China’s Embattled “Rule of Law”: Paradoxes and the Breakthrough Under Single Party Dominance

by

Hao Wang

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Graduate Department of East Asian Studies
University of Toronto

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Abstract

China’s thirty years of economic development has brought on a number of crippling problems: high inequality, unbalanced development, environmental degradation and so forth. Arguably all of them coincide with China’s long-enduring absence of a full-fledged legal system that could balance state power and human rights, in another word, the “rule of law”. Looking into reform advancement and regression of China’s legal development, this thesis argues that a “rule of law” regime as proposed by Pan Wei would either fail to come into being, or will not do the job, without constitutional and legislative reform. This thesis argues that China’s centuries-old civic project is one focusing on building constitutionalism, and a Chinese Socialist Constitutional State conducive to Socialist democracy as proposed in the thesis would better reconcile the needs of the Party and society at this critical juncture, as well as in the long run.
This thesis is dedicated to Prof. H.X. Wang and Dr. S.Q. Zhu, grandpa and grandma, for their love and discipline.
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LIST OF ABBREVIATIONS

PRC:        People’s Republic of China 中华人民共和国
CCP:        Communist Party of China 中国共产党
KMT:        Kuomintang (Chinese Nationalist Party) 中国国民党
NPC:        National People’s Congress of PRC 中华人民共和国人民代表大会
CPPCC:     Chinese People's Political Consultative Conference 中国人民政治协商会议
CCDI:      Central Commission for Discipline Inspection 中央纪律检查委员会
CPLC:     Central Politics and Law Commission 中央政法委员会
PSC:         Politburo Standing Committee 中央政治局常务委员会
PLA:        People’s Liberation Army 人民解放军
SPC:        Supreme People’s Court 最高人民法院
MOJ:       Ministry of Justice 司法部
CL:          Criminal Law 刑法
CPL:        Criminal Procedure Law 刑事诉讼法
GPCL:     General Principles of the Civil Law 民法通则
APL:    Administrative Procedure Law 行政诉讼法
CHAPTER I:  
The Puzzle, Literature Review, Reassessment and Thesis Argument

Despite the fact that China’s gross national income per capita of $6091\(^1\) ranked around the 90\(^{th}\) in the world, and that the alleviation of poverty remains a fundamental challenge to the country, Deng Xiaoping’s policy of “reform and open-up” has started a economic miracle which turned China into the second largest economy in early 2010s. However, rapid economic ascendance has also brought on a number of crippling problems: high inequality, unbalanced development, strong state-society tension, environmental degradation and so forth. And arguably, all of these “mounting governance deficits”\(^2\) coincide with China’s long-enduring absence of a full-fledged legal system that could balance state power and human rights of all members of the society, or in another word, the “rule of law” against “rule of man”.

In the first decade of the 21\(^{st}\) century, it is seen that “rule of law” concerns in China has passed on from social elites to a much wider population in the grass-root level, as more and more Chinese people find out their civil liberty in either modern economic activities or in consuming public services as a daily routine, remains highly vulnerable to either the “misfeasance” or the “nonfeasance” of the legal system attached to single party dominance, institutionally and culturally. In early 2000s, surges of petitioners broke through local obstructions, jumped onto the train to Beijing, and attracted the attention of central government. According to the statistics

\(^1\) Data refer to the year of 2012. World Development Indicators database, World Bank. Data Accessed on April 6\(^{th}\) 2014.

\(^2\) Pei, Minxin. *China's Trapped Transition: The Limits of Developmental Autocracy* (Cambridge, Massachusetts: Harvard University Press, 2008), 167
of Yu Jianrong, Professor at Chinese Social Science Academy, a large portion of the petitions to the central authorities are “law-related (Shefa)”: 63.4% of the 632 interviewed petitioners had first resorted to the court for legal resolution; 42.9% of their cases were rejected by the court; and in 54% of the cases, the court adjudicated the case yet ruled against the petitioners. The Petition Bureau of the NPC standing Committee estimated that 40% of the petitions were against decisions made in the legal system perceived to be unfair, and 80% of them were well grounded. As pointed out by Yu Jianrong, “the failure to satisfy the demand of petitioners was diminishing the credibility of the central authorities and as a result, the petitioners were becoming radicalized and seeking remedies outside the political system.”

It’s argued by many in both the West and the East that substantial political reforms, or at least, significant policy adjustments, are in urgent need for China’s economic growth to be sustainable and thus its social-contract to be renewed. However, such an observation is by no means an established consensus, since any consensus process regarding topics on China is meant to be lengthy, pandemoniac and unpromising. This paper only aims to add a new layer of uncertainty to the existing chaos in the field.

1. The Reform Puzzle:

3 Yu Jianrong 于建嵘, is an eminent Chinese scholar and public intellectual, named by Foreign Policy in 2012 to as one of the Top 100 Global Thinks for “daring to be specific about how to change China.”


Facing China’s alleged stunning “economic success”, literatures assessing and making predictions on the Communist oligarchy started to quiver and split. Pessimists hold that economic development is not sustainable under a “partially reformed” political system resistant to any substantial changes, and the ruling party now is in constant danger of legitimacy crisis. Min Xinpei argued in his *China’s Trapped Transition* that the central government has failed to provide the people with “safe workplaces, education, public health, and a clean environment”, and has now turned social frustration into widespread political discontent.\(^7\) Susan Shirk argued in her *China: Fragile Superpower* that Chinese leaders face a troubling paradox—“the more developed and prosperous the country becomes, the more insecure and threatened they feel.”\(^8\) While the optimists tend to understand Chinese government as a successful state engine whose efforts in economic development can win out any other pressures for political change. Flabbergasted by the scale, instead of virtues of Chinese economy, Edward Friedman argued that “the PRC has already transited into a stable political system capable of winning nationalist support and providing dignity, wealth and stability for Chinese people.”\(^9\) Francis Fukuyama, who wanted to put an “end” to “history” when Berlin Wall fell in 1989, even turn to argue that Chinese system of accountability is a “moral accountability” which is highly idiosyncratic, meritocratic and institutionalized.\(^10\)

\(^7\) Pei, 205-167


In the foundational text of the modernization theory, Seymour Martin Lipset wrote “the more well-to-do a nation, the greater the chances that it will sustain democracy”\(^{11}\). Michael C. Oksenberg, along with many other China watchers believe such a scenario will eventually materialize in China. Doug Guthrie holds that economic development would inevitably weaken the authoritarian rule, empower the civil society and foster middle class experiences that would eventually result in popular demand for China’s transition to democracy.\(^{12}\) However, such a long-held expectation is being increasingly challenged by a newer postulation coming into vogue, namely the conception of East Asian Developmentalism. In fact, such an idea has been adopted by CCP to justify its rejection to any reform projects towards liberal democracy and the expansion of civil and political rights since 1980s\(^{13}\). According to an East Asian Developmentalist, “economic growth through market development is the absolute priority” and “adopting a pluralist parliamentary system and implementing legislation protecting individual rights could only be destabilizing, and would therefore be premature.”\(^{14}\) Believed by both Jiang Zemin\(^ {15}\) and Edward Friedman, rising middle class “privileges” political stability, which is essential to ensuring steady economic growth. The latter further argues that the ruling party “can legitimize its predominance as a maintainer of stability by manipulating a specter of destabilizing alien intrusion”\(^ {16}\).


\(^{14}\) Ibid.

\(^{15}\) Jiang Zemin 江泽民 (1926-present) : Chinese politician, former General Secretary of CCP (1989-2002).

\(^{16}\) Friedman and Wong, ed., 258
Disputes over “universalness” and “particularity” entails contrasting reform agendas suggested for Chinese government at arguably the conjuncture of “Life and Death”\(^\text{17}\). Under the umbrella of “East Asian Developmentalism” and the “China—in analogy to Singapore—Particularism”, authoritarian rulers and many scholars within the “high solid wall”\(^\text{18}\) launched their searches for a usable past, one that might be Legalist, Confucianist and even Maoist in nature. Among a number of alternative regime-designs, the idea revolving around the “rule of law” as a new legitimacy source, has been favourably reviewed by many in the West. Undoubtedly, it is convincing to all that the country’s greatest challenge today is not whether to turn democratic, but to be fair and just in the first place. However, it remains a highly unsettled framework. First, it remains uncertain whether and why the “rule of law” could be brought to fruition by the single-party dominance. Moreover, its overall coherence with China’s century-long civic project of “implementing a government” has not been assessed at all. Succeeding in neither taking into consideration the political realities of the Communist oligarchy, nor to contextualize its model within a recent history of bottom-up pursuits, any attempts made to reach a solution by unfolding the “particularism”, become vain.

Bearing these questions in mind, I would like to raise my research question—“whether ‘Rule of Law’ will come into being under, and contribute to the longevity of, single party dominance, without any form of democratization”—and if a dim but prudent view has to be taken — then


\(^\text{18}\) “Between a high, solid wall and an egg that breaks against it, I will always stand on the side of the egg.” Said Novel Prize in Literature Laureate, Murakami Haruk in Jerusalem, Feb. 17, 2009
“by what institutional innovation a smidgen of validity might be added to the rule of law regime”— and on top of that, “how it would come forth, and where it is heading to in the long run.” In this chapter, a brief literature review will be firstly given on ongoing debates over Pan’s model as a regime innovation in China. Secondly, my takeaways from the “rule of law regime” will be further discussed in closer consultation to traditional legal philosophy and recent legal history of China 19, in order to uncover some continuities and developments, or discontinuities and lack of developments in history that might be useful in understanding today. At the end of this chapter, my thesis argument and emphases of each sections will be provided.

2. “Rule of Law” as a Regime Innovation?— A Literature Review

When dealing with traditional polities and their changeabilities, Samuel Huntington argued in his Political Order in Changing Societies that “a political system where power was dispersed would have many proposals and few adoptions and one where power was concentrated would have few proposals but many adoptions.” 20 Under such a “double-barreled” model in which the potential of innovation is lower at the extremes, it seems an educated guess that Chinese polity in Post-Deng reform era, wavering between hardcore authoritarianism and a liberal alternative, is possible to hit the mark of “highest rate of innovation” at its theoretically best chance.

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19 A modern legal history of China is only “recent” when it’s in comparison to Pan Wei’s evocation of traditional Chinese wisdoms from Pre-Qin era (2100 B.C.-221 B.C).

Believing that pressure for political reform in China derives from pragmatic concerns over forms of social injustice, rather than a nation-wide thirst for democracy, Pan Wei, as a representative of many Chinese intellectuals, argued for a “Consultative rule-of-law regime” as a alternative solution to China’s interwoven social-political problems\(^21\). The six pillars of Pan’s regime design include a neutral civil service; an autonomous judiciary; extensive social consultative institutions; an effective anti-corruption body comparable to ICAC in Hong Kong; and independent auditing system; and basic freedoms (of speech, press, assembly and association)\(^22\) still held, but on longer leashes.

