number of articles belonging to the category of constitutional law. See *supra* note 596 at 32-33.

⁶⁰⁹ Opponents further assert that meddling of the judiciary in this area will only weaken the Chinese constitutional system. As local courts are under the authority of, and have to report to, the local legislature, they have no power to strike down local ordinances that conflict with higher laws. Local courts must, therefore send such issues to the legislature for review. Quiet Revolution, see *supra* note 487 at 272-273, 277. One academic went so far as to condemn SPC judges for being “self-interested judicial elites” who exploited their existing privileges to usurp the powers of other state agencies. For this, see *supra* note 477 at 432. For example, some argued that the Court might have relied solely upon the Education Law. Certainly, therefore, the use by the Court of the 1982 Constitution moved that document to the position of a legal document in and of itself, rather than merely a statement of policy. A number of commentators still argue that using a statutory basis was and is the only proper way to enforce the right, and that recourse to the Constitution — what many of them pejoratively term the “judicialization” of the Constitution — is therefore improper. See *supra* note 594 at 286-287 and *supra* note 602 at 265.

⁶¹⁰ Based on the author’s own four-year studying experience in China’s law schools, and author’s own collections of Constitutional textbooks written by scholars in PRC, it was probably not until then, the “Marbury” and constitutional review was introduced into and discussed in classes in almost all law schools and major constitutional textbooks in China, and these discussions on constitutional review was not declined even though the *Qi* Interpretation had been abolished. It is indeed not quite “usual” for laws school in a Socialist state to widely discuss Marbury, a common-law case under a “check and balance” system.

⁶¹¹ Judicial Interpretation No.86, Justices of the Constitutional Court, Judicial Yuan, R.O.C., online <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=86>, last accessed on April 15 2015.

⁶¹² Examples include Interpretation No. 137, Interpretation No. 154, Interpretation No. 165, Interpretation No. 177, Interpretation No. 185 and Interpretation No. 187 before the democratization. See Interpretations, online: Justice of the Constitutional Court, Judicial Yuan- Interpretation <http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=38>, last accessed on April 15 2015.

interpret the Constitution according to the 1946 Constitution of Republic of China (Art. 78, Art. 171 and Art. 172), but the PRC Constitution and other statutes did not intend to confer such constitutional position for the SPC. Nevertheless, on a more optimistic note, the *Qi* case may indeed be the first “China’s *Marbury*”, because it started the long march toward institutional building for the judicial authority of the SPC as well as China’s courts.

2. “Seed Case”

After the *Qi* Case in 2001, the SPC issued another significant decision regarding judicial review of local ordinances in 2004. On May 27, 2003, Judge Li Huijuan of the Luoyang Intermediate People’s Court invalidated the Henan Province Agricultural Seeds Management Act on grounds of inconsistency with the national Seeds Law (2001). Local authority then condemned Judge Li for courts do not have the power to declare provision invalid on the grounds that it is unconstitutional or that it does not respect the hierarchy of texts⁶¹³. Under pressure from the Henan People’s Congress, the Luoyang Intermediate court removed Judge Li and Vice President Judge Zhao Guangyun from their positions. Li then took her case to the SPC for appeal. Mainly due to massive mobilization of the local media, lawyers and academics took notice due to the great intellectual authority of the court triggered by the *Qi* Interpretation, and Judge Li was reinstated to her duties and position in February 2004. Nevertheless, the High Court in Henan Province made a compromise by emphasizing that the necessary procedure in such a case had not been followed⁶¹⁴. On March 30, 2004, the SPC issued a reply stating that pursuant to Article 79

⁶¹³ *Supra* note 596 at 34-35.

⁶¹⁴ *Ibid.*

of the Legislative Law, primary legislation overrides both local laws and administrative regulations. While the SPC avoided the politically sensitive issue of whether judges have authority to strike down provincial legislative acts⁶¹⁵, it unequivocally affirmed that when provincial laws contradict national ones, judges should rely only on the latter⁶¹⁶.

It should be noted that, in theory, when handling cases like this, the necessary procedure calls for suspending final judgment, pending a decision from the NPCSC that is taken on the basis of a preliminary report from the SPC, once it has been referred to by a lower Court. However, as shown in the Seed Case, without referring to the NPCSC, the SPC issued the Interpretation to allow selective application of a conflict law after considering the legal order of such. This has produced a “blocking” effect on the system in the case of a “usurpation” of power by the judiciary⁶¹⁷.

The Seed Case, once again, confirmed the SPC’s strategy to increase judicial power by not directing challenges to the parliamentary authority. When courts appear to be seeking to expand their authority, including the Seed Case, such steps mainly have come from lower courts. However, higher courts may directly or indirectly support or acquiesce to such actions, and the SPC itself was responsible for a number of important reforms⁶¹⁸. In fact, in a recent conference, one SPC Justice confirmed that “the Seed Case will not

⁶¹⁵ See *supra* note 477 at 422.

⁶¹⁶ After the “Seed Case”, the President of administrative tribunal in SPC, Kong Xiangjun stated: when selectively applied laws conflicted in different rankings or even the same levels, “in principle the courts should offer sufficient reason and legal basis.” However, “some courts have been censured for identifying the conflict between local regulations (and/or rules) and primary legislation”, or “be reluctant to offer such explicit explanation in courts’ decisions” because judges may be afraid of incurring such censure. Therefore, “in order to protect the judges”, Kong stated that courts may choose not to explicitly express these reasons in their decision, or directly use phrases such as “conflict” or “void”. Nevertheless, “courts may continue to selectively apply superior legislations when laws are conflicted in specified cases.” Kong believed when the “judicial external environment” improved, then “these problems” would automatically be solved. See *supra* note 590 at 17-18.

⁶¹⁷ See *supra* note 596 at 35.

⁶¹⁸ *Restricted Reform*, *supra* note 487 at 32-33.

happen again, simply because today courts would just ignore those lower-ranking legislations and apply those issuing by higher legislative bodies, if finding lower-ranking legislations contravene higher legislation.⁶¹⁹” Indeed, the SPC has focused more on improving the efficiency and fairness of courts as adjudicators of disputes, not on shifting the role or power of courts within the system. Even lower courts’ innovation is to ensure the legal consistency, as in the Seed Case, where the court directly challenged the authority of the Provincial People’s Congress, the court found in favor of applying a national law⁶²⁰. As Grand Judge Kong Xiangjun once stated: “the *Legislation Law* has offered judges a duty to protect the unification of legal system, and courts’ selective application of laws devote to such purpose⁶²¹.”

4.4 Court and Party: Autonomous Development and Political Limit

The relation between Party and Court in an authoritarian state is a controversial issue that has been widely and substantially discussed. However, the main purpose of this part is to outline China’s courts’ strategy to develop their authority under the “political leadership” of the CPC.

4.4.1 Incentives for Party’s Tolerance on Courts’ Development

Indeed, the CPC is playing a significant role for enhancing judicial authority of China’s courts. But the question is, why did the CPC, an authoritarian ruling party that traditionally lacks interest for judiciary, become a supporter for judicial development of China’s courts? In fact, Tamir Moustafa and Tom Ginsburg have provided a very useful

⁶¹⁹ Tao Kaiyuan & Luo Dongchuan, “China Under the Rule of Law---Blueprint and Prospect” (lecture delivered at the Chinese Judicial Delegate/Roundtable, Institute for Asian Research, University of British Columbia, 30 January, 2015), [Unpublished].

⁶²⁰ *Restricted Reform*, *supra* note 487 at 32-33.

⁶²¹ See *supra* note 590 at 17-18.

framework to answer this question by outlining five aspects of courts' functions in an authoritarian regime: (1) Establishing social control; (2) Bolstering a regime's claim to "legal" legitimacy; (3) Strengthening Administrative compliance within the state's own bureaucratic machinery and solving coordination problems among competing factions within the regime⁶²²; (4) Facilitating trade and investment; and (5) implementing controversial policies so as to allow political distance from core elements of the regime⁶²³.

As we have seen, the CPC has publicly committed itself to modernizing the legal system and building more autonomous judicial and legal institutions, as is typically the case in Leninist regimes⁶²⁴. Based on Moustafa and Ginsburg, in this part we have defined at least seven factors accounting for why the CPC supports "fairer" and more efficient courts in China.

