

# DEVELOPING A NEW ANALYSIS FRAMEWORK FOR EXAMINING CONSTITUTIONALISM IN MAINLAND CHINA

Wenjuan Zhang<sup>†</sup>

## Abstract

*The purpose of this paper is to develop an analysis framework beyond political philosophy orientation for examining the development of constitutionalism. The parameters of the new analysis framework are summarized on the basis of convergency and divergency of constitutionalism theories. After reviewing the struggles of constitutional transformation from the revolution-oriented social order to the rule of law order, the paper has also analyzed the constituted form in the Constitution (1982) from the perspective of popular sovereignty. Finally, the author conducts a detailed discussion of Chinese constitutionalism in the three parameters and makes her argument that China has a thin version of constitutionalism despite the challenges ahead.*

*Key words: Thin Version of Constitutionalism, China, Popular Sovereignty, Constituted Form, Constitutional Enforcement, Constituent Power.*

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<sup>†</sup> Associate Professor, Jindal Global Law School; Director, Center for India-China Studies, O.P. Jindal Global University. Email: wzhang@jgu.edu.in.

## 1. Introduction

It is still debatable if China has constitutionalism or not. Some scholars including Chinese scholars doubt China has constitutionalism. For example, Prof. Qianfan Zhang of Peking University Law School has published several articles to argue that China has a constitution but without constitutionalism which is directly caused by lack of judicial review.<sup>1</sup> Some other scholars, such as Larry Cata Backer, have distinguished between western constitutional notions and constitutional notions, and argue that Chinese constitutionalism after 1989 meets the notions of constitutionalism.<sup>2</sup> Others in the middle like Tom Kellogg<sup>3</sup> and Keith Hand<sup>4</sup> believe that China is progressing toward constitutionalism. However, there are also some doubts about whether China is making continuous progress toward constitutionalism especially since 2013. What causes this concern is that “constitutionalism” itself has become a politically sensitive term in China since 2013.<sup>5</sup>

While scholars believing in liberal democracy do not accept China as a country with constitutionalism, some Chinese scholars do not even want to use the concept of “Constitutionalism” in Chinese context at all. The most controversial argument is made by Xiaoqing Yang, a faculty from Renmin University Law School. In her article titled ‘*Comparative Studies of Constitutionalism and Chinese Democratic Dictatorship*’,<sup>6</sup> she has argued that the term “constitutionalism” or even the term “constitutionalism with Chinese Characteristics” should not be used. This is because the Democratic Dictatorship System, which is the foundation of the Chinese Constitution, is completely different from the political logic and constitutional jurisprudence of constitutionalism commonly used in the west.<sup>7</sup>

The concept of constitutionalism is capacious. Whether China is a country with constitutionalism depends on how to define constitutionalism. This paper is going to develop a new analysis framework based on theoretical review of constitutionalism. In Part I, the paper highlights the theoretical development of Constitutionalism in English Literature. In Part II the paper reviews the evolution of constitutional design to show the struggling journey of the constitutional transition from revolution oriented to the rule of law direction. Part III focuses on the introduction and analysis of the constituted form in the Chinese constitution especially from the perspective of popular sovereignty. In the final part of the paper, the author puts the

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<sup>1</sup> Q. Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8 *International Journal of Constitutional Law* (2010); Q. Zhang, *Common Knowledge of Constitutionalism*, CITYU HK Press, Hong Kong, pp. 170-174 (2016).

<sup>2</sup> L.C. Backer, *Party, People, Government and State: on Constitutional Values and the Legitimacy of the Chinese Party-State Rule of Law System*, 30 *Boston University International Law Journal*, 342 (2012 Summer).

<sup>3</sup> T.E. Kellogg, *Constitutionalism with Chinese characteristics - Constitutional Development and Civil Litigation in China*, Volume 7, Issue 2, *International Journal of Constitutional Law*, 215–246, (April 2009).

<sup>4</sup> K. Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 *East Asia Law Review*, 51-159 (2011).

<sup>5</sup> J. Cohen, *China’s New National Constitution Day: Is It Worth Celebrating?* Volume XIV Issue 22, *China Brief*, Special Issue on China’s Fourth Plenum s 4. (November 20, 2014) And also see from R. Creemers, *China’s Constitutionalism Debate: Content, Context, and Implications*, 74(1) *The China Journal* (1 2015).

<sup>6</sup> X. Yang, *Comparative Studies of Constitutionalism and Chinese Democratic Dictatorship*, No. 10, *Red Flag Write-up*, 4-10 (2013).

<sup>7</sup> *Ibid.*

Chinese constitution designing and practice in the new analysis framework and argues that China has a thin version of constitutionalism.

## 2. Theoretical Development of Constitutionalism in English Literature

Constitutionalism originated from the west. Looking at its theoretical development, it is evident that the constitutionalism in the west has fueled the process of shifting from monarchy to popular sovereignty. Western constitutionalism has also furthered the debates on perfecting the constituted form and, improving the balance between constituted form and constituent power in driving constitutional development.

### 2.1.1. *Constitutionalism and the Understanding of Power Shift from Monarchy to People*

The *Oxford English Dictionary* first used the term “Constitutionalism in 1832”.<sup>8</sup> It can be said that the modern concept of constitutionalism is developed in tandem with the “transition from the irrational imposition of authority in feudal societies to the capitalist state and the rule of law.”<sup>9</sup> The discussion of nature and history of constitutionalism can be traced back to philosophers and political scientists such as Thomas Hobbes and John Locke “who are thought to have defended, respectively, the notion of constitutionally unlimited sovereignty versus that of sovereignty limited by the terms of a social contract containing substantive limitations”.<sup>10</sup> The French and American revolutions helped the human societies launch into the constitutionalism of modernity.<sup>11</sup>

Early focus of constitutionalism, such as in Britain and France, was to control the monarchy for popular sovereignty. The American constitution has taken a step further and believed that governmental power, which is derived from the people, should also be constrained.<sup>12</sup> From then on, it is almost agreed upon that state power shall be constrained. For example, Scott Gordon takes ‘constitutionalism’ to “denote that the coercive power of the state is constrained”.<sup>13</sup> He believes the “central issue of constitutionalism” is “the problem of controlling the power to coerce”.<sup>14</sup> Maria Tzanakopoulou also emphasized that “[a] quintessential characteristic of constitutionalism has ever since been the establishment of domestic limitations to sovereign power”.<sup>15</sup> Martin Loughlin and Neil Walker further listed “two fundamental but antagonistic imperatives” of modern constitutionalism—that “government power is ultimately generated from the ‘consent of the people’ and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive

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<sup>8</sup> S. Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today*, Harvard University press, footnote 3, (1999).

<sup>9</sup> M. Tzanakopoulou, *Reclaiming Constitutionalism: Democracy, Power and the State*, Hart Publishing, xi (2018).

<sup>10</sup> Constitutionalism, *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/constitutionalism/index.html#ConMinRicSen>, last seen on 01/08/2020.

<sup>11</sup> Supra 9, at 23-27.

<sup>12</sup> Supra 8, at 6-8.

<sup>13</sup> Supra 8, at 5.

<sup>14</sup> Supra 8, at 7.

<sup>15</sup> Supra 9, at xi.

institutional forms”.<sup>16</sup> The containment of individual rights on state power has also been emphasized. As Ruti Teitel summarized, the “modeled constitutionalism as a form of pre-commitment and constraint on government or state action” is usually “in the name of individual rights”.<sup>17</sup>

## 2.2. *Debates on Best Constituted Forms for Power Check*

However, what has not been agreed upon is how the state power shall be constrained in the constituted form such as in the debate of legislative supremacy or judicial supremacy. Historically, the debate on who has the final authority in constitutionalism has been largely influenced by theoretical development and historical events.<sup>18</sup> After the French Revolution in 1789, many countries followed Rousseau’s theory. This theory postulated that “only general will can direct the state according to the object what it was situated” which is also called parliamentary sovereignty.<sup>19</sup> In the United States of America, there have been many debates, such as the Lincoln-Douglas debate in 1840, on who should control the constitutional development- the people or the court.<sup>20</sup> However, the emergence of Nazism and Fascism of the Second World War taught a lesson that the legislative supremacy might produce abusive constitutionalism such as pervasive violation of fundamental rights and deprivation of minorities.<sup>21</sup> For example, the Indian Constitution abandoned parliamentary sovereignty and has borrowed judicial review from United States of America.<sup>22</sup>

Alexander Bickel’s “counter-majoritarian difficulty” is one of the most widely used theoretical frameworks for the debates about judicial review both for proponents and critics.<sup>23</sup> He argues that “the root difficulty is that judicial review is a counter-majoritarian force in our system.”<sup>24</sup> Other proponents of theory, like Watkins and Lemieux, promote the defense of judicial review using various forms of “bulwark theory”. These forms include protecting unpopular minorities, protecting democratic procedural rights and balancing democratic procedural rights and democratic outcomes.<sup>25</sup> For instance, Ronald Dworkin argued that judicial review is necessary for the constitutional conception of democracy which is different

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<sup>16</sup> M. Loughlin & N. Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford University Press, 1 (2007).

<sup>17</sup> R. Teitel, *Transnational Justice and the Transformation of Constitutionalism* (in Tom Ginsburg and Rosalind Dixon Ed.), *Comparative Constitutional Law*, Edward Elgar, Cheltenham, UK and Northampton US, 57 (2011).

<sup>18</sup> H. Learner, *The Indian Founding: A Comparative Perspective*, *The Oxford Handbook of the Indian Constitution*, Oxford University Press, New Delhi, 56 (2016).

<sup>19</sup> F. Fabbrini, *Kelsen in Paris: France’s Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, 9 *German Law Journal*, 1301 (2008).

<sup>20</sup> M.A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 *Chicago-Kent Law Review*, 924, Issue 3 (2006).

<sup>21</sup> M. Hailbronner, *Rethinking the rise of the German Constitutional Court: From anti-Nazism to value formalism*, 12 *J•CON*, No. 3, 626–649 (2014).

<sup>22</sup> K. Keshav, *Constitutional Law-I*, Singhal Law Publication, Delhi, pp. 4-5 (7<sup>th</sup> ed., 2016).

<sup>23</sup> D. Watkins & S. Lemieux, *Compared to What? Judicial Review and Other Veto Points in Contemporary Democratic Theory*, 13:2 *Perspectives on Politics*, 313 (2015); Alexander Bickel, *The Least Dangerous Branch?*, *The Supreme Court at the Bar of Politics*, Bobbs-Merill, Binghamton, (1962).

<sup>24</sup> A.M. Bickel, *The Least Dangerous Branch*, Yale University Press, New Haven and London, p. 16 (1<sup>st</sup> ed, 1962).