According to Pan’s agenda, the “Consultative rule of law regime” could materialize in “three stages” of political reforms lasting a total of about twenty years. During the first five-year period, the primary task of the reform is to educate the population about the “virtues of a law based order.”\(^23\) The Party has to shift the “central work” from “economic construction” to “building rule of law,” and then “separate the duty of the Party from that of the government” by giving up the administration over government’s personnel affairs and control over its routine works of law enforcement.\(^24\) During the second phase focusing on institutional development, a system of checks and balances (featuring independent judiciary, anti-corruption system, and social consultative institutions) is expected to be built. In the last ten years of the reform, the Party is expected to expand the basic freedoms (of speech, press, assembly and association) and


\(^{23}\) Ibid, 58

\(^{24}\) Ibid, 37-35
thus improve the state-society relation in substantial level. In the end, the law will replace the Party as the supreme authority in China, and the Communist Party would enjoy “high prestige among Chinese people” and its legitimacy would be renewed for that China would during the process achieved “modernity, instead of democracy”.

In a nutshell, Pan’s model believes that through a top-down implementation of a government giving centre stage to “the supreme authority of established legal requirements”, the CCP could eradicate all entrenched problems, walk away from the long-overdue legitimacy crisis, achieve the goal of political modernization and remain completely unscathed in terms of its monopoly of political power.

**Prima facie plausibility**

Most “big names” in the West give extensive amount of credits to the “prima facie plausibility” of Pan’s belief that the “consultative rule of law regime” under single party dominance is a faster relief to many social issues than democratization, of which the future course in China, if any, seems super tortuous and lengthy. They believe that reform-minded leaders in China, well-informed about inherent flaws of their rule and legitimacy crisis it faces, may happen to coincide with Pan’s answer to the question. Gunter Schubert, who finds Pan’s

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25 Ibid, 36
26 Ibid, 5
proposal very attractive, argued that Pan’s institutional framework is the best available translation, though a highly abridged version, of “democracy” in a one-party system, and it “transcends to some extent the official understanding of ‘socialist democracy’ by theorizing on one of its most prominent aspects—the implementation of a sound legal system.”

Randall Peerenboom, pointed out that the central government will support such a movement toward “rule of law” because of their aspirations for legitimacy in China and on the globe, and for that they desire to rationalize local governments that are being increasingly ignorant of central policies, and not doing quite well economically. Larry Diamond, resolutely believing in the “urgent necessity for substantial political reform” in China, applauded the feasibility of Pan’s model for that “anything that would reduce the overweening political power of the Communist Party” is very considerable and badly needed.

A Transitional Framework

While celebrating Pan’s “bold attempt” to chart a feasible path of political reform in China, Western scholars didn’t avoid the discussion of its nature as a transitional framework. They believe it is only logical that such a invaluable move toward “rule of law” would produce substantial societal changes that will by nature demand greater individual rights, freedom and

28 Zhao ed., 121-111
29 Peerenboom, 46
30 (As argued by Pan Wei in) Ibid, 1
32 Peerenboom, 46
shares of benefits from China’s economic development. According to Peerenboom, China’s rising civil society will not be satisfied by a partially reformed polity as proposed by Pan, for that without democratic preparations made in advance, opportunities for them to participate in law-making, interpretation and implementation, remain highly limited.³³ Larry Diamond, believing that “horizontal accountability” cannot be fully carried out prior to “vertical accountability”, further pointed out that “China will not achieve a truly vigorous rule of law, and bridge the widening chasm between the people and the ruling elite, unless it also develops, however gradually, democracy.”³⁴ Even Gunter Schubert, a deep lover of Pan’s proposed model, has to recognize in his conclusion that the implementation of a “rule of law” with more political consultation, will only grant legitimacy to the single party dominance for a “borrowed time” in which the Party should learn how to develop “demos” as the ultimate authorizer of law and real source of legitimacy.³⁵

*Being Conducive to Despotism?*

In Contrast to Schubert, Diamond, Peerenboom and others to whom Pan’s proposal of political reform seems more or less a welcome answer to the China puzzle, Edward Friedman held a lot dimmer view over the validity of a “consultative rule of law regime” under single party dominance, and its foreseeable implications for China’s political future. As promised in the

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³³ Ibid, 64-60

³⁴ Diamond, 331

³⁵ Schubert, 121
opening that “Pan is worth taking seriously”\textsuperscript{36}, Friedman spared no effort laying out Pan’s misjudgment on democracy, debunking Pan’s version of comparative politics, and most importantly, spotting a crucial inherent flaw contained in Pan’s model. According to Friedman, the synthesis of Chinese ancient political thoughts (i.e. Confucianism and Legalism) is not a way to “attain the liberty and lawfulness”, but is likely to give rise to “a despotic rule by the law, the coercive imposition of authoritarian rules on a populace whose unaccountable rulers will still remain above the law.”\textsuperscript{37} Major arguments being made in later chapters of this paper fundamentally agree with Fredman’s observation on the despotism-conducing nature of “rule of law regime” under single party dominance.

3. Reassessing “Rule of Law Regime” Against Backgrounds

In the previous section, I reviewed some leading western critiques on Pan Wei’s proposed “rule of law” model. Setting aside other intellectually provoking debates on insufficiently supported arguments made by Pan Wei (e.g. his misunderstanding of democracy; his failure in making a comparative sense and so on) , I would like to further assess his “Consultative rule of law” model in a closer consultation to traditional legal philosophy, modern political history and basic realities of communist oligarchy in contemporary China.

\textit{A Misrepresented Legal-cultural Foundation}

\textsuperscript{36} Zhao ed., 91

\textsuperscript{37} Ibid, 93
Pan Wei made it very clear that his “Consultative rule of law regime” represents “an attempt to revitalize a unique tradition of Chinese political civilization.” However, “historical determinism” is a neutral connotation only when the arguments being made are based on non-biased interpretation of history. In Pan Wei’s search of an usable past in favour of “Chinese particularism”, philosophical preoccupation in ancient time seem to have been misrepresented in nature, separated from practices, and sugarcoated to be sold to the global audience.

Pan Wei elaborated on Chinese “Law School of Thought” believed by him to have dominated China before the early Han dynasty (206BC-9AD). In fact, both “legalist tradition” and “Law school of thought” are apologetic variant forms of a notoriously loaded term, “Legalism”, which is “an imprecise Sinological translation of the Chinese term fajia 法家”39. The term “law school of thought” coined by Pan Wei gives scholars in the field a deceptive impression that it refers to a branch of political thought in which “Law” instead of “Monarchy” rules all under the heaven. Undoubtedly, a school of thought believing in the “supremacy of law”, if there is any, would be a desirable preparation for the implementation of “rule of law regime” as proposed by Pan Wei. However, the notoriously loaded term fa-jia 法家, which is the archetype of “legalism”, “legalist tradition” or “Law School of Thought”, functioned in a very opposite way.

Pan argued that the “Law school of thought” could be traced back to Guan Zhong (?—645), a prime minister of the State of Qi. However, the term “fa 法” in Guanzi 管子 written by Guan

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38 Ibid, 31

Zhong and his disciples, does not even fit into the semantic field of the concept of “law” at all. The term fa has been defined by Guan Zhong himself as i) principles of nature, in another word, Ze 则; ii) models, in another term, xiang 象; iii) mensuration, or fa 法; iv) tutelage, in another word, hua 化; v) incentives and deterrents, or juesai 決塞; vi) xinshu 心术, literally the “techniques of the heart-mind” and vii) units of calculation, or jishu 计数.\(^{40}\) Later on, Guan Zhong further explained that:

“trying to issue proclamations and commands while being unenlightened with respect to ze is like establishing sunrise and sunset on the basis of a spinning wheel or trying to stabilize the tip of a stick while shaking it... trying to change customs and improve education while being unenlightened with respect to hua is like bending a wheel in the morning and trying to ride a carriage with it that evening... trying to organize great undertakings while being unenlightened with respect to jishu is like trying to travel through a river gorge without boat or oars.”\(^{41}\)

It is crystal clear that “fa” in the account of Guan Zhong refers to a set of methods, standards, or noteworthy techniques in delivering governance, instead of “law” referring to “legal regulations” as translated by Pan Wei in the term “Law School of Thought”. As pointed out by Goldin, early Sinologist not sensitive to the difference between the usage of ancient and modern Chinese terms, may have assumed that fa meant something like “law” in classical times as well.\(^{42}\) However, Pan Wei, a Berkley-trained scholar who finished his early education in Peking University, is clearly not one of them.

\(^{40}\) Ibid, 93


\(^{42}\) Goldin, 93
Besides misattributing the origin of Chinese legal tradition to Guan Zhong in whose lexicon “fa” refers to “methods and standards”, Pan Wei turned a blind eye to other synthesisers of Chinese legalism: Shen Dao (395-315BC)\textsuperscript{43} who speaks of monarchical absolutism; Shen Buhai (420-336BC)\textsuperscript{44} who speaks of tricks and techniques in state control; Gongsun Yang (390-338 BC)\textsuperscript{45} who speaks of cruel punishment and restriction of knowledge; and most importantly, Han Feizi (281-233BC)\textsuperscript{46} whose philosophy became the guiding principles of the first emperor of China, and contributed heavily influence to every dynasty afterwards. Han Fei’s philosophy featuring the intimate cooperation of power, techniques and a punishing device, was described by A.C Graham as an “amoral science of statecraft.”\textsuperscript{47} In the word of Han Feizi, a legalist held that “Law is something promulgated by the monarchy and learned by the people; the violation of which will be punished and its obedience rewarded.”\textsuperscript{48}

Pan Wei suggested that the “Law School of Thought” dominated China until Confucianism rise to power in the reign of Liu Che in around 130 BCE. In fact, despite its outcast status throughout Chinese imperial history since Emperor Wu of Han, legalism hasn’t ever ceased in

\textsuperscript{43} Shen Dao, 慎到, commonly referred to as Shen Zi 慎子, was a pre-Qin Chinese philosopher at the Jixia Academy in the State of Qi.

\textsuperscript{44} Shen Buhai, 申不害 was a Chinese philosopher and reformer who was the Chancellor of the State of Han 韩 under Marquis Zhao of Han from 351 BC to 337 BC.

\textsuperscript{45} Gongsun Yang 公孙鞅, also known as Shang Yang 商鞅, was an famous statesman and legalist reformer of the State of Qin during the Warring States era.

\textsuperscript{46} Han Feizi 韩非子, or known as Han Fei, was a Chinese philosopher seen as the major developer of the doctrine of legalism. He was a member of the ruling aristocracy of the State of Han in late Warring-States era.


