

A REFORMING CONSTITUTION NEVER FAILS?: THE LATEST EVOLUTION OF CHINA'S 1982 CONSTITUTIONAL ORDER IN THE "NEW ERA"

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ABSTRACT

"Born for changes, not for ages." Sharing the theoretical theme of constitutional failure, this article addresses the case of contemporary China and its 1982 "reforming" constitution, inquiring into the consequences of 2018 amending of that constitution in a realistic context. The 2018 amendment, together with the unprecedented institutional reforms it aims to archive, has altered the reforming identity of the 1982 Constitution in its original sense. During the New Era, there have been two seemingly opposite trends in the latest constitutional developments in China: the consolidation of the authority of the 1982 Constitution over political actors, and the simultaneous recentralization of the post-1978 party-state structure. Since the 1982 Constitution is designed to accommodate changes in its nature, even fundamental changes that were not expected at the time of the 1982 Constitution's

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birth are still formally compatible with the reforming identity. Such a paradox indicates that the reforming identity of the 1982 Constitution lacks a normative bound, leaving only fluidity within the 1982 Constitution in both theory and practice. In China's case, this unbounded constitutional fluidity renders the bounds of the reforms political and institutional, rather than normative. Such a potential model of 'reforming' constitutions invites constitutional lawyers to reconsider the inherent vulnerability of national constitutions that are made in the reform or transitional era and to extend this research question in historical and comparative directions.

KEYWORDS: *Constitutional identity; the 1982 Constitution of China; constitutional amendment; nonjudicial review; the 'reforming' Constitution*

1. INTRODUCTION

To inquire how and why a constitutional fail is to question how a constitution turns against itself during the evolution of the constitutional order it is built upon. Put differently, proper answers to constitutional failure lies within the workings and changes of the constitution in response to political challenges. Since the values and spirits of constitutionalism are enshrined globally in both politics and constitutional law scholarship after World War II, particular constitutional failures usually come hand in hand with a constitutional crisis and result in modifying or even altering the former identity of the constitution. With sufficient intellectual flexibility, *constitutional failure* might imply an analytical framework to effectively address the climate of constitutional politics that we all watch and experience with concern during the last decade.

Since no constitution is supposed to destroy the constitutional order it is born for and committed to, constitutional failure can hardly be a pure legal phenomenon; usually, it falls in the realm of constitutional politics, which indicates a realistic approach is needed in studying it. Constitutional failure is the failure that delivers on constitutional promises in both institutional design and its underpinning aspirations. Closely associated with a constitutional crisis in both conception and reality, a typical constitutional failure implies a dead end to the referred constitutional order. Such an event can trigger a constitutional crisis that might be solved outside the constitutional framework via political devices. The constitutional crisis usually originates from constitutional disharmonies, leading to the fact that a constitution has already failed.

In some cases, the constitution itself has laid down the roots for future constitutional disharmonies that would render the constitution failed. In other words,

a constitution, even one upon which there has been established a seemingly stable constitutional order, might be profoundly challenged or even overthrown by unexpected political factors, especially influential political leaders.²

“Constitutional identity” serves as a useful conceptual tool in this article. It refers to the fundamental characteristics that “make this constitution *this one*.” During the last decades, literature has shown the conceptual richness within this specific term. In a relatively early study in legal theory, constitutional identity conceptually leads to the identity of the constitutional subjects (Rosenfeld 1994, 2012). Once in the rosy expectation toward an EU constitution, constitutional identity revealed itself in the collective identity of a European people (Sadurski 2006, 6). More recently, the 2009 Lisbon Ruling has successfully brought about discussions on the national identity of the EU member states in the sphere of EU public law, although the Lisbon Ruling itself resorts to the core identity of the Basic Law of the German Republic rather than any EU law (van der Schyff 2016b, 229). As a result of the growing interests in constitutional politics across the global scholarship of comparative constitutional law, constitutional identity is studied mainly on the constitutional traditions with methodological implications. In addition, constitutional identity can also be ideologically used in real politics to gloss over the resurgence of authoritarianism (Kelemen and Pech, 2018).

The identity of a constitution can be read through constitutional expressions and languages and provides a constitution’s self-definition.³ The constitutional identity is not only expressive but also could be normative when confronted with constitutional changes. So it leaves room for discussions on unamendable articles or principles of one particular constitution. On the one hand, a strong constitutional identity that is connected to thick normative commitments is less likely to be altered in the face of a political challenge; in contrast, a weak or modest identity of the national constitution is more open to driving factors of constitutional changes in general, for example, international law or political challenges.⁴

On the other hand, in the absence of normative commitments, the very identity of a national constitution might be easily changed through amendment or by the adoption of a subsequent constitution. Meanwhile, implementing the

2. For typical cases, see the 1982 Constitution of Turkey in 2017 ; the 2001 Constitution of the Republic of Congo in 2015; and serial constitutional changes in Hungary since 2011, including the adoption of its new conservative constitution. Also, the 1993 Constitution of Russia is in sight after the government resigns in January 2020.

3. Expressivism as a workable approach into inquiring about the identity of one constitution highlights the constitutional preambles (see Tushnet 2010, 672).

4. The Netherlands is an exemplar of the modest constitutional identity (see van der Schyff 2016a).

existing constitution may also nurture a dynamic context for a different constitutional identity to develop (Jacobsohn 2011, 132). Where a constitutional identity has a strong normative ground, existing constitutional adjudications imply that the constitutional identity is so rigid that it can defend the constitution itself and the constitutional order against unconstitutional constitutional changes.⁵ In that situation, a constitutional identity can be forcefully changed; this brings up the case of the constitutional revolution. In this situation, the elements of constitutional identity are so fundamental that state institutions might focus on preserving them and protecting them from change (Martí 2013, 22). In this view, the continuity of constitutional identity determines the continuity of a polity, and a constitutional revolution “presupposes the disjunction of identities” (Martí 2013, 20). Therefore, in the real sociopolitical context where the constitution is embedded, when constitutional identity is forcefully altered, it is a clear failure of the former constitutional order and its constitution. By contrast, where a constitutional identity is dynamic and can be changed within limits in “bounded fluidity.”

This article addresses the case of contemporary China and its 1982 “reforming” constitution, inquiring into the consequences of the 2018 amending of that constitution. Although China remains a one-party state without judicial review, the framework of constitutional failure can be useful in evaluating the 1982 Constitution and subsequent developments.⁶ As a significant symbol of socialist democracy and legality during the Reform and Open era, the 1982 Constitution has been recognized as far more advanced than its three precedents adopted in 1954, 1975, and 1978 respectively. This is not only because of its modern-like textual structure but also as a result of historical aspirations of guaranteeing the farewell to the Cultural Revolution, restoring socialist legality, pursuing national prosperities, and moving

5. In the European Union, the Lisbon-like rulings made by the member states’ constitutional courts justifies the supremacy of each member state’s constitutional identity and national constitutional order over the EU constitutional law.

6. The terms of “constitutional amending” and “constitutional amendment” are used in this article, instead of constitutional amendments, when it comes to the formal changes to the text of the 1982 Constitution of China. There are two main reasons. The first one is ever since the adoption of the 1982 Constitution, every ‘constitutional amendment’ actually means the whole package of all amended articles, which is proclaimed by the National People’s Congress. Put another way, one “amendment” to the 1982 Constitution of China officially include many amended articles. According to this established practice, there are only five ‘amendments’ so far to the 1982 Constitution. This is also why it shall be the 2018 ‘amendment’ in China’s case, leaving no room for using ‘amendments’. The second reason is that my analysis in this article focuses on the institutional consequences of the amended constitutional text in the real political context of China, rather than providing mere textual explanations. I hope the aforementioned word choices will cause as little misunderstanding as I am willing to.

toward the rule of law.⁷ The 1982 Constitution offers an unusual article, which articulates that “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 accounted for.”⁸ This article responds to the last paragraph of the preamble, which resulted from the political promise made by Deng Xiaoping. These constitutional expressions, in both the preamble and Article 5(4), have guided Chinese constitutional scholars’ evaluations of the 1982 Constitution, with the hypothesis that the 1982 Constitution moved China closer to a normative constitutional regime that aims to regulate all political factors and enjoy supremacy over politics (Zhou 2013; 2016, 591).

In response to the changing economic and social circumstances brought about by the Reform, the 1982 Constitution has been amended five times: in 1988, 1993, 1999, 2004, and 2018. The first four sets of amendments to the 1982 Constitution have usually been seen as reasons for optimism about Chinese constitutionalism.⁹ By contrast, the latest constitutional amending in 2018 is controversial and has triggered extensive criticism and grave concerns among scholars at home and abroad.¹⁰ In institutional arrangements, it mainly removes the term limit of the state president and establishes the national system of the Supervisory Committee.¹¹ In ideology, the articulation of the leadership of the Party has returned to the main body of the constitution rather than remains mere presentation in the preamble. The 2018 amendment also generate a new institutional framework to accommodate reforms of the system of nonjudicial constitutionality review. Such constitutional changes are significant, aggressive, and fundamental, identifying the constitutional features of contemporary China’s “New Era” after the 19th Congress of the Communist Party of China. The New Era presents two seemingly opposite trends in the latest constitutional developments in China: the consolidation of the authority of the

7. The rule of law as a governing principle was amended in the 1982 Constitution in 2004, later than the former two that were articulated in the original version of the 1982 Constitution.

8. Art. 5(4), 1982 Constitution of the PRC.

9. During each amending process, all textual changes to the 1982 Constitution are listed in one official document called a constitutional amendment. This is also why in this article the term “amending” is used rather than “amendment” or “amendments.”

10. For a typically criticizing note, see Minzner (2015). For an opposite commentary, see Li (2019).

11. Regarding the unlimited term of the state presidents and the vice president, Art. 79(3) now reads, “Both the President and the Vice-President of the People’s Republic of China have a term of office the same as the term of the National People’s Congress.” It is indeed debatable whether this new section implicitly delegates the term limitation of the state president and the vice president to the articulated term of the National People’s Congress.

1982 Constitution over political actors, and the simultaneous recentralization of the post-1978 party-state structure. The fact that these two trends are proceeding simultaneously calls for reflection not only on the amendments themselves but also in the context of the latest evolution of the 1982 constitutional order.

This article asks whether the latest amending brought about the failure of China's 1982 "reforming" constitution and the post-1978 constitutional order. Overseas colleagues might be familiar with the criticism of the 2018 amendment's removal of term limits for the state president. However, the question deserves more specific thoughts if we restore a picture that encompasses both the very nature of the 1982 Constitution through a historical perspective and the ongoing reforms underpinning these key amendments adopted in 2018. My analysis shares this hypothesis: there might be historical circumstances during the creation of a constitution that renders the constitution vulnerable to political challenges. I then argue that the 1982 Constitution is consistent with the original intentions of the reforms since the Deng Xiaoping era, when the 1982 Constitution was born. The 1982 Constitution aims at a proper separation between the Party organization and the state machinery. As a result of the fundamental reforms brought by the New Era, the latest amending plays as an affirmation of an ongoing project of further reforms. I conclude that the 2018 amendment, together with the unprecedented institutional reforms it aims to archive, has altered the reforming identity of the 1982 Constitution in its original sense.¹² However, since the 1982 Constitution is designed to accommodate changes in its nature, even fundamental changes that were not expected at the time of the 1982 Constitution's birth are still formally compatible with the reforming identity. Such a paradox indicates that the reforming identity of the 1982 Constitution lacks a normative bound, leaving only fluidity within the 1982 Constitution in both theory and practice. In China's case, this unbounded constitutional fluidity renders the bounds of the reforms political and institutional, rather than normative.

In the following sections, I will first elaborate on the original intentions of the 1982 Constitution, focusing on the ideological features and institutional transformations of the 1982 Constitution. Then I will move to the latest reforms that underpin the 2018 constitutional amendments, namely, the establishment of a constitutionality review system and the establishment of National Supervisory Commissions. These two fundamental institutional changes are embedded in the political and social circumstances that produced unprecedented trends such as the

12. Cf. Lin (2019), which argues that none of the constitutional amendments will have any practical importance, though they do send out a very negative signal.

institutionalization and semilegalization of intraparty regulations. Putting the two aforementioned reforms and the crucial political-social currents together in one picture, I will provide a contextual analysis of the critical institutional changes affirmed by the 2018 constitutional amendment. The final part provides answers to the research question of this article.

2. ORIGINAL INTENTIONS OF THE 1982 CONSTITUTION

2.1 Aspirational Aspects of the 1982 Constitution: On People's Democratic Dictatorship

Although the 1982 Constitution remains a socialist constitution, it offers innovative aspirations and commitments that differ from the previous constitutions of China.¹³ If we make a comparison in the historical perspective, then the 1982 Constitution embodies reforming intentions toward political normalization, economic reforms, and socialist legality.¹⁴ To analyze the socialist constitutional vocabulary requires reading and interpreting the text of the constitution, especially the ideological part. In restoring elements of the 1954 Constitution that had been omitted from the 1975 Constitution, the 1982 Constitution adopted a vocabulary similar to that of the 1954 original language but with subtle alternatives.¹⁵

Between the two were the constitutions adopted in 1975 and 1978, which were marked by heavy communist ideology. To bring order from the chaos left by the Cultural Revolution and to serve the Reform and Open Project (the Reform primarily), the 1982 Constitution was drafted according to the 1954 Constitution as a throwback to the evolution of socialist legality and the modernization of the state featured with a systematic construction of the Chinese socialist legal system. The text was closely modeled on the 1954 Constitution, as ninety-eight Articles in the 1954 Constitution are either identical or closely related to the 1982 Constitution.

The term “people’s democratic dictatorship” and the concept of people deserve special attention. Concepts such as democracy and people center the

13. Art. 1 of the 1982 Constitution reads, “The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants.”

14. The article on human protection was amended in the 1982 Constitution in 2004, twenty-two years after the constitution’s adoption.

15. The texts of 98 out of 138 articles in the original 1982 Constitution appear highly similar to the 1954 Constitution (see Han 2008, 402).

constitutional theories.¹⁶ Modified from its Soviet origin “people’s dictatorship,” the “people’s democratic dictatorship” is also a result of the nationalization of Marxist-Leninist ideology. In international communist history, debates on the meaning of “dictatorship of the proletariat” during the 1950s showed how different communist countries nationalized ideological authority rather than simply adopted the USSR’s ideological leadership (Schwartz 1970, 17–20). As a result, in China’s case, “people’s democratic dictatorship,” once articulated in the 1954 Constitution now reappearing in the 1982 Constitution, might be a proper departure to analyze the restored socialist constitutionalism after 1978 and its ideological link to the pre-Cultural Revolution constitutional expressions.

As a concept, people’s democratic dictatorship was systematically discussed by Mao in his famous essay “On People’s Democratic Dictatorship” (June 30, 1949).¹⁷ The phrase implies that the people enjoy freedom and that the dictatorship is prepared for reactionaries as the enemy. This was the original essay in which the people’s democratic dictatorship was presented as a clear and workable concept, four months before the founding of the PRC. Mao’s argument begins with the definition of “people” that includes the working class, the peasantry, the urban petit bourgeoisie, and the national bourgeoisie, which presents China as a transitional interclass regime moving toward socialism and communism rather than as permanent and classless (Steiner 1950, 39–40). Then, democracy should be practiced among the people, who enjoy the rights of freedom of speech, assembly, and association, the right to vote, and so on. Mao argues as follows:

Who are the people? At the present stage in China, they are the working class, the peasantry, the urban petty bourgeoisie and the national bourgeoisie. These classes, led by the working class and the Communist Party, unite to form their own state and elect their own government; they enforce their dictatorship over the running dogs of imperialism—the landlord class and bureaucrat-bourgeoisie, as well as the representatives of those classes, the Kuomintang reactionaries. . . . Democracy is practised within the ranks of the people, who enjoy the rights of freedom of speech, assembly, association and so on. The right to vote belongs only to the people, not to the reactionaries. The combination of these two aspects, democracy for the people and dictatorship over the reactionaries, is the people’s democratic dictatorship.

16. Socialist political theories are included (see Skilling 1951a, 1951b).

17. This essay was written for the commemoration of the twenty-eighth anniversary of the Communist Party of China (CPC).

Therefore, “the combination of these two aspects, democracy for the people and dictatorship over the reactionaries, is the people’s democratic dictatorship.” According to Mao’s theory, the people’s democratic dictatorship was a particular “system of the state” (国体), which means it was the fundamental character of the transitional regime. Mao’s theory on state-founding is the primary resource of people’s democratic dictatorship. The government built on the “people’s democratic dictatorship” is an intricate mechanism that responds to the leadership of the Chinese Communist party (CCP); this concept helped maintain revolutionary tension to stimulate effective performance, a sense of discipline and loyalty to the system among government personnel during the crucial time of the founding of the new people’s republic (Steiner 1950, 51).