<sup>25</sup> Watkins & Lemieux, pp. 315-316.

from the majoritarian conception of democracy.<sup>26</sup> He pointed out that majoritarian premise is not absolute, as evident in many constitutions which set limits on what a majority can enact.<sup>27</sup> Watkins and Lemieux believe that judicial review should not be exaggerated as the “deviant institution” of democracy.<sup>28</sup> Their recent research proposes an “acquittal theory” that “courts do sometimes exercise counter-majoritarian influence but they can only reliably use this influence to acquit individuals from criminal or civil penalties”.<sup>29</sup> Thus, it can be interpreted that courts can free people from government domination with minimal threat to democratic values.<sup>30</sup>

Jeremy Waldron and Richard Bellamy are strong critics of judicial review. Waldron’s critique is based on “equal respect to persons under conditions of persistent disagreement”.<sup>31</sup> From a different angle, Bellamy categorizes decision-making procedure into two types: democratic and legal. He insists that collective decision-making should give each individual equal weight in the procedure.<sup>32</sup> Some scholars, like Ran Hirschl, have tried to explain the phenomenon of voluntary and self-imposed judicial empowerment and argued that “political, economic, and legal power-holders who either initiate or refrain from blocking such reforms estimate that it serves their interest to abide by the limits imposed by increased judicial intervention in political sphere”.<sup>33</sup> Eoin Daly has questioned judicial supremacy by pointing out the lack of transparency resulting from the fact that using the adjudicative form for legislative function which causes obfuscation and esotericism.<sup>34</sup>

Mark Tushnet has tried to balance between “political constitutionalism” and “judicial constitutionalism” as offering “weak form of judicial review” with “iterative nature” as a solution.<sup>35</sup> In his analysis, “weak form” means that the judicial review can step in circumstances such as “legislative inertia” or political parties’ competition for constitutional issues.<sup>36</sup> It also means that legislatures can change the judicial review decision through the general law or constitutional amendments depending on the context.<sup>37</sup> He believes the weak-form of judicial review is good for the enforcement of economic and social rights, and even for civil and political rights.<sup>38</sup>

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<sup>26</sup> R. Dworkin, *The Majoritarian Premise and Constitutionalism*, Philosophy and Democracy: An Anthology, Oxford University Press, 242-244 (2003); Jeremy Waldron, *Law and Disagreement*, Oxford University Press, New York, (1999).

<sup>27</sup> Ibid, at 244-247.

<sup>28</sup> Supra 23, at 316.

<sup>29</sup> M.E.K. Hall, *Judicial Review as A Limit on Government Domination: Reframing, Resolving and Replacing the (Counter) Majority Difficulty*, 14:2 Perspectives on Politics, 404 (2016).

<sup>30</sup> Ibid.

<sup>31</sup> Supra 23, at 13-14; Jeremy Waldron, *Law and Disagreement*, Oxford University Press, New York, (1999).

<sup>32</sup> Supra 23, at 15-16; Richard Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, Cambridge University Press, London (2007).

<sup>33</sup> R. Hirschl, *Towards Juristocracy: The Origins and Consequence of the New Constitutionalism*, Harvard University Press, 11 (2007).

<sup>34</sup> E. Daly, Transparency as A Justification for Legislative Supremacy, *Critical Review of International Social and Political Philosophy*, Routledge, <https://doi.org/10.1080/13698230.2018.1497247>, 1-25 (2018), last accessed on 01/08/2020.

<sup>35</sup> M. Tushnet, *The Relationship between Political Constitutionalism and Weak-Form Judicial Review*, 14:12 German Law Journal, 2249-2255 (2013).

<sup>36</sup> Ibid, at 2251-2256.

<sup>37</sup> Ibid, at 2250.

<sup>38</sup> Ibid, at 2258-2261.

The debate is not only with legislative supremacy or judicial supremacy in the constituted form but also with the balance between the “constituent power” and “the constituted form” in the constitutional transformation and adaptation. The “tension linking” and also “the question of priority” between “constituent power” and “constituted form” has been defined as the centrality of all forms of the paradox of constitutionalism.<sup>39</sup> This is involved with the balance of what can be changed and what cannot be changed in the constitution (the people in the constitution drafting era as contrasted with the people today) and with “how the attribution of legislation by constituent power to a collective can take on the form of collective self-attribution” (how to define “we” as collective political identity).<sup>40</sup>

Scholars of popular constitutionalism prioritize the constituent power over constituted power including the judiciary. Larry Kramer is the leading scholar on popular constitutionalism. In 2002, he had the Jorde lecture which was later written into a paper on popular constitutionalism to contest the judicial supremacy.<sup>41</sup> He summarized the critics about judicial usurpation of people’s role in constitutional interpretation and believed that some form of popular constitutionalism is inevitable.<sup>42</sup> In 2004, he published his book on the same topic with rich historical analysis and continue the argument that it is not legislature or judiciary to have the final say about constitution but the people themselves.<sup>43</sup>

### 2.3. *Summary and Analysis*

From this review of literature, it is clear that the early discussion on constitutionalism mainly focused on achieving popular sovereignty and the supremacy of constitutional law. The goal has almost been achieved in most countries of the world today. Now, the discussion is mainly around what could be the best constituted form to reflect popular sovereignty and how to balance the constituted form and constituent power in constitutional development.

While there are various constituted forms for the popular sovereignty little agreement has reached on what is the best form. Each has the weakness from the functional perspective. Yale Law School Professor Bruce Ackerman argued that American style of separation of powers should not be a model for other countries whereas the “constrained parliamentarianism” model practiced in several countries including India “offers a more promising path for constitutional development”.<sup>44</sup> However, Indian scholars such as Upendra Baxi have raised the concern about the big shift from jurisprudence to *demoprudence* through judicial activism “in the absence of judicial self-discipline and in the full absence of a degree of judicial consistency” in India.<sup>45</sup> While comparing the constitutional review through centralized constitutional courts vis-à-vis the constitutional review through ordinary courts, European scholars such as Victor Ferreres Comella have observed that specialized constitutional courts are institutionally fragile for not being indispensable like ordinary courts, for lacking buffer

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<sup>39</sup> Supra 16, at 1

<sup>40</sup> Ibid, at 17-19.

<sup>41</sup> L.D. Kramer, *Popular Constitutionalism*, 92:4 California Law Review, 959-1012 (July 2004).

<sup>42</sup> Ibid, at. 960.

<sup>43</sup> L.D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford University Press, 2004.

<sup>44</sup> B. Ackerman, *The New Separation of Powers*, Harvard Law Review Vol. 113 No. 3, 2000, pp. 633-725.

<sup>45</sup> U. Baxi, *Law, Politics, and Constitutional Hegemony: the Supreme Court, Jurisprudence and Demoprudence*, in Sujit Choudhry and et al (Ed.) *The Oxford Handbook of the Indian Constitution*, Oxford University Press, 2016, New Delhi, p.109.

zone or strategy of avoidance in selecting cases and in making decisions through reconstructive constitutional interpretation.<sup>46</sup>

Furthermore, scholars are upset to see the demise of liberal constitutionalism marked by “the June 2016 Brexit referendum in the United Kingdom and the November 2016 presidential election in the United States”.<sup>47</sup> The recent World Value Survey even shows a more problematic trend that citizens in North America and West Europe especially among young generation and wealthier persons are more cynical about the liberal values.<sup>48</sup> More and more countries have been “seen partial or full-blown moves toward authoritarianism”.<sup>49</sup> Given the above-mentioned scenario, it is very hard to define what is the best constituted form for popular sovereignty from the practical purpose.

Beyond the debate of the best constituted form under the modern constitutionalism, the debate around whether people’s sovereignty just means the constituted form is also worthy of attention. However, for scholarship on popular constitutionalism, their weakness is trying to separate constituted form from constituent power in terms of constitutional development. The author believes they cannot be separated easily. On one hand, public interest litigation and street mass movement still rely on the constituted form. On the other hand, the magnitude of the scale and degree of destruction of constitutional movement depends on how much confidence citizens still have in the constituted form to respond to them. For example, in the case of racial discrimination, the civil rights movements and the judicial response of *Brown v. Board of Education*<sup>50</sup> supplemented each other well. Similarly, the scale and degree of street movement sparked by the death of George Floyd, is different from the movements that were undertaken sixty years ago. This difference arises from the difference in the people’s perception regarding how they are governed today.<sup>51</sup>

Based on the above analysis, even though we could comb the line of theoretical development on constitutionalism it is still very hard to define the concept of constitutionalism which is very capacious like the concept of “rule of law”. In order to better define the concept of rule of law, scholars have used the technique such as “thin” version versus “thick” version; or “minimum” version versus “aspirational” version.<sup>52</sup> By referring to this technique of defining concepts with ambiguity and elasticity, the author would like to define the thin version of constitutionalism with the following parameters: (1) Pursuing rule of law with the Public Recognition of Constitution as the Supreme Law; (2) Reflecting popular sovereignty in the constituted form; and (3) Creating an institution to look after the constitution enforcement but also leaving space for constituent power to drive constitutional development.

The paper will rely on this framework to examine the constitutionalism in mainland China.

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<sup>46</sup> V.F. Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, *Texas Law Review*, Vol. 82(2004), pp. 1705-1736.

<sup>47</sup> T. Ginsburg, Aziz Z. Huq and Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, *The University of Chicago Law Review*, Vol. 85, No. 2 (March 2018), pp. 240-241.

<sup>48</sup> *Ibid.*, at 243.

<sup>49</sup> *Ibid.*, at. 241.

<sup>50</sup> *Brown v Board of Education of Topeka*, 347 U.S. 483.

<sup>51</sup> K.G. Bates, *Similarities And Differences Of George Floyd Protests And The Civil Rights Movement*, NPR, June 4, 2020, <https://www.npr.org/2020/06/04/869952367/similarities-and-differences-of-george-floyd-protests-and-the-civil-rights-movem>, last accessed on 02/08/2020.

<sup>52</sup> P. Rijkema, *The Rule of law beyond Thick and Thin*, 32:6 *Law and Philosophy*, 793-816 (November 2013).

### **3. The Constitutional Evolvement in the PRC**

From the founding of the PRC, there has been one transitional constitutional document, four constitutions and five constitutional amendments. This shows how the CPC has gone through the turbulent transitions from a revolutionary party to a ruling party with the responsibility of providing state welfare, respecting and protecting human rights, and maintaining law and order of the society with the respect of Constitution as the Supreme Law.