First, the progress of China's economic reforms created many complex problems, which can only be effectively addressed by a fair and efficient judiciary⁶²⁵. Second, the CPC conversion to a socialist modernization loosened the ideological control that the CPC

⁶²² As pointed out by Tom Ginsburg, courts have particular institutional features that affect the relative desirability of using them for the core governance task of monitoring officials and reducing agency costs. Courts are reactive. Whereas auditors, designated monitors, and internal affairs boards can take an active role in seeking out instances of malfeasance, courts rely in their very institutional design on a quasi-adversarial process that is initiated from outside the government. Reactiveness requires a procedural structure to encourage "good" lawsuits that advance the goal of the regime and to discourage "bad" ones. The nature of law requires that this procedural structure be stated in general terms, and this is a second institutional quality that deserves mention. Bureaucracies will become more "rationalized" in response to the threat of exposure of errors; they will seek to enhance their obedience to legality and their internal procedures. It is clear that the decision by an authoritarian regime to utilize administrative law can be a rational one and need hardly be at odds with other regime goals. Indeed, by enhancing legality, the authoritarian regime can more effectively implement policy goals through state agents. Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes" in Tom Ginsburg & Tamir Moustafa eds, *Rule By Law: The Politics of Courts in Authoritarian Regimes*. (New York: Cambridge University Press, 2008) 58 at 71-72.

⁶²³ Tamir Moustafa & Tom Ginsburg, "Introduction: the Functions of Courts in Authoritarian Politics", in Ginsburg & Moustafa, *ibid*, 1 at 4.

⁶²⁴ Pierre Landry, "the Institutional Diffusion of Courts in China: Evidence from Survey Data" in in Ginsburg & Moustafa, *ibid*, 207 at 209.

⁶²⁵ *Quiet Revolution*, *supra* note 487 at 260-261.

exercised over China's political reforms. Third, courts are the most important safety valve in a Party/State⁶²⁶. In particular, the concern of an authoritarian regime such as China's for upholding judicial reform is to ensure social stability⁶²⁷. That may also be the main reason for the CPC permitting or even encouraging class actions and other more "progressive" legal reform. Fourth, as a crucial part of the institutionalization of the Party/State, development of the courts serves state interests in curbing abuses, maintaining control, and using the development of the legal system to reinforce state legitimacy⁶²⁸. The fifth reason is the self-development and self-empowerment of leadership of courts⁶²⁹. The sixth reason is a professional judiciary serves the needs of the CPC to professionalize the governance system of China⁶³⁰. Seventh, research has also shown ordinary Party members receive selective benefits when entering courts, thus these members are more likely to support judicial development in the long run⁶³¹.

At the 15th National Congress of the Chinese Communist Party in 1997, President Jiang Zemin of the CPC, for the first time in official documents, explicitly advocated the idea of "promoting judicial reform and providing systemic guarantees for the judicial organs

⁶²⁶ However, care must be taken that the courts are not unique, or even particularly prominent, in this role. The letters and visits system plays a broader, and arguably more significant, function as a safety valve. Courts are thus one of a number of fora for raising grievances and courts that permit such grievances to be raised act in the interests of social stability. *Restricted Reform*, *supra* note 487 at 38-39.

⁶²⁷ Authoritarian regimes may have a greater stake in being responsive to public demands regarding the courts than democratic states, where the political process provides a mechanism for public grievances to be aired and resolved. The legitimacy of China's leadership depends on its ability to both channel and contain populism; concerns that popular expressions of outrage may spin out of control encourage rapid intervention in the legal system. Modest growth in caseloads does appear to reflect a conscious decision by Party-state leaders to strengthen the courts' ability to resolve an increasing number of disputes. But the Party-state has also emphasized reforming other dispute resolution institutions - including the letters and visits system, mediation, arbitration, and administrative review. These moves suggest that the Party-state is focused on the need to resolve disputes and grievances, and thus preserve social stability. See *ibid* at 10 & 39.

⁶²⁸ *Ibid* at 40-41.

⁶²⁹ Chinese judges themselves are increasingly looking to the roles judges play in other countries as they seek to define their own positions. See *Ibid*.

⁶³⁰ For a long time, the CPC remained revolutionary in character. This began to change in the 1980s and early 1990s, when the CPC began to understand its relationship with modern government, as evidenced in the passage of the Provisional Civil Servant Act in 1993. Not coincidentally, academic criticism of appointing discharged military officers as judges also started at this time. The call led to a series of judicial reforms. See *supra* note 514 at 62-64.

⁶³¹ *Supra* note 624 at 234.

to exercise independently and openly adjudicatory power and prosecutorial power”⁶³². Though the term “independence” is subject to interpretation, China’s courts gained the institutional authority to promote adjudicate independence and legal professionalism from these speeches and documents⁶³³. At the following 16th Party Congress in 2002, Jiang’s report highlighted law and legal procedure as vital to the safeguarding of the rights of citizens and legal persons under the law, and that CPC leadership is moving towards a new understanding of the term “justice”⁶³⁴.

In 2008, as a response to Xiao Yang’s activism, the CPC permitted more wide-ranging judicial remedies for citizen petitions by releasing the *Opinions on Deepening Reform of the Institutions and Working Mechanisms of the Judicial System* in 2008 (*Opinions*). The *Opinions* called for a “just, efficient, and authoritative socialist judicial system” by eliminating the political obstacles to the proper exercise of power by judges and the administration of justice⁶³⁵. More recently, both the 3rd Plenary of the 18th CPC Congress in 2013 and 4th Plenary of the 18th CPC Congress in 2014 declared a number of measures that typically aim to strengthen the justice system in the PRC, as serving an important path toward “Socialist Rule of Law”. The current official Party judicial policy is “supporting Judiciary and Justice System” according to the 18th CPC document, which continuingly focuses on making the courts fairer and more efficient.

⁶³² *What Kind*, *supra* note 488 at 59.

⁶³³ See *supra* note 233 at 795.

⁶³⁴ *Quiet Revolution*, *supra* note 487 at 262.

⁶³⁵ Specifically, it advocated for a more balanced criminal justice policy, greater financial security for courts, and high quality judicial personnel, which the SPC advocated since the 1990s. See *supra* note 477 at 409.

4.4.2 Assessing Party Control in China Courts

As pointed out by Moustafa and Ginsburg, for authoritarian regimes, empowering courts to serve in some functions is hardly risk-free⁶³⁶. Thus, many authoritarian regimes will employ measures to rein the ongoing development of courts⁶³⁷.

But unlike many authoritarian states ideologically embracing the value of “liberal democratic constitutionalism”(e.g. authoritarian Taiwan), judicial power in the PRC has “ideological and Constitutional Underpinnings⁶³⁸”. Traditionally, a Marxist-Leninist doctrine and Maoist regime tend to perceive judiciary as an oppressive “superstructural” apparatus in the hands of those “loyal to the state, the people, and the cause of socialism.” The result of such, in theory, should be that courts are indistinguishable from a “proletarian regime organ” as any other administrative organs, as discussed in chapter 2. Thus, in this sense, the Marxist-Leninism is essentially “Anti-Judicial Professionalism”. Apart from ideological consideration, another reason for controlling the agenda and contents of judicial reform is more practical and the CPC believes a strong and centralized leading core is necessary for building a fairer and more efficient judiciary⁶³⁹.

There are indeed several important channels developed by the CPC to rein the courts. The primary way is through the Political-Legal Committee (PLC) in various levels. The

⁶³⁶ This is perhaps an inevitable outcome, because the success of each of these regime-supporting functions depends on some measure of real judicial autonomy. For example, in some countries, regime legitimacy derived from a respect for judicial institutions also rings empty unless courts are perceived to be independent from the government and they rule against government interests from time to time. *Supra* note 623 at 13.

⁶³⁷ After studying several authoritarian regimes in the world, they typically identified four major strategies to contain judicial activism without infringing on judicial autonomy: (1) Providing institutional incentives that promote judicial self-restraint; (2) engineering fragmented judicial systems; (3) constraining the access to justice, and (4) incapacitating judicial support networks. See *ibid* at 14.

⁶³⁸ See *supra* note 477 at 377.