\textsuperscript{48} “法者，宪令著于官府，刑罚必于民心，赏存乎慎法，而罚加乎奸令者也。” as in Chapter Ding Fa 定法 of \textit{Han Feizi} 韩非子.
practice. As pointed out by Qu Tongzu⁴⁹ in his *Law and Society in Traditional China* (1948), legalists in the Han dynasty successfully incorporated the essence of Confucianism and the hierarchical order it entails into legal regulations of the Han⁵⁰, and law further became an assistive device to state ideology. “Ever since the controversy between the Confucianists and the legalists, law lost much of its idealistic fascination and henceforth definitely acquired a Positivist’s conception,” says Chinese jurist Mei Ju-ao (1904-1973) in his *China and the Rule of Law* (1934), “the word *jus* (*droit, Recht etc.*) finds no place in Chinese mind; but to a Chinese, law (*fa*) has always meant ‘positive law’ in its genuine Austinian Sense”⁵¹. Such a theoretical foundation impeding the birth of any legal principle of a modern sense (either formalist, functionalist or substantivist), is continuing to holding back China’s steps towards legal modernization.

In contrast to the Western notion of “rule of law” featuring “Lex, Rex” (“the Law is King”)⁵² advocating limited government and the importance of covenant, Chinese Legalism, or more precisely, *fa-jia* in Chinese history, de facto refers to “Rex, Lex” (“The King is Law”). In another word, Pan’s invention of “Law School of Thought” stands for the principles and practices of a school of political theorists advocating strict legal control over all members, a system of rewards and punishments uniform for all classes, and most importantly, an absolute monarchy, which itself in most of time stands out of the reach of “law”. Designated to

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⁴⁹ Qu Tongzu (1910-2008) 瞿同祖, Chinese legal historian, former Professor at National Southwestern Associated University 西南联大, and former research at Harvard-Yenching Institute, Harvard University.

⁵⁰ See Tongzu, Qu. *Law and Society in Traditional China* 中国法律与中国社会. (Beijing: Zhonghua Book Company 中华书局, 1981. 1948) 358


⁵² *Lex, Rex* is a book written by Scottish Presbyterian minister Samuel Rutherford (1600-1661).
“revitalize” such a “unique tradition of Chinese political civilization”\textsuperscript{53}, Pan Wei’s “rule of law regime” is intrinsically contradictory to a social-contractarian “government of law”, and has the theoretical potential to go very wrong in its practice under the rule of Communist oligarchy.

\textit{What has been left over? — The Other Side of History}

Besides reconstructing the ancient preoccupation of “amoral science of statecraft”\textsuperscript{54} featuring “absolute monarchy” into a “law school of thought” featuring the supremacy of law, Pan Wei’s delineation of a more recent legal history of China, is a rather bitter disappointment. Admittedly, KMT under Chiang Kai-shek, deeply beset by partisanship from within, Japanese invasion from without and Communist aggression scattered all over the country, failed to honour the political trajectory of “three-stage revolution”, i.e. military dictatorship (\textit{jun zheng}), authoritarian rule (\textit{xun zheng}), and constitutional rule (\textit{xian zheng}), announced by Dr. Sun Yat-sen in 1923. However, that by no means suggest that China has to make “a different choice”\textsuperscript{55}. Being ignorant to the civic part of the story, Pan Wei neglected a century-long “bottom up” pursuit of rule of law towards a constitutional end.

As pointed out by Philip Kuhn in his \textit{Origins of the Chinese Modern State}, institutional adaption that was pursued in China from the nineteenth century until the post-Maoist People’s republic, aimed at the implementation of a “program of government”, or in his words, a “constitutional

\textsuperscript{53} Zhao ed., 31
\textsuperscript{54} Graham, 285-67
\textsuperscript{55} Zhao ed., 27
program.” The following paragraphs will depict a brief history of constitutional awareness in China from the Republican era to Mao’s reign. It is seen that although such a civic pursuit has been interrupted from time to time, its basic goal hasn’t varied. A more thorough and further treatment of modern Chinese constitutional thoughts will be provided in Chapter III of this paper.

In 1929, Hu Shih (1891-1962) published his famous chapter Human Rights and Provisional Constitution, in which the god-alike Human Rights Protection Order promulgated by the Nationalist Government in Nanjing was critically debunked. Hu Shih thought the order was “outrageously disappointing” for its inherent flaws, and more importantly, its discrepancy with how public intellectuals and political dissenters were treated under the rule of KMT. According to him, the labels of “reactionary elements (fandong fenzi)”, “local tyrants and evil gentry (tuhao lieshen)”, “anti-revolutionary (fan geming)” and “suspected communist (gongdang xianyi)” can simply deprive a man of all his venerable human rights. By labeling it a “reactionary publication (fandong kanwu)”, any book or newspaper can be purged by the state at no cost. A foreign-owned school can be “closed and confiscated” for its alleged “cultural invasions (wenhua qinlue)”, and the Chinese-owned for being a “scholar-tyrant (xuefa)” or “reactionary

\[\text{56} \text{ See Kuhn, Philip A. } \textit{Origins of the Modern Chinese State}. \text{ (Stanford, California: Stanford University Press, 2002), 26-1 and 114-81}\]

\[\text{57} \text{ Hu Shih} \text{ 胡适 was a Chinese philosopher, writer and diplomat, known as one of the leaders of China’s New Culture Movement of 1910-1920s.}\]

\[\text{58} \text{ See Hu, Shih. 胡适 } "\text{Human Rights and Provisional Constitution 人权与约法.}" \text{ In } \textit{Selected Articles On Human Rights 人权论集}. \text{ (Beijing: China Chang An Publishing House, 2013), 3-1. The article was originally published on the Crescent Moon 新月, Volume 2, Issue 2, (1929).}\]

\[\text{59} \text{ Ibid}\]
force (fandong shili). Hu Shih further pointed out that the order “prohibits individuals and organizations from infringing human rights”, whereas “our most painful experience today result from those infringements on ‘physical body, freedom and property rights’ conducted by, or under the name of, government agencies or party chapters.” Hu jumped to a conclusion that:

The protection of human rights and the materialization of rule of law can hardly be achieved with a piece of paper full of uncertainty.

... Rule of law is to impose restrictions on the behaviors of bureaucrats within the extent of power regulated by the law. Rule of law exclusively recognizes legal codes instead of faces of men.

Hu Shih’s chapter soon triggered a nation-wide debate on the definition of “human rights” and its relation with “rule of law”. Luo Longji (1896-1965), another crucial member of the Crescent Moon Society, responded Hu’s calling for “rule of law” in his On Human Rights:

Someones with bankrupted human rights, made self-deceptive arguments that ‘human rights’ is a abstract noun with which one cannot stave off hunger or cold... Human rights entail, undoubtedly, food and cloth, and many things far more important.

... Those who tramples human rights and remains lucky at present...try at pains to to make themselves into Charles I of 17th Century England and Louis XVI of the 18th Century France... They are rehearsing an old play, in which the ruler shall say “I’m the state.”

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60 Ibid  
61 Ibid  
62 Ibid 5.  
63 Luo Longji 罗隆基 was a famous Chinese liberal politician and thinker, former Vice-president of China Democratic League  中国民主同盟, also known as China’s “No.2 Rightist” during Mao era.
It’s only logical one who strives for Rule of Law should strive for Constitution in the first place. **Constitution is the law with which people rules the government,** while **common law is the law with which government rules the people.**

The articles by Crescent Moon Scholars such as Hu Shih and Luo Longji addressed several crucial legal-cultural disagreements between the state and the society in China at the juncture between a traditional monarchy and a modern political system in the 1920s: i) the definition of “law”; ii) the definition of “human rights”, and ultimately, iii) the definition of government, in a modern society. First of all, heavily indebted to western political thinkers, Chinese social elites in 1920s hold the view that law is the expression of general will, and all citizens have the right to contribute personally, or through their representatives, to its formation. In the word of Luo, Human rights give birth to law, and Law is made to protect human rights. Contrarily, the Nanjing government remained in their comfort zone of an instrumentalist approach of law, or law as a tool of state control, of which an essential part was human rights violation. Secondly, the progressive Chinese civil society believed that “human rights” cannot be simply reduced, as the state always did, to be no more than basic access to “food, cloth and housing”. It however is, all the necessities of being a human, including “the right to wear, eat and live”, “the protection over personal security”, and all “conditions” with which “the greatest happiness of the greatest number” can be achieved through individual experience of “being my self at my best.” Most importantly, reform-minded scholars and China’s “new youth” created in and after the New Culture Movement, called for a limited government, framed under the people’s rule over it.

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64 See Luo, Longji. "On Human Rights." In **Selected Articles on Human Rights.** (Beijing: China Chang An Publishing House, 2013), 47-23. The article was originally published on the **Crescent Moon** in 1929.

65 Ibid, 35.

66 “成我至善之我” as in Ibid, 28-27.
through constitutional arrangements. Chinese social elites held that the state is only one of many social organizations in a modern country, and once it failed to protect “human rights”, people shall be then discharged from the obligation of being obedient to its orders.\textsuperscript{67}

After its taking over in 1949, the Communist Party refused to deliver the Roosevelt-styled “Four Freedoms” promised to the world by Mao Zedong in 1945. Contrarily, the entire nation was controlled in terms of speech, banned from non-Mao worships and denied the right to an adequate standard of living. Majority of the population lived in constant fear during restless political campaigns from late 1950s to late 1970s. As noted by Michael Dutton, the Communist Party chose to stay away from any forms of procedural justice and to limit public supervision over legal system, in order to utilize the judiciary and law as its powerful weaponry in class struggle as the furtherance of the Socialist revolution in the new era.\textsuperscript{68} It is a sober fact that Mao’s obsession with the politicization of law and judicial system, successfully turned rule of law “bankruptcy” in republican era into a “blackout”.\textsuperscript{69} However, the civilian quest for a constitutional government, has not ever stopped, though met only with bloody suppression in a socialist China where equal justice “subject to change along with Party’s policy on class division”.\textsuperscript{70}

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\textsuperscript{67} Ibid, 31.


\textsuperscript{69} For a more comprehensive legal history in and after Mao era, please consult Lubman, Stanley B. \textit{Bird in a Cage: Legal Reform in China after Mao}. (Stanford, California: Stanford University Press, 1999)

establishment of a special committee made up of members of the Communist Party, democratic parties and non-party personages, to redress numbers of unjust cases in the Three-anti, Five-anti and the Su-Fan campaigns. Simultaneously, Zhang Bojun (1895-1969)\textsuperscript{71}, President of the China Democratic League in 1950s, further argued for a empowered bicameral legislature formed by members from NPC, CPPCC, democratic parties and other social organizations. Zhang argued that NPC and CPPCC gathering on a yearly basis is insufficient, and national affairs shall be discussed far more frequently. Chu Anping (1909-1966)\textsuperscript{72}, a student of Harold Laski back at LSE, the Chief Editor of \textit{Guangming Daily} in 1950s, was another exemplary figure among numerous Chinese liberal thinkers who fought for a constitutional government at the cost of their own lives. This very gentleman, whose esteemed publication \textit{The Observer}\textsuperscript{73} routinely criticized KMT for its illegitimate rule in 1940s, criticized the newly found PRC as a “World as the Party’s (dang tianxia)” and urged the Communist Party to honour its promise of the establishment of a coalition government. His famous speech\textsuperscript{74} published in full text by both \textit{People's Daily} and well received by people who read in 1950s, exerted tremendous pressure on the communist rulership. Besieged by pro-democratic pressures from all quarters, Mao Zedong wrote the official editorial \textit{Why Is That}, in which he enumerated the merits of the CCP, defined liberal thinkers as “reactionary running dogs of western imperialism”, and announced the start of Anti-right movement in 1957. During this movement, more than 300,000 pro-liberal members

\textsuperscript{71} Zhang Bojun\textsuperscript{章伯钧}, Chinese liberal politician and intellectual, known as "China's No.1 rightist" during Mao era.