After being replaced by “full proletarian dictatorship” in both the 1975 Constitution and the 1978 Constitution, “people’s democratic dictatorship” reappeared in the 1982 Constitution. The reappearance of this term has both theoretical and practical implications. On the one hand, the revival of the concept of the people’s democratic dictatorship indicates that the legitimacy of socialism has lasted since the founding constitution of socialism in 1954. On the other hand, the concept of people has been implicitly and pragmatically redefined in a mainly defensive way against the ideological friction that might occur during the Reform, so that enemies of reform take the place of “reactionaries” in the 1954 original version. More recently, it has been argued that the “constitutional recurrence” (宪法重现) of the people’s democratic dictatorship symbolized a “spiritual overthrow” (精神颠覆) to the CCP’s earlier understanding of socialism (Liu 2013, 54).

By borrowing the term from Mao’s theory, the 1982 version of the people’s democratic dictatorship substantially extends the meaning of “people” to include the forthcoming private business owners who are expected to emerge as a result of economic reforms. This reform method has avoided ideological debates during the economic reform, which restored the private economy. For future practice, with a new definition of “the people,” the new “reforming” Constitution was expected to protect the emerging social class that might have been identified as the enemy of the people and becomes the subject of a proletarian dictatorship in earlier understandings. Deng Xiaoping evaluated the proletarian dictatorship and justified the disaster during the Cultural Revolution as a “feudal fascist dictatorship” in a historic speech in 1979 (Deng 1984, 173). Through Deng’s pragmatism, the people’s democratic dictatorship obtained its new definition. Therefore, the readoption of the “people’s democratic dictatorship” in the 1982 Constitution implies a departure from the ideological part of the constitution’s class division of people.

2.2 Institutional Efforts: Separating the Party from the State

When drafting the 1982 Constitution, the issue of how to handle the former office of the state chairman was highly controversial. According to one member of the Secretariat of the Constitution Drafting Committee, there was little consensus as to whether the description of the role of the state chairman would be an entire chapter of the new constitution, as it was in the 1954 Constitution (Xu 2003, 565). The 1954 Constitution was particular about the state chairman's position because of its authority over the Supreme State Conference, which was supposed to be the supreme decisive body according to the constitutional arrangements offered by both the Common Program and the 1954 Constitution. In other words, the state chairman was the *de facto* center of power in the 1954 constitutional arrangement, and this center of power rested with Mao Zedong in person.¹⁸ The 1982 Constitution aims to dismantle the *de facto* personalized post.¹⁹ The 1982 Constitution instead adopted a symbolic post of state president with a limited term of office, both of them to serve no more than two consecutive terms.²⁰ This feature presents the key that leads to our understanding of the reforming characteristics of the 1982 Constitution together with other supplementary reforming designs: separating the party organization from the state machinery in order to strengthen the latter.²¹

The restoration of the Central Military Commission in the 1982 Constitution also reflects the goal of horizontal power diffusion, providing constitutional recognition of the military force under the leadership of the CCP.²² Under the 1954 Constitution, the People's Liberation Army was commanded by the National Defense Committee, which the state chairman also headed.²³ However, the National Defense Committee never actually worked, and the 1975 Constitution

18. For a systematic review on the evolution of the state chairman before the Reform, see Zhai (2015).

19. Early observation on comparative communist constitutions noticed that the 1936 Constitution of the USSR had nothing like the powerful state chairmanship specified in the 1954 Constitution (see Hsia 1955; Steiner 1955; Chang 1956)

20. Art. 79(3), 1982 Constitution of China (before the 2018 amendment).

21. Of note, the 1975 Constitution was characterized by similar expressions describing the socialist state and the state's obligation to develop socialism, although it more fully embraced Leninist ideology. However, the state machinery was heavily damaged during the Cultural Revolution, which rendered those constitutional expressions totally empty.

22. For a recent study of the relationship between the Chinese military and the CCP, see Blasko (2013, 27).

23. Art. 42, 1954 Constitution of China.

eventually abolished it. When Deng Xiaoping was alive, the general secretary of the CCP, the state president, and the president of the Central Military Commission were positions held by different leaders, which indicated the virtue of self-restraint among the first generation of reforming politicians in the CCP. Then, the 1989 Tiananmen Square Crisis resulted in the reintegrated leadership of the party, state, and military under the sole leadership of Jiang Zemin (Ginsburg 2012, 141). This “trinity of powers” has become one of the post-1978 constitutional conventions in China ever since then.

The other side of the constitutional reforming nature was the reinforcement of the legislature. During the early drafting period, whether China should adopt a bicameral system was highly discussed as an alternative to the system of the single-chamber People’s Congress (NPC). Leading up to the 1982 Constitution, various proposals to reform the NPC into a bicameral system were received from members of the Constitution Drafting Committee as well as external suggestions. Ultimately, however, the bicameral proposal was refused by Deng Xiaoping and Ye Jianying.²⁴ In the subsequent four decades, China has seen the NPC become more and more professional and competent in drafting legislation that serves to establish the socialist legal system in China.²⁵ As a result, the political representation of China’s ethnic peoples is absorbed by the election system and the NPC system.²⁶ The pattern of representation based on careers and social associations implicitly infringes on the general constitutional principle that all citizens above eighteen years of age have an equal right to vote and stand for election.²⁷

3. AMENDING THE 1982 CONSTITUTIONAL ORDER

The 1982 Constitution has been through constant amending since its adoption. These amendments have not resulted in a movement toward a Western-style constitutional system. The first two amendments, in 1988 and 1993, mainly responded to the emerging private economy during the early days of the Reform, culminating

24. See Special Correspondent (2011, 10).

25. The official term is “socialist legal system with Chinese characteristics,” including the constitution and constitutional laws, civil law, and commercial laws (see Information Office of the State Council 2011).

26. All of Chapter 4 of the new Election Law of China articulates the details in election principles and mechanism among ethnic peoples since its adoption in 1979.

27. Art. 34, 1954 Constitution; Art. 3, Election Law (1978; 1982; 1986; 1995; 2004; 2010); Art. 34, 1982 Constitution.

in the constitutional confirmation of the private economy.²⁸ The more critical changes came with the amendment on the rule of law in 1999 and the one guaranteeing human rights protection in 2004.

In 1999, a new paragraph was added to Article 5, with the first paragraph stating, “The People’s Republic of China governs the country according to law and makes it a socialist country under the rule of law.”²⁹ In 2004, the new Article 13 stated, “The State respects and preserves human rights.”³⁰ Inspired by these progressive amendments with specific value orientations in Western liberal legal discourse, both overseas and domestic constitutional scholars once deemed the amendments to the 1982 Constitution to be major reforms pointing toward real constitutional democracy.³¹ Along with this evaluation, scholarly expectations were rising for the possibility of establishing a system of judicial review system under the 1982 Constitution. Such scholarly expectations soon declined, however, as a result of the CCP leadership’s lasting official silence and stated objections to the Western constitutional system.³² Nevertheless, while the constitutional evolution in post-1978 China did not result in a system familiar to Western constitutionalism, constitutional changes in contemporary China still follow a hidden logic, which is revealed in constitutional amending and the adoption of laws with constitutional implications.

The major reforms of the 2018 amendment involved the establishment of a nonjudicial form of constitutional review, the national supervisory system and the institutionalization of intraparty regulations. These articulated reforms identify the

28. Accordingly, Art. 6(2) has been amended such that “[i]n the primary stage of socialism, the State upholds the basic economic system in which the public ownership is dominant and diverse forms of ownership develop side by side and keeps to the distribution system in which distribution according to work is dominant and diverse modes of distribution coexist.”

29. Art. 13, Amendment to the Constitution of the People’s Republic of China (adopted at the Second Session of the Ninth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress, March 15, 1999), http://www.npc.gov.cn/englishnpc/Constitution/node_2827.htm.

30. Art. 24, Amendment to the Constitution of the People’s Republic of China (adopted at the Second Session of the Tenth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress, March 14, 2004), http://www.npc.gov.cn/englishnpc/Constitution/node_2826.htm.

31. See, e.g., Killion (2005).

32. For the possibility of judicial application of the 1982 Constitution, see Zhang (2010). A more cautious analysis on the possibility of constitutional adjudication in China as a one-party state, see Hand (2011, 159).

fundamental changes in China's post-1978 constitutional order.³³ Although relevant scholarly discussions indicate the positive participation of Chinese constitutional scholars in the 2018 reforms, few have recognized the potential institutional consequences and the possible long-term influence of these unprecedented reforms to the post-1978 constitutional order overall. These reforms pose to both researchers and general readers the very question, Would the constitutional identity of the 1982 Constitution sustain after the 2018 constitutional amendments? Alternatively, to put it differently, how should we evaluate the latest reforms under China's 1982 constitutional framework.³⁴

3.1. Constitutionality Review

One critical consequence of the 2018 amendment is the introduction of a version of constitutional review, 合宪性审查, namely, creation of a special commission within the PRC Standing Committee to review the constitutionality of all legislations and regulations. Such a review system aims to bring the following legislations or regulations within its jurisdiction: (1) national laws made by the NPC and its standing committee, (2) administrative rules made by the State Council and its departments, (3) autonomous regulations made by the People's Congresses of the five Autonomous Regions, (4) local rules made by the local People's Congress above the county level, and (5) local regulations made by the provincial People's Congresses and their standing committees, the municipalities under direct governance of the State Council and the authorized metropolis.³⁵ The preliminary institutional basis for this reform is the filing and recording system for normative

33. "The Decision on Major Issues concerning Comprehensively Deepening Reforms" (adopted at the close of the Third Plenary Session of the 18th CPC Central Committee, November 12, 2013).

34. Allocation of legislative power within China's unitary system is complicated. A recent study touches on the topic in relation to China's invisible constitutional changes (see Zhai 2018, 411–15).

35. This is achieved in different ways, including (1) constitutionality consultation during drafting, (2) ex ante review of adopted regulatory documents before their promulgation, and (3) ex post review of organizational requests and individual applications according to Art. 99 of the Law-Making Law (2000; rev. 2015). Of note, the existing scholarly discussions in China do not usually include internal constitutional consultation and consequent constitutional control on legislative drafts within the National People's Congress and its standing committee in China, but they are considered indispensable to the whole constitutional review system. For a typical study on constitutional control on legislation drafts, see Xing (2018).

documents.³⁶ The authority, the working procedures, and the specific criteria for recording and review are articulated in the Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels, passed in 2006. This national law aims to enhance the supervisory function of the People's Congress from the national level down to the local level. According to the Law on the Supervision of Standing Committees of People's Congresses at Various Levels, there are three review criteria based on which a rule or enactment may be struck down:

1. Transcending the statutory limits of power in restricting the lawful rights and interests of citizens, legal persons, or other organizations, depriving them of their lawful rights and interests, or increasing the obligations of citizens, legal persons, and other organizations
2. Contravening the provisions of laws and regulations;
3. Other inappropriate manners that make it necessary to annul said resolutions, decisions, or orders.³⁷

The official emphasis on constitutionality review and its full operation has emerged in publicly since 2013. In 2013, the NPC Standing Committee had heightened the existing recording and review work in its annual report to the National People's Congress, and the significant advances of the recording and review work come up from the national level. From 2014 to now, all administrative regulations made by the State Council and judicial interpretations released by the Supreme People's Court and the Supreme People's Procuratorate are sent to the Office of Recording and Review of Laws and Regulations and are also numbered in the annual reports of the NPC Standing Committee. In 2017, the Committee released its first specific annual report on the recording and review work. By 2018, the Office of Recording and Review of Laws and Regulations had received 4,778 regulatory documents for recording and review, of which it actively 188 administrative regulations and judicial interpretations. At the same time, the Office reviewed local legislation on

36. In the context of Chinese law, the term “normative document” (规范性文件) feasibly refers to any local legislation and administrative regulations lower than the national laws. According to Chapter 2 of the Law-Making Law, only legislations enacted by the National People's Congress and its standing committee become law in China. In other words, only enacted by the national legislature becomes laws in China. This is a typical feature of China's unitary legislative system, which also indicate the implicit legacy of the Soviet model of political institutions.

37. Art. 30, Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels (2006, 2008 rev.).

focused issues and paid particular attention to 1,527 review applications issued by citizens and social organizations (Zhang 2018).

3.2 The National Supervisory Commission at All Levels

The establishment of the National Supervisory Commission of China is the embodiment of the CCP's political supervision over the entire bureaucratic system of the state at all levels, 国家监察委员会. This reform was initiated in connection with the broad anti-corruption campaign, together with the CCP's tradition of internal supervision.³⁸ Pilot experiments had been taken place in Beijing, Hebei Province, and Zhejiang Province since 2017.³⁹ In general, the relevant functions of the supervision departments (bureaus) and bureaus of corruption prevention under the people's governments and various departments of investigation are to be integrated into the supervision committees. Consequently, civil servants who once worked in the party above and in state institutions now transfer to the newly established National Supervision Committee.

Such an unprecedented reform involves fundamental changes. On the one hand, the establishment of the National Supervisory Commission has erected a new national system, which has never emerged in all previous constitutions of China since 1949. Under China's socialist constitutional framework, the National People's Congress and its standing committee as a whole, enjoy institutional supremacy above the State Council, the People's Supreme Court, and the Supreme People's Procuratorate, created through the People's Congress and consequently also responsible to the National People's Congress and its standing committee.⁴⁰ After the 2018

38. The internal central institution of the CCP is the Central Commission for Discipline Inspection (中央纪律监察委员会). For the central inspection groups as the occasional anti-corruption method that supplementary to the institutional inspection after the 18th Party Congress in late 2012, see Yeo (2016).

39. The Standing Committee of National People's Congress, "Decision of the Standing Committee of the National People's Congress on Carrying out the Pilot Program of Reforming the National Supervision Mechanism in Beijing Municipality, Shanxi Province, and Zhejiang Province" (December 26, 2016) [全国人大常委会:《全国人大常委会关于在北京市、山西省、浙江省开展国家监察体制改革试点工作的决定》, 2016年12月26日。].

40. Art. 3(3) of the 1982 Constitution reads, "All administrative, supervisory, judicial, and procuratorial organs of the State are created by the people's congresses, to which they are responsible and by which they are overseen." For specifics concerning the political obligations of the State Council, the National Supervisory Commission, the Supreme People's Court, and the Supreme People's Procuratorate to the National People's Congress and its standing committee, see Arts. 92, 126, 133, and 138 of the 1982 Constitution.

constitutional changes made based on the preliminary experiments, the establishment of the National Supervisory Commission become the fourth national authority.

On the other hand, the substantive authority of the National Supervisory Commission is defined in the Supervision Law as the authority to “conduct supervision of public officials exercising public power (hereinafter referred to as public officials), investigate duty-related violations and crimes, build integrity and carry out the anti-corruption work, and maintain the dignity of the Constitution and the law.”⁴¹ According to the 1982 Constitution, all the national state organs shall work in coordination and check each other as well.⁴² However, considering the authority of the supervisory organs, mentioned earlier, the 2018 constitutional amending has de facto created a more powerful organ than any other, one authorized with the power to check the rest in the sense of “full-coverage” supervision. In reality, the key public officials are the members of the CCP, so the constitutionalization of this new system can also be seen as the institutional spillover of the CCP’s long tradition of internal supervision against corruption.⁴³ Put differently, the establishment of the National Supervisory Commission system strongly indicates that the party authority can directly enter the state machinery and controls its cadres by taking the very system as an institutional channel.

4. ORGANIZING THE PARTY THROUGH SYSTEMATIC INTRAPARTY RULES

The institutionalization of the intraparty regulations has been significantly increasing since 2013, strongly indicating the CCP’s determination to exercise much stricter self-regulation within the party organization. So far, two five-year plans for “legislating” the intraparty regulations have been issued with blueprints up to 2022. Seventy-four new intraparty regulations were promulgated in 2018 alone,

41. Art. 3, Supervision Law of the People’s Republic of China (2018).

42. Art. 140 of the 1982 Constitution reads, “The people’s courts, the people’s procuratorates and the public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of the law.” Art. 127(2) reads, “Supervisory organs shall, in handling duty-related violations of law or crimes, cooperate with judicial organs, procuratorial organs, and law enforcement organs, with mutual checks.”

43. For a historical review on the CCP’s internal anti-corruption inspection, see Li (2016). On the function of the top inspection committee of the CCP, see Guo (2014).

and Chinese legal academia has also witnessed a plethora of papers since 2012.⁴⁴ The comprehensively strengthened intraparty system presents the other side of the coin: parallel to the establishment of the National Supervisory Commission system at all level, within the CCP the internal tradition of supervision and inspection mainly against corruption has also seen its own institutional expansion of the ordinary operations of the party and its members.

The intraparty regulations and their working organizations are not new to the CCP.⁴⁵ Immediately after the founding of the PRC, the CCP realized there should have been a separation between the party and the state in public administration of the nascent republic. Toward the end that the national and local governments should have governed all affairs that fell into the purview of public administration; decisions, solutions, and notices regarding the state administration were not issued directly in the name of the CCP.⁴⁶ Accordingly, the CCP once held that the intraparty affairs should be dealt with by a different system of the party's regulations during the PRC's early years. Regrettably, during the 1950s and the 1960s, political campaigns swiftly nipped this self-understanding of the CCP's role in the bud. Starting in 1978, as part of the Reform, the fundamental principles of intraparty democracy have been progressively reestablished, largely because of the searing experiences during the Cultural Revolution.⁴⁷ The 1990s saw preliminary efforts to file intraparty regulations and proposed procedural controls for the making of intraparty regulations. In 1996 and 2000, the CCP Central Committee twice compiled the existing intraparty regulations. The compilation work resulted in three

44. According to empirical evidence acquired in the dominant Chinese academic database, 86 journal articles were published under the theme of intraparty regulations in 2012, then 216 in 2013, 497 in 2014, 768 in 2015, 959 in 2016, and 994 in 2017. The year of 2018 saw a slight drop to 796, and it is estimated by the CNKI platform that the number might reach 1,050.

45. This CCP organizational tradition has experienced a long evolution. In 1931 and in Moscow, the Sixth National Conference of the CCP adopted "Provisions Regarding On-Site Central Inspections" (中央巡视条例). Seven years later, party regulations and party rules (党规党法) were officially conceptualized to restore and normalize intraparty relations after Zhang Guotao's betrayal of the CCP during the Anti-Japanese War. For more details of the relevant historical background, see Saich and Yang (1995, 825).

46. Publicity Department of the CCP Central Committee and the General House of the Xinhua News Agency, "Instructions on the Concerned Issues in the Publicity Work after the Establishment of the Central People's Government" (October 1949).

47. This also constitutes an important part of the context to comprehend the real meaning of "democracy" and "legality" documented in the historical texts of the CCP, which mostly aims at normal and stable governance under the singular political leadership of the CCP, rather than anything similar to their Western origins.

volumes of intraparty regulation collections (1978–96, 1996–2000, 2000–07), providing 260 regulations adopted from 1978 to the end of 2007.⁴⁸ In 2011, the Bureau of the CPC's Central Committee Rules and Regulations was established to begin the systematic construction of intraparty regulations.

This fundamental reform to the entire post-1978 system has also generated a hot research field in Chinese constitutional law. Research institutes of intra-regulations have been founded in quick succession in Chinese universities, especially in universities where top law schools are located, including Tsinghua University (2011, the earliest), the Northwestern University of Political Science and Law (2015), Wuhan University (2016), the Chinese University of Political Science and Law (2017), and the East China University of Political Science and Law (2018).⁴⁹ Previously, intraparty regulations were mostly studied in the fields of party history, Marxism (with Chinese characteristics), and Chinese politics. By attracting legal scholars from public law and jurisprudence in China, an identical trend in current intraparty regulation research is to treat the intraparty regulations as semilegal in nature and to apply legal approaches to topics such as which authorities shall interpret the intraparty and where does the bindingness of the intra-party regulations originates from. One of the most basic challenges is to describe the relationship between intraparty regulations and laws in a systematic way.⁵⁰ So far, however, a very large part of intraparty regulation research remains empirical and preliminary, with a huge blank occupied by intellectual challenges such as the apparent tension between the political obligation of being a party member and having the fundamental rights of a citizen that an individual may experience under some specific circumstances.

5. LATEST REFORMS IN ONE PICTURE: A CONTEXTUAL ANALYSIS

The constitutional currents featured in the 2018 constitutional amending share the CCP's post-1978 logic of governance: political institutionalization. With the forty years' experience of successively constructing a socialist legal system to support the

48. These four volumes are jointly selected by the the Regulation Room of the General Office of the CCP Central Committee, the Regulation of Central Commission for Discipline Inspection of the CCP, and the General Office of the Organization Department of the CCP Central Committee.

49. By May 18, 2019, nineteen intraparty regulation research institutes were founded in Chinese universities, out of thirty-three in total. The Chinese Academy of Law also started building up a national platform to exchange research updates in institutes across the country since the end of 2018.

50. Constitutionalization of political parties remains greatly marginal in the current boom of intraparty regulation studies in China.

state machinery, the CCP has gained more and more belief in the value of institutionalization. Deng Xiaoping presented his thoughts in governing China by institutionalization, with learned lessons from the Cultural Revolution. He held that the institutional system should be adopted in regulating the ruling party itself, reforming the leadership system of the party and the state by reinforcing democratic centralism (Deng 1984, 302). During the early years of the Reform, the “process of routinization” has been the top priority of the state building that is still ongoing.

The institutionalization of the state machinery mainly presents in the building-up of the socialist legal system, as a result of the return of socialist democracy and legality. Since 1997, the discourse of the socialist legal system was embedded within the government’s will to improve the rule of law and governmental accountability (Jiang 1997).⁵¹ The official discourse of a socialist legal system was preliminarily expressed in 2002.⁵² Before 2018 came the emergence of judicial review on specific administrative actions established in April 1989; the Law-Making Law providing the institutional possibility of constitutionality review in 2000; the National Judicial Examination established in 2004; and the Civil Servant Law of China, aiming at building up just, effective, and stable criteria in selecting civil servants in 2005.⁵³ In other words, the socialist legal system has mainly served to restore healthy state machinery and improve the legal system itself.

The institutionalization of intraparty regulations might be considered to pose theoretical challenges to the organizational and political evolution of the CCP as a ruling communist party. Given that the intraparty system has become more and more semilegal, what is the theoretical basis for creating bind spots when it comes to intraparty regulations rather than law, especially when the *legal* rights of party members are limited or even annulled? Yet, compared to the national legal system, the lack of a semijudicial authority to apply those legal-like intraparty regulations might better determine the political rather than the legal essence of the intraparty regulations.

The unprecedented institutional reform of the National Supervisory Commission system has the potential to radically alter the 1982 constitutional arrangements because it requires a new state organ authorized by the National People’s Congress,

51. For an early work that sees China’s constitutional developments toward the rule of law, see Chiu (1985).

52. Li Peng, chairman of the Standing Committee of the National People’s Congress at that time, gave a speech at the release ceremony of *corpus juris* of China on October 10, 2002.

53. Then the Administrative Litigation Law is amended in 2014, the Law-Making Law in 2015, and the Civil Servant Law in 2018.

except for the State Council, the Supreme People's Court, and the Supreme People's Prosecutors' Office. In general, the former "one national government, two institutions" 府两院 and the horizontal state structure at the national level will become "one national government, two institutions, and one Committee" 府两院一委. In particular, the establishment of the State Supervision Committee system might result in the reemergence of a direct connection between the party organization and the state institutions, between which the 1982 Constitution promises a proper separation; this is the "reforming" nature of the 1982 Constitution.⁵⁴ Then the fundamental change to the previous 1982 constitutional order lead to a further inquiry on the openness of the 1982 Constitution itself, namely, whether this constitution can accommodate unforeseen changes that occurred during the Reform or there can be any normative constraint that bonds the reforming changes, including those fundamental ones.

The Chinese version of constitutional review should not be imagined as anything similar to a Western-style judicial review. The system of constitutional review does not seemingly offer the normative bonding to the legislation or the constitutional changes, either formal or informal; more probably, it serves for formally centralizing the national legal system. Although constitutional scholars in China have been hotly debating potential proposals, what constitutional review will be like in design and what orientation it might adopt remain unknown. However, that the authorities have chosen to disclose the proposed reforms implies something similar will eventually be implemented.

It is worth asking why the clause of constitutional supremacy, namely, Art. 5(4) of the 1982 Constitution, remained untouched in the 2018 amendment, while the leadership of the ruling party has returned to the form it took in the main body of the 1982 Constitution. Art. 5(4) articulates that "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." Meanwhile, in 2018, the amended Art. 1(2) articulated that the leadership of the CCP is "the essential attribute of Chinese socialism" (中国社会主义最本质特征).⁵⁵ This new expression of the state form taken from the 1982 Constitution implies that to define what socialism requires

54. It has been openly stated that the function and workings of the Supervisory Commission is political rather than legal. This statement was released by Xinhua News Press on November 5, 2017, in one review article in regards to the relative laboratory practice since November 2016.

55. "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."

is an officially monopolized power, a model that reflects a fundamental shift away from the spirit of the constitution that had previously blessed a proper separation between the party organization and the state machinery. Article 5(4) might have seeded the core of the 1982 “reforming” Constitution’s constitutional normativity but now in the New Era sees China’s constitutional developments, including the system of constitutionality review, following a different path—one away from the existing global practice of liberal constitutionalism established after World War II.

CONCLUSION

The New Era presents two seemingly contradictory directions of the constitutional developments in contemporary China: to consolidate the authority of the current PRC Constitution and to recentralize the post-1978 party-state structure, which forms the constitutional paradox in an era of deepening the specific reforms. Such a paradox indicates that the reforming identity of the 1982 Constitution has not provided a normative bound on subsequent amendments, including those of 2018, leaving a great deal of both in theory and in practice. In China’s case, the exceptional situation here is that the constitutional bounds of the Reform become political and institutional, rather than normative. As a result, in 2018, the amending process was able to push the 1982 Constitution in a fundamentally different direction institutionally and ideologically. This review of the Chinese case also suggests the need for researchers to develop a realistic picture of constitutions and their workings that bridges varieties of constitutionalism and their weaknesses.

The fundamental goal of driving successive institutional changes in recent years in China is unity itself, which usually links to the. This hidden logic can help external observers and researchers understand emerging reforms and, more important, the future direction of likely developments. It might be reasonable to consider that removal of the term limit of the state president indicates that the weight of the Constitution might be more substantial and more significant to the current top leaders than is sometimes expected. Overseas observers and researchers might have dramatically underestimated the significance of the constitution—and perhaps of formal, institutionalized law in general—at high levels of Chinese politics.⁵⁶

“Born for changes, not for ages.” When the desirability of the 1982 “reforming” Constitution became a scholarly consensus among national constitutional lawyers, few foresaw that one day the spirit of those reforms would be fundamentally altered. With a very thin grounding in normative principles, the excessive openness

56. See Zhang (2018).

and weakness of the 1982 Constitution demonstrate elements of constitutional pragmatism that characterize constitutions that are born during grand reform periods.⁵⁷ Because of a lack of foresight, those constitutions can be vulnerable to political challenges. This article invites constitutional lawyers to reconsider the inherent vulnerability of national constitutions that are made in the reform or transitional era and to extend this research question in historical and comparative directions.

57. The 1982 Constitution as the unfinished constitution and the supposedly multiple ways to continue it, see Lin (2015).

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