#### *3.1. Struggles of Establishing the Constitutional Order during 1949-1978*

After the civil war, Kuomintang (KMT Party) fled to Taiwan and the PRC was established under the leadership of CPC on October 1, 1949. The CPC abolished all the laws enacted in the Republic of China under the leadership of KMT. Before the first Constitution was enacted, the Chinese People's Political Consultative Conference (CPPCC) served as the Supreme Power of the PRC.<sup>53</sup> CPPCC<sup>54</sup> convened on Sep. 21<sup>st</sup> 1949 and passed the *Common Program of CPPCC* as the guiding constitutional document for the transitional period. As to the length of the transitional period, the original plan was to remain indefinite.<sup>55</sup> At the transitional period, CPC shared powers with other democratic parties and non-party personages such as two thirds of ministers in cabinet being held by the democratic.<sup>56</sup>

However, Stalin tried to persuade the CPC three times in 1949, 1950 and 1952 to hold the elections and to pass the constitution following the model of the Soviet Union as early as possible.<sup>57</sup> The key arguments from Stalin was two folds. First, he argued that the CPC lacked legitimacy without national election and a formal constitution.<sup>58</sup> Second, he argued that the multi-party government posed risks to the CPC's future ruling. These were persuasive to Mao Zedong. The CPC took the suggestion of Stalin and put constitutional making as one of the three main tasks in 1953.<sup>59</sup>

The 1954 constitution was passed on June 14, 1954. This laid the foundation for the key institutional framework of PRC even for today. However, the 1954 Constitution played a very limited role in checking power abuse and avoiding political turbulence. For example, it was helpless in checking the anti-rightist movements in 1958 which substantially curtailed the

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<sup>53</sup> Xinhua, *Backgrounder: Chinese People's Political Consultative Conference*, 03/03/2014, [http://www.chinadaily.com.cn/china/2014npcandcppcc/2014-03/03/content\\_17317558.htm](http://www.chinadaily.com.cn/china/2014npcandcppcc/2014-03/03/content_17317558.htm), last accessed on 02/08/2020.

<sup>54</sup> The CPPCC is a patriotic united front organization of the Chinese people, serving as a key mechanism for multi-party cooperation and political consultation under the leadership of the Communist Party of China (CPC). After 1954, its role is to "conduct political consultation, exercise democratic supervision and participate in the discussion and the handling of state affairs. See Xinhua News, 2014.

<sup>55</sup> G. Tiffert, *Epistrophy: Chinese Constitutionalism and the 1950s*, UC Berkeley Previously Published Works, 12-13, <https://escholarship.org/content/qt0rm248nk/qt0rm248nk.pdf>, last accessed on 02/08/2020. See C. Liu, *The Development of Chinese Constitutionalism*, 48:2 St. Mary's Law Journal p. 204 (2016). (The argument for not making the constitution within a short period is for the two considerations: Capitalist and small property owners still dominated the economy which would make the socialist constitution not fit; the Constitution dominated by the CPC could alienate the democratic who are important for the recovery of the civil war.)

<sup>56</sup> C. Liu, *The Development of Chinese Constitutionalism*, 48:2 St. Mary's Law Journal 204 (2016). p. 203.

<sup>57</sup> D. Han, *The Making Process of 1954 Constitution of PRC*, Law Press China, 63-64 (2014); Also see Supra 55, at 12-13.

<sup>58</sup> Supra 55, at 13.

<sup>59</sup> Supra 57, at 69.



freedom of expression.<sup>60</sup> It could not stop the Culture Revolution which dragged China into the political tragedy for the next 10 years.<sup>61</sup> Sadly, the constitution itself was discarded in 1975 and was replaced by the 1975 Constitution which was the endorsement of Mao's ideology for the Culture Revolution.<sup>62</sup> The 1975 constitutional was treated as "a radical instrument" by comparing to the 1954 constitution and even to the ones of other Communist States.<sup>63</sup> Among the many reflections, one of the key weakness of the Constitution is lack of enforcement mechanism.<sup>64</sup> After the Culture Revolution, the CPC proposed another constitution in 1978. However, it was soon realized that the 1978 constitution was still based on revolution mindset which made few changes to the 1975 constitution.<sup>65</sup> The few changes made were for ensuring institutional check but not for protecting fundamental rights such as property rights.<sup>66</sup>

### 3.2. *The 1982 Constitution and the Transition from Revolution to Ordinary Constitutional Order*

Then in 1982, another constitution was made which is still in use today. The 1982 constitution admitted that socialism could not be easily achieved within a short period and that the whole country needs to shift from the mindset of revolution to economic development and society building which helps restore the law and order after the Culture Revolution. Freedom of strike and freedom of migration which were in 1975 Constitution and 1978 Constitution was removed.<sup>67</sup> Due to the serious abuse of fundamental rights in the Culture revolution, the 1982 Constitution placed fundamental rights and duties before the State Structure and right after the Preamble and General Principles to show the priority of protecting fundamental rights.<sup>68</sup>

This constitution added to Preamble that, "it is the fundamental law of the State and has supreme legal authority". Furthermore, in the main body of the Constitution, Article 5 further emphasizes the Supremacy of the Constitution. The provision is clear: "[n]o laws or administrative or local regulations may contravene the Constitution." It also adds "[a]ll 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." It further emphasizes that, "[n]o organization or individual is privileged to be beyond the Constitution or other laws." This is also drawn from the lesson from the Culture Revolution which ignore the Constitution 1954 at all. Later we will also introduce that Article 5 was amended with adding one more section of commitment to the rule of law building in the Amendments 1999.

Another significant part learned from the Culture Revolution is to strengthen institutional building for constitutional enforcement. In the Constitution (1954), NPC was the only body granted with the power to supervise the constitution enforcement. However, NPC is composed part-time deputies who only meet once a year for ten days or two weeks. In order to make it function, a permanent acting body of NPC named Standing Committee of NPC

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<sup>60</sup> Supra 56, at 217-222

<sup>61</sup> Supra 56, at 222-226.

<sup>62</sup> Supra 56, at 226.

<sup>63</sup> J. Cohen, China's Changing Constitution, *China Quarterly*, 803 (1978).

<sup>64</sup> Supra 57, at 476.

<sup>65</sup> Supra 63, at 805.

<sup>66</sup> Supra 63, at 805-810.

<sup>67</sup> Y. Shu & J. Yu, *Thirty Years of Chinese Legal Studies*, Sun Yat-sen University Press, 80-90 (2008).

<sup>68</sup> D. Han, *Sixty Years of Chinese Constitution Evolvement*, Guangdong People's Press 207-208 (2009).

(NPCSC) was established which had relatively minor power.<sup>69</sup> But it didn't prevent the Culture Revolution. Learned from the profound lesson of the Culture Revolution, the Constitution (1982) gives exclusive power of constitutional interpretation and the joint power of supervising constitutional enforcement to NPCSC which was interpreted as institutional building for constitutional enforcement.<sup>70</sup>

Since the constitution (1982) was drafted at the early stage of "opening up and reform", it is inevitable that "certain parts unavoidably exhibit certain political overtones".<sup>71</sup> However, the follow-up constitutional developments were not through the rewriting of the constitution but through constitutional amendments. From 1982, the constitution has been amended five times (in 1988, 1993, 1999, 2004 and 2018) to match the evolving development of market economy and social transformation.

The main purpose of 1988 amendments was to further legitimize the private economy and the transfer of land rights. For example, the fourth paragraph of Article 10 of the Constitution, which provides that "no organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means," has been amended to: "[n]o organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law."<sup>72</sup>

The 1993 amendment formally institutionalized "market economy" over "planned economy" and changed structures and terms for business entity and rural units, such as replacing "planned economy" with "socialist market economy", replacing "state-run economy" with "state-owned economy" and replacing "rural people's communes and agricultural producers' cooperatives" with "responsibility system in rural areas, mainly the household contract responsibility system with remuneration linked to production".<sup>73</sup> It also adds in the preamble that "[t]he system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come", which is important for creating long-term space of multi-party cooperation.<sup>74</sup>

"All of the 1999 amendments arose out of the demand for meaningful reform in the economy, politics, and social welfare."<sup>75</sup> For example, in the Preamble, Deng Xiaoping Theory was added to the guiding principles which is to institutionalize the market economy efforts.<sup>76</sup> But it also opens the door for all the following leaders to add their guiding theories to the Preamble of the Constitution.<sup>77</sup> In addition, the concept of rule of law is strengthened. A new paragraph is added to Article 5 of the Constitution that "[t]he People's Republic of China governs the country according to law and makes it a socialist country under rule of law". It also

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<sup>69</sup> D. Cai, *Constitutional Supervision and Interpretation in the People's Republic of China*, Journal of Chinese Law No. 9, 220 (2005).

<sup>70</sup> Supra 69, at 222.

<sup>71</sup> Q. Zhang, *On the Selective Application of the Chinese Constitution*, 2:1 Peking University Law Journal, 2 (2014).

<sup>72</sup> M. Jihong, *The Constitutional Law of the People's Republic of China and Its Development*, 23 Columbia Journal of Asian Law, 144 (2009-2010).

<sup>73</sup> Ibid, at 145.

<sup>74</sup> Supra 68, at 227.

<sup>75</sup> Supra 72, at 145.

<sup>76</sup> Supra 68, at 235-237.

<sup>77</sup> Such as Jiang Zemin's Theory of Three Represents, Hu Jintao's Scientific Outlook of Development and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era.

clearly mentioned that private economy is a healthy supplement to state-owned economy and that the state protects the rights and interest of private economy.<sup>78</sup>

The constitutional amendment of 2004 focused on rights, such as bettering the land acquisition system, clearly proposing to encourage, support and guide the development of private economy, to improve the system or private property protection, to expand social security system. More importantly, it adds one section to Art. 33 in the chapter of fundamental rights and duties, that “[t]he State respects and protects human rights.”<sup>79</sup>

The most recent amendment efforts were made in 2018 which was slightly different from the early four amendments. The earlier amendments focused on universalism such as market economy, rule of law and human rights. The 2018 amendments are a mix of universalism such as strengthening constitutionality review, and culture particularism such as strengthening Chinese political identities of party-state. The main content of the reforms include: (1) Updating the guiding principles of the CPC into the Preamble; (2) Further strengthening the party leadership which were mentioned both in the Preamble and also in the Article 1 of the Constitution; (3) Creating a new institution named National Supervision Commission which reports to the National People’s Congress together with the State Council, Supreme People’s Court and Supreme People’s Procuratorate; (4) Changing Law Commission into Constitution and Law Commission (CLC) which is expected to take the role of constitutional review in China.<sup>80</sup> In fact, there is another important amendment in 2018 which is to remove term limit for President and Vice-president of the Country. However, almost all Chinese scholars writing on the 2018 Amendments avoided commenting on it in their open publications.