\textsuperscript{72} Chu Anping\textsuperscript{储安平}, famous Chinese liberal scholar and journalist, considered to be one of the most famous rightists in China.

\textsuperscript{73} \textit{The Observer}, \textit{Guancha 观察}, was a famous pro-democratic publication in the Civil War era of China in 1940s.

\textsuperscript{74} The article was named \textit{My Comment made to Chairman Mao And Premier Zhou}. 
of the society were purged, and 170,000 of them lost their lives. In Peking University, 716 pro-
democratic faculty and students were labeled rightists for their outspoken criticism, and eight of
them were executed in later years. This includes Lin Zhao (1932-1968)\textsuperscript{75}, whose life was
brought into public attention by Hu Jie’s documentary \textit{In Search Of Lin Zhao’s Soul} in 2004.
Legal professionals who called for an independent legal system free from political obligations
were sent into exile or transferred to other jobs, while the judicial power of the state, was instead
exercised by party cadres.

\textit{Does All But to Materialize: Pan’s Model and Beyond}

Another crucial weakness of Pan Wei’s remedy is that it lost sight of some basic political
realities of the communist oligarchy today and provides no compelling argument as to why the
Party state would risk itself by implementing a “rule of law regime”. Two of the six supporting
factors of the implementation of “rule of law regime” raised by Pan Wei are i) an existing polity
whose structure is not too far away from his proposed six-pillar regime, and ii) a Politburo in
which a few members could make the decisive decision to embark on a substantial political
reform like what they did in pursing the market-oriented economic reforms.\textsuperscript{76} If these factors
best describe China’s political reality, China might have already democratized during the rule of
reform-minded leader Zhao Ziyang (1919-2005), given that China in the 1980s satisfies all six
factors as listed by Pan.\textsuperscript{77} In fact, the existing polity, a communist oligarchy wielding “almost

\textsuperscript{75} Lin Zhao林昭, or Peng Lingzhao 彭令昭, was a pro-democratic student at the Peking University. She was
executed in 1968.

\textsuperscript{76} Zhao ed., 40

\textsuperscript{77} Zhao ed., 40
absolute power” vastly differs from Pan’s goal of reform, a quasi-Montesquieuian government featuring a neutral civil service system, independent judiciary, and a substantially empowered legislature. And the decision-making in Post-Deng China, is fundamentally different from the previous decades in which founding fathers of the country can easily sweep away dissenting opinions inside the Central Committee of the CCP. Although the Politburo Standing Committee consist of seven members remains as the top of the power structure, there is a growing trend that the decision making of the PSC is held accountable by seniority and other powerful patrons who play important roles in the selection to the Standing Committee. A single decision cannot be solely made by a strong leader without consultation to stakeholders with strong family connections, and policy views of ambitious aspirants are routinely concealed to “avoid making mistakes that could derail their ambitions.”

Therefore, pinning hope on a deeply bothered, and more or less atrophied central power in launching a set of bold reforms at risk of its own demise, seems super unrealistic. Without essential constitutional and democratic preparations made to China’s legislature, the proposed top-down implementation of “rule of law”, sounds like a project aimed to “pull up oneself by his own bootstraps”. Even though the central power well informed about their life-and-death situation decide to implement a “rule of law regime”, it still remains uncertain whether and how such a grand blueprint can be carried out into executable policy adjustments that could win out all institutional and cultural obstacles in both central and local levels. And if such a process

78 Ibid.
becomes super lengthy, then the meaning vanishes. In fact, the possibility of separation of powers, even only the separation of executive from party dominance required in the first stage of Pan’s reform, has already been denounced by Wu Bangguo and Hu Jintao respectively in 2010 and 2013. By citing these insufficiently supported arguments made by Pan Wei, I do not mean to discredit his brilliant achievement as a pioneer in searching an institutional alternative to the concurrent government, to which I am heavily indebted in the framing and execution of my work.


In the world’s second largest economy today, the “state” and its “society” has not yet reached an agreement on any of the aforementioned key issues addressed by Crescent Moon Scholars in 1920s. Yet the constitutional awareness and human rights concern has already passed on from social elites to grass-root level of the society, due to the current regime’s failure to provide a fair and just legal environment that protects civic liberty and fosters sustainable growth. With a ever-growing middle class rising up to accomplish the centuries-long civic project of implementing a constitutional government, the CCP has to be both vigilant, and progressive in launching a substantial political reform. However, the top-down implementation of a “Rule of Law” regime proposed by Pan Wei, would either fail to come into being, or will not do the job, under one-party dominance, without constitutional preparation made to China’s legislature.
Contrarily, this paper held that current leadership of the Communist Party is well informed that the political modernization needed for economic performance can only be achieved through joint efforts made by both “state” and “society”. Given that China’s centuries-long civic project was one focusing on building constitutionalism in stead of multi-party competition, the Communist Party, after weighing pros and cons, will launch a set of reforms paving the way for a constitution-based “check and balance” favoured by Chinese citizens. Through a lengthy but mutual-beneficial period of negotiation, the society demanding political participation and the Party protecting vested interest, would reach an equilibrium at China’s transition from Communist oligarchy to a framework of pluralized one-party dominance, featuring an neutralized government, an uncompromising judiciary, and a powerful legislature with two houses, which respectively consist of members elected from party-components and public constituencies.

Taking advantage of Philip Kuhn’s concept of China’s Constitutional Program, the thesis argues that a “rule of law regime” wouldn’t be made possible without constitutional arrangements made in advance, and a constitutional order with Chinese characteristics reached at joint effort of the state and society might prolong the Party’s dominance until a need for further democratization emerges from within. The Chapter II of the thesis will further assess the implementation “rule of law” model in consultation to the paradoxical judicial reform and its obstacles under single-party dominance. In Chapter III, I will further discuss the plausibility, contents and the agenda of building a Chinese constitutional order. Its relationship to democracy in the long run will be discussed at the end of the thesis. However, as stated in the very
beginning, by providing an alternative agenda which is meant to be infirm and subject to corrections, this paper only adds a new layer of uncertainty to China’s reform puzzle.
CHAPTER II:
China’s “Rule of Law” Paradox: Limitations of “Law” Under Single Party Dominance

As we talked about in Chapter I of the thesis, the concept of law in a loosely defined past of China, is something “promulgated by the government and learned by the people, the violation of which will be punished and its obedience rewarded”. Legalism, or more precisely, fajia ceased to be the dominant philosophy after Qin dynasty (221-206BC), yet started to merge with Confucianism in Western Han (206BC–9AD). Legal codes from then on incorporated Confucianist hierarchical relationships between father and son, ruler and subject, husband and wife, and elder and younger brother. In an idealized Confucian society, there is no need for the operation of “law”, since people act virtually by following the rule of proprieties. Therefore, “law” has been structurally reduced to “penal codes”, only applied to those who failed to subscribe Confucian ethics. Such a Confucianized legalism, functioned as the de facto official ideology from the Han dynasty and lasted until the end of imperial China in 1911. Moreover, its instrumentalist understanding of law continued to exert influence in the Republican China, Mao’s era, and even until today.

In Mao’s era, Communism, together with a cult of the supreme leader’s personality, replaced Confucianism to be the “natural law” of China, while the “formal laws” being drafted in early 1950s repeatedly failed to come to fruition. For three decades after 1949, civil and criminal justice system functioned without any guidance of established legal codes, and the positions of judges were filled mostly by party cadres and former PLA officers without any legal training. According to statistics, only 3% of 150,000 court personnel in 1984 had received college-level
legal education. As pointed out by Stanley Lubman, law under Mao was an instrument of rule particularly in the context of criminal process but also through civil law institutions that served as highly politicized mechanisms of state authority.

In the wake of economic development after Deng’s policy of “reform and open-up” since 1978, China’s legal system started to reconstruct itself towards a functioning apparatus that provides protection over basic civic liberties needed for economic success. The criminal law (CL) and the Criminal Procedure law (CPL) were promulgated by NPC in 1979, and were later on amended in 1997, 2002, and 2005 for the CL and in 1996 for the CPL. It is the first time in China that a legal code provides protection against legal arbitrariness resulted from political flexibility by regulating that “No one shall be convicted without adjudication by the people’s court in accordance with the law.” The General Principles of Civil Law (GPCL, or minfa tongze , promulgated in 1987) and other hundreds of new statutes and regulations were issued in order to promote court trials as the “preferred venue” for resolving civil disputes and commercial grievances.

As pointed out by Carl Minzner, Chinese leaders aimed to advance their own interests through legal reforms from 1980s to early 2000s. In practical level, they adopted “law” as a new

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80 See Ma, Liying Li and Yue. "Adjudication and Legal Reforms in Contemporary China." *Journal of Contemporary Criminal Justice* 1, no. 26 (2010): 43


82 Article 12 of CPL, 1996.

mechanism to resolve “mounting social conflicts” created in the process of economic
development and rapid urbanization. On ideological level, they seek “law” as an alternative
source of legitimacy in replacement of Maoism. In 1989, the standing committee of NPC even
passed an Administration Procedure Law$^{84}$ (APL) with which ordinary citizens can sue state
authorities under a considerable number of circumstances. During the 15th National Congress of
CCP in 1997, Jiang Zemin announced “Rule According to Law (yifazhiguo)” to as the “basic
principle” of the Party in the new era. He further suggested that the purpose of such a basic
principle is to “incrementally institutionalize and legalize the system of Socialist Democracy”
and making the system and the laws associated with it “free from alterations according to the
changing wills and emphases of the central leader.”$^{85}$

However, Jiang Zemin’s political ideal featuring the unchangeable “Rule According to Law” failed to unfold after early 2000s. Driven by mounting tensions between the state and its people as a result of China’s unique pattern of economic development, noticeable legal cultural backlashes toward “rule by law” started to appear. One of the main rationales behind such a backlash is the rising “local mafia states”$^{86}$ and the influence they wield toward the local legal institutions. Although the Judge’s Law of PRC promulgated in 1995 $^{87}$ contains detailed

$^{84}$ 中华人民共和国行政诉讼法

$^{85}$ “逐步实现社会主义民主的制度化、法律化，使这种制度和法律不因领导人的改变而改变，不因领导人看法和注意力的改变而改变。”

$^{86}$ Pei, 165-159. For reported cases please consult Pei, 219.

$^{87}$ The Judge’s Law of People Republics of China (1995), aka. Zhonghua Renmin Gongheguo Faguan Fa, first time requires educational qualifications of the judges. After the amendment made in 2001, it further raised the educational requirement of judges. It provides that to become a judge, the candidate must i) possess the citizenship of China; ii) have reached the age of 23; iii) Be supportive to the Constitution of PRC; iv) have good political and professional qualities and good moral character; v) be in good health; vi) meet the specified educational requirement.
provisions regarding the training, selection, function, conducts, rewarding and punishment of judges all over the country, it is still very common to see vastly different outcomes in cases that are “at least on paper look quite similar”\textsuperscript{88}. As both a continuation of the institutional approach in which law is secondary to state power, and a result of unbalanced distribution of legal resources, local courts in China remain “institutionally weak”\textsuperscript{89} in either making fair and just verdicts, or the enforcement of their rules. Facing mounting “violent showdowns”\textsuperscript{90} between citizens seeking justice and local courts failed to deliver, and waves of petitioners surging into Beijing in early 2000s, the central authority of the Party decided to shift civic disputes away from court-based adjudications according to the law, back to, some times party-led, mediative procedures which prevailed in the lawless Mao’s China. Such a legal cultural retrogression is not only a by-product of 30 years of political decentralization, but also deeply rooted in the ruling logic of the single party dominance. In the first decade of 21\textsuperscript{st} century, it is seen that the new alleged top priority of the Party have swayed the Party’s once established slogan of “rule according to law”, let along the great disparity to be filled between the “rule according to law” and the proposed “rule of law” regime.

To better assess the practicability of a “rule of law” regime, or any idealized regime type featuring a “government of law” under single-party dominance as an alternative to concurrent governance, the author provides in the Chapter II of the thesis an empirical analysis towards the practices, retrogressions and the potential of the ongoing party-led legal reform. The author hold


\textsuperscript{89} Minzner, 68

\textsuperscript{90} Minzner, 68
the view that the proposed “rule of law” regime has given way too much credit to the function of law in contemporary China, and the Party-State without relinquishing some of its absolute power to the citizen through substantial legislative reforms, is intrinsically incapable of giving the central stage to “law” due to the growing fear from within described by Susan Shirk as the “fragility” of the super power 91.

1. The Deadlock of Civil Justice Reform

As we noted above, the civil justice system in China have gone through major reconstruction and reforms from late 1970s to early 2000s. Reform-minded leaders in the new era held that an important reason why the cultural revolution took place and lasted 10 years was that they had not paid enough attention to the function of law. Thus starting 1980s, Chinese authority tried to adopt “law” as their new legitimacy source, as well as a mechanism in resolving social conflicts generated by economic development. In 1990s, China made a great achievement in legislating many fundamental legal codes needed for a market economy in almost all of the important areas: contracts, business organization, securities, bankruptcy, secured transactions and so on. 92 However, all of these achievements China made in implementing top-down legal reforms and in legislating for a market economy, were described by Stanley Lubman, to as the “bird in a


cage.” Lubman argues that China does not yet have a legal system, since it continues to lack a unifying concept of law as a result of its long-held instrumentalist approach to law and the fundamental reluctance of the Party to tolerate any significant diminution of its authority. Recent party-led reformational, or deformational efforts made to the judicial system reaffirmed the precision of Lubman’s all time classical metaphor. In the first decade of the 21st century, “law” in China remains trapped in the “cage” of party power and governmental direction, and the judicial reform, once toward a goal of legal professionalism, seems to have gone derailed again. In rather cynic words of Minzner, China turned against the legal reform.

**Retrogression to Mediative Justice**

From 1949 to 1980s, the political ideology of the Party-state as a “people’s democratic dictatorship” required that any contradictions among the people (vis-a-vis contradiction between people and people’s enemy) shall be settled through “democratic methods”, which are, “persuading and educating disputants rather than adjudicating their disputes according to the established legal principles.” By the end of 1980s, “legal workers” in the judicial system are required to follow a “sixteen characters directive (shiliuzi fangzhen)”, which is “relying on the masses, investigation and research, mediation serving as the principal method, and solving

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94 Potter, 846-845

95 Minzner, 66

96 Margaret Woo, and Mary Gallagher, ed. 28
disputes on the spot (yikao qunzhong, diaocha yanjiu, tiaojie weizhu, jiudi jiejue).”

Any civil litigations were required to go through a “four-steps-to-court” protocol—“interview, investigation, mediation, and at last, adjudication”. Legal workers, lacking any essential legal education, familiarized themselves with and only with “two contradictions theory”, were told to:

i) interview both parties to understand the claims and defenses; ii) investigate into disputes and try to reach evidences; and iii) assemble repeated mediations to avoid proceeding to adjudication. As pointed out by Fu Hualing, both the plaintiff and the defendant were “passive participants” who had pin all their hopes into the “competency and integrity” of the judges.

The reform and open-up has changed China in both ideological level and practical level in the early 1980s. With the diminishing use of counter-revolutionary cases which were common in Mao era, the dichotomy between “people” and “people’s enemy” ceased to guide China’s legal framework. Under the influence of unprecedented growing civic disputes and economic grievances in the new era, Chinese authority decided to rebuilt the civil justice toward an court-based adjudicatory system that could better facilitates China’s economic development. Under an adjudicatory system with more emphasis on procedural justice, judges were then prohibited from making any prior-trial contacts with each of the two parties, which used to be a key component of mediative justice prevailed in previous decades. The “four-steps to court” protocol has been reduced to an “one-step to court” policy and the use of mediation become highly limited. As pointed out by Fu Hualing, such a move shifted the burden of proof from the

97 “十六字方针：依靠群众，调查研究，调解为主，就地解决。”

98 Margaret Woo, and Mary Gallagher, ed. 29
judges to litigants, and the two parties started to play a much more active role, contributing to a more adversarial process required for parties-centric civil justice. 99

However, in the first decade of the 21st century, the Party-state have overthrown many of the legal principles that they themselves drafted previously from 1980s to early 2000s. The central authority decided to switch the preferred venue of dispute resolving from law-abiding “adjudicatory justice” to “mediatory procedures” serving the need of “stability maintenance (weihu wending)” 100 alleged by the Party-state to as its top priority. In 2002, the Supreme People’s Court and the Ministry of Justice, together issued the *Opinions of the SPC and MOJ on Further Strengthening the Work of People’s Mediation in the New Era*101. Cornered by mounting state-society tensions in mid 2000s, Hu Jintao called for the construction of a “harmonious society” in 2005. As part of the Party’s campaign of “building Socialist harmonious society (goujian shehuihui hexie shehui)”102, Xiao Yang, the president of SPC further ordered local court judges to “mediate cases that could be mediated, adjudicate cases that should be adjudicated.”103 In 2006, he further suggested that “there should not be petitions or continuous litigation, or failure to bring the disputes to an end, for cases concluded through mediation.” As noted by Fu, Judges under the new policy are required to take into consideration

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99 Margaret Woo, and Mary Gallagher, ed. 40

100 “维护稳定”

101 “最高人民法院、司法部关于进一步加强新时期人民调解工作的意见”

102 “构建社会主义和谐社会”

103 “能调则调，当判则判”
out-of-court impacts of their verdict \(^{104}\), in stead of making the decision solely in accordance with the legal codes.

Benjamin Liebman explained such a retreat to mediation as the Party-state’s search for “a balance between respect for the authority of legal institutions and populism.”\(^{105}\) However, it’s nothing but an apologetic excuse of the heartrending fact that Chinese legal modernity again bent over in front of party interest in the name of people’s will. As noted by David Luban, mediation procedure requiring the avoidance of public participation and accountability, falls into the category of informal justice which creates a “private peace” by privatizing public issues and compromising legal principles. \(^{106}\)

**The Politicization of Courts**

Chinese Constitution\(^{107}\) and Organic Law of People’s Court\(^{108}\) both provide that “court shall exercise trial authority independently in accordance with the law, and shall not be subject to the interference from administrative organ, social organizations, and individuals. ” \(^{109}\) However, court decision-making in the new era under single party dominance not only subject to party

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\(^{104}\) See Margaret Woo, and Mary Gallagher, ed. 57-25

\(^{105}\) Liebman, 23


\(^{107}\) See Article 126 in Chinese Constitution 1982.

\(^{108}\) See Article 4 in Organic Law of People’s Court 1980.

\(^{109}\) “人民法院依照法律规定独立行使审判权，不受行政机关、社会团体和个人的干涉。”
interest and populism on street as we discussed in previous section, but also to a micromanaging judicial disciplinary system and its associated highly politicized “advisory requests, Qingshi”\textsuperscript{110} system.

Chinese Judges’s Law (1995) and two SPC directives issued in 1998 together established a progressive outline for the evaluation and discipline of judges\textsuperscript{111}. The Judges’s law provides that judges shall not be “suspended ,demoted, removed from office, or disciplined” for reasons other than those specified by law or pursuant to procedures other than designated by law.\textsuperscript{112} SPC directives (1998) provides that those who “intentionally ignore law or facts and issue an incorrect verdict must bear responsibility.”\textsuperscript{113} The directives further specified a list of faulty conducts of court personnel that shall be disciplined, which include: i) altering or fabricating court transcripts;\textsuperscript{114} ii) concealing evidence from the court pannel;\textsuperscript{115} iii) interfering with the work of lower courts in hearing cases;\textsuperscript{116} and iv) failing to assist court personnel from other jurisdictions in handling related cases.\textsuperscript{117}

\textsuperscript{110}“请示”

\textsuperscript{111} Margaret Woo, and Mary Gallagher, ed. 60

\textsuperscript{112} See Article 8(3) in Judges Law of PRC, 1995

\textsuperscript{113} See Article 14 in Experimental Responsibility Measures, SPC, 1998

\textsuperscript{114} Ibid, Art. 11

\textsuperscript{115} Ibid, Art. 12

\textsuperscript{116} Ibid, Art. 7

\textsuperscript{117} See Article 55 in Experimental Disciplinary measures, SPC, 1998
It is clearly seen from above regulations that both Judges’s Law (1995) and SPC directives (1998) provide that judges do not bear responsibility in wrongful court-decisions resulted from “simple legal error". The two directives further specified that judges shall not be sanctioned or disciplined for alteration or reversal of the cases caused by i) unclear law or regulation; ii) different views or understanding of the law, facts, or evidence; and iii) new evidence, amendment of law or alteration made to policy. As noted by Carl Minzner, 1998 SPC directives created a theoretical framework for an autonomous judicial disciplinary system run by courts in which judge’s individual liability for “simple legal errors” are restricted.

Under the influence of growing populism in 2010, the SPC issued a new Disciplinary Regulations for People’s Court Personel which nullified the 1998 Experimental Disciplinary Measures. The new Disciplinary Regulation removed the “protective language” exempting judges from being sanctioned for reversal of cases caused by simple legal error resulted from unclear laws or different understanding of laws or facts. As a result of such an unhealthy departure from the 1998 Experimental Disciplinary Measures, judges in local courts started to increasingly rely on an highly politicized and unprofessional system of “advisory requests (Qingshi)” to solicit ideas from judges in higher courts, in order to avoid potential disciplines or sanctions for “incorrectly decided case” or “reversal of cases”.

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118 Margaret Woo, and Mary Gallagher, ed. 62
119 See Article 4 in Experimental Disciplinary Measure, SPC, 1998
120 See Article 22 in Experimental Responsibility Measures, SPC, 1998
121 Ibid.
122 Margaret Woo, and Mary Gallagher, ed. 62
In some formally written “Qingshi” submitted to higher courts by adjudication committee of local courts, guidance being requested are more likely to focus on interpretations on certain legal codes or understanding on facts. However, the extent of Qingshi request made informally by lower court judges, in the words of Carl Minzner, can become “extremely varied, broad, and murky in scope.”  

In many cases, Qingshi requests are done orally and a likely decision preferred by higher court judges is being solicited. Such an highly politicized and unprofessional channel of decision-making is not only procedurally problematic, but also legally ungrounded. Given that higher courts being asked for an opinion are solely relying on written reports or oral expressions rather than evidences and forensic arguments, the Qingshi system is a potential threat to the fairness of court decisions. A rather peculiar consequence of Qingshi system is that the appellate courts are then very likely to be appealed against a judgement made by lower courts under their previous guidances. Given that Chinese Civil Procedure Law provides “second instance is the last instance in civil procedure”\(^\text{124}\), the very meaning of the appellate system seems nullified. In such situations, the Qingshi system disestablishes the two parties’ rights to appeal and the procedural justice of Chinese court system.

In addition, both the move toward mediation and the growing reliance on Qingshi system creates great opportunities for court corruption, given that the operations of the two can be highly informal, secretive and unaccountable. In the long run, the retreat to mediation and ever

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\(^{123}\) Margaret Woo, and Mary Gallagher, ed. 77

\(^{124}\) “人民法院审理民事案件，依照法律规定实行两审终审制度。” See Article 10 in Civil Procedure Law of PRC.
harsher controls over court personnel would necessarily jeopardize legal professionalism and formality, and thus diminish general public’s trust in law and confidence in legal procedure.

2. Criminal Justice Under Single Party Dominance

Besides that of the civil justice reform, the assessment of ongoing developments of Chinese criminal justice also lies at the heart of the question as whether single party dominance can be conducive to “rule of law”, especially one that provides both public order and enjoyment of human rights. As noted by many scholars in their works, Chinese criminal justice as a “jealously guarded prerogative”\(^\text{125}\) that is key to the state’s control over society, has gone through major reforms in mid-1990s. In order to deal with plenty of “new crimes” sprouting from fast-paced economic developments since reform and open up policy in 1978, Chinese authority revised its CL(1979) and CPL(1979) in respectively 1997 and 1996. Undoubtedly, the new legislation has made great improvements to the 1979 versions in terms of both the scope of contents and its philosophical underpinnings. In one hand, the CL 97 included 452 articles designated to deal “exhaustively and clearly”\(^\text{126}\) with diversifying new crimes, while CL79 had only 192 articles and 103 special provisions. On the other hand, CL97 recognized “implicitly or explicitly”\(^\text{127}\) some key legal principles of the West, namely the principle of legality, the principle of equality, and the proportionality of level of punishment. The following paragraph further discuss the


\(^{126}\) Keith and Lin, 4

\(^{127}\) Li and Ma, 40-39
major conceptual improvements of criminal justice that China has made on paper during the legal reform in 1990s.

The principle of legality, or “no crime without a law (nullum crimen sine lege)” was provided for in the CPL in which major tasks of criminal procedure law has been specified as i) to assure accurate and timely investigation of crimes and punish criminals based on correct application of law and ii) to protect innocent people from criminal prosecution. The newly added Article 12 of CPL 96 further provides that “No one shall be convicted without adjudication by the people’s court in accordance with the law”. On the other hand, the amended CPL 96 enhanced the “principle of equality before law” provided by Organic Law of People’s Court 1979. The CPL 96 provides that in conducting criminal proceedings, “the people’s courts, procuratorates and security agencies must seek truth from facts and use the law as the only criterion” and “all citizens are equal in the application of law and no special privilege is permitted before the law.”

Furthermore, it is the first time in China that the CL97 recognized the principle of “proportionality of level of punishment” by providing that “the degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender.” The amendments made in CPL96 further supported this principle by specifying that “in the

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128 “中华人民共和国刑事诉讼法的任务,是保证准确、及时地查明犯罪事实，正确应用法律，惩罚犯罪分子，保障无罪的人不受刑事追究。” Article 2 in CPL 1996.

129 “未经人民法院依法判决，对任何人都不得确定有罪。” Article 12 in CPL 1996.

130 Article 5 of Organic Law of People’s Court, provides that people’s court must apply the law equally without regard to citizen’s ethnicity, race, gender, occupation, social status, religion, education, wealth, and duration of residence.

131 “人民法院、人民检察院和公安机关进行刑事诉讼...必须以事实为根据，以法律为准绳。对于一切公民，在适用法律上一律平等，在法律面前，不允许有任何特权。” as in Article 6, CPL 1996.

132 “刑罚的轻重，应当与犯罪分子所犯罪行和承担的刑事责任相适应。” as in Article 5, CL 1997.
decision of all cases, stress shall be laid on evidence, investigation and study; credence shall not be readily given to oral confessions” and facts according to which a defendant is being sentenced to criminal punishments shall be confirmed by “reliable and sufficient evidence”.\textsuperscript{133} CPL96 further ensured the appropriate level of punishment by providing that People’s Court should retry a case upon the petition when “evidence upon which the condemnation was made and punishment meted out is unreliable and insufficient.”\textsuperscript{134} In addition to the aforementioned on-paper improvements China made in 1996-1997 reforms, some scholar even argued that the newly added Article 12 in CPL 96, “No one shall be convicted without adjudication by the people’s court in accordance with the law”, clearly indicates China’s acceptance of “presumption of innocence”.\textsuperscript{135} While the majority still hold that it is nothing more than a reaffirmation of the authority of court, and does not amount to an acceptance of the presumption of innocence.

As noted by Ronald Keith, it is seen in the new codes that Chinese legislative authority has tried to respond to both international and domestic pressure to enhance protection of individual human rights.\textsuperscript{136} All of these legislative improvements challenged the “principle of flexibility” which, for a very long time, had been used as a legitimate principle of Chinese jurisprudence with which government arbitrarily assume the role of “judiciary” and state policy frequently substitutes “law”.\textsuperscript{137} Judging from these legislative improvements, Chinese authority has

\begin{itemize}
  \item\textsuperscript{133} Article 46 in CPL 1996.
  \item\textsuperscript{134} Article 204 in CPL 1996.
  \item\textsuperscript{135} Li and Ma, 40.
  \item\textsuperscript{136} Keith and Lin, 2
  \item\textsuperscript{137} Keith and Lin, 3
\end{itemize}
succeeded in re-making criminal justice from a pure instrument serving the despotic dictatorship in the 1960s, into one that provides basic protections over lives and properties, under the rule of authoritarian leadership that is willing to abide some law, and pretending to consent to some others. In the words of Keith, a “balance of value (jiazhi pingheng)” between social control and human rights has been endorsed by legislative shifts under one party dominance from 1980s to 1990s. However, it is equally noteworthy that such legislative shifts are still policy-oriented, secondary to party strategies and slogans, and remain subject to pivotal changes if needed in new circumstances. As noted by Stanley Lubman, the criminal process after reforms is till “in the grip of CCP authoritarianism”. Later sections aim to provide empirical observations showing that such a temporary “balance of value” on paper is institutionally weak, full of changeabilities, and fundamentally incapable to materialize into a solidified “rule according to law” that can win out over interruptions from central and local party leaders as proposed by Jiang Zemin in 1997.

Local Mafia “Political-Legal System” (Zhengfa Xitong):

As noted by Minxin Pei in his *China’s Trapped Transition*, thirty years of decentralization since 1978 gained success in enabling local economic initiatives needed for economic development, however, simultaneously implied an emerging “decentralized predatory state” due to the decentralized economic rights, erosion of ideological norms, Party’s declining monitoring capacity and the availability of new exit options. Pei further argued that some decentralized predatory states not only misappropriate state power in benefiting themselves and their cronies,
but also cooperate informally with local gangs and thus turn into “local mafia states” that wield the powers of both of the state and the gangsterdom. In fact, a substantial institutional cause of the “decentralized predatory state” left undiscussed by Pei is the incapacity of the Communist oligarchy to give birth to full-fledged “rule of law”, a problem lies in the centre of the discussion of this paper.

In fact, the “local mafia state” not only represents the organized practices of the cooperation between state power and local gangsters as mentioned by Pei, but in more cases, described a type of hybrid governance featuring the dual natures of both “state power” and “predatory organism”. A key component of such a hybrid governance in China is known as the “Political-legal System”, or more precisely Zhengfa Xitong, which in the word of Keith, “deliberately combines the political and legal worlds.”\textsuperscript{140} In fact, what has been deliberately combined is not only the two worlds, but more precisely three power divisions— Public Security Bureau, People’s Procuratorate and People’s Court— to serve the Party’s urgent need of stability maintenance. As noted by Keith, the Zhengfa system places absolute emphasis on the supremacy of the position of party leader and thus it has led to a revival of the instrumentalist approach of legal work in which “policy, as interpreted by the party leader, was more important than, and could even substitute for, the comprehensive stipulation of law.”\textsuperscript{141}


\textsuperscript{141} Ibid, 624-623
Being merely one link of the reintegrated “political-legal” chain, the judiciary has again lost all its ideals and been reduced to nothing but an operation of “amoral science of statecraft” as in Pre-Qin societies and Mao era. Given that Chinese Constitution requires the judiciary to receive no intervention from any “administrative organs, social organizations and individuals”, the cooperation of powerful state organs in such a “control cartel” in all levels are way too intimate to remain constitutional. As written by Qin Yanhong in a letter home when he was on death row, “Our public security system is the product of dictatorship... Police use dictatorial measures on anyone who resist them. Ordinary people have no way to defend themselves. Instead of rule of law, we have chaos.” As noted by Joseph Kahn, the cooperation of police and court resulted in a situation in which court decisions are made mainly relying on “pre-trial confessions and perfunctory court proceedings to resolve criminal cases rather than extensive legal review.”

In a system where the courts functions as a part of state bureaucracy, the court process has been reduced to nothing more than a formality stripped off the real capacity in balancing the “state power” and the protection of “human rights”.

In local level, the role played by People’s Court can get even worse. In the process of stability maintenance led by Zhengfa System, the judiciary as part of this integrated state apparatus, is in constant danger of being misappropriated by local political leaders to seek individualized political and even economic interests. A good example is the series of “Chongqing Gang trials”

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143 Qin Yanhong was a Chinese citizen wrongly convicted of murder.


145 Ibid.
led by Bo Xilai (Communist Party Chief of Chongqing, member of Central Committee, CCP) and Wang Lijun (Police Chief of Chongqing), in which 9000 suspects were investigated and 4781 suspects were arrested and brought to trials in Chongqing Intermediate Courts. By launching such a political-legal campaign, the party leader of Chongqing not only cracked down most of his political opponents, but also plundered a great amount of private properties by misappropriating public powers. According to Chinese investigative journalist Yang Haipeng\textsuperscript{146}, “the confiscated assets seized by legal methods during the campaign is estimated to be within the range of 80 to 170 billion, and only about 60 million became national treasury under the custody of Ministry of Finance as required.” Jiang Weiping, a Scholar-at-Risk in Massey College, University of Toronto, also pointed out in many of his articles that in only the case of Li Jun (Chairman of the Chongqing Junfeng Industrial Development Group), 4.5 billion worth of assets were confiscated by Chongqing authority through legal channel. After the fall of Chongqing party leader Bo Xilai in March 2012, a small part of the confiscated assets were being returned to owners, and 70\% of the 1235 police officers who had been charged with offenses under Bo’s political-legal campaign were declared innocent\textsuperscript{147}.

More importantly, such a campaign-styled, fast-paced crackdown of officials, entrepreneurs and legal workers under the name of “targeted actions against dark and evil forces (dahei chu’e zhuanxiang xingdong\textsuperscript{148})”, lacked due process of law for that it highly relied on intimidations, tortures and forced confessions under the party-led cooperation of police, procuratorate and the

\textsuperscript{146} Yang Haipeng 杨海鹏, famous Chinese investigative journalist, formerly worked for Southern Metropolis Daily and many other outspoken media in China.

\textsuperscript{147} Huang, Jingjing. "Appeals Flood Chongqing." Global Times, December 1\textsuperscript{st} 2013 2013.

\textsuperscript{148} “打黑除恶专项行动”
court. Fan Qihang, 39 years old, was accused and convicted of running a crime syndicate during the “targeted actions”. On 27 July 2010, his lawyer Zhu Mingyong released videotapes of his client accusing authorities of torturing him almost every day for six months, in the hope of persuading the Supreme Court to reverse the death sentence on his client. According to Fan, he was beaten, deprived of sleep and placed in stress position. Refusing to accuse his lawyer of “fabricating evidence” in exchange of commutation, Fan Qihang was subsequently executed in September 2010. Another defense lawyer, Li Zhuang was arrested and accused of “coaching his client to make false claims of torture” during this campagne. Li Zhuang was sentenced to 18 months in prison and banned for practicing law for life. After his release upon the completion of sentence, Li Zhuang repeatedly appealed to Chongqing local court and the Supreme Court of China, and the decision remains unknown.

The Abuse of “Inciting Subversion” Clause and Beyond

As discussed above, court work under the political-legal (zhengfa) system places paramount emphasis on the supremacy of the position of party dominance and party leaders, and an instrumentalist approach, in which law is secondary to and could be substituted by state policy, has revived. Besides the rising “local mafia states” in which political leader misappropriates judicial power toward individualized ends, law has also been frequently used by Chinese authority as an effective tool to suppress political dissent. One of the criminal codes frequently used by Chinese authority to detain or imprison outspoken political dissenter is the “inciting subversion” clause in CL97. The clause provides that:

149 Pei, 165-159
“Whoever incites others by spreading rumors or slanders or any other means to subvert the State power or overthrow the socialist system shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; and the ringleaders and the others who commit major crimes shall be sentenced to fixed-term imprisonment of not less than five years. (2)” 150

Being fair to the Chinese legal reforms in 1990s, the “inciting subversion” clause in CL97 has made a healthy departure from the chapter of “Counter-revolutionary Crimes” in CL79, however, it still remains unsettled in terms of its ultimate contradiction with Chinese Constitution151, and the unspecified standard of application. As seen in the cases of Liu Xiaobo (and his Charter 08), Tan Zuoren (and his investigation into Sichuan earthquake), Gao Zhisheng (and his public letters to Hu Jintao), Hu Jia (and his criticism of government’s failure in AIDS prevention) and many other outspoken political dissenters convicted or detained on the suspicion of “inciting subversion”152, there is no single evidence showing that they intended to “subvert the State power or overthrow the socialist system”. Taking advantage of the unclear standard of the application of the code, the Party-state utilized the “inciting subversion” as a “legal tool for prosecuting free speech in China”153.

It is nothing new to us that the vague and flawed “inciting subversion” clause serves as a privatized weapon of the Communist Party in dismantling political opponents. But there is an


151 Article 35 in Chinese Constitution provides that “Citizens of the People's Republic of China have freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”


153 Ibid.
alarming trend that the clause is being used by the Party in wider forms of social control starting late 2000s. Ren Jianyu, a college graduate once served as a village officer in Pengshui county, was charged “inciting subversion” and thrown into labor camp near Chongqing under the name of “re-education through labor”, purely for forwarding 150 pro-liberal posts on a micro-blogging site. Although the “freedom of speech” is provided in Chinese Constitution, and majority of the case-involving posts were written by others including a party-school professor, Ren’s appeals to higher level courts against the locality's unlawful decision of “re-education through labor” was repeatedly rejected. His case was widely regarded by Chinese “netizens” as the “darkest hour” in Chinese legal history since reform and open up, for that it indicated that political-legal system has “opened its fire” on the online community.

After the “political earthquake” in Chongqing in 2012 and the downgrading of Central Politics and Law Commission (zhongyang zhengfa weiyuanhui) 154 during the 18th Party’s Congress in 2013, which together marked the decline of the political-legal (zhengfa) fraction 155 headed by Zhou Yongkang 156, the new party leader Xi Jinping repeatedly declared his good intent to honour basic human rights provided for in the Chinese Constitution and to improve the social injustice in China. However, the administration of Xi has increasingly been described as “Bo’s route without Bo” 157 or “turning left with the right light on” 158 for that party-led “political-legal

154 “中国共产党中央政法委员会”

155 “政法系”

156 Zhou Yongkang 周永康 (1942-present) is a retired senior leader of the CCP, who was a member of the 17th PSC, China's top decision-making body, and the Secretary of CPLC, CCP between 2007 and 2012.

157 “没有薄熙来的薄熙来路线。” See Heng, Lu. "Interview: Is Chinese Authority Going Along 'Bo’s Route without Bo'?" BBC Chinese, February 10th 2014

158 “打左转灯向右转。”
campaigns” against civil society activists become only more rampant than ever. Besides the classical “inciting subversion” and “betraying state secret” clauses, some other criminal codes were innovatively adopted by the Party as a tool of social control. The following are two exemplary cases well depicts the dilemma of criminal justice in China and the party state’s noteworthy move toward a police country.

In April 2013, Chinese legal scholar, the main founder of China’s New Citizen Movement in early 2010s, Xu Zhiyong who publicly called for “non-violent upholding of civic rights”, “equalized educational rights” and “discloser of officials’ assets”, was unlawfully arrested. In January 2014, Xu Zhiyong was sentenced to four years of imprisonment by the First Intermediate Court of Beijing under the clause of “gathering crowds to disrupt public order”\(^\text{159}\) in CL97. The court judge prohibited Xu’s lawyer from questioning the prosecuting witness, and refused to call in evidence the witness for the defense. It has been reported by Western media that Xu Zhiyong and his lawyer remained silent to protest the judiciary’s ignorance of Chinese Constitution (Article 35), and the Party-state’s violation of basic procedural justice provided for in CPL96. Xu’s closing statement, *For Freedom, Justice and Love*, though cut short by the judge during court procedure, gained tremendous support on the internet afterwards.

In August 2013, a campaign-styled political-legal “targeted action (*zhuanxiang xingdong*)\(^\text{160}\)” against the spreading of rumors online was launched by the CCP and was loudly praised in state media. Following the unlawful detainment of political activists calling for governmental

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159 Article 291 in CL1997

160 “公安机关集中打击网络有组织制造传播谣言等违法犯罪专项行动”
transparency during the campaign, Xue Manzi, a well known commentator on social media, angel investor and philanthropist, was detained on the “suspicion of soliciting a prostitute” in a low-end residential area in Beijing. Chief-Editor of the Chinese newspaper Global Times (huanqiu shibao) commented on his Weibo account that “the case is a reminder that those who choose to challenge the government will be scrutinized more closely” and “If you want to go this road, your rear end must be clean.” Nation-wide media coverage on Xue and the allegations he faced were unified and manipulated by the state in order to make him into an example of a hypocritical political opponent. Though it remains contentious whether Xue was set up by the state, the revived tradition of using charges such as “soliciting prostitute” to discredit and silence political opponents, is a good indicator of the revival of an explicitly instrumentalized criminal justice under the party-led “political-legal(zhengfa)” framework of social control.

3. Diagnostics, Role of the Party and Beyond:

The previous two sections focused on the limitations of “law” in respectively civil and criminal justice systems in China under the single party dominance. Other obstacles preventing Chinese legal systems from transitioning into a full fledged “rule of law” might include strong-arming local governments, unbalanced legal resource, corruption in court decision-making and hardships in the enforcement of court decisions. The goal of this chapter is not to provide an exhaustive list, but to highlight key issues that would set the pattern for the operation of law in China under single party dominance in a medium-ranged future. In another word, it is seen in the ongoing development of both civil justice and criminal justice that China is undergoing a
judicial retrogression in terms of both professionalism and procedural justice. As we discussed in the previous sections, such a retrogression is a result of a reviving instrumentalist approach of law in which legal codes is secondary to, and could be replaced by policy of the party state.

To both subscribers of Stanley Lubman’s metaphor of Chinese legal system as a “bird in the cage” or disciples of Randal Peerenboom’s “East Asian model”, the role played by the Communist Party in the legal reform is a key parameter in answering the question whether and how “rule of law” will come forth in China. As shown in the previous sections, the Communist Party has done a great job in building basic concepts of legality in Chinese society on the basis of Mao’s era in which Communist ideology and cult of supreme leader ruled as the “natural law” of China. The legal system reconstructed and hundreds of new legislations passed by the NPC during the reform era, successfully served the need of economic development by providing a good venue of dispute resolving. In comparison to Mao’s China marked by despotism and lawlessness, the CCP played a role that is more positive than ever in promoting legal awareness and transforming legal system toward a modern definition.

However, thirty years of political decentralization and otherwise costly economic development resulted into various forms of state-society tensions that current legal system cannot stomach. Since early 2000s, the Party’s fear toward its people generated from within and without resulted in extra-legal amendments made to court procedures and harsher controls over court personnel. In the face of accelerating civil unrest in various forms (e.g. surging numbers of petitioners, mass parades, online criticism and etc), the ideal of “rule according to law” featuring legal
professionalism and procedural justice, are now required by the Party-state to make way for its top priority of “stability maintenance” in the new era. As noted by Carl Minzner, there is a growing trend since mid-2000s that the CCP attempts to “rein in politically wayward judges.” In 2006, new round of campaigns designated to enhance judges’ loyalty to the Party and cautioning against “supremacy of law” are launched within the court system. In 2008, the “Three Supremes (sangezhishang)” campaign reminded Chinese judges that “CCP policies and the ‘people’s will’ are equal to (or above) the constitution”. Party interest in the name of “people’s will” again becomes the court’s paramount consideration, to which judicial fairness and individual rights must give in.

The concept of “law” in today’s China is not only a “bird in the cage” deprived of freedom to soar, but one in constant danger of being deprived of food when fails to manage its tongue. It is seen in the ongoing development of both civil and criminal justice in China after 2000s that the single party dominance is currently having a disestablishment effect toward the “rule of law”. The institutional reason for such a disestablishment effect lies in the questionable legitimacy of Chinese legislative power. The Organic Law of People’s Court provides that the president of the court is selected by the people’s congress at the corresponding level, and judges are nominated by the president and approved by the standing committee of the corresponding people’s congress.

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161 Minzner, 72-68

162 “三个至上”

163 Minzner, 72-68

164 “地方各级人民法院院长由地方各级人民代表大会选举，副院长、庭长、副庭长和审判员由地方各级人民代表大会常务委员会任免。”See Article 34 in the Organic Law of People’s Court of PRC.
(regardless of its ambiguity under a single party system), the role of “law” configured in accordance with the priority of the Party, would only remain paradoxical and ambivalent, without a People’s Congress whose constitutional potential has been fully realized. As noted by Andrew Nathan, “the constitutionalist scenario gains credibility from the improbability of other alternatives.”\textsuperscript{165} As pointed by Qiao Shi\textsuperscript{166}, former chairman of the the Standing Committee of Chinese NPC, the People’s Congress should be enhanced and given full play in order to ensure that state power can be exercised by people.\textsuperscript{167} The next chapter of the thesis will focus on the plausibility, contents and agenda of building a Chinese constitutional order as an institutional preparation for a settled “rule of law”.

\footnotesize
\begin{itemize}
\item[\textsuperscript{166}] Qiao Shi 乔石 (1924-present) is a Chinese politician who served as the Chairman of NPC during 1993-1998 and a member of the Standing Committee of Politburo during 1987-1997.
\end{itemize}
CHAPTER III
Searching for Breakthrough: a Constitutional Approach to Political Modernization

Philip Kuhn, an accomplished Chinese historian, Professor of History and EALC at Harvard University, traced the Constitutionalist attempt in China back to “literarti reaction” against Niohuru Heshen (1746-1799)\(^\text{168}\) led by Hong Liangji (1746-1809)\(^\text{169}\) who called for more active political participation of official elite as a counterweight against despotic power.\(^\text{170}\) As pointed out by Kuhn, Hong Liangji, in his detailed indictment, criticized not Heshen but the official elites’ indifference and indulgence that had permitted him to get so rampant, and the negligence of the new emperor himself for failing to launch essential reforms.

As a development of Hong’s idea, Wei Yuan (1794-1857)\(^\text{171}\), 18th Century Chinese political thinker, further argued that Shi\(^\text{172}\), as an extended community of social elite consists of holders of “provincial level degrees” who gathers regularly in Beijing every year, should be granted with more access to decision-making in provincial and national levels. As noted by Kuhn, defining what part of the community should participate in national politics, has been complicated by a long enduring fact that literacy in China is much more widely distributed than

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\(^{168}\) Niohuru Heshen 钮祜禄 和珅, an official during the reign of Emperor Qianlong (1735-1796), known as the most corrupted official in Chinese history.

\(^{169}\) Hong Liangji 洪亮吉, a Chinese scholar, statesman, and political theorist, who was most famous for his critical essay to the Emperor Jiaqing 嘉庆(reigned from 1796-1820), which resulted in his banishment to Yili 伊犁 in Xin Jiang 新疆.

\(^{170}\) Kuhn, 115

\(^{171}\) Wei Yuan 魏源 was a late Qing scholar who proposed many suggestions for the improvement of the Qing empire. He is also known for his 1844 work Haiguo Tuzhi 海國圖志.

\(^{172}\) “士”
political power\textsuperscript{173}. Chinese elitism traditionally included a general interest in political vocation. However, mid-Qing dynasty in which Wei Yuan lived, featured a “refined machinery of centralized monarchy”\textsuperscript{174} ensuring that only a teeny tiny portion of elites could actually participate in national and provincial politics. As pointed out by Wei Yuan, the mid-Qing monarchy had lost contacts with its society and thus lost sight of the nation’s crippling problems, mainly due to that access to the state power was quite limited.\textsuperscript{175} Therefore, the idealized regime type suggested by Wei Yuan contains two compatible counterparts, namely a greater scope for political involvement by the Shi and an authoritarianism that practice the Confucianist “Kingly Rule” instead of the conduct of hegemony.\textsuperscript{176} Wei’s constitutionalist idea featured a mutual beneficial structure between a broader group of social elites and a consultative monarchy, based on their shared willingness to cure the ills of the country. Wei suggested that broader political participation would prevent the possibility of a “factional tyranny”, and “mobilize a broader response to the economic and social chaos” of his age.\textsuperscript{177} To him, the expansion of political participation, is not to limit the authoritarian rule, but to substantially enhance it.\textsuperscript{178}

Departing from Wei Yuan’s early constitutional design of a mutual beneficial political-participatory system based on the shared political ideal of Confucianist “good governance”

\textsuperscript{173} Kuhn, 28
\textsuperscript{174} Ibid, 47
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid, 51
\textsuperscript{177} Ibid, 117
\textsuperscript{178} Ibid, 48
termed by Mencius as “Kingly Rule”, remedies proposed by late Qing political thinkers Kang Youwei (1858—1927)\(^{179}\) and Liang Qichao (1873-1929)\(^{180}\) more emphasized on launching radical reforms, paving the way for a mutual-restraint “symbiotic relationship” between the monarchy and its people, by installing a constitution and expanding political participation. Shortly after that China was defeated by Japan and forced to sign the Treaty of Shimonoseki in 1895, more than 1200 Juren-s (holders of provincial degree) followed the lead of Kang Youwei and signed his “ten-thousand-word petition (wanyan shu)” to the Emperor Guangxu (1875—1908). Kang Youwei wrote in his petition:

> Above, they are to broaden His Majesty’s sage-like understanding, so that he can sit in one hall and know the four seas. Below, they are to bring together the minds and wills of the empire, so that all can share care and pleasures, forgetting the distinction between public and private... Sovereign and people will be one body, and China will be as one family...\(^{181}\)

It seems on paper that Kang Youwei’s definition of political participation shared common ground with Wei Yuan’s “mutual beneficial” constitutionalism, however, as noted by Kuhn, the central task of Kang’s movement was to elect representatives of people (even regardless of their official status) to serve in the court as “Gentlemen for Consultation (yilang)\(^{182}\)”, who would “offer criticism of imperial commands and serve as spokesmen for the people.”\(^{183}\)

\(^{179}\) Kang Youwei 康有为 was a Chinese scholar and political thinker who led the movement toward constitutional monarchy in late Qing dynasty.

\(^{180}\) Liang Qichao 梁启超 was a Chinese scholar, philosopher and reformist active in late Qing and early republican era, who inspired many later scholars with his writings and reform ideas.

\(^{181}\) Kuhn, 123

\(^{182}\) “议郎”

\(^{183}\) Kuhn, 123
Liang Qichao further made the argument that there is always room for the rise of tyrants such as Jie of Xia or Zhou of Shang\textsuperscript{184} in China, granted that the well-being of the current polity was solely depending on the the rulers’ good intention to subscribe Confucian values. Liang believed that those who prevailed in Chinese imperaility in history were not “sages” who would only readily accept good advices, but “mediocre materials” who would easily submit to the manipulation of what was “evil”. Liang provided the remedy that “it is only the civilian supervision that would empower the legal codes, and it is only the legal codes that can deter rulers from behaving negligently.”\textsuperscript{185} The central task of Liang Qichao’s constitutional project is thus to implement a regime featuring the representation of people’s will, with the view of limiting the strengths of the monarchy and the government. According to him, three essential components of a constitutional government are i) an electoral-based National Congress that limits the power of monarchy by debating on bills and providing financial supervision; ii) a Head of Government without whose signature any imperial orders would not take effect; and iii) an independent judiciary of which court judges make their own decisions solely according to legal codes regardless of opinions from the government.

A premise underlying Liang Qichao’s proposed constitutional government is the idea that the “national polity (guoti)”\textsuperscript{186} as a generalization of the nation’s political ideal should be differentiated from the “political regime (zhengti)”\textsuperscript{187} referring to the highly concretized state

\textsuperscript{184} Jie of Xia 夏桀 and Zhou of Shang 商纣 were traditionally regarded as two tyrants in pre-history China.

\textsuperscript{185} “所以不敢为非者，有法以限之而已；其所以不敢不守法者，有人以监之而已。”

\textsuperscript{186} “国体”

\textsuperscript{187} “政体”
apparatus at work. The idealistic “national polity” in late Qing as proposed by Liang would be a virtuous monarchy attained the Confucianist “Kingly Way” by allowing the people to partake his absolute power. While in practical level, the leader of the “political regime”, or Head of Government, whose rights derives from the legislature, functions as the de facto political leader of a state. In the realm of “fundamental principles” or more precisely ti ¹⁸⁸, Confucian virtues of kingship endure. While in the realm of “practical application” or more precisely yong ¹⁸⁹, a westernized separation of powers could be at work. The merit of such a separation of “principle” and “application” lies in that it enables an incremental and peaceful political modernization, rather than restless violent revolutions in which despotic rules are toppled down and then replaced by a new one of the same batch. For example, the 1911 revolution gave rise to the rule of Yuan Shikai (1859-1916) who later restored monarchical absolutism. The Northern Expedition (1926-1927) gave rise to the Stalinist rule of KMT which contributed to China’s “human rights bankruptcy” in the words of Luo Longji. And most recently, the Communist revolution in 1949 gave rise to Mao’s reign in which both Confucianist “Kingly Rule” and Westernized “Separation of Powers” had been completely eradicated and replaced by a polity that was more Fascist than Communist in nature for that the charismatic supreme leader wielded absolute authority and the country had been arranged in a ultra-nationalist line.

Since Maoism ceased to rule the nation as the “natural law”, and the revolutionary approach with “class struggle” as the guiding principle was abandoned by the new leader of CCP, a constitutional approach of political modernization, once interrupted by totalitarianism after

¹⁸⁸ “体”
¹⁸⁹ “用”
1949, has been again put into spotlight. The *Common Program of the Chinese People’s Political Consultative Conference* promulgated in September 1949, the enacted consensus on China’s political future between CCP and democratic parties, provided in its *Article 12* that “the people's congresses of all levels shall be popularly elected by universal franchise.” The *Common Program*, as a contract between CCP and representatives of the society, which functioned as the Constitution at the founding moment of PRC, still theoretically hold good. Neither the Communist Party nor the National People’s Congress (China’s highest authority on paper), has ever annulled it, and it is still contained in the official textbook of modern Chinese history. Moreover, as a major departure from Chinese Constