

FURTHER READING

- Chen, H, *An Introduction to the Legal System of the People's Republic of China*, 4th edn (Hong Kong, LexisNexis Butterworths, 2011) ch 1.
- Chow, T, *The May Fourth Movement: Intellectual Revolution in China* (Cambridge, MA, Harvard University Press, 1960).
- Hahm, C, 'Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity' (2009) 57 *American Journal of Comparative Law* 135–204.
- Kim, HI, *Fundamental Legal Concepts of China and the West: A Comparative Study* (London, Kennikat Press, 1981).
- Spence, JD, *The Search for Modern China* (New York, WW Norton, 1990) 230–43.
- Thompson, RR, *China's Local Councils in the Age of Constitutional Reform* (Cambridge, MA, Harvard University Press, 1995).

2

The New Constitutional Order of the People's Republic

THE SECOND REPUBLIC: THE COMMUNIST REVOLUTION OF 1949 – The May Fourth Movement and the Communist Ascendance – The Founding of the People's Republic – Revolutionary Legacies – THE 1982 CONSTITUTION – The 1978 Reform – An Overview of the 1982 Constitution – Basic State Structure in the 1982 Constitution – CONSTITUTIONAL AMENDMENTS – Previous Amendments: Towards a Market Economy and the Rule of Law – The 2004 Amendments: Recognising Human Rights and Private Property – CONSTITUTIONAL TRANSFORMATIONS – Reform and the Constitution: The Benign Violation Paradox – From Popular Sovereignty to Human Rights: A Paradigm Shift for Constitutional Jurisprudence – The Rise of 'Rights Consciousness' and 'Populist Constitutionalism' in an Inchoate Civil Society

THE SECOND CHAPTER will begin with the political and ideological development of the current socialist regime in China, which saw a turning point in 1978. The chapter will sketch out the new constitutional order that was promulgated in 1982 and is still effective today. I will explain the socio-political background as well as the guiding principles for the drafting of the constitution before describing the main features of the new constitution, and then successively trace four constitutional amendments. The chapter will end with a summary of significant constitutional transformations during the last three decades of reform, which have witnessed not only fundamental shifts in the methodological approach to constitutional jurisprudence, which laid

the theoretical foundation for constitutional reform, but also the rapid rise of a popular consciousness of human rights, perhaps for the very first time in Chinese history. These events and developments occurred despite the arrest of the reform momentum by the June Fourth Incident (六四事件, *lusi shijian*, also referred to in English as the Tiananmen Protests).

I. THE SECOND REPUBLIC: THE COMMUNIST REVOLUTION OF 1949

A. The May Fourth Movement and the Communist Ascendance

The Chinese Communist Party (CCP) and the Nationalists once were deadly rivals, but they shared a common nature as revolutionary parties. And they became enemies precisely because they shared the revolutionary conviction that each was pursuing the absolutely 'correct' cause for the good of the Chinese people. This not only made their own political cause sacred and solely legitimate against all rivalries but also lent moral supremacy to each party, as well as justification for using any means, including physical violence, to eliminate all impediments in the way of achieving unconditionally salutary objectives. In that sense, both parties were revolutionaries against the old Confucian imperial order, but both inherited from Confucianism the same dogmatic tradition that has run through Chinese history. Sun Yat-sen was a genuine republican, committed to Western liberal constitutionalism, but when he resorted to violent revolution against the last dynasty, he had already embarked on a one-way journey along which his party regularly used violence whenever it met any challenge or competition, whether from warlords or Communists. Following the Nationalist footprints and under the guidance of their common Soviet mentors, the Communists from the very beginning aimed at nothing less than 'the forcible overthrow of all existing social conditions'.¹ Founded in 1921, precisely a decade after the 1911 Revolution, the CCP was in many ways the younger brother who learned from and surpassed its elder sibling in manipulating ideological propaganda and organisational violence, succeeding where the latter failed.

¹ K Marx and F Engels, *The Communist Manifesto* (New York, International Publishers, 1948) 44.

The CCP was brought to the fore of China's political arena on 4 May 1919, when an angry assembly of Beijing students allegedly set fire to the Zhao Mansion (赵家楼, *zhaojia lou*) during mass demonstrations against the peace Treaty of Versailles,² which transferred the rule of Shandong province from the defeated Germany to the victorious Japan. US President Woodrow Wilson, who otherwise sympathised with the Chinese demand for sovereignty over its own land, yielded first to the white Australian policy and rejected Japan's perfectly legitimate claim for ethnic equality in the Asia Pacific region, then succumbed to Japanese pressure to grant it illegitimate control over the Chinese territory, as if it were 'compensation' for the earlier wrong and in exchange for Japanese support for the League of Nations.³ This apparently innocent realist strategy proved detrimental to China's pursuit of constitutionalism by arousing Chinese nationalism and antipathy against liberal democracy, which ultimately paved the way toward communism.