⁶³⁹ In fact, even the recent judicial reform advocated by the 18th CPC Congress do not signal any intention to separate another, more pervasive political entity—the Communist Party itself—from the policy input into court, prosecution and public security work. It is clear that judges are expected to remain ‘activist’ in the sense that the Party expects them to judge cases on the basis of judicial and political policy, which is supplied from CPC central. *Mapping Terrain, supra* note 490 at 21.

history for the CPC to use the Political and Legal Committee to settle disputes can be traced back as early as during the *Yan'an* period in the 1930s⁶⁴⁰. In contemporary times, the central level is the Central Political Legal Committee (CPLC) of the CPC, and locally, there is a corresponding political legal Commission for different levels. Courts are commanded by the PLC to fulfill their duties in support of current CPC policies, while in particular, CPLC plays a key role in transmitting the CPC's ideological messages to judges⁶⁴¹. However, on the other hand, the PLC have a political duty to support the works of the judiciary⁶⁴². Therefore, in principle, while the PCL transmits party policies to judiciary, they must uphold the "adjudicate works" of courts. In order to be supportive, it is not surprising that in almost all matters except for sensitive political cases, Political-Legal leaders have little interest and little influence over the courts' stance. It is now undeniable that the CPLC's current work respecting judicial affairs is confined to ideological education and not adjudicative decision-making⁶⁴³.

The second tier for Party control are various levels of LPMG and other party organs attached to the SPC and lower courts to monitor compliance with the CPC's latest central policies, as a reflection from the Organic Principle of Party Control Cadres as discussed in Chapter 2. Since 1954, within the court, party group chief secretaries are normally higher-ranking party cadres than those who hold the formal positions in the courts. By contrast, the Presidents of the SPC have always been Chief Secretaries of the Court's

⁶⁴⁰ *Court in Transition*, *supra* note 488 at 99-100.

⁶⁴¹ *Supra* note 477 at 379.

⁶⁴² The relationship between PLC and courts could be summarized by Hu Jintao's two speech on political legal committee personnel meeting in 2011, in which Hu urged political-legal personnel to uphold the "three Supremes", namely, "the Supremacy of the Party's Cause, the Supremacy of the People's Interests, and the Supremacy of the Constitution and the Law." In another speech to the Central Party School that same year, Hu called for bureaucrats to perform what is normally regarded as the judiciary's duty: to implement the fundamental strategy of governing the state in accordance with law, to spread the spirit of the rule of law, and to defend social justice and fairness." *Ibid* at 380.

⁶⁴³ *Ibid* at 381.

Party Group and the Group's contemporary Deputy Secretaries are always chosen from among the SPC's Vice Presidents⁶⁴⁴. Since the president is held responsible for the whole court, the party can achieve effective control over the court through the presidential responsibility system⁶⁴⁵. However, as Eric Ip's research demonstrates, in the SPC, much of the Party Group's membership interlocks with that of the Adjudicate Committee of the SPC, which is the Court's principal decision-making and most important organ. As "the most professionalized" of all legal institutions in the SPC⁶⁴⁶, the Adjudicate Committee approves all Judicial Interpretations and case judgments it deems significant, monitors the work of the SPC's several Tribunals, and designates which cases lower courts shall treat as binding precedent. As a result, the nearly identical membership of the Party Group and the Judicial Committee evidences that exogenous CPC constraints on the SPC have ceased to exist in all but name⁶⁴⁷. In addition, for other Party's organs in courts, such as the Party Institutional Organ and Party cells, they also generally have little power⁶⁴⁸.

The third way is the CPC's general leadership in the abstract social-political sense⁶⁴⁹. In fact, such "general leadership" does not rely on a specified method but on a general sense. For example, the party is responsible for providing "principles" and "guidelines" for major political and legal reform activities⁶⁵⁰. On the other hand, in concrete cases, the

⁶⁴⁴ Even if vice president positions will usually be held by someone who is not a CPC member, these persons will nevertheless be carefully selected by the relevant branch of the CPC and will be people the party trusts. See *supra* note 514 at 55-56; See also Tong Zhiwei, "Zhongguo xianzhi fazhan de zhongduanqi pinggu [Evaluation of short term and medium term of Constitutional development in China]" in Lin Feng, *supra* note 9, 123 at 141.

⁶⁴⁵ *Court in Transition*, *supra* note 488 at 100.

⁶⁴⁶ The Adjudicative Committee consisted typically of the President, nine Vice Presidents, a Grand Justice responsible for judicial discipline, a small number of regular Grand Justices, and the presiding judges of the specialist Tribunals.

⁶⁴⁷ See *supra* note 477 at 381.

⁶⁴⁸ They generally take instructions from the Party Group and are in charge of such day-to-day issues as developing Party members, handling applications to become a Party member, organizing political study sessions, and transmitting Party policies to Party members within the court. See *supra* note 47 at 302.

⁶⁴⁹ The CPC perceives itself as, to a great extent, the principal driver of a necessary social transformation in China- and that includes a necessary social transformation of the judiciary. See *supra* note 514 at 60.

⁶⁵⁰ The most recent amendment on 'rule of law', for example, was first raised as a proposal in the CCP Charter during the 15th Party

general leadership of the Party determine “environment” or “tune” for cases that have political significance⁶⁵¹. As noted above, the general leadership of the CPC is a constitutional Principle entrenched by the *1982 Constitution*⁶⁵². The general leadership of the party also guarantees political safety for courts when they hear and judge routine cases, as opposed to politically sensitive ones⁶⁵³. But as pointed out by Liebman, the scope of sensitive cases remains wide and can include not only major criminal or political cases, but also cases involving the financial interests of either the Party/State or individuals with Party/State ties, or high profile companies, or those involving a large number of potential plaintiffs, and cases receiving extensive media coverage⁶⁵⁴.

However, care should be taken that the CPC may not be the main source of interference with the courts in the majority of cases⁶⁵⁵. First, the extent of direct Party intervention should not be overstated. In fact, interference by local government may appear to be much more serious than Party interference⁶⁵⁶. Also, as Zhu Suli argues, in many cases such problems are more meaningfully attributed to the unprecedented social

Congress before it was copied verbatim to the Constitution. Nor could the judicial reform be launched without approval of the major party leaders. *Court in Transition*, *supra* note 488 at 100.

⁶⁵¹ These included judgments on the cases of Chen Xitong, Bo Xilai, Liu Xiaobo or other political importance or political sensitive cases. In these cases, although the SPC offered some legal reasoning, it can be safely expected that the judgments of the lower courts was simply to be affirmed since Chen’s sentence was already politically decided. *Ibid* at 99.

⁶⁵² The Constitution, as noted earlier, formally recognizes in its Foreword the leading role of the CCP. Although the 1982 Constitution explicitly stipulates that ‘The People’s Courts independently exercise the adjudicate power according to the provisions of law, and are not to be interfered by administrative agencies, social organizations, and individuals’. Therefore, “judicial independence”, if any, should be interpreted within the contour of the political power of the party. As demonstrated in later part of this chapter, there are huge difference between “judicial independence” and “adjudicate independence” in China’s Context.

⁶⁵³ For example, judges comment that they are rarely under pressure in intellectual property cases because these cases do not touch on core Party interests.

⁶⁵⁴ *Restricted Reform*, *supra* note 487 at 15.

⁶⁵⁵ Zhu Suli had identified this dominant view is based on four unwarranted assumptions. First, there exists some pure state of reality that deserves to be called judicial autonomy. Second, it is possible to construct a set of standards for, or an objective model of, this judicial autonomy, either as a political structure or as a set of social conventions. Third, this model can show that the CPC exercises political influence on judges and the courts in a way that is inimical to and undermines judicial autonomy. Fourth, it is possible to identify and examine the actual social effect of such influence, and the overall effect of party influence is negative. See *supra* note 514 at 52.

⁶⁵⁶ See *supra* note 47 at 307.

transformation of Chinese society⁶⁵⁷. Secondly, the leaders of local authority, as the majority of China's social elites, are often CPC members. Thus, distinguishing inference from the CPC policy or governmental policy is often a difficult task⁶⁵⁸. Even if interferences come from the senior judges or leadership in courts, it is still hard to identify whether particular interferences or influences issue from the CPC policies or cadres themselves⁶⁵⁹.