By reviewing the constitutional development history, it is evident that that after the PRC’s founding, at the initial stage (1949-1978), the struggles were between the institutional building and the ideology of utopian society with the complex of factional fighting and divergent understanding for the path to achieve socialism and communism. During the Cultural Revolution, it seemed that the state gave enough liberty and freedom to street movements which were easily manipulated by demagogue and finally turned the society into widespread mob lynching and social disorder for 10 years.

After the Culture Revolution, in the process of transition from political fever to market economy (1978-2018), CPC paid good attention to the role of constitution in a pragmatic and evolving way which help slowly create law and order in China. The main thread of constitutional development reflected by the four amendments is toward market economy and some form of constitutional democracy. As to the most updated constitutional amendments in 2018, it sent mixed signals about the Chinese constitutional trend. While it emphasizes the role of constitution in governance such as strengthening constitutionality review it also changes some content which may not be in line with the political democracy envisioned by Deng Xiaoping as the Chinese Reform Designer. This might be one of the reasons that some scholars

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<sup>78</sup> Supra 68, at 241-243.

<sup>79</sup> Supra 68, at 247-249.

<sup>80</sup> Q. Qin, *2018 Constitutional Amendments and the Rule of Law Development in the New Era in China*, China Parliament, No. 11, 4-6 (2018); See *Annotated Translation: 2018 Amendment to the P.R.C. Constitution (Version 2.0)*, NPC Observer, <https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/>, last accessed on 02/08/2020.

argued that even today's constitutional order is still revolution based, not completely shifted to the standard constitutional order.<sup>81</sup>

#### **4. The Constituted Form in the 1982 Constitution and the Analysis from the Perspective of Popular Sovereignty**

While there are explicit words in the constitution (1982) to embrace popular sovereignty the constituted form to implement it is different from the theories of liberal constitutionalism. In this part, the author shall introduce the constituted form for popular sovereignty and shall also provide the analysis through scholarly theoretical frameworks.

##### *4.1. Texts About the Nature of the State and Constituted Power Structure*

The nature of the State and the general principles of the power arrangement are mainly written in the Preamble and Chapter I of the General Principles. As to the specific arrangement of the state organs, it is in Chapter III.

The Chinese constitution has the longest Preamble in the world. As Prof. Quanxi Gao emphasized, "without first interpreting the constitution's preamble, no real conclusions about the current constitution of China can be drawn".<sup>82</sup> He views the preamble as the "core of the constitution which forms an organic constitutional structure together with other parts of the constitution".<sup>83</sup>

The Preamble, after combing the long struggle of political modernization after the Opium War also highlights what had been achieved through the socialist revolutions. It is then clarified that, "The basic task of the nation [after the Culture Revolution] is to concentrate its effort on socialist modernization along the road of Chinese-style socialism." After that it emphasizes the leadership of CPC, the guiding theories (ideology) and the goal of the nation building.

Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents and the Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road, persevere in reform and opening to the outside world, steadily improve socialist institutions, develop the socialist market economy, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize the country's industry, agriculture, national defence and science and technology step by step and promote the coordinated development of the material, political and spiritual

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<sup>81</sup> Q. Gao, *Revolution, Reform & Constitutionalism: The Evolution of China's 1982 Constitution*, 2:1 Peking University Law Journal, 27-57 (2014).

<sup>82</sup> Ibid, at 31.

<sup>83</sup> Ibid.

civilizations, to turn China into a socialist country that is prosperous, powerful, democratic and culturally advanced.<sup>84</sup>

Then the Preamble states that even though CPC plays the leadership in the nation building it is necessary to build the United Front to support CPC's ruling:

In building socialism it is essential to rely on workers, peasants and intellectuals and to unite all forces that can be united. In the long years of revolution and construction, there has been formed under the leadership of the Communist Party of China a broad patriotic united front which is composed of the democratic parties and people's organizations and which embraces all socialist working people, all builders of socialism, all patriots who support socialism, and all patriots who stand for the reunification of the motherland.<sup>85</sup>

In order to make the United Front function in an institutionalized way is stated that the role of Chinese People's Political Consultative Conference is that of a broad-based representative organization. As mentioned in Part II the amendment of 1993 makes it a system for long.

The Chinese People's Political Consultative Conference, a broadly based representative organization of the united front which has played a significant historical role, will play a still more important role in the country's political and social life, in promoting friendship with other countries and in the struggle for socialist modernization and for the reunification and unity of the country.<sup>86</sup>

Chapter I General Principles the nature of the state and the guiding principles of power arrangement is re-emphasized. Article 1 Section 1 says:

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."<sup>87</sup> Section 2 says, "The socialist system is the basic system of the People's Republic of China. *The defining feature of socialism with Chinese characteristics is the leadership of the Communist Party of China.*"<sup>88</sup> (Emphasis supplied)

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<sup>84</sup> Constitution of the People's Republic of China, [http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content\\_1372962.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372962.htm), last accessed on 02/08/2020.

<sup>85</sup> Ibid.

<sup>86</sup> Constitution of the People's Republic of China, [http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content\\_1372962.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372962.htm), last accessed on 02/08/2020.

<sup>87</sup> Ibid.

<sup>88</sup> The second part of the section was added in the 2018 Amendment. See *Annotated Translation: 2018 Amendment to the P.R.C. Constitution (Version 2.0)*, NPC Observer, <https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/>, last accessed on 02/08/2020. The bracketed part was added in March 2018 Amendments. This matches the opening paragraph of CPC's Constitution which says "The Communist Party of China is the vanguard of the Chinese working class, the Chinese people, and the Chinese nation. It is the leadership core for the

Article 2 Section 1 says: “All power in the People’s Republic of China belongs to the people.” Article 2 Section 2 says: “The National People’s Congress and the local people’s congresses at various levels are the organs through which the people exercise state power.” Article 57 says 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.” Article 2 Section 3 says “The people administer State affairs and manage economic and cultural undertakings and social affairs through various channels and in various ways in accordance with the provisions of law”<sup>89</sup> which focuses on the importance of the law.

Article 3 has four sections. Section 1 says: “The State organs of the People’s Republic of China apply the principle of democratic centralism.” Section 2 says: “The National People’s Congress and the local people’s congresses at various levels are constituted through democratic elections. They are responsible to the people and subject to their supervision.” Section 3 says: “All administrative, *supervisory*<sup>90</sup>, adjudicatory, and procuratorial organs of the State are created by the people’s congresses, to which they are responsible and by which they are overseen.”<sup>91</sup> And Section 4 says: “The division of functions and powers between the central and local State organs is guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities.”

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cause of socialism with Chinese characteristics and represents the developmental demands of China’s advanced productive forces, the orientation for China’s advanced culture, and the fundamental interests of the greatest possible majority of the Chinese people;” See *Constitution of the Communist Party of China*, 10:1 Qiushi Journal (January-March 2018), available at [http://english.qstheory.cn/2018-02/11/c\\_1122395578.htm](http://english.qstheory.cn/2018-02/11/c_1122395578.htm), last accessed on 02/08/2020.

<sup>89</sup> The Constitution of the People’s Republic of China, available at [http://english.www.gov.cn/archive/laws\\_regulations/2014/08/23/content\\_281474982987458.htm](http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987458.htm), last accessed on 02/08/2020.

<sup>90</sup> Added in 2018 constitutional amendments.

<sup>91</sup> The highlighted part was added in March 2018. See *Annotated Translation: 2018 Amendment to the P.R.C. Constitution (Version 2.0)*, NPC Observer, available at <https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/>, last accessed on 02/08/2020.

The power structure reflecting the Chinese version of Popular Sovereignty in the constituted form can be depicted as follows:

Figure 1: Popular Sovereignty and Its Forms of Representation (Political Power)

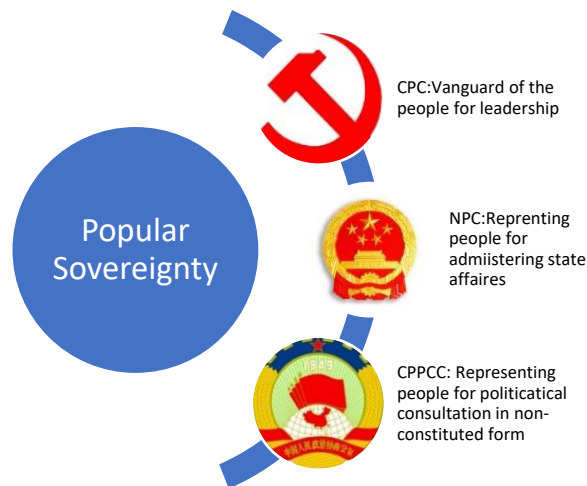
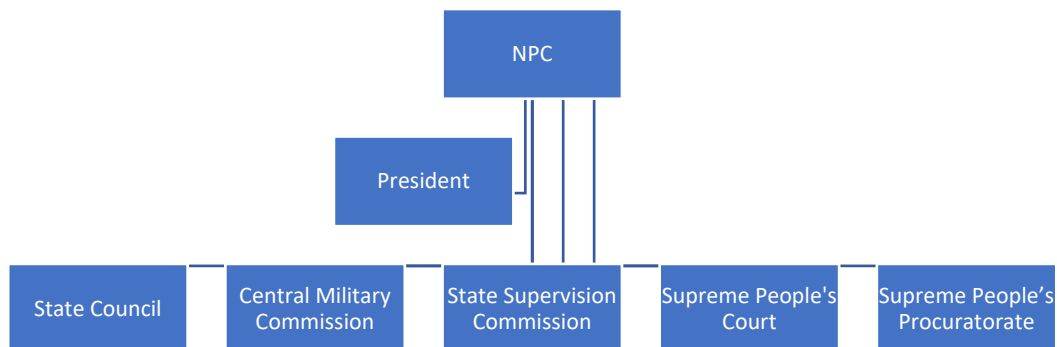


Figure 2: PRC Constitution and Parliamentary Sovereignty (Administrative Power)



#### 4.2. Conceptual Frameworks for Analyzing the Power Structure in Chinese Constitution 1982

The Chinese power structure and its reflection of popular sovereign is very different from the liberal constitutionalism. There have been some academic efforts to develop a conceptual framework to understand it. The paper delves into two such conceptions. The first is the political power/ administrative power structure constructed by an American scholar named Lary Cata Backer. Backer tries to consolidate the CPC and the PRC Constitution into the framework that places political power with the CPC and the administrative power with the

State. He believes that the Chinese constitution “exists as a combination of polity and governing ideology on the one hand and state apparatus on the other”<sup>92</sup> in which “the repository of political power” is with the “the party” and “the repository of administrative power” is with “the government”.<sup>93</sup>

This means that the discussion of PRC constitutionalism shall not only be based on PRC Constitution but also includes the CPC Constitution. As Creemers pointed out, legal scholars on Chinese constitutionalism usually ignore the CPC about its ideology, organization and theory.<sup>94</sup> It is easy to understand why it is so essential to understand the CPC’s ideology, organization and theory. The CPC leads the efforts to design, interpret and implement the constitution on behalf of the people. For example, “the National People’s Congress amended the constitution every time after the Party’s National Congress adopted a crucial resolution”.<sup>95</sup> Meanwhile, CPC is an organization which has her own functional logic bound by her own constitution. This is why Creemers has emphasized that “It is in the Party Constitution that we find many of the substantive norms and epistemological claims that give meaning to the terminology in which law is conceived and discussed.”<sup>96</sup>

From this design, some clues from Backer’s framework of dividing political power and administrative power can be found. First, it uses two different articles to talk about the different powers based on its nature. Political power belongs to the working class led by the CPC as the Vanguard of the working class. Administrative power is exercised through the NPC and people’s congresses at different levels as well as the bodies responsible to them. Second, it also uses different principles for the power exercise. For political power it is applied through the principle of “people’s democratic dictatorship”. For the administrative power, the principle is “democratic centralism”. Third, we can find that the term following the “administrative, supervisory, adjudicatory, and procuratorial” is “organs of the State” not “power”. This is another evidence to show the difference between political power and administrative function.