Unlike the signing of the Shimonoseki Treaty with Japan, which led to civilised scholarly petitions by Kang Youwei and other elites, the Versailles Treaty resulted in radical student reaction. It is to be remembered that after Japan defeated China in 1894, the Chinese viewed this 'tiny island' with awe and inspiration rather than hatred. During the quarter century following 1894 – notwithstanding continual skirmishes over what should be preserved as China's 'core' values – Westernisation and institutional modernisation seemed to be the theme of the era. For a time the Chinese seemed to have forgotten the humiliations of defeats and unequal treaties from which they had suffered since the Opium War of 1840. By 1919, despite its tenuous involvement in the First World War, China was treated as being victorious and viewed itself as such, expecting to regain full control of its own territory. The Treaty of Versailles served a disheartening blow to such optimistic expectations,

² The mansion's resident was Cao Rulin (曹汝霖), then the Minister of Transportation and a graduate from Japan. The students broke into the mansion and destroyed some furniture, though doubts remain as to whether they were responsible for the ensuing fire. Anyway, the 'burning of Zhao's Mansion' became the symbolic event of student radicalism after the May Fourth Movement. For an incisive narrative account of the May Fourth Movement, see T Chow, *The May Fourth Movement: Intellectual Revolution in Modern China* (Cambridge, Harvard University Press, 1980) 84–115.

³ See PG Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (Boulder, Westview Press, 1988) 80–99; and TA Bailey, *Woodrow Wilson and the Great Betrayal* (New York, Times Books, 1963) 75, 161–64 and 407.

however, and sorely reminded China of its disgraceful past and the opposition between peremptory Western powers, now including Japan, on the one side, and a weak and humiliated China on the other. That did not stop China from experimenting with Western democratic constitutionalism right away, but it did inculcate a mood of the opposite kind. Even Liang Qichao, an eloquent defender of Western constitutionalism, began to express doubts about the future of Western civilisation following the mass destructions of WWI and reservations concerning China's Westernisation efforts.⁴

No wonder, then, that when the new Soviet regime established by the 'October Revolution' of 1917 actively peddled Marxist Leninism to its disgruntled neighbour in order to convert it into a political ally, the new doctrine was welcomed with enthusiasm, especially among radical intellectuals and young students. True, Marxism was also a Western product, but it shared no part with the Western ideological mainstream; on the contrary, it was fiercely critical of the bloody capitalist order that would inevitably turn into global imperialism, and of which China was a victim. Better yet, it prophesied that the death knell of such an oppressive order would sound sooner or later in the human evolution toward communism. Communism instead of constitutionalism, then, seemed to be the 'right' theory for China because it offered bright hope for the weak to ultimately defeat the powerful and avenge itself for past humiliations. When the Soviet Union extended its embrace to a country just abandoned by the Western powers at the Paris Peace Conference, the offer turned out to be more than China could resist. The once shelved nationalism now fought its way back under the name of 'patriotism', putting an end to the liberal enlightenment of the New Culture Movement (新文化运动, *xinwenhua yundong*).⁵ Chen Duxiu (陈独秀), who had been a liberal faculty member at Peking University and had co-initiated the 'vernacular literature movement' (白话文运动, *baihuawen yundong*) with Hu Shih, now turned himself into a founding theorist of Chinese communism, which quickly spread out like a wildfire throughout the

⁴ See Liang Qichao, *Reflections on the European Trip: Travel Memoir of a New Continent* (Beijing, East Press, 2006).

⁵ It has been a common practice for mainland scholars to extend the 'May Fourth Movement' back to 1915 so as to embrace the New Culture Movement, even though the youth movement initiated on 4 May 1919 proved to be the end of China's cultural enlightenment.

country. A mere three decades after the start of the May Fourth Movement, the Communists succeeded, through unexpected twists and turns of historical contingencies, in replacing their Nationalist predecessors as the absolute ruler of China, and despite great calamities caused by major policy failures and political upheaval, they have managed thus far to maintain the institutions established by their revolution.

B. The Founding of the People's Republic

Having renounced traditional Confucianism as anachronistic 'feudalism' on the one hand and Western constitutionalism as capitalistic 'imperialism' on the other, the new People's Republic of China (PRC, 中华人民共和国, *zhonghua renmin gonghe guo*) started to build its own legal infrastructure from the ground level. Even before it took over power in 1949, the CCP had already undone every Nationalist accomplishment in rule of law by repealing all 'six basic laws' (六法, *liufu*), including the Nationalist constitution. In contrast to the Nationalists, the CCP has never been keen on constitutionalism and has never devised, as Sun Yat-sen did, any practical procedure for transition from 'tutelage' to constitutionalism, whereby political power could be returned to the people.⁶ In a sense, there was nothing to be 'returned', since the people supposedly already possessed all the powers under 'democratic dictatorship' and the Communist leadership, so much so that the former Party Secretary of Hunan province, Zhang Chunxian (张春贤), created quite a shock wave in China's media by speaking of 'returning power to the people' in 2009,⁷ six decades after the Communist takeover. Indeed, the ruling party was not quite prepared to adopt a formal constitution but for Stalin's prodding that a constitution might add to consolidation of the regime's legitimacy. Since then, China has had one provisional and four formal constitutions, none of which were seriously implemented – hence a seemingly unique phenomenon of constitutions without constitutionalism.⁸

⁶ See above ch 1, ss III and IV.

⁷ Zhang Chunxian on Ideological Emancipation: Not Only Benefits, but also Powers are to be Returned to the People', *Changsha Evening News* (1 September 2008).

⁸ In contrast, the Vietnamese Communist Party seems to be rather serious in debating its constitutional drafts and amendments. See M Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Oxford, Hart Publishing, 2009) ch 1.