4.4.3 Authoritarian Court Strategy: Using Party Authority to Balance Institutional Powers

In fact, after the 1980s, we could see that the PRC courts adopted a common strategy adopted by courts in authoritarian regimes that, complying with “political leadership” of the Party, was used to exchange for a large degree of judicial autonomy in routine judicial affairs and space for continuing development of the courts.

In the 1980s, China's courts had very little institutional autonomy. Not only were the identities of Party members and its various organs immune from suits in the courts, but also the acts and policies of the Party could not be impeached or questioned even in litigation between other organizations or individuals⁶⁶⁰. What's more, in the early post-

⁶⁵⁷ See *supra* note 514 at 58. For instance, according to a survey, social pressures from relatives, friends, and acquaintances are major source of outside interference. In a society that places a premium on *guanxi* (personal networks) and *renqing* (human feelings or empathy). See *supra* note 47 at 315.

⁶⁵⁸ It is true that government officials generally wear two hats. Thus, it is not always easy or possible to distinguish between Party and government interference. In some cases, particularly cases of local protectionism, local Party cadres may share the interests of government officials in ensuring economic growth in the region. However, the interests and incentives of government officials qua Party member sentence fragment. Given the separation between the Party and state, the breakdown in Party discipline, the diminished importance of socialism as an ideology, the jaded motivation of many Party members for joining the Party in the first place, the professionalization of the civil service, and the changing incentive structure in the market economy, government officials may be expected to identify more with their government position than their Party affiliation. See *ibid* at 307-308.

⁶⁵⁹ See *supra* note 514 at 55-56.

⁶⁶⁰ This appears to be the basis for a ruling of the Supreme People's Court that the courts of Yunnan province could not accept a case in which a bureau directly under the control of a ministry claimed the return of a building occupied by the provincial office of a major national corporation. In the words of the ruling: “The buildings... were allocated for the use of the ... Company by virtue of document issued the Yunnan Provincial Committee and are not within the by [Party] scope of the jurisdiction of the courts...” See *supra* note 539 at 95-96; and *supra* note 342 at 754.

Mao era, it was noted that party policies, or even the words expressed from some authoritative figures in the CPC could be used as reasoning in some cases⁶⁶¹.

However, China's courts have gradually shifted from primarily serving as political tools in criminal campaigns in the early 1980s to focusing on providing justice in individual cases today⁶⁶². Of course these trends do not apply to politically sensitive cases where courts often have little say in the final outcomes. The rapid development of China's courts has much to do with the strategy that is ensuring courts' march towards independence for the judiciary and the legal profession seems to coordinate with the overall goal of the Party/State. This strategy has mostly reflected how Chinese courts use the Party authority to deal with "vertical" and "horizontal" power players in the PRC's constitutional system⁶⁶³.

For the vertical structure, courts have to tackle local governmental organs that are responsible for allocating the personnel resources and funds for local courts in their jurisdiction under the current constitutional system of China. Not only are local judges elected, appointed, and removed by local people's congresses, they are paid by local governments, and a large majority of them are members of the ruling party⁶⁶⁴. Courts in practice may also have to serve the interests of the local authorities that pay them. Particularly in legal disputes involving land and environmental issues, local government

⁶⁶¹ *Supra* note 539 at 97-99.

⁶⁶² Thus, for example, the SPC's 1996 Work Report emphasized the court's role in carrying out the Party's "strike hard" campaign against crime and noted a number of important cases in which defendants were sentenced to death. In contrast, the 2006 report, although stating that the courts continue to work to "uphold Deng Xiaoping Theory and the Three Represents under the leadership of Communist Party Secretary General Hu Jintao," also noted the importance of courts being impartial and protecting the human rights of criminal defendants. *Restricted Reform*, *supra* note 487 at 18-19.

⁶⁶³ Indeed, for China's courts, one enormous pressure comes from existing constitutional power holders in vertical and horizontal structures.

⁶⁶⁴ *Courts in West China*, *supra* note 488 at 164.

officials sometimes rely on the help of local courts to protect their interests⁶⁶⁵. Donald Clarke once identified one important obstacle for enforcing courts' judgment⁶⁶⁶ as being the "anomalous Position of Courts in the Chinese Polity"⁶⁶⁷. Their difficulty in enforcing decisions reflects a problem that courts cannot address on their own: local protectionism. This "difficulty for enforcing judgments" has grown to become a regular feature of Supreme People's Court reports to the NPC each year since 1988.

Logically, the Party authority seems to be a superb choice for addressing this problem⁶⁶⁸. One important goal for the Central CPC is to always reassert control on local government, and to prevent "local protectionisms". The SPC then, always takes an initiative to lobby the central CPC to allocate more resources and funds for local courts, as could be seen in the SPC's expressions that persuaded the Central CPC and governments to support local courts especially for those in western areas from the SPC annual Reports from 1999 to 2015⁶⁶⁹. In particular, because central party authorities have long committed to the idea that China would build a socialist rule of law, the courts thus have the legitimacy to rely on Party authority to bargain with local government in the name of "tackling local protectionism", "sweeping local corruption" or "striking hard of crimes". For example, both in 2013 and 2014, the Party committed to strengthening the

⁶⁶⁵ *Political Ideology*, *supra* note 490 at 336.

⁶⁶⁶ Since the 1980s, it is a staple of Chinese legal literature that the judgments of Chinese courts in civil and economic cases are plagued by a low execution rate and that this is a serious problem. *Civil Judgments*, *supra* note 481 at 2.

⁶⁶⁷ Specifically, two principles, *tiao* and *kuai*, govern the flow of power in the Chinese political system. *Tiao* is the principle of vertical control: superiors in a given bureaucratic hierarchy dictate to inferiors. *Kuai* is the principle of horizontal control: a particular body at a given level of administration, that influences from other bodies at the same level of administration in a given jurisdiction. Individual courts are subject to both in varying degrees. But the exercise of power by courts fits comfortably into neither principle, and this is the key to their continued weakness. The only power that a court can exercise by virtue of *tiao* is over a lower court. But this is not supposed to be the source of court power. Court power is supposed to stem from their authority to pass judgment on disputes involving anyone in accordance with rules validly promulgated by a large number of local and national bodies. *Ibid* at 84-85.

⁶⁶⁸ For example, in an acknowledgement of the continuing difficulties in enforcement, the Party's Central Political-Legal Committee issued a notice in December 2005 calling for the cooperation of the police and the procuracy in the enforcement of court judgments and for the establishment of a comprehensive enforcement information system that involves government departments overseeing banks, real estate, vehicles and other sectors. See *Restricted Reform*, *supra* note 487 at 16.

⁶⁶⁹ See SPC Reports in NPC. Available at NPC, online: NPC <www.Npc.gov.cn>.

mutual coordination and mutual restraint of judicial powers to tackle judicial corruptions and “optimize” the allocation of judicial powers. This also presented an opportunity to the SPC for strengthening local courts, as evidenced by the “Forth Reform Plan (2014-2018)” issued by the SPC. “With cooperation offered by other Central departments”, management and allocation of personnel resources and funds for basic and intermediate courts will be unified by provincial levels⁶⁷⁰.” This strategy was confirmed by a speech stated by a current Vice-President of SPC and a President of a tribunal in the SPC in a recent conference. According to them, “when Party’s group in SPC report to CPC, we (SPC) ask for help for solving problems regarding personnel resources, funding or other equipment in lower courts. And in many cases we receive a positive response and substantial assistance from the Party in most occasions⁶⁷¹.”

Horizontally, the courts, polices and the procuratorate are traditionally named and thought of as one entity, the *gongjianfa*. The coupling of these two mirrors the long-standing CPC ideological bias that courts are fundamentally punitive organs. The PRC legal vocabulary contains only the narrow term “adjudicative organ” to describe the courts⁶⁷². First, under China’s constitution, the procuratorate have the right to supervise the courts and assert their receded but still enormous power especially in criminal cases⁶⁷³. Historically, public security was the strongest institution, especially during the

⁶⁷⁰ *Supra* note 494.

⁶⁷¹ See *supra* note 619.