It is also worthy of notice that the PRC constitution puts “All power in the People’s Republic of China belongs to the people” into the second article. This article alludes to administrative power and not the first article, which talks about political power. One explanation for this framing might be that 1982 Constitution is still a transitional one which keeps some flavor of revolution mindset. Beginning with the CPPCC Common Program, the Chinese Constitution differentiates people from citizens to grant them different scope of constitutional rights especially for civil and political rights.<sup>97</sup> In the early days, big landlords, big bourgeois, people who are against socialism were not treated as part of the people whose political rights were abridged.<sup>98</sup> This can also partly explain the logic of “people’s democratic dictatorship”.<sup>99</sup>

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<sup>92</sup> L.C. Backer, *Party, People, Government and State: on Constitutional Values and the Legitimacy of the Chinese Party-State Rule of Law System*, 30 Boston University International Law Journal, 343 (2012).

<sup>93</sup> Ibid.

<sup>94</sup> R. Creemers, *China’s Constitutionalism Debate: Content, Context, and Implications*, 74(1) *The China Journal* (1 2015), at 108-109.

<sup>95</sup> *Supra* 81, at 36.

<sup>96</sup> *Supra* 94, at 109.

<sup>97</sup> Z. Xianyi & Z. Jinfan, *Brief Introduction to Chinese Constitutional History*, Beijing Press, 243 (1979).

<sup>98</sup> Ibid.

<sup>99</sup> Z. Anping, L. Xudong & Z. Yunfen, *The Constitutional Journey of PRC: Problems, Response and Texts*, *People’s Publisher*, 85, 189 (2017).



The second conception of the Chinese power structure is the “Three Types of Representations” which was constructed by Chinese scholars such as Gao Quanxi and Tian Feilong. They categorize the people’s sovereignty of PRC into three types of representations: “the Representation of Leadership by the Communist Party of China in the sense of truth, plus the People’s Representative Congress in the sense of procedure, plus Participatory Democracy in the non-representative sense”.<sup>100</sup>

The “Three Types of Representation” helps to understand the mixed arrangement of constituted form and constituent power in the Chinese Constitutional designing. However, among the three representations, NPC is the only one which has been clearly constituted by the PRC Constitution. CPC is half constituted through the PRC Constitution. And CPPCC is only constituted in the Preamble.

The PRC Constitution formally grants the following powers to the NPC: (1) prescribe NPC as the highest organ of the state; (2) establish NPCSC as the permanent body of NPC; (3) prescribe NPC to supervise all administrative, supervisory, adjudicatory, and procuratorial organs of the State; (4) develop a long list of functions in Art. 62 for NPC and Art. 67 for NPCSC; (5) gives NPCSC the function of constitution interpretation and give NPC and NPCSC to supervise the enforcement of the Constitution; (6) set terms and elections for the NPC and People’s Congress at lower levels. It is worthy of notice here is that people’s congress is not just a legislative body but as the entry body for people to exercise their power at five levels from national level to township level.

It is evident that the form and function of NPC are very well structured in the constitution which is supposed to function well. However, from the three types of representations we can see that NPC is just one type of popular sovereignty representation. Since the other two types of representation were not constituted clearly in the main body of the PRC Constitution and their relationship with the NPC was not clearly defined, their relationship is ambiguous which will cause confusion how they really function to better the quality of popular sovereignty.

Before the 2018 Constitutional Amendments, CPC was mentioned only in the Preamble.<sup>101</sup> The Preamble mentioned CPC in three places: first, in the leadership for “the victory in the New-Democratic Revolution and founding the People’s Republic of China”. Second, in the leadership in the “victory in China’s New-Democratic Revolution and the successes in its socialist cause”. Third, in leadership role in the “broad patriotic united front. The third reference is composed of the democratic parties and people’s organizations and which embraces all socialist working people, all builders of socialism, all patriots who support socialism, and all patriots who stand for the reunification of the motherland”. The 1993 constitutional amendments added the fourth reference that “The system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come”. But this is still in the Preamble.<sup>102</sup> Only in the amendments of 2018 was “the leadership of the Communist Party of China” added in the main body of the constitution which is in Art.1 Sect. 2.

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<sup>100</sup> Supra 81, at 43; See T. Feilong, *Chinese Version of Political Constitutionalism*, CITYU HK Press, 49 (2017).

<sup>101</sup> Ibid.

<sup>102</sup> Tracking Constitutional Amendments in People’s Republic of China, Law Press China, 63 (2004).

In contrast to the role of CPC, the role of CPPCC in Chinese Constitutionalism has been little explored in scholarship, especially after 1982. As mentioned in Part 1, CPPCC used to be the Supreme Power of PRC before the 1954 Constitution. Later, the reference of CPPCC was only mentioned in the preamble of 1954 and 1982 Constitution.

For CPPCC, the Preamble has a clear description of it.<sup>103</sup> Through the press releases of the state we can understand the nature of CPPCC in a more detailed way: (1) as “an organization in the patriotic united front of the Chinese people”; (2) as “an important organ for multi-party cooperation and political consultation under the leadership of the Communist Party of China”; and (3) as “an important means of promoting socialist democracy in China’s political activities”.<sup>104</sup> In summary, it is “an important platform on which various political parties, people’s organizations, and people of all ethnic groups and from all sectors of society work together in democratically participating in state affairs.”<sup>105</sup> However, the state press release also emphasized that CPPCC is “neither a body of state power nor a policymaking organ”.<sup>106</sup>

The main functions of the CPPCC are as follows: first is to conduct political consultation which “covers major principles and policies proposed by the central and local governments and matters of importance concerning political, economic, cultural and social affairs”; second is to “exercise democratic supervision” and; third is to “participate in the discussion and the handling of state affairs.”<sup>107</sup>

Even though CPPCC has been only referred in the preamble, in practice it has been institutionalized with structured organization, with regular budgets from the state and routine functional forms. CPPCC has four levels: at national, provincial, prefecture and county. All have their official websites ending with “gov.”, such as the national one <http://www.cppcc.gov.cn/>. All conduct elections of representatives<sup>108</sup> every five years. Every year they conduct the political consultation conference with all representatives from the country. CPPCC representatives have similar rights and duties as NPC deputies in the annual sessions. CPPCC conducted their session every year two or three days before the NPC session which enables them to deliver the suggestions to the NPC for discussion. As mentioned above, the preamble of the 1982 Constitution clearly points that the system of the multi-party cooperation and political consultation led by the CPC will exist and develop for a long time. It

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<sup>103</sup> “The Chinese People’s Political Consultative Conference, a broadly based representative organization of the united front which has played a significant historical role, will play a still more important role in the country’s political and social life, in promoting friendship with other countries and in the struggle for socialist modernization and for the reunification and unity of the country.” See *The Constitution of the People’s Republic of China*, available at [http://english.www.gov.cn/archive/laws\\_regulations/2014/08/23/content\\_281474982987458.htm](http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987458.htm), last accessed on 02/08/2020.

<sup>104</sup> Roles and functions of Chinese People’s Political Consultative Conference, *China Daily*, March 2017, available at [http://www.chinadaily.com.cn/china/2017twosession/2017-03/03/content\\_28422856.htm](http://www.chinadaily.com.cn/china/2017twosession/2017-03/03/content_28422856.htm), last accessed on 02/08/2020.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> There are 2151 representatives of CPPCC (national level) currently. The quota distribution of the representatives is proportional among 36 groups based on political parties, political organizations, professional fields and oversea Chinese. See *中国人民政治协商会议第十三届全国委员会委员名单*, available at <http://www.cppcc.gov.cn/zxww/2020/05/11/ARTI1589179608333237.shtml>, last accessed on 02/08/2020.

means that the research of CPPCC's role in the Chinese constitutionalism should be paid more attention.

However, to make the analysis framework of Tian and Gao meaningful, we need to further explore the membership composition of CPC, NPC and CPPCC. A further conceptual framework should be developed to assess how the degree of membership overlapping of the three would influence the quality of popular sovereignty.

## 5. Assessing Constitutionalism of PRC in the New Analysis Framework

In this part, the paper is going to refer to the parameters of a thin version of constitutionalism to discuss whether China has constitutionalism after the introduction to the constitutional evolvement and the constituted form for popular sovereignty in the current Constitution 1982.

### 5.1. Pursue Rule of Law with the Public Recognition of Constitution as the Supreme Law

This parameter can be further divided into two important parts-.from one side, the state has public recognition of the constitution as the supreme law; from the other side, the state shall pursue the rule of law with genuine efforts. The supremacy of the constitution, as introduced in Part II, is mentioned in two parts: the Preamble and Chapter 1 of the General Principle.

In the Preamble, it is stated that: "*it is the fundamental law of the State and has supreme legal authority*"<sup>109</sup> In the main body of the constitution, Art. 5 has five sections to emphasize: (1) the state's commitment to building socialist rule of law, (2) to uphold uniformity of legal system; (3) no law or regulations contravening the Constitution; (4) to investigate acts violating constitution; (5) no organization or individual above the constitution. <sup>110</sup>

The words of the Preamble and the General Principle provide good evidence that the Constitution (1982) embraces the Constitution as the supreme law in a public way. What is debatable is whether China has taken serious efforts for upholding the rule of law.

Rule of law itself is a very capacious concept. The definition varies a lot, depending on the purpose of using it. Some academic efforts have been made for defining it from difference perspectives. For example, based on the scholarship on the rule of law such as Joseph Raz and Robert Summers, Peerenboom develops the defining model of "thin" and "think" version.<sup>111</sup> There are scholars who are more ambitious to establish normative and prescriptive framework particular for the rule of law as a principle of law and as a principle of

<sup>109</sup> For more details of the Preamble of the Constitution (1982), please refer to the link: [http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content\\_1372962.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372962.htm).

<sup>110</sup> Art.1, Chapter 1, General Principle of Constitution (1982), available at [http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content\\_1372963.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372963.htm), last accessed on 03/08/2020.

<sup>111</sup> R. Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion, Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in twelve Asian Countries, France and the U.S.*, Routledge, London and New York, 1-55 (Randall Peerenboom, 2004).

governance, such as Peter Tijkema.<sup>112</sup> Reflected on the international program designing, Gordon summarizes the definition into minimalist version, a market-oriented version and a human rights-oriented version.<sup>113</sup>

In terms of assessing the Chinese rule of law, Peerenboom's thin and thick version is widely used. Peerenboom's thin conception stresses on "formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of democratic or non-democratic society, capitalist, liberal or theocratic."<sup>114</sup> The thick version is to add elements of political morality to the thin version which includes "particular economic arrangements (free-market capitalism, central planning, 'Asian developmental state', or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, 'Asian values' etc.)".<sup>115</sup>

The stakeholders' perspective of the definition has also been incorporated into several rankings such as the rule of law index ranking by the World Justice Project and the Ease of Doing Business Ranking by the World Bank. For example, multilateral lending institutions tend to interpret the rule of law in terms of its function: "well functioning markets require the support of a framework of clearly defined and effectively and predictably enforced legal rules and rights".<sup>116</sup> Human rights activists view the rule of law "as legal constraints on a state's authority to search, arrest, imprisonment, torture or kill persons in its jurisdiction".<sup>117</sup>

Based on scholarly assessment, China does have a thin version of the rule of law. In terms of the market-oriented rule of law, Chinese performance is better than many developing countries. For example, Peerenboom observes that, "China is now following the path of other East Asian countries that have achieved sustained economic growth, established the rule of law, and developed constitutional or rights based democracies, albeit not necessarily liberal rights-based democracies."<sup>118</sup> Some research in comparing the FDI policy in India and China also reveals that:

a country's (in this case, China's) disregard of the 'rule of law' in political governance may, ironically, allow it more effectively (1) to grant rule of law protections to investors and (2) to implement more efficient approval processes than a country such as India, which

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<sup>112</sup> P. Tijkema, *The Rule of Law Beyond Thick and Thin*, *Law and Philosophy*, 32:6, 793-816 (November 2013).

<sup>113</sup> R.W. Gordon, *The role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, Faculty Scholarship Series Paper 1397, 441-443, available at [http://digitalcommons.law.yale.edu/fss\\_papers/1397](http://digitalcommons.law.yale.edu/fss_papers/1397), last accessed on 03/08/2020.

<sup>114</sup> R. Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, *Randall Peerenboom, Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in twelve Asian Countries, France and the U.S.*, Routledge, London and New York, 2 (2004).

<sup>115</sup> *Supra* 114, at 4.

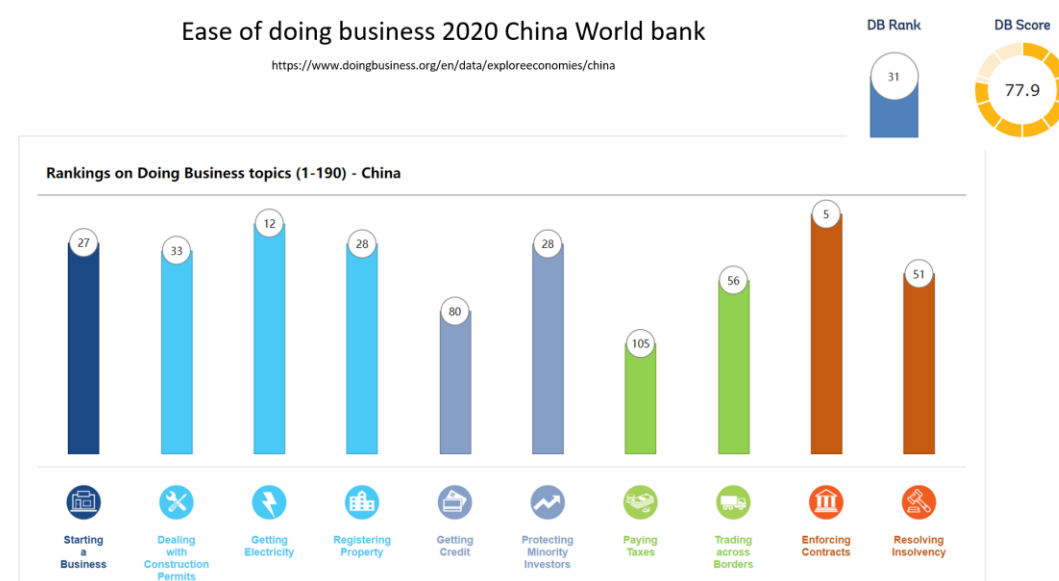
<sup>116</sup> R.W. Gordon, *The role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, Faculty Scholarship Series, Paper 1397, 442, available at [http://digitalcommons.law.yale.edu/fss\\_papers/1397](http://digitalcommons.law.yale.edu/fss_papers/1397) last accessed on 03/08/2020.

<sup>117</sup> *Ibid.*

<sup>118</sup> R. Peerenboom, *Law and Development of Constitutional Democracy: Is China a Problem Case?*, *The Annals of the American Academy of Political and Social Science*, series 603 Law, Society, and Democracy: Comparative Perspectives 193 (Jan., 2006).

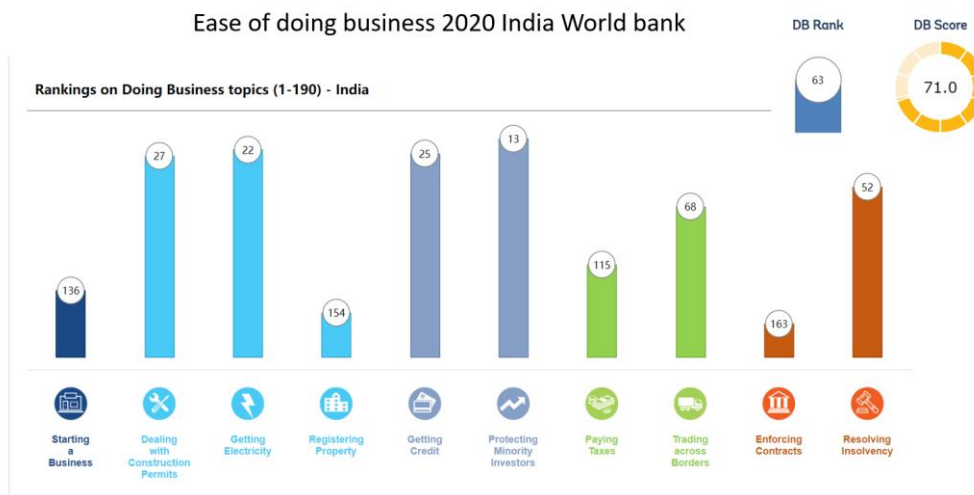
preserves rule of law at the highest levels of governance, yet at the expense of streamlined FDI statutory governance and approval procedures.<sup>119</sup>

A look at the Rule of Law Index Ranking and the Ease of Business Ranking in the last several years especially the most updated version in 2020, makes it evident that China is performing better as compared to many developing countries, including India, in terms of market oriented rule of law but poorer from human rights oriented version. Compared to India, we can see that China performs better in regulatory enforcement, contract enforcement, civil justice, criminal justice and regulatory enforcement while India has strength in government constraints, protection of fundamental rights and government transparency.<sup>120</sup>



<sup>119</sup> R. Sachdev, *Comparing the Legal Foundations of Foreign Direct Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context*, Columbia Business Law Review, 169 (2006).

<sup>120</sup> See Rule of Law Index Ranking 2020 in China by the World Justice Project, available at <https://worldjusticeproject.org/sites/default/files/documents/China%20-%202020%20WJP%20Rule%20of%20Law%20Index%20Country%20Press%20Release.pdf>; for India part, see <https://worldjusticeproject.org/sites/default/files/documents/India%20-%202020%20WJP%20Rule%20of%20Law%20Index%20Country%20Press%20Release.pdf>. For Doing Business Ranking 2020, for China's profile, see <https://www.doingbusiness.org/content/dam/doingBusiness/country/c/china/CHN.pdf>; for India's profile see <https://www.doingbusiness.org/content/dam/doingBusiness/country/i/india/IND.pdf>.



2020 Rule of law index in China and India

China

The scores range from 0 to 1, where 1 signifies the highest possible score and 0 signifies the lowest possible score.

Overall Score	Regional Rank	Income Rank	Global Rank
0.48	12/15	33/42	88/128
Score Change	Rank Change		
-0.01	-4		

Factor	Score	Score Change	Regional Rank	Income Rank	Global Rank
Constraints on Government Powers	0.32	0.00	14/15	40/42	123/128
Absence of Corruption	0.53	-0.02	8/15	15/42	51/128
Open Government	0.43	0.01	12/15	33/42	92/128
Fundamental Rights	0.29	-0.03	15/15	41/42	126/128
Order and Security	0.78	-0.01	8/15	9/42	40/128
Regulatory Enforcement	0.49	0.01	9/15	21/42	67/128
Civil Justice	0.53	-0.01	8/15	22/42	64/128
Criminal Justice	0.45	-0.02	10/15	21/42	62/128

\* Indicates statistically significant change at the 10 percent level

India

The scores range from 0 to 1, where 1 signifies the highest possible score and 0 signifies the lowest possible score.

Overall Score	Regional Rank	Income Rank	Global Rank
0.51	3/6	6/30	69/128
Score Change	Rank Change		
0.00	—		

Factor	Score	Score Change	Regional Rank	Income Rank	Global Rank
Constraints on Government Powers	0.61	0.00	1/6	3/30	41/128
Absence of Corruption	0.42	-0.01	2/6	9/30	85/128
Open Government	0.61	0.00	1/6	1/30	32/128
Fundamental Rights	0.51	-0.02	3/6	10/30	84/128
Order and Security	0.59	0.00	4/6	24/30	114/128
Regulatory Enforcement	0.49	0.00	2/6	8/30	74/128
Civil Justice	0.45	0.00	2/6	18/30	98/128
Criminal Justice	0.40	0.00	3/6	9/30	78/128

\* Indicates statistically significant change at the 10 percent level

From the above analysis, we can conclude that China openly announces that the constitution is the supreme law of the land. It has made a commitment and taken serious efforts for the rule of law building. In theory, scholars believe China has developed a thin version of the rule of law which, even if present in substance or in governance is not in line with the model of liberal democracy. In practice, the rule of law in China is more market oriented.

5.2. Reflecting Popular Sovereignty in Constituted Form

Part III, of the paper introduces how popular sovereignty has been reflected in the constituted form and also referred to the theoretical framework to understand it. However, the confusion or debate arises when one seeks to understand the combination of entrenching CPC's only leadership and popular sovereignty in the Constitution.

For interpreting the role of CPC and NPC in reflecting popular sovereignty, the two conceptual frameworks were introduced in Part III. These frameworks share the similar understanding. However, compared to Backer's one, Tian and Gao emphasise the CPPCC as a very important political form into the analysis. This difference in attitude toward CPPCC is largely caused by the difference of whether to treat CPPCC as a constituted form. For Gao and Tian, Chinese Preamble is an integrated part of the Chinese Constitution. Thus, CPPCC is a constituted form. However, Backer, recognizes that the CPC leadership in the Preamble but not gives attention to the role of CPPCC in participatory democracy.

The common challenge of both the conceptual frameworks is that they have not argued or debated on how to explain the logic of entrenching CPC's only leadership in the Constitution while openly embracing popular sovereignty. For understanding this, some academic efforts especially by scholars with deep knowledge of Chinese culture have been made.

One critical academic effort is to differentiate between the political legitimacy in Confucianism and liberal democracy. Chinese Confucianism scholar Mr. Jiang Qing has published a book to elaborate his theory about Confucian Constitutional Order.<sup>121</sup> In his theory, he has outlined the differences in the concept of political legitimacy in Confucianism (Human Authority) and in the liberal democratic model. In his comparison, he has listed three features of liberal democracy for political legitimacy- (the will of the people as the sole source of legitimacy; rule by a formal majority and; only aim is to meet the secular desires of the people.

In the human authority based on Confucianism, political legitimacy focuses on two key points. First, humane authority states that the legitimacy of political power (Zhengdao) comes from recognition and representation of the Way of heaven (higher values), history, and the popular will".<sup>122</sup> This means people's will is the source of the legitimacy but not the sole one. Second, the legitimacy of power exercising (Zhidao) is also important which requires practical ruling of achieving the harmony of heaven, earth and people.<sup>123</sup> Jiang argues that:

The political problem of the present time is not simply a matter of how to implement democracy. Indeed, as I see it, the problem is precisely the opposite. The political problem of today's world is that democracy itself presents a serious problem. So long as the will of the people is seen as the sole source of legitimacy, politics can never aim at implementing the good. Hence, the problem is not to implement democracy, as Fukuyama reckons, but how to change the basic principles of democracy and re-establish the principles of legitimacy. This is the most fundamental political issue facing humanity. In practice this means demoting popular legitimacy from its status as sole source of legitimacy and founding a new model of politics in which several kinds of legitimacy work together in equilibrium. This new form is precisely what the Way of the Humane Authority is about.<sup>124</sup>

Even though Jiang Qing's theory sounds ideal it does offer us some cultural insights to read the Chinese perception of the relationship between political legitimacy and popular sovereignty. The long Preamble, tracing the political modernization from Opium War of the

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<sup>121</sup> Q. Jiang, D.A. Bell, R. Fan, & E. Ryden, *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future*, Princeton University Press, 2012.

<sup>122</sup> *Ibid*, at 28.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid*, at 41-42.

Constitution, is the evidence to show how China values the legitimacy of culture and tradition. While incorporating the concept of the rule of law into the Constitution the CPC also proposes the rule of virtue as a ruling guideline. It was introduced by President Jiang Zemin and is still emphasized by President Xi Jinping.<sup>125</sup> This is another evidence to show how the exercise of power is legitimized to achieve the equilibrium between higher values and practical rules.

Some other scholars explore the coordination of party state and popular sovereignty from the practical perspective. Zheng Yongnian, a Chinese political scientist based in Singapore has argued that even if the CPC has not tolerated the emergency of a counter-hegemony “it has been able to absorb all political forces which might be a counter-hegemony”.<sup>126</sup> To some extent, this perspective of absorbing capacity is similar to the debate among India scholars regarding the expansion of Hinduism.

Daniel Bell, a Canadian political scientist based in China frames Chinese political system from the functional angle as grassroot democracy with vertical meritocracy and tries to argue that it could avoid some challenges faced by electoral democracy.<sup>127</sup> It provides some insights to Jiang Qing’s theory that people’s will should not be the sole source for political legitimacy. Yunhan Chu, a distinguished scholar of Taiwan also used rigorous data analysis to argue that the political legitimacy of CPC in China is not mainly based on economic performance but more with “culturalist argument on the prevailing influence of the traditional concepts of political legitimacy” as well as “institutionalist argument about the importance of perceived characteristics of the political system”.<sup>128</sup>

Thus, it can be concluded that the perception of political legitimacy in Chinese culture is not solely based on people’s will but with other legitimacy factors valued by Chinese culture. The current constituted form in Constitution (1982) is not in line with the theory of popular sovereignty in liberal democracy but acceptable from the Chinese cultural perspective. From universalism perspective, Chinese constituted form has not fully embraced popular sovereignty. But from culture particularism, this can be accepted as genuine efforts of constituted form to reflect their understanding of popular sovereignty. Hence, the assessment of this parameter for constitutionalism will depend on how to define popular sovereignty.

### *5.3. Create An Institution to Look After Constitution Enforcement While Leaving Space for Constituent Power to Drive Constitutional Development*

As discussed in Part II and Part III, the vulnerability of Chinese constitution is the lack of strong enforcement mechanisms. The constitution is sitting at the juncture of being both political and legal. For the political part, it would be hard to be directly enforced in a way

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<sup>125</sup> X. Jinping, *Ruing in the Coupling of Rule of Law and Rule of Virtue*, People’s Daily, 09/12/2016, available at <http://theory.people.com.cn/n1/2018/0103/c416126-29742944.html>, last accessed on 03/08/2020.

<sup>126</sup> Y. Zheng, *The Chinese Communist Party as Organizational Emperor—Culture, Reproduction and Transformation*, Routledge 119 (2010).

<sup>127</sup> D. Bell, Three Models of Democratic Meritocracy (Chapter 4), *The China Model: Political Meritocracy and the Limits of Democracy*, Princeton University Press, 151-178 (2010).

<sup>128</sup> Y. Chu, *Sources of Regime Legitimacy and the Debate over the Chinese Model*, 13:1 *The China Review*, 1-42 (Spring 2013).



citizens can feel in daily life. However, the weakness of the Chinese constitution is more than that. In the daily life, it is hard for people to feel the legal nature of it.<sup>129</sup>

One critical deficiency is that there is a lack of a well-designed mechanism to enforce the constitution. In the Constitution (1954), NPC was the only body granted with power to supervise the constitution enforcement. But NPC is composed part-time deputies who only meet once a year for ten days or two weeks. In the drafting process of the constitution (1982), it has been debated on how to strengthen it. Judicial review was introduced but not adopted. The adopted solution is to strengthen the power of permanent acting body of NPC that is NPCSC for constitution enforcement. As presented above, Constitution (1982) gives exclusive power of constitutional interpretation and the joint power of supervising constitutional enforcement to NPCSC.

However, before 2000, there was no formal mechanism developed by the NPCSC on how to supervise the constitution enforcement. This means that 'NPCSC's role on constitution enforcement was almost inactive before 2000s.

From 2000, constitutional movements become active in both ways of top to down and bottom up in China. In 2000, NPC passed the Law on Legislations which prescribes law-making process and hierarchy of laws and regulations in China. More importantly, it codified the procedure for local acts, administrative regulations and binding rules to file the record with the NPCSC.<sup>130</sup> This lays a good foundation for constitutionality review and legality review.

Meanwhile, the Supreme People's Court (SPC) started experimenting with judicial activism on enforcing the constitution. Under the Constitution (1982), judiciary is law-applying courts which have no constitutional power to check legislative but limited power to check administrative power through the administrative litigation. From the early 2000s, liberal professionals of SPC and liberal scholars have tried to experiment the formal role of the judiciary in enforcing the constitution, such as judicializing the constitution by applying it in specific cases such as *Qi Yuling* case (2001)<sup>131</sup> and announcing the local legislation unconstitutional through case-based constitutional review in *Luoyang Seed Case* (2003)<sup>132</sup>. From the late 2000s, the efforts by the judiciary stepped out due to lack of constitutional basis and other factors. However, according to the Law on Legislation, the SPC still has the power to move the NPCSC for legal interpretation and constitutional review of regulations made by central or local governments. This could be another window for judiciary to promote the constitutional review.

The lack of formal constitution enforcement mechanism also creates some space for constituent power to drive constitutional development which is also summarized as "grand mediation" model for constitutional disputes by American scholar Keith Hand.<sup>133</sup> The first most noticeable constitutional development driven by constituent power is to strengthen the constitutional review promoted by the *Sun Zhigang* case (2003) which became a civil society

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<sup>129</sup> Supra 71, at 3.

<sup>130</sup> Q. Qin & D. Goayang, *Forty Years of Constitutionality Review in China*, Pushi Institute for Social Science, 23/05/2019, available at <http://www.pacilution.com/ShowArticle.asp?ArticleID=9609>, last accessed on 03/08/2020.

<sup>131</sup> Z. Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling Case*, 43 *Suffolk U. L. Review*, 669-680 (2010).

<sup>132</sup> Supra 4, at 109-112.

<sup>133</sup> Supra 4, at 51-159.

based constitutional movement fueled by open letters to the NPCSC for requesting constitutional review by liberal scholars and professionals.<sup>134</sup>

This case is significant in the constitutional development in China after 1982. First, the State Council (the central government) repealed the administrative regulation 1982 Measures on Custody and Repatriation of Vagrants and Beggars (C&R Measures 1982) soon after the case was reported by Media. Second, in 2004, the Commission of Legislative Affairs of NPCSC established a new office for reviewing and processing legislative conflicts.<sup>135</sup> Third, in 2004 NPC adopted a constitutional amendment confirming that the state respects and safeguards human rights which are believed partly contributed by wide discussion about human rights violations in this case.<sup>136</sup> Fourth, the revision of Law on Legislation in 2015 took a multiple steps forward to strengthen constitutional review., These steps include the expansion of the scope of regulations to be reviewed and the grant of automatic review powers to the NPCSC even if there is no request from the public or designated authorities.<sup>137</sup>

However, the high-profile political attention to the necessity of constitutionality review has not been evident until 2017. At the 19th national congress of the Communist Party of China held between October 19 and October 24<sup>1</sup> 2017, the CPC, for the first time, formally proposed to strengthen constitutional review in China.<sup>138</sup> Being inspired by the 19<sup>th</sup> CPC report, on December 24 2017, the Commission of Legislative Affairs released the constitutionality review report first time which shows from 2004 to 2017 it has received 1527 constitutional review requests from citizens, organization and agencies.<sup>139</sup> Through the demonstration cases listed in the Report, we can find that the review is mainly for legality review that is to review the compliance of government regulations, local acts and judicial reviews with laws enacted by the NPC or NPCSC.<sup>140</sup> In addition, the publicity of information is still limited, lack of information about who sent the request, status or outcome of the review.<sup>141</sup> It is interesting to notice that 92.5% of the requests for legality or constitutionality review is against judicial interpretations.<sup>142</sup> It is also worthy of attention that almost within ten years after the establishment of review office there was no record of review requests and that 71% of the requests happened in 2017.<sup>143</sup> This can also be an evidence to show how CPC's attitude towards constitution influences the attention of NPC and NPCSC.

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<sup>134</sup> Supra 4, at 112-115.

<sup>135</sup> K. Hand, p. 114; See Liao Weihua, *Zhongguo Shouci Chengli Zhuanmen Jigou Jinxing Weixian Shencha China for the First Time Establishes a Special Body to Engage in Constitutional Review*, *Xinjing Bao* [Beijing News], 19/06/2004, available at <http://www.boxun.com/news/gb/china/2004/06/200406191347.shtml>, last accessed on 03/08/2020.

<sup>136</sup> Ibid.

<sup>137</sup> See [http://www.npc.gov.cn/zgrdw/npc/xinwen/2015-03/18/content\\_1930129.htm](http://www.npc.gov.cn/zgrdw/npc/xinwen/2015-03/18/content_1930129.htm), last accessed on 03/08/2020.

<sup>138</sup> W. Zhang, *China is Now Grappling With What It Means to Review Its Constitution*, *Wire*, 24/10/2017, available at <https://thewire.in/external-affairs/china-now-grappling-means-review-constitution>, last accessed on 03/08/2020.

<sup>139</sup> J. Mo, *Building the Workable Mechanism of Constitutional Review in China in Last 40 Years*, 16:3 *Journal of Beijing Union University (Humanities and Social Sciences)*, 21 (July 2018).

<sup>140</sup> T. Wei, *Procedural Studies for the Constitutional Review by the Constitution and Law Committee*, 4 *Journal of East China University of Political Science and Law*, 32 (2018).

<sup>141</sup> J. Hu, *The Filtering Mechanism of Constitutional Review*, No.1, FN 7, *China Law Review*, 66 (2018).

<sup>142</sup> Supra 2, at 65.

<sup>143</sup> The analysis is based on the data provided by Ibid.

In response to the CPC's proposal for strengthening constitutionality review, on March 11, 2018, NPC passed the constitutional amendments. One of it is to change the "Law Committee" in Art. 70 into "Constitution and Law Committee" (CLC) which is supposed to take the responsibility of constitutional review.<sup>144</sup> On March 13<sup>th</sup> 2018, the list of committee members were released which includes one Director, Seven Vice Directors and ten members.<sup>145</sup> Among the 18 members, all are NPC deputies. In terms of expertise background, while 13 are from law background five are from non-law backgrounds, such as medical, engineering, higher education and military reform or disciplining. So far, no formal mechanism for constitutionality review has been announced by the CLC. For example, what can be reviewed? Would review request be abstract or case based? Will the review request sent by specified authority such as the Supreme People's Court, State Council (Central Government) be dealt with in a similar way as the request sent by organizations or individuals? Will the review process and review result be open to the public?

However, there is an acceleration in the institutional building of constitutional review even though its mode of functioning is not clear yet. It is also a good example to show how constituted form interacts with constituent power to drive constitutional development.

In addition to this case, there are also several other cases which drive the substantive part of the constitutional law, such as bring the protection of private property in Constitutional Amendment through dealing with the open challenge from leftist scholar Prof. Gong Xiantian in a sophisticated way and also responding to the tragic cases of causing the death of citizens in coercive grabbing of private property such as Tang Fuzhen case and several other cases).<sup>146</sup> The movements for the implementing Art. 33 of the Constitution of equality before the law through several anti-discrimination cases were also very active.<sup>147</sup> But there are also failed cases, such as the trial and sentencing of Xu Zhiyong in 2014.<sup>148</sup> Since there is a lack of a formalized mechanism to deal with citizens' concern about constitutional enforcement the space and outcomes of constitutional movements are not very predictable.<sup>149</sup>

Most worried that "whether another wave of constitutional entrepreneurship could happen again in the age of Xi Jinping" since he has tightened the CPC's grip of officials and the civil society.<sup>150</sup> Even though constitutional movements have slowed down however the accessional movements could also be more resilient and creative. The most recent movement was demanding the recognition of the freedom of expression during the coronavirus early this year. When Dr. Li Wenliang, the whistle blower died on Feb. 7<sup>th</sup> 2020 China almost reached the "Chernobyl moment" or started the "beginning of a version of the Arab Spring".<sup>151</sup> It reached the peak for Chinese social media users to defy censors by reposting an interview with

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<sup>144</sup> Constitutional Amendment 2018, available at [http://www.npc.gov.cn/npc/xinwen/2018-03/12/content\\_2046540.htm](http://www.npc.gov.cn/npc/xinwen/2018-03/12/content_2046540.htm), last accessed on 03/08/2020.

<sup>145</sup> See <http://www.npc.gov.cn/npc/c34375/xfl.shtml>, last accessed on 11 August 2020.

<sup>146</sup> Detailed analysis about the cases, please refer to Supra 4, at 115-125. You can also get the details from M. Jia, *China's Constitutional Entrepreneurs*, *American Journal of Comparative Law*, Vol. 64 648-659 (2016).

<sup>147</sup> Supra 4, at 130-131.

<sup>148</sup> *China jails 'New Citizens' Movement' activists*, BBC News, 19/06/2014, <https://www.bbc.com/news/world-asia-china-27917234>, last accessed on 03/08/2020.

<sup>149</sup> R.E. Stern, Kevin, J. O'Brien, *Politics at the Boundary: Mixed Signals and The Chinese State*, 38:2 *Modern China*, 174-198 (March 2012).

<sup>150</sup> M. Jia, *China's Constitutional Entrepreneurs*, 64 *American Journal of Comparative Law*, 671 (2016).

<sup>151</sup> E. Li, *Xi Jinping Is a 'Good Emperor'*, *Foreign Policy*, 14/05/2020, available at <https://foreignpolicy.com/2020/05/14/xi-jinping-good-emperor-coronavirus/>, last accessed on 03/08/2020.

Dr. Ai Fen, a whistleblowing Wuhan doctor, in dozens of coded versions of the text in scripts ranging from emoji to Klingon.<sup>152</sup> The pressure is so significant that the government has made concessions in various ways, such as honoring Dr. Li Wenliang as martyrs<sup>153</sup> and showing some concessions in propaganda after witnessing the relentless efforts of citizens for freedom of expression<sup>154</sup>. These social media movements happened in such an unprecedented way that they could change policymakers' understanding of people's bottom line of speech censorship.

Thus, it is evident that China is trying to take serious efforts to enforce its constitution. In this process, bottom up efforts supplemented but also pushed the top to down efforts which could be interpreted as being in line with the thin version of constitutionalism.

## 6. Conclusion

From the theoretical development of constitutionalism in a liberal democracy we can see that at its early stages, constitutionalism was meant to facilitate the power transition from monarchy to people. Later, with majority of states adopting a popular sovereignty model, the focus of constitutionalism has been to design the constituted form and to balance between constituted form and constituent power.

In terms of the constituted form, there are different ways to safeguard the constitution—judicial supremacy, legislative supremacy and political constitutionalism with a weak form of judicial review. Each has its own advantages and disadvantages. The debate has never stopped. The emergence of popular constitutionalism reminds scholars of the remaining power of people for driving constitutional development.

The analysis of the theoretical development of constitutionalism helps us understand that constitutionalism could be a capacious term. We may argue that even though most constituted forms for popular sovereignty are followed in liberal democracies popular sovereignty can also be reflected under other political theories such as Marxism and Confucianism. The debates among scholars help us develop the new analysis framework of constitutionalism based on their convergence and divergence. This paper tries to develop a value-free analysis framework which includes the following three parameters: (1) Pursuing rule of law with the Public Recognition of Constitution as the Supreme Law; (2) Reflecting popular sovereignty in the constituted form; and (3) Creating an institution to look after the constitution enforcement but also leaving space for constituent power to drive constitutional development.

In the Chinese case, it is evident that China has taken serious efforts to transition from revolution-oriented order to the rule of law order. Many of its rule of law index indicators have steady better than many developing countries. It embraces the constitution as the supremacy in a public way. The constitution also unequivocally announces that “All the power belongs to the people”. In terms of the constituted form to reflect the popular sovereignty, it has not

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<sup>152</sup> *In China, demands for more free speech outlast coronavirus lockdowns*, Japan Times, 17/04/2020, available at <https://www.japantimes.co.jp/news/2020/04/17/asia-pacific/china-demands-free-speech-outlast-coronavirus-lockdowns/#.XuyzWmgzbic>, last accessed on 03/08/2020.

<sup>153</sup> Ibid.

<sup>154</sup> L. Kuo, 'Gratitude education': Wuhan boss faces backlash over calls to thank leaders, Guardian, 09/03/2020, available at <https://www.theguardian.com/world/2020/mar/09/gratitude-education-wuhan-boss-faces-backlash-over-calls-to-thank-leaders>, last accessed on 03/08/2020.

taken the people's will as the only political legitimacy which is not in line with the liberal democracy but reasonable in her own culture. What remains to be explored further is the method to develop a new framework to assess the quality of the different constituted form for popular sovereignty. Among the three parameters, the weaker part is the lack of formalized constitutional enforcement mechanism in the constituted form. As a result, constitutional development has been largely driven by "grand meditation" through the popular movements with unpredictable outcomes. However, the positive side is that the CPC has shifted attention to the institutional building of constitutionality review which is worthy of close observation for further research.

The purpose of this new analysis framework is to help understand how constitutionalism has been developed in China by providing some parameters of enabling a functional constitutional order despite political philosophy orientation. However, this is just the minimum version for constitutionalism. In China, the pursuit of thick constitutionalism still has a long way to go. For example, the quality of constituted form to uphold popular sovereignty has not been well-researched and assessed. In addition, it is also necessary for China to define the basic structure of the constitution. By defining what can be changed and what cannot be changed, then stability of constitution can be maintained while leaving space for constituted form and constituent power to drive the constitution in line with social development. One more important task is to develop a transparent constitutional enforcement mechanism to strengthen the legally-binding nature of the constitution for reviewing the constitutionality of laws and regulations and also for people to enforce their fundamental rights.