The first constitutional document of the People's Republic was the provisional Common Programme (共同纲领, *gongtong gangling*), passed in 1949 by the new Political Consultative Committee (PCC), which differed from the old in that it was now composed of political parties and associations dominated by and friendly to a new ruling party. In seven chapters and 60 articles, the Common Programme laid down completely new principles for all the later constitutions. Its Preamble proclaimed a 'people's democratic dictatorship' (人民民主专政, *renmin minzhu zhuanzheng*), that is, a power based on a 'united front' (统一战线, *tongyi zhanxian*) made up of classes of workers, peasants, petty and national bourgeois and other 'patriotic democratic elements', based on the alliance between workers and peasants, led by the working class. The first chapter on General Principles (总纲, *zonggang*) provided for civil and political rights and promised to protect not only state public property but also the 'economic interests and private properties' of workers, peasants, petty bourgeois and national bourgeois' (Article 3), reflecting the CCP's willingness to accommodate a wide variety of interests while it was consolidating its political power. The second chapter on the Organs of Political Power defined the People's Congresses (人民代表大会, *renmin daibiao dahui*) at various levels as the basic form of political institutions.

The first formal constitution was drafted in 1953 and passed the following year with an unanimous vote among the 1197 representatives of the first National People's Congress (NPC). As the first socialist constitution in China, the 1954 Constitution served as the prototype for the current constitution, with textual and institutional designs that are familiar today. It contained 106 articles in four chapters. The first chapter on General Principles proclaimed that all powers belonged to the people, who were to exercise their powers through the NPC and local People's Congresses (LPC) at various levels (Article 2) and reaffirmed the flexibility in the Common Programme that recognised the legitimate coexistence of various types of ownership during the 'transitional period' of China's socialism, even though the state-operated economy (国营经济, *guoying jingji*) was to enjoy a dominant position and preferential development by the state (Article 6). Chapter II on State Institutions defined the basic structure of the government, which is still in effect today, consisting of the NPC and its Standing Committee (NPCSC), the State President (国家主席, *guojia zhuaxi*), the State Council (国务院, *guowu yuan*), LPC at various levels and their People's Committees (local govern-

ments), governments for the ethnic autonomous areas, the courts and procuratorate. Like the American president, the State President wielded substantial power, not only as the symbol of the state but also as commander-in-chief and chairman of the Supreme State Conference, a decision-making body of the central government (Articles 40–43). Chapter III provided for 19 articles of 'Fundamental Rights and Obligations of Citizens', among which 15 were about the protections of rights and liberties.

C. Revolutionary Legacies

Although the 1954 Constitution was generally well received in China, it was not implemented with any serious effort and failed to curb calamities of massive scale caused by abuse of state power. Partly out of a need to maintain power against competing rivals within the party, Mao Zedong initiated a series of radical political campaigns, from the suppression of 'counter-revolutionaries' (1950–51) and the 'anti-rightists movement' (1957) to the Great Leap Forward (1958), which eventually led to the greatest famine in the world,⁹ and the Great Proletarian Cultural Revolution (1966–76), the Chinese version of the Holocaust, which diminished human dignity and rule of law to the point of annihilation.

These campaigns decimated the basic rights of ordinary citizens, be they 'enemies' of the state like the 'bureaucratic bourgeois', landlords and kulaks, and 'counter-revolutionaries' (反革命分子, *fangeming fenzi*) of different kinds, or marginal groups like the petty bourgeois, middle-class peasants and intellectuals, later classified as the 'stinky ninth category' (臭老九, *chou laojiu*), or for that matter, the poor peasants who constituted the vast majority of the population and the very foundation of the state. Indeed, when Mao Zedong, the State President in charge of drafting the constitution, was approached about the constitutionality of some of these measures, he frankly responded that he could not

⁹ Although the death toll remains disputable, it is commonly estimated that roughly 30 million peasants died of starvation, see Yang Jisheng, *The Tombstone: A Documentary History of China's Great Famine in the 1960s* (Hong Kong, Tiandi Books, 2008). According to the most recent estimate based on the declassified documents, the death toll rose to 45 million: F Dikötter, *Mao's Great Famine: The History of China's Most Devastating Catastrophe, 1958–1962* (New York, Walker, 2010).

quite recall what the Constitution was about.¹⁰ When he launched the Cultural Revolution in order to save his own authority from declining within the party in 1966, he committed plainly unconstitutional acts by putting Liu Shaoqi (刘少奇), who succeeded him as State President, and other high-ranking leaders under house arrest, and by later removing Liu from his post without the approval of the NPC, which was essentially suspended during the tumultuous era. When Liu, referred to as 'China's largest capitalist roader', protested in vain to the Red Guards (红卫兵, *hongweibing*) in a 'mass denunciation meeting' held in August 1967 that his freedom of speech and personal right were violated, he merely illustrated a simple point that an unenforced constitution was as useless to the State President as it was to a plain citizen.

In 1975, the NPC reconvened after a long hiatus and managed to pass a revolutionary constitution right before the end of the Cultural Revolution. The 1975 Constitution was structurally similar to its more conservative predecessor but was severely politicised and abridged by the removal of most human rights and institutional provisions, leaving only 30 articles. It reduced the 15 provisions of human rights in the 1954 Constitution to merely three and eliminated the latter's requirements for open and independent trials. It did add the right to strike (Article 28) and the 'Four Big Freedoms' (四大自由, *sida ziyou*) of expression, airing (views), debating and writing 'big character posters' (大字报, *dazhibao*), which were introduced as new means to carry out the socialist revolution (Article 13).¹¹ This constitution conflated the party and state functionaries and dramatically enhanced the role of the CCP by authorising the chairman of the Central Committee 'to command the national armed forces' (Article 15); replacing the LPC and local governments with the 'revolutionary committees' (Articles 22 and 23); and substituting the township governments in rural areas with the People's Communes (人民公社, *renmin gongshe*). In a sense the 1975 Constitution was merely a political declaration, at most an outline for a politicised constitution; a constitution was in any case quite meaningless in an era when rights and laws were trampled on with disdain as 'bourgeois influences' (资产阶级流毒, *zichanjielie liudu*).

¹⁰ See Liu Zheng, 'Why the 1954 Constitution Gradually Fell into Disuse after Three Years of its Promulgation' (2002) 14 *China People's Congress* 42, 43.

¹¹ These wall posters were particularly popular during the Cultural Revolution for expressing mass political views.

This is not to say that the Cultural Revolution, which has been widely and justly condemned for wreaking massive destruction, had produced nothing positive. At the very least, the tumultuous decade helped to inculcate a critical and reflective generation that, despite its deficiency in concrete knowledge, was courageous enough to challenge the legitimacy of the ruling party and undertake a painstaking search for the institutional causes of the revolutionary upheavals.¹² In retrospect, the Cultural Revolution marked both the high tide and low ebb of the leftist ideology initiated by the May Fourth Movement and paved the way for the return of the liberal democratic spirit in the April Fifth Movement (四五运动, *siwu yundong*) in 1976, which began as a protest against the leftist perversions and culminated in the June Fourth Incident of 1989.

Following Mao's death in 1976 and the subsequent purge of the Gang of Four (四人帮, *sirenbang*) as the chief culprits of the Cultural Revolution, the NPC enacted a third constitution in 1978. Extended to 60 articles, the 1978 Constitution deleted some of the leftist provisions in the 1975 Constitution, supplemented human rights and institutional provisions and set the 'Four Modernisations' (四个现代化, *sige xian-daihua*) in industry, agriculture, defence, and science and technology as the new primary objective. These moves were unmistakably reminiscent of the Modernisation Movement of the 1860s. Still under the influence of the Cultural Revolution, however, the 1978 Constitution retained such leftist phrases and concepts as 'continuing revolution under the proletarian dictatorship', 'class struggles', the revolutionary committees and the People's Communes (Articles 7 and 34). Not until the end of 1978 when the CCP convened its Third Plenum of the 11th Congress (十一届三中全会, *shiyijie sanzhong quanhui*) was the Cultural Revolution formally denounced as turmoil and the direction of the state realigned from the 'class struggles' to economic construction. The Constitution was accordingly revised in 1979 and 1980, before it was completely replaced by the current constitution in 1982.

¹² In this respect it might not be mere coincidence that quite a few liberal dissidents now active overseas were activists during the Cultural Revolution, eg, Wei Jingsheng (魏京生) and Wang Xizhe (王希哲).

II. THE 1982 CONSTITUTION

A. The 1978 Reform

The CCP's Third Plenum of the 11th Congress in 1978 proved to be a landmark for China's open-door reform (改革开放, *gaige kaifang*). By 1982, the moderates in the mainstream of the CCP who had been ousted by the revolutionary radicals managed to come back and consolidate their powers around Deng Xiaoping, then the Chairman of the Central Military Commission (中央军委, *zhongyang junwen*). It was not surprising, then, that the 1982 Constitution borrowed heavily from the first constitution enacted in 1954, when the CCP mainstream under Liu Shaoqi and Deng Xiaoping shared power with Mao Zedong. In fact, the main programme of the opening and reform by and large reverted back to the industrialisation and limited liberalisation of the rural economy that had begun in the 1950s and early 1960s. Although the 1982 Constitution got rid of most of the revolutionary rhetoric in the previous two constitutions, it was overall a rather conservative – indeed, out-dated – constitution, given its resemblance to its remote predecessor, which had been enacted three decades earlier in a very different social context.

The post-1978 reforms did carry a novel strain of their own, however, with far-reaching significance for China's constitutional development. The economic reform, though legitimised and sometimes positively promoted by the central government, was far from a top-down process; to the contrary, its participants – and even initiators – included the rank and file from the very beginning. In December 1978, 18 peasants in Xiaogang Village (小岗村, *xiaogang cun*) of Fengyang county (Anhui province) signed a private agreement among themselves to divide the public land, each household to be responsible for the farming and yield of its own land.¹³ That move, later officially sanctioned and promoted nationwide, appears commonplace today. Indeed, it had by and large been the situation in rural China since the early 1950s, until the collectivisation movement agglomerated the land under individual ownership into the collective land owned by the People's Commune; and it was the situation to which rural China reverted following the colossal failure of the Great Leap Forward in the early 1960s.

¹³ See Chen Guidi and Chun Tao, *The Story of Xiaogang Village* (Beijing, Huawen Publisher, 2009).

Keep in mind, however, that such 'revisionist' (修正主义, *xiuzheng zhuyi*) policy had become the chief crime of the deposed State President Liu Shaoqi by the time of the Cultural Revolution, when harsh criticisms would fall on even 'a flash of the "private" word in the mind'.¹⁴ Moreover, China in 1978 was supposedly governed by a constitution under which the People's Commune was the sole legitimate owner of rural land. At that time it took these peasants great courage to break away from the collectivist yoke and pioneer the 'household responsibility system' (家庭联产承包责任制, *jiating lianchan chengbao zerenzhi*), which triggered wholesale economic reform throughout the country. Like the scholars' gatherings in 1895, the signing of the peasant agreement in 1978 marked the rise of spontaneous civil participation in reform, only this time the peasants did not petition any emperor but took actions for themselves. Even more significant, they were peasants, not elites; and they took actions for their own good rather than begging any elite intermediary to represent their cause. This fundamental difference set the Xiaogang experiment apart from the Hundred Days Reform that had failed 80 years before, and provided fresh hope for the latest reform.

It was against this background that the current Constitution was enacted in 1982. As a product of reform, the new constitutional order carried with it both the momentum and the constraints of a century's worth of alternating episodes of reform and revolution. The new episode played out in a different constitutional framework and socio-political context.

B. An Overview of the 1982 Constitution

The 1982 Constitution symbolised a new, reformist order that has lasted to this day. It was enacted in order to purge the revolutionary rhetoric that remained in its 1978 predecessor and confirm the shift of national focus to economic construction, as proposed in the CCP's Third Plenum of its 11th Congress. In February 1982, the Committee for Constitutional Revision, composed of legal scholars, proposed a draft, and a revised draft was published by the NPCSC in April. Based upon the

¹⁴ 狠批私字一闪念 (*henpi sizi yishannian*), meaning that one was forbidden to even momentarily flirt with the idea of private interest.

opinions and comments solicited from society at large, the draft constitution was further revised and approved on 4 December, which has since been annually celebrated as 'Constitution Day' (法制宣传日, *fazhi xuanchuan ri*).

Though a mark of the new order, the 1982 Constitution was in nature by and large a reversion to the pre-Cultural Revolution era, which had been dominated by the CCP's moderate mainstream, only this time without the fatal destructions from its own demigod, Mao Zedong, who permanently shelved the constitution he himself had drafted by initiating the Great Leap Forward and the Cultural Revolution. As such, it inherited the basic socialist spirit from the 1954 Constitution and indeed from even the 1949 Common Programme. To highlight the new order under the party leadership, the 1982 Preamble explicitly expressed Deng Xiaoping's insistence on the Four Cardinal Principles (四项基本原则, *sixiang jiben yuanze*), which included the political leadership of the CCP, the state foundation on the 'people's democratic dictatorship', the economic system of the 'socialist road' and the ideological guidance of Marxism, Leninism and Mao Zedong Thought. Added to this list are 'Deng Xiaoping theory' and the 'important thoughts of three representatives' (三个代表, *sange daibiao*), which demands that the ruling CCP should 'represent the most fundamental interest of the overwhelming majority of the people', by the constitutional amendments of 1999 and 2004, respectively. In practice, the most important and perhaps the only relevant principle today is regarding the CCP leadership, which ironically runs counter to the spirit of constitutionalism. The Preamble did highlight the legal nature of the constitution by defining it as 'the fundamental law of the state with supreme legal effect'. The legal force of the Constitution is reaffirmed by Article 5, which explicitly provides that 'no laws or administrative and local rules or regulations may contravene the Constitution'.

The Constitution contains 138 articles in four chapters. Paraphrasing the Marxist ideology expressed in the 1949 Common Programme, the first chapter on General Principles defines the nature of the state as 'a socialist country of people's democratic dictatorship led by the working class and founded on the worker-peasant alliance', where socialism is the 'fundamental system' of the state, the disruption of which is strictly 'prohibited' (Article 1). All state powers belong to the people, who exercise their powers through the NPC and LPC at various levels of government (Article 2). The state institutions follow the principle of

'democratic centralism' (民主集中制, *minzhu jizhong zhi*), which means that the NPC and LPC at various levels are made 'responsible to the people' by periodic elections, and the deputies thus constituted in turn supervise all administrative, judicial and procuratorial departments by electing the leadership of these departments at their levels. As a compound of two opposite orders, one bottom-up and the other top-down, the principle of democratic centralism also implies that a People's Congress at a higher level is to be created either by one at a lower level or directly elected by their constituencies (the democratic element¹⁵), but the government at the higher level is to direct and supervise the one(s) below (the centrist element¹⁶). In practice, given the ineffectiveness of elections and electoral checks on power, the centrist inclination has always overwhelmed the democratic counterpart, thus reducing the apparently balanced principle to a lopsided structure in which the top-down supervision alone exerts force. The Constitution makes no effort to delimit central and local powers but adopts a vague principle of 'giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities' in attempt to guide their functional divisions (Article 3).

A major structural difference between the 1982 Constitution and its predecessors lies in the order of chapters: 'Fundamental Rights and Duties of Citizens' used to be provided in Chapter III but now precedes the 'State Structure' as the second chapter, partly to reflect the enhanced status of individual rights. The scope of protection is also expanded, as the number of rights provisions has increased to 24. The most important rights include the rights to equality (Article 33), elections (Article 34), freedom of speech, press, assembly and association (Article 35), religious freedom (Article 36), personal freedom (Article 37), personal dignity (Article 38), privilege of residence (Article 39), freedom and privacy of correspondence (Article 40), to criticise, make suggestions and receive compensation for losses caused by state infringements of civil rights (Article 40). The last four provisions were absent in the previous constitutions and were added in view of the great atrocities committed against human rights and dignity during the Cultural Revolution.

Perhaps as a result of duty-oriented Confucian influence, some of the rights are also accompanied by corresponding duties on citizens. For

¹⁵ See below ch 5.

¹⁶ See below ch 3.

example, not only is the obligation of the state to protect religious freedom limited to 'normal religious activities', but private citizens are prohibited from 'making use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state' (Article 36.3); a citizen is free to press charges against any state functionary for violation of the law or dereliction of duty but is explicitly prohibited from 'fabrication or distortion of facts for purposes of libel or false incrimination' (Article 41.1).¹⁷ Like other constitutional provisions, however, these provisions have not been seriously implemented, partly owing to the lack of judicial review and the ineffectiveness of the legislative review that is supposed to be exercised by the NPCSC (Article 67.1).

C. Basic State Structure in the 1982 Constitution

A brief sketch of the state structure is in order before detailed discussion of China's government institutions. It is necessary particularly because, unlike the Nationalists and even warlords, contemporary Chinese leaders have repeatedly rejected the Western models of federalism and separation of powers and thus have purported to create a novel constitutional structure with unique 'Chinese characteristics'.¹⁸ In reality, however, any institutional design is to be evaluated by its efficacy in fulfilling certain social needs common to every human society and, indeed, described by a common set of functional vocabularies. China's 1982 Constitution is no exception, and its basic features can be summarised as a unicameral legislature, a dualist judiciary and a tripartite administrative system at the national level.

The 1982 Constitution, resembling in this respect the British parliamentary model but explicitly rejecting the American model of separation of powers, in which the executive and judicial branches share power with the Congress, vests China's primary legislatures, the NPC and LPC

¹⁷ For a criticism of including private duties in the Constitution, see Zhang Qianfan, 'What the Constitution Should Not Provide' (2005) 3 *Journal of East China University of Politics & Law* 25–33.

¹⁸ Deng Xiaoping, for example, repeatedly rejected the separation of powers idea as 'bourgeois' during the 1980s, though curiously, he also criticised excessive concentration of powers. See *Selected Works of Deng Xiaoping*, vol 1 (Beijing, Renmin Press, 2002) 328.

at various levels, solely with the constituent and thus nominally supreme power. Consistent with socialist ideology, which usually presupposes the presence of a simple majority will,¹⁹ all People's Congresses are unicameral legislatures, and any law or local regulation needs only to pass one particular Congress to take effect. The Standing Committee of the NPC or LPC above the county level is sometimes seen as the 'second chamber'; it is a 'second chamber' in view of its independent authority to pass laws or local regulations alone. But this does not make China's legislature 'bicameral', since both a whole Congress and its Standing Committee are capable of passing legislations of almost equal legal force,²⁰ and since the work of a Standing Committee is also supposedly subject to review of the entire Congress (Article 62 of the Constitution). In this sense a Standing Committee is an inferior though independent and alternative legislature. Above all, the Standing Committees were created not for the purpose of an alternative representative scheme (for example, regions rather than population) or legislative check and balances, but rather to facilitate law-making and, indeed, to lead the whole Congress.

It is perhaps somewhat justified to characterise China's representative system as 'quasi-bicameral' since, in addition to the People's Congresses and their Standing Committees, the Political Consultative Committees at various levels also play some legislative role, convening at the same time with their congressional counterparts every year. The PCCs are not, however, a formal institution defined in the Constitution, and their resolutions, however influential on state policymaking, lack formal binding force. To be precise, the NPC and LPC are the sole legislative bodies from which other state institutions are created.

Beneath the People's Congresses are 'one government and two (judicial) chambers' (一府两院, *yifu liangyuan*). The government and the judiciary are supposed to be elected and supervised by the People's Congresses at their respective levels, while maintaining independence among themselves, though it is common for the government to dominate over the judiciary. While in most countries legal prosecution is

¹⁹ Chinese constitutional scholars are well aware of the dilemma raised by French scholar Sieyès a century ago: if the House and the Senate in a bicameral system disagree, which should be seen as representing the 'general will' expressed by the majority of the people? See Miao Liangying, 'The Legislature' in Zhang Qianfan (ed), *Studies of Constitutional Law*, 2nd edn (Beijing, Law Press, 2008) ch 7.

²⁰ See below ch 4.

normally part of the administration, the procuratorate in China was made a separate and supposedly independent institution within the judicial branch (Article 129 of the Constitution) – an echo of its central role in imperial China – and it constitutes with the courts a ‘dualist’ judiciary. While the judges are in charge of trials and appeals, the procurators are primarily responsible for prosecutions and investigations for official corruption. The two judicial branches with separate functions check against each other in some respects but often act in concert on major policy initiatives.²¹

Finally, while many modern ‘mixed’ constitutions incorporate a presidency within a parliamentary framework, resulting in a ‘dual heads’ scenario (usually a directly elected president and a cabinet created by and accountable to the parliamentary majority), the powers of China’s central government are divided among three institutions. If the State President serves mostly as a honorary symbol of the state, the State Council holds most substantive powers of administration in its capacity as the Central People’s Government (CPG, 中央人民政府, *zhongyāng rénmin zhèngfǔ*), and military power is vested in a separate Central Military Commission, which ordinarily overlaps with its counterpart in the CCP, which has exactly the same name.²² Deviating significantly from the 1954 Constitution, whereby military power was vested in the State President, this arrangement is often criticised for politicising the military and facilitating the CCP’s ultimate control over the state.²³

Without the military and symbolic components, the structure of a Local People’s Government (LPG) is a good deal simpler. The only complication comes from the fact that government at each level is matched with a Party organisation, which is in charge of overseeing government decision-making. In fact, the Party is an omnipotent and omnipresent shadow over every branch of public power; the two judicial branches and even the LPC are likewise under the supervision of their own party organisations.²⁴ The structure of the ruling party is not

²¹ See below ch 6.

²² See below ch 5 for exceptional cases where the two CMCs do not exactly coincide.

²³ Thus, liberals often call for the ‘nationalisation of armies’ (军队国家化, *jūndūi guójia huà*). See Charter 08 signed by over three hundred intellectuals in China and published on 10 December 1998, <http://www.vckbase.com/bbs/viewtopic2.asp?rid=3537795&sf=96>.

²⁴ See further below ch 3.

stipulated in the 1982 Constitution other than the general leadership dictated by the first ‘Cardinal Principle’ in the Preamble, but it is the decisive factor for allocating powers to each formal institution defined in the Constitution.

III. CONSTITUTIONAL AMENDMENTS

The 1982 Constitution was drafted and promulgated in the initial stage of China’s opening and reform, when Chinese society had barely begun to reopen itself to new ideas after decades of revolutionary bigotry, self-enclosure and self-destruction. It inherited from the 1949 Common Programme and the 1954 Constitution a political and ideological framework that badly needed adjustment, to say the least, in order to comply with the fast-changing demands arising both from economic developments and from a legal and constitutional consciousness that gradually taken root in the minds of ordinary people since the 1978 reforms. Fortunately, the Constitution allowed for timely revisions through a simple procedure, entailing approval by a two-thirds majority of the NPC. As a result, the Constitution was amended in 1988, 1993, 1999 and 2004. So far, most of the amendments have been revisions of the economic system defined in the Preamble and the General Principles, but a few amendments have supplemented fundamental constitutional principles on the rule of law and human rights.

A. Previous Amendments: Towards a Market Economy and the Rule of Law

On 12 April 1988, two constitutional amendments were approved in the first session of the Seventh NPC, both on the economic system. The first supplemented Article 10.4 by allowing ‘the rights to the use of land be transferred according to law’, thus giving limited space to market transactions within the straitjacket of public land ownership – the hallmark of socialism purporting to have under public ownership every major ‘means of production’ (生产资料, *shēngchǎn zīliào*). The second amendment supplemented Article 11 of the Constitution by allowing ‘the private sector of the economy to exist and develop within the limits prescribed by law’. The private economy, which used to be the target for

'transformation' (改造, *gaizao*), was now 'a complement to the socialist public economy', which is to be 'guided, supervised and controlled' by the state but whose lawful rights and interests will also be protected by the same state.

On 29 March 1993, the Eighth NPC approved a total of nine amendments in its first session. It changed the Preamble to highlight that China is in 'the primary stage of socialism', during which the basic task of the state is 'socialist modernisation along the socialist road with Chinese characteristics'. In order to reflect the new idea of separating management from ownership, whatever enterprises used to be 'state-run' were all changed to 'state-owned', implying that the state was no longer in charge of daily management of public enterprises. The planned economy provisions in Articles 15, 16 and 17 were deleted and replaced by the notions of 'socialist market economy' and 'macro regulation', to be implemented by the state through economic legislation. The 1993 amendment also deleted, belatedly, the term 'People's Commune' and transformed the system of collective ownership in rural areas by implementing the household responsibility system, whereby a commune's lands are distributed to individual peasant households. Last but not least, the term of LPCs at the county level was extended from three to five years (Article 98). LPCs at the township level were not extended to the same term until 2004, when a constitutional amendment made the term of People's Congresses at all levels a uniform five years.

On 15 March 1999, the Ninth NPC approved six amendments in the second session. First, it reassured the validity of the previous amendments by emphasising that 'China will be in the primary stage of socialism for a long time to come', during which the public economy, as the principal component in the socialist economic system, is to develop together with 'multiple forms of economies' (Article 6). The status of the private sector was elevated from 'a complement' in the 1988 Amendment to 'the important constituent component' of the socialist market economy (Article 11). And the political notion of 'counter-revolutionary activities' punishable by the state was changed to the more legalistic term 'unlawful activities that harm state security' (Article 28), followed by corresponding changes in the Criminal Law. More significantly, the 1999 Amendment inserted in the beginning of Article 5 a declaration that China is committed to 'administration of the state according to law' and construction of a 'socialist rule of law state'.

B. The 2004 Amendments: Recognising Human Rights and Private Property

In comparison to the previous amendments, the most recent set of amendments in 2004 was the most extensive in scope, revising 14 provisions. It was the product of the new regime headed by Secretary General Hu Jintao (胡锦涛), who succeeded President Jiang Zemin (江泽民) in 2003, shortly before the outbreak of the severe acute respiratory syndrome (SARS) epidemic and the landmark Sun Zhigang incident (孙志刚事件, discussed in detail in chapter three). The latter prompted the ruling party to give constitutional recognition to 'human rights' for the first time since the founding of the People's Republic, a notion that had once been ridiculed as a 'bourgeois sentiment'. Now Article 33 provides: 'The state respects and protects human rights.' Notably, what are to be respected and protected are not only rights for workers, peasants and any other 'good class' but rather 'human' rights in general – that is, rights of all human beings, which, literally understood, include even such 'enemies' as those who used to be called 'counter-revolutionaries'.

The 2004 Amendment, then, signifies a partial repudiation of the Marxist class-based cosmology underlying all previous constitutions – 'partial' because the class language in the Preamble and General Principles remains intact in the 1982 Constitution, creating tensions between the original text and recent amendments, which are products of quite a different spirit. The new cosmology is confirmed in corresponding amendments to the Preamble, expanding the 'patriotic united front' to embrace 'all socialist working people, builders of the socialist cause' and inserting the 'Three Represents' theory, according to which the CCP is supposed to 'represent the most fundamental interests of the broadest range of the people'.

Consistent with the ideological shift and continuing with the momentum of the previous amendments, the 2004 amendments further strengthen the equal protection of the private economy. The notion of 'individual and private' sectors is generalised to that of 'non-public' economies, whose 'lawful rights and interests' are protected by the state (Article 12.2). The new Article 13 goes so far as to declare that the 'lawful private property of citizens is inviolable' – almost a paraphrase of Article 12, which dictates that 'socialist public property is inviolable'.

Not only is the status of private property thus elevated to a position almost parallel with that of public property, but for the first time, the taking of private property for the public interest now explicitly gives rise to a requirement to provide 'compensation' (Article 13).²⁵ Although mere 'compensation', if literally taken, is meaningless without a requirement to be 'just', these revisions nonetheless reflect significant changes in the constitutional consciousness of China's legislators, officials, scholars and ordinary people since the promulgation of the 1982 Constitution.

Much like the Nationalists had done with earlier constitutions, all post-1949 constitutional amendments in China had been proposed and drafted by the CCP. In fact, it was normal practice to incorporate the amendments first in the CCP Charter (党章, *dangzhang*) in a Party Congress held a few months before the NPC convenes, and then move the amendments from the Party charter to the Constitution verbatim. In comparison, the 2004 Amendments were more 'democratic' in origin for a few reasons.²⁶ First, while the previous amendments were decided by the Central Committee of the CCP before they were open to public comments and suggestions, the 2004 Amendments were based on surveys that solicited the opinions of the central and local governments, corporate entities and scholars before they were summarised and digested in July 2003 in the form of a draft for recommended amendments. The recommendations were then discussed and approved by the Politburo (政治局, *zhengzhi ju*) of the Central Committee and its Standing Committee before they were distributed to the Party committees of provincial governments and ministries of the central government, as well as to the central committees of satellite parties, economists, legal scholars and political theorists. After the second round of soliciting opinions, the central committee in charge of constitutional amendments revised its recommendations and submitted them to the Politburo

²⁵ The original 1982 Constitution did provide for the 'public interest' condition for state appropriation, though without requiring 'compensation'. The other major revisions include the authorisation of the State President to conduct 'state visits' (Art 81) and a change of vocabulary from 'martial law' to 'state of emergency' (Art 67.20) in wake of the SARS epidemic in 2003, when the central and local governments were compelled to take non-military action for protecting the public interest.

²⁶ See Wang Leiming and Shen Lutao, 'An Important Measure for Implementing the Basic Strategy of Governing the State According to Law: Recording the Birth of the Constitutional Amendment', *Guangming Daily* (22 March 2004).

and its Standing Committee for further deliberation. While the previous amendments were decided by the Politburo, the final version of the 2004 Amendments was submitted to and approved by 342 members of the Third Plenum of the 16th Party Congress in October 2003, when the formal amendment proposal, consisting of 14 recommended revisions, was submitted to the NPC. After the NPCSC unanimously approved the proposal in December, it was introduced to the plenary session of the NPC when it convened in March 2004, during which the 14 amendments were passed by 2903 members of the NPC with overwhelming approval, against only 10 objections and 17 abstentions.²⁷

IV. CONSTITUTIONAL TRANSFORMATIONS

China's constitutional progress neither began nor ended with textual changes. Ever since the opening and reform initiated in the late 1970s, Chinese society has been exposed to a myriad of new ideas and practices. From classical liberalism to the New Left, various schools of economic, political and legal thought have been translated and introduced to Chinese readers of different generations. If a version of democracy was already enshrined in the original text of the 1982 Constitution, the Western concepts of human rights, private property, rule of law, judicial review and constitutionalism, to name a few, gradually found their way into the Chinese literature, some even into laws and the Constitution, though with Chinese modifications. Perhaps more importantly, the spread of legal and constitutional knowledge has led to institutional practices that, however limited and defective, have helped to inculcate popular consciousness for defending the individual rights provided for in the Constitution and in laws, which in turn has raised new expectations for institutional performance and reform. Nor have all salutary transformations taken place within the existing constitutional and legal framework. In a unitary state like China, some local reforms of constitutional nature can take place only in spite of the uniform constitutional provisions to the contrary, giving rise to the unique paradox of 'benign constitutional violations'.

²⁷ *Ibid.*