⁶⁷² Traditionally, the staffs of these three institutions worked side by side in the same environment and socialized with each other. Personnel transfer and job rotation among them was usual. Today, they still form the core of the CCP Political-Legal System of state security bureaucracies. See *supra* note 477 at 376.

⁶⁷³ Comparatively, the procuratorate is China's public prosecution agency and is more than simply the office of the state attorney in United States and some other countries. It also has supervisory power over due process in courts. Because its authority reaches widely and variously, the procuratorate has access to the procedural pie at almost every point of the criminal process, from investigation to enforcement of prison sentences. The procuratorate can use its investigatory powers under while simultaneously using its supervisory powers over the court to “supervise” the case judged by courts. The vast authority of procuratorate had been manifested in 2007 when SPC wining back from the provincial courts the authority for final review and approval of all death sentence decisions. With

Cultural Revolution when the procuratorate was shut down and the judiciary weakened⁶⁷⁴. Even now, the head of the PLC is often the current chief or formal leader of Public Security Bureau, who generally has a higher position in Party ranking than the president of courts. And this is usually also true for the local public security and courts. Moreover, the Public Securities not only enjoy a great deal of flexible administrative power, but also like procuratorate, play an important role in criminal procedure.

Thus, Party's authority is also used by Courts to neutralize horizontal influence from another two powerful "judicial" institutions from time to time. A prime example for this is the fact that courts have taken advantage of the CPC's consistent advocating for striking judicial corruption and protecting human rights in criminal cases and criminal procedure since the 1990s. In 2013, the CPC Third Plenum announced a number of impressive reforms that if properly implemented, as highlighted in the 2013 Party Reforms Plan, includes six main goals relating to criminal justice⁶⁷⁵. Because each reform relates partly to the goals of improving 'fairness' and/or 'efficiency' (goals that have dominated justice reform plans not only in this latest round of reform announcements, but for many years in China⁶⁷⁶), they give a good opportunity for China's courts to strengthen their judicial characteristics at the expense of two other "judicial" counterparts. Moreover, these Party highlights also confer a higher authority on courts to deal with

opposition from procuratorate, the 2008 Party Plan requires the SPC to notify the SPP of all death penalty cases in which the SPC rejects the original sentence handed down by a provincial court "to execute immediately". *Political Ideology*, *supra* note 490 at 324-325, 327.

⁶⁷⁴ See *supra* note 505 at 83.

⁶⁷⁵ (1) Allocating more human resources and funding to local courts especially in western rural area in China; (2) Improving the system of personnel recruitment to increase professionalism in courts; (3) Providing national standards for the system of punishment commutation, parole and medical bail procedures; (4) Standardizing judicial procedures for detention, custody and other coercive measures, and Abolishing the re-education through labor system; (5) Improving mechanisms to prevent and correct misjudged cases, including the prohibition of the practice of extorting confession through torture; and (6) Progressively reducing the number of offences that carry the death penalty. *Mapping Terrain*, *supra* note 490 at 20.

⁶⁷⁶ *Ibid* at 21-22.

their horizontal judicial counterparts in criminal cases. In the “Fourth Reform Plan (2014-2018)” issued by the SPC, not only was the SPC advocating strengthening the central position of “adjudication” in criminal litigations, but it was also committed to “prompting (*cushi*)” the process of investigation by procuratorates and police to respect the crux of adjudication⁶⁷⁷.

Therefore, for China’s courts, intentionally or unintentionally, powerful Party figures and Party organs have become extremely important resources to influence or bargain with local governmental agencies and their parallel governance counterparts⁶⁷⁸. In return, courts fulfill their political functions and adhere to political leadership of the CPC. While the SPC attempts to make its development devoting to the political goal and judicial policies of the Central CPC, local courts may directly fulfill various political and societal functions, such as publicizing party policies, assembling people to perform collective tasks, or teaching law⁶⁷⁹.

4.5 Mapping The Development of Courts: “Adjudicate Independence” or “Judicial Independence”?

We have already pinpointed the current position of the court under the People’s Congresses’ system and political leadership of the CPC. But the next question is, where does the court go? This thesis argues that current China’s courts, including the SPC, should pursue goals of “Adjudicate Independence” rather than “Judicial Independence”, a “Judicial Independence” with “Chinese Characteristic”.

⁶⁷⁷ *Supra* note 494.

⁶⁷⁸ Interview with a president in prefecture intermediate courts in Guangdong Province, 2014.

⁶⁷⁹ *Courts in West China*, *supra* note 488 at 164.

The idea of “Adjudicate independence” has its constitutional origin. If views from the original Chinese Version of In Article 126 of the 1982 PRC Constitution, the phrase is “The people’s courts exercise *shenpanquan*(审判权) independently.” The closest English translation for *Shenpanquan* is “the Adjudicate Power” rather than “the Judicial Power(*sifaquan*, 司法权).” On the other hand, both the official phraseology and mainstream constitutional theories in the PRC regard “judiciary” in PRC as the combination of courts and procuratorate. As noted above, this configuration has also been confirmed by the 1982 Constitution, which provides a “Section 7” for “The People’s Courts and the People’s Procuratorates”, stipulating that “The people’s procuratorates exercise procuratorial power independently” in Article 131. More importantly, the pursuit of Adjudicate Independence is developing and reinforcing by China’s courts’ own development as we discuss in this chapter.

The idea of Adjudicate Independence incorporates two fundamental principles: (1) as noted in earlier parts, China’s courts do not directly challenge the constitutional supremacy of the NPC nor the political supremacy of the CPC in order to be protected; (2) China’s courts remain in an authoritarian regime and in the position to incrementally gain its own authority by improving a fairer and more efficient justice system. Textually, Adjudicates Independence refers to “the technical expertise of judicial institutions in evaluating fact- and law-complex disputes⁶⁸⁰”. Judicial independence is still another idea, and goes to the ability of courts and judicial officers to act independently from, and may go directly against, the interest of other political players. A simple example is the courts

⁶⁸⁰ See *supra* note 532 at 327-328.

in Check and Balances system in the United States. Both are independent in the sense of their political system that enables them to quash legislations through constitutional review.

The reason for China's courts to choose "adjudicate independence" as the current goal for development rather than "judicial independence" is quite understandable. First, technical judicial reform seems to be easier and more feasible for current courts in China. Although as Liebman pointed out, China's effort to create courts that act fairly without challenging single-party rule is not unprecedented in other single-party states⁶⁸¹, recent Chinese history does not fit squarely into any of these models⁶⁸². The aim of judicial reforms has been technical: improving the training of judges, rooting out corruption, increasing efficiency, and overseeing judges more closely. Courts are still struggling to develop the functional ability to resolve individual cases. Such reforms appear aimed at making the courts institutions for the fair and efficient adjudication of individual disputes⁶⁸³. Courts have also confronted new challenges, particularly pressure from media reports and popular protests. At the same time, with continuing development of courts, such development increasingly comes into conflict with other state institutions⁶⁸⁴. In short, the judicial authority and competence of China's courts still need to be strengthened, and

⁶⁸¹This includes Spain under Franco, and modern Singapore - have had courts that commentators have viewed as largely fair and independent in their handling of non-sensitive or non-political cases. Parallels may also be drawn to Japanese courts, which were largely independent both in the late Imperial period and also, after democratization, during the long period of Liberal Democratic Party rule. Similarly, recent writing on Egypt has explored why that authoritarian regime has created an independent constitutional court. *Restricted Reform*, *supra* note 487 at 42.

⁶⁸²In contrast to Singapore and Japan, for example, the range of cases deemed to be sensitive in China is extraordinarily wide - and includes not only direct challenges to Party authority or major criminal cases, but also a wide range of cases attracting public attention, as well as cases involving litigants with ties to Party-state officials. In contrast to Franco's Spain, where a degree of independence was possible because courts' powers were extremely limited and courts played little role in creating legal values, China's courts have become significant fora for the airing of rights-based grievances. And in contrast to Egypt, where the constitutional court was established and developed in significant part due to its role in furthering economic development, courts in China have developed into significant fora for the airing of rights-based claims even absent their serving as effective guarantors of property rights. Moreover, the most significant changes in Chinese courts' roles appear to be coming from lower courts, not the Supreme People's Court. *Ibid* at 42-43.

⁶⁸³*Ibid* at 2.

⁶⁸⁴*Ibid*.

pragmatic but incremental enhancement of the adjudicate independence seems to be an easier and more feasible way to solicit external assistance from the Party/State than a “higher demand” of Judicial Independence.

More importantly, as demonstrated earlier, under China’s current constitutional configuration and political environment, any reform set forth by China’s courts have to take the NPC and CPC’s reactions into account. Under this authoritarian framework, the courts enlist a strategy that avoids using any phrases that possibly link the judicial development of China’s courts to the idea of “judicial independence” in the liberal-democratic sense. In fact, this is a consistent tactic taken from Xiao Yang’s court to today. In the Xiao Yang era, for example, Cao Jianming, vice-president of the Supreme People's Court, linked the campaign to the need to avoid the “negative influence of Western rule of law theory”, an apparent reference to those within and outside of China advocating for Western-style judicial independence for China⁶⁸⁵. In the Wang Shengjun era, although a notice issued by Chief Justice Wang urged judges to improve their political discipline and training in Marxism-Leninism, Vice President Justice Jiang Bixin clarified that “it is plainly inadequate for judicial officials to possess political awareness only; they must have complete legal awareness and form the habit of thinking legally. They must defend the Constitution and avoid neglecting their rightful judicial duties in the course of adjudicating procedurally and substantively.”⁶⁸⁶ Currently, Zhou Qiang’s SPC still maintains such a strategy in order to increase the courts’ autonomy and competence. In a conference held in January 2015, I had personally heard one Vice-President and two

⁶⁸⁵ *Ibid* at 20-21.

⁶⁸⁶ See *supra* note 477 at 412.

Grand Justice in the SPC openly advocate for “adjudicate independence”, and object the usage of judicial independence: “The western phrase of ‘judicial independence’ is established on the basis of ‘check and balance’, and this idea advocates that the courts be independent from the legislative branch and executive branch, just like courts in the United States or Canada. What China’s courts advocate is ‘adjudicate independence’, an idea that refers to our adjudicative activities as independent from external and internal interference, by ensuring judges are free from interference from government, Party and other organs, and any individuals”. Interestingly, in this over one-hour speech, the phrase “adjudicate independence” was always unintentionally blended with the word “judicial independence”⁶⁸⁷ by all these grand justices themselves. In fact, such tactics taken by the SPC and China’s courts is nothing new for China. A prime example is the so-called “Socialist Market Economy,” which is essentially a kind of “Capitalism”. By using a similar strategy, China’s courts could avoid many ideological barriers and even constitutional obstacles when promoting judicial competence and authority by reforms that aim to increase fairness and efficiency. For the Party/State, it could be seen that, just as it accepted the idea of “Market-Economy”, it has already come to embrace and even promote the notion of independence of courts while covering it with a different name: Adjudicate Independence⁶⁸⁸.

Specifically, in order to seek the development of Adjudicate Independence, China’s

⁶⁸⁷ See *supra* note 619.

⁶⁸⁸ Chris X. Lin has once noted that, the idea of judicial autonomy has gone through from “Rejection” to “Acceptance”. He gave an example of an authoritative book published in China in the 1990s, which declared that “the nature of judicial system is to prosecute, on behalf of the state, to implement the will of the state with coercive force.” The book also had totally criticized any form of “independence” of the courts. In another authoritative book published in 2000, it mentioned the socialist nature of the Chinese legal system in passing, as most official writings in China still do, but judicial independence have been generally accepted in principle, despite the fact that there are still different interpretations as to what “judicial independence” actually means. *Quiet Revolution*, *supra* note 487 at 293-295.

courts have developed two sub-tactics that we demonstrated in earlier parts. First, China's courts have adopted strategies employed by courts in other authoritarian countries, which is to exercise the self-restraint to not challenge the regime on key political issues of Party/State⁶⁸⁹. Still another sub-strategy is seeking public support. For example, the move to mediate disputes is also in part an attempt of the judiciary to enhance its legitimacy by responding to the needs of citizens, many of whom, particularly in rural areas want decisions that reflect local customs and norms rather than the formal central laws promulgated by national legislators in far off Beijing⁶⁹⁰.

Through these two sub-strategies, China's courts have gained much and perhaps lost relatively little by promoting mediation, cooperation with other government institutions, and responsiveness to popular opinion. These measures help it avoid having to take a clear stance in socially or politically controversial disputes and thus lower its exposure to criticism and pressure⁶⁹¹.

Thus, it seems reasonable that observers feel that Chinese judicial reforms are, "if slow, largely praise-worthy" for following: greater legal professionalism, expanding civil and administrative jurisdiction, improving the quality and uniformity of judicial reasoning, while strengthening the judiciary's enforcement powers, and a slowly growing amount of attempts to assert independence from outside influences of judicial independence⁶⁹². Both the SPC and Party/State have acknowledged that since the Xiao Yang era, the goal for

⁶⁸⁹ *Introduction*, *supra* note 490 at 15.

⁶⁹⁰ *Ibid.*

⁶⁹¹ See *supra* note 489 at 8-9.

⁶⁹² *Ibid* at 14.

current judicial reform is to build a more fair and efficient justice system in China⁶⁹³. In the wake of the ill-fated *Qi* Case, the SPC responded by entering into a period of more openly pragmatic maneuvering. Under such tactics, when external pressures intensified, they swiftly adapted through a variety of measures that often escaped neat ideological categorization, while never quite giving up on the promotion of legal professionalism⁶⁹⁴. If the courts in China remained a “bird in a cage”, then at least the cage was expanding⁶⁹⁵.

Under the model of “Adjudicate Independence”, Party directives may establish basic parameters for SPC activity, but the technical complexity of the judicial affairs will usually create considerable room for maneuvering within those parameters. As empirical evidence repeatedly suggests, the SPC possesses substantive agency in determining agendas in the SPC issued Reform Plans⁶⁹⁶. China’s judicial institutions are not necessarily simple handmaidens of the Party/State. Their complex political life is replete with their own institutional interests and the personal interests and preferences of their personnel⁶⁹⁷. Today, prolonged judicial activism in social and economic regulation implies that the SPC has managed to frame the emergence of an independent, expert-run, and policy-oriented national court that aligns with the best interests of the CPC⁶⁹⁸.

⁶⁹³ Since the Xiao Yang era, a fair and just judicial system will result from a highly educated and well trained body of individual judges distinguished by high moral integrity, from effectiveness of penal law in controlling judicial corruption, and from judicial independence as a result of the judicial appointments and dismissals made strictly according to law, a high socio-economic status and sufficient operational funding as guaranteed by law, and the individual responsibility of the judges for delivering judicial opinions without political, administrative, and social interference. Improvement of a judicial system toward judicial fairness requires improvements in all the ‘independent variables’ discussed above, and the breakdown of any conditions listed above is likely to result in failures in the judicial system. *Court in Transition*, *supra* note 488 at 74-75.

⁶⁹⁴ See *supra* note 489 at 6, 56-57.

⁶⁹⁵ *Ibid* at 4-5.

⁶⁹⁶ *Ibid* at 7.

⁶⁹⁷ *Political Ideology*, *supra* note 490 at 335.

⁶⁹⁸ See *supra* note 477 at 405.

On occasion, such “adjudicate independence” also enable China’s courts to “push back” the Party’s influence. For example, He Xin’s research on “Married Outsides Women” cases demonstrates that although local party committees and governments exert considerable control over the courts’ personnel and budget, the courts do not always follow their instruction⁶⁹⁹. In particular, He Xin discovered that by citing technical issues in legal domain, the courts are able to resist pressure from other actors and develop a significant form of judicial autonomy, even though they are still embedded in a complex political power structure. Thus, he concluded there is room for the courts to continually extend their authority in the current political structure⁷⁰⁰.

The “Adjudicate Independence” has also, in a large extent, made China’s courts substantially independent from the People’s Congresses, which is the only constitutional organ that the Courts should be subject to. By the text of the Constitution, the NPCSC appoints and dismisses SPC judges. Undoubtedly, some form of *nomenklatura* exists in judicial appointments, yet candidates for senior Judicial Committee and Tribunal positions in the SPC are generally recommended by the SPC then submitted to the CPC Central Organization Department for approval, before sending them to the NPC for formal approval⁷⁰¹. According to Xiao Yang, the Court’s selection policy was justified on two grounds: (1) it strengthened intra-judiciary connections and (2) introduced cutting-edge legal scholarship into judicial practice⁷⁰². Additionally, the SPC has the power to

⁶⁹⁹ In many “MOW” cases, local party committees and governments strongly and repeatedly request the courts to hear MOW disputes, but the courts effectively resist their pressure. More whereas the Political-Legal Committees may provide a venue for non-judicial political actors to exert influences on the courts, PLCs have also become an arena for the judiciary to resist such pressure and to advance its own institutional interests. Xin He, “The Judiciary Pushes Back”, in Randall Peerenboom ed., *supra* note 485, 180 at 193-194.

⁷⁰⁰ *Ibid.*

⁷⁰¹ See *supra* note 477 at 383-384.

⁷⁰² For example, between 2000 and 2007, the SPC appointed 197 judges, 127 from local courts and 70 from academia. *Ibid* at 382-

appoint and dismiss associate judges. At the discretion of the Adjudicate Committee, associate judges may exercise the full power of regular judges. Because the President and Vice Presidents are themselves perceived as agents of the CPC in controlling the SPC, they are given substantial freedom from other Party departments in recruiting for the SPC⁷⁰³. For another tier of “supervisory power” conferred by the *1982 Constitution*, as discussed in Chapter 3, with the abandonment of “Supervision on specified cases” in recent years, the remaining way for the current NPC (and NPCSC) to supervise the SPC is quite limited, mainly through “listening to SPC Reports” and keeping contact with People’s Representatives” according to the 2015 SPC Annual Report⁷⁰⁴. However, apparently the legislative supervision on China’s courts, at least for the SPC, could almost be ignored for their substantial inefficiency. This is particularly evidenced by the fact that the NPCSC had not quashed any judicial interpretation issued by the SPC so far, and is underscored by the ill fate of “Supervision on Individual Cases” as demonstrated in Chapter 3.

On the other hand, the downside of the “Adjudicate Independence” should also be noted. In the short term, the crucial question for China’s courts is whether they can further develop the capacity to serve as neutral and efficient decision-makers in routine, private cases. However, further development may also give rise to increased tensions with other Party/State actors⁷⁰⁵. Moreover, to pursue “adjudicate independence”, deeper philosophical tensions and institutional aims between courts and Party/State still exist,

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⁷⁰³ As of June 2010, five out of nine Vice Presidents of the Wang Court have a Ph.D. in law, and all hold LL.M. degrees. Six were law professors or academic researchers before appointment. *Ibid* at 383-384.

⁷⁰⁴ SPC, Working Report of SPC (Mar.20, 2015), online: NPC <http://www.npc.gov.cn/npc/dbdhhy/12_3/2015-03/20/content_1930946.htm>, last accessed on April 15 2015.

⁷⁰⁵ *Restricted Reform*, *supra* note 487 at 42 at 43.

and could not be easily reconciled. The Party seeks to control the Chinese courts in a manner entirely consistent with how the rest of the bureaucracy controls it: by responsibility systems, as noted earlier. The interests of the party and the state bureaucratic personnel system in streamlining administrative management can thus directly conflict the SPC efforts to ensure that judges can freely decide the legal merit of cases without risking sanctions for unintentional legal error⁷⁰⁶.

4.6 Concluding Remarks

In this chapter, we have demonstrated that although “Independence” is an extremely important yet controversial topic for studying China’s courts, the “Global Standard” may not suitably fulfill the task to depict the changing dynamic of China’s courts. Instead, as we noted, China’s courts in the Constitutional and political system of the PRC should be identified as pursuers of “Adjudicate Independence” rather than advocates of “Judicial Independence”.

By design, the PRC’s current constitutional framework places the courts under the control of the legislature and vests the power to make law and interpret the Constitution solely in the NPC. Moreover, in an authoritarian Party/State Socialist regime, courts also should be subject to the political leadership of the Party. However, by continually exercising its interpretive power, the SPC has gained a great deal of judicial authority relative to other power holders and is able to unify and rein the lower courts by its own authority and measures such as judicial interpretations.

⁷⁰⁶ *Judicial Disciplinary system*, *supra* note 483 at 84-85.

This chapter also reviewed two failed attempts by the SPC to gain judicial authority and competence: the *Qi* case and the Seed Case. They had set the SPC back to the pragmatic path to accumulate judicial authority and competence incrementally. We have also pointed out, not only did party interference into specified cases and routine operations of courts remain minor among factors influencing courts' independence in China, but also appealing to the power of the CPC to lobby more personal resources and financial support to local courts became an important and efficient way for the SPC to improve judicial authority and competence. In particular, by getting along with the Party authority and policies, China's courts could occupy a more advantageous position when bargaining with "vertical" and "horizontal" power players in China's constitutional system.

The SPC has adopted a unique path to map the position of itself and other lower courts in the constitutional system of the PRC since the 1980s, in the pursuit of "Adjudicating Independence" rather than "Judicial Independence." As noted above, the idea of "Adjudicate Independence" contains two fundamental principles: Firstly, by rejecting official usage of "Judicial Independence" in the liberal democratic sense, China's courts avoid directly challenging the constitutional supremacy of the NPC and the political supremacy of the CPC in order to be protected. Secondly, in an authoritarian regime, China's courts remain in the position to incrementally gain authority by improving a more fair and efficient justice system, in the name of promoting "adjudicate independence". With the CPC's recent high-profiled return to the "Rule of Law", the SPC, led by Zhou Qiang, adopted a more progressive and thorough gesture toward "adjudicate independence" in the *SPC Fourth Plan* in 2014, which openly demonstrates

the necessity to expand the scope of judicial review and enhance the independence and authority of the courts.

However, “perhaps Chinese courts are not designed to do, and should not do, the things Western courts do⁷⁰⁷.” The disadvantage of this strategy has been evidenced by the relative weakness of Chinese courts to push back external interference from party organs, governmental authorities, and their counterparts in “*gongjianfa*”. Nevertheless, one should consider what judicial independence means in an authoritarian environment. In the case of authoritarian Taiwan, for example, the judicial authority has gradually increased by following incremental approaches, and it took over 40 years until the courts had the authority to quash an unconstitutional act of the Party/State⁷⁰⁸. In Mainland China, as a counterpart 300 times larger than Taiwan with huge regional disparity and a more “hostile environment” to judicial independence, this similar process would likely have a longer march toward a parallel power judiciary as the powerful protector of the Constitution.

⁷⁰⁷ *Restricted Reform*, *supra* note 487 at 4.

⁷⁰⁸ For example, Interpretations No.38, online: Justice of the Constitutional Court, Judicial Yuan-Interpretation<http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=38>, last accessed on April 15 2015 and Interpretations No.210, online: Justice of the Constitutional Court, Judicial Yuan-Interpretation<http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=210>, last accessed on April 15 2015.

Concluding Chapter: “Dream of China, Dream of Constitutionalism”?

In January 2013, a leading Chinese newspaper, *Southern Weekly* has confronted censorship from the government because of the original New Year editorial with the title “Dream of China, Dream of Constitutionalism”⁷⁰⁹. It was witnessed that the Propaganda department of the CPC directly changed both the Title and Content of the editorial. This has led to wide global attention and a strike from nearly one hundred staffs in the *Southern Weekly*⁷¹⁰. Fundamentally, one important reason for *Southern Weekly* incurring censorship is because until recently the phrase “Constitutionalism” held the status of a “non-official expression” in China. In January 2015, the author personally heard from the Vice-President of the SPC, that “Constitutionalism”, by itself, “is not the ‘phrase’ used by us (Party/State)”⁷¹¹.

Indeed, the pursuit of Constitutionalism in China could be traced back to the late 19th Century, and the effort has lasted for one hundred years, from the Imperial period to the ROC and the PRC. This hundred-year journey was a tortuous progress entailing many disasters and pain, and it greatly shaped and re-interpreted the idea of constitutionalism in contemporary China. The debate of “*ti*” and “*yong*”⁷¹² in late Qing period, Nationalism, constitutional experiments, and KMT’s authoritarian rule in the Republican era, have left their own mark on the PRC’s constitutional development today. Also, as demonstrated in earlier Chapters in this thesis, from the “revolutionary period” to today’s Open China,

⁷⁰⁹ “Southern Weekly Reporters Confront China Censors”, BBC News, (4 January 2013) online BBC News <<http://www.bbc.com/news/world-asia-china-20911823>>.

⁷¹⁰ Jessica Elgot, “China Censorship: Journalists Strike at Southern Weekend Over Censorship in New Year Editorial”, The Huffington Post UK, (07 January 2013), online <http://www.huffingtonpost.co.uk/2013/01/07/china-censorship-southern-weekend-journalist-strike_n_2423144.html>.

⁷¹¹ See *supra* note 619.

⁷¹² See *supra* note 73 at 8-9.

Marxist orthodoxy, and Leninist discipline from Russia, Maoist tradition, Deng's pragmatism, and recent evolution of CPC political theories that are increasingly coherent with the Constitutionalism all influence both the constitutional discourse and the constitutional practice in China.

Lack of official endorsement for "Constitutionalism" by no means indicates or implies that the constitutional development in China is impossible. Instead, to some extent, even the ongoing institutionalization and legalization of Party/State *per se*, is sufficient to prove it. Although still authoritarian, for example, ordinary Chinese people may have no real power to elect higher-officials in power central, but Party's organization is increasingly embedding into the constitutional structure of the state, and it has been witnessed Party's control on state and society has been significantly weakened. This tendency will likely continue in the foreseeable future.

Institutionalization and legalization of the Party/State, along with other factors, have led to considerable constitutional development in the NPC. Today, the RLL in 2015 has legally acknowledged the 37 years of ongoing development of legislative competence and constitutional authority of the NPC, from its transformation from an insignificant "rubberstamp" of Party/State to a formidable constitutional organ with real powers in legislative process and a growing supervisory body. However, constitutional development in authoritarian states is generally not "spontaneous". For an authoritarian environment with a powerful Party/State and a "hostile" official constitutional discourses with unique constitutional arrangements, constitutional development may be more

invisible. The parliamentary system may very well remain the “rubberstamp” of Party will and Party polices. However, by playing along with the political power, the representative organ is playing important constitutional roles such as strengthening the legitimacy of the Party/State, and perhaps more importantly, representing the pluralism of the society and promoting limited democracy.

For the courts in many authoritarian states, such as in Taiwan, the judiciary takes an incremental approach to expand its constitutional status with “institutional politics”, a strategy that reconciles with the political hegemony and other constitutional power holders in exchange for autonomy to self-develop and self-empower. Likewise, we see that China’s modern court has also adopted such tactics. As demonstrated earlier, the SPC and lower courts in China are complying with the political leadership of the CPC and supporting the parliamentary system in order to build its own authority and power to push back external influences, say, from the “vertical and horizontal structures of the government”. However, as noted above, this tactic is not “cost-free”. Take, for instance, the 1950s Taiwanese judiciary that had legalized the authoritarian rule and extra-constitutional power of the Party/State by its earlier Judicial Interpretations. Similarly, the Courts in today’s Mainland China have completely compromised their independence in political cases or other political sensitive cases. China’s courts, endorsed by the CPC to build a “fairer and more efficient Justice System” are allowed to pursue Adjudicate Independence. Also, the SPC utilizes the Party as a resource to solve problems that local courts in vastly underdeveloped regions confront, along with local protectionism, as several SPC Reports, Party documents and Judicial Reforms Plans discussed in the

Chapter 4 have revealed.

Furthermore, in China, the pursuit of constitutional development not only comes from the above, but also finds its resonance from the society. For example, the 2013 *Southern Weekly* Incident mentioned above could be regarded as an effort to identify the tolerant limit of “Promoting Constitutionalism” from Party leadership, since the discourse of “China’s Dream” was raised by the CPC’s new leader, Xi Jinping in late 2012. Over thirty years of institutionalization and legalization of the Party/State have gradually retreated from China’s society, and it has been witnessed that today, China’s society is more compatible for Constitutional development due to its ongoing liberalization and pluralism.

Nevertheless, this thesis has proved that, in present day China, constitutional development can “manifest itself in a seemingly inhospitable political environment”⁷¹³, other than manifesting from the Mature Constitutional paradigm from the West. Once again, this is not to say that the “Mature Constitutionalism” is not desirable. As suggested by global experience crossing both the Western and Eastern Hemisphere as examined in Chapter 1, “Mature Constitutionalism” is indeed a very successful path and a popular model for the modern world. However, the point, as demonstrated by this thesis is that “Constitutionalism” or more precisely, “Mature Constitutionalism” may not be the best lens for assessing China’s constitutional development. It would not only overlook some seemingly potential developments in an authoritarian regime, but may also misjudge some institutional politics or strategies that might ultimately contribute to constitutional

⁷¹³ *Supra* note 62 at 1.

development. This has been further verified by our discussion in Chapter 4, when we used the “global model” to evaluate the “independence” of China’s courts. Simply put, constitutional development is multifaceted and therefore cannot be judged or assessed by a single standard or a unitary standard.

Admittedly, as much research has indicated, the current constitutional development in the PRC is facing new challenge while still struggling with old issues. A prime example of such platitude is that the authoritarian rule and Party/State structure created by the CPC still remains as the primary task for China to build a genuine constitutionalism. However, during the process of writing this thesis, I do find a potential conflict hidden in the current constitutional development in China: the tension between Democracy and Constitutionalism. This remaining question has not revealed its tension in either today’s Party/State or between developing constitutional organs in PRC Policy.

As identified in Chapter 1, the three main principles underlined by the Mature Constitutional Model do not contain “Democracy”. However, today, as Pan Wei has pointed out, “when all the good things are thrown into the single basket of ‘democracy’, democracy appears more like an ideology than a practical policy or an instrument of governance.”⁷¹⁴ Indeed, Democracy and Constitutionalism have been widely regarded as a “Golden Partner” in modern politics, especially when defined as “Liberal-Democratic-Constitutionalism” and based on the constitutional system in North America and West Europe. Nevertheless, few in China have noted the different root of such two ideas in political and legal philosophy. The “Democracy” in liberal-democratic context generally

⁷¹⁴ Pan Wei , “Toward a Consultative Rule of Law Regime in China”(2003) 12:34 Journal of Contemporary China 3 at 8.

refers to “periodic elections of top leaders”⁷¹⁵, whereas as discussed in this thesis, the idea of Constitutionalism mainly means the circumscription of power by various kinds of methods. However, Many view the “Western Democracy” as the cure for everything, without paying attention to the fact that in most western democratic countries, democracy may be achieved hundreds of years later after these western states had built at least some level of “constitutionalism”, such as the “thin version” of rule of law (if quoting Peerenboom), separation of power, and powerful or independent courts. “Distributing ballot boxes is far easier than building checks and balances.”⁷¹⁶

In fact, democracy without constitutionalism may lead to “low quality” or unstable democracies, as many “democratic states” have revealed in history and the modern age. A very obvious danger in this “lame duck” democratic system is the tendency of the tyranny of majority to rule, as warned by founders of the US Constitution hundreds of years ago. Interestingly, some Asian states or constitutional systems have verified that, without democracy, some degree of constitutionalism could sustain. For example, many studies has pointed out that a large portion of these Asian states have taken the “rule of law first” in exchange for rapid economic development, such as Singapore in the 1960s, Hong Kong and South Korea in the 1970s, and authoritarian Taiwan from the 1950s to the 1980s. Mainland China, especially in the current “Xi Jinping Era”, seems to follow these instances.

However, China’s circumstance is unique because China’s development has a more

⁷¹⁵ *Ibid* at 10.

⁷¹⁶ *Ibid*.

unorthodox path. Due to historical background and special context, when democracy has not yet been realized, China has to face the problems that Constitutionalism has attempted to deal with. This not only has been intensively reflected on in intellectual discourses, but also conformed by institutional predicaments, as discussed in the previous Chapters. Moreover, from a broader view of the current situation, China has not only had to confront the “internal problems” like vast regional differences and separatism, but also the international pressures from globalization such as global marketization and environmental issues, that may also increase both the uncertainty and challenges for China’s future constitutional development. China is indeed, still in an unprecedented and unpredictable crossroad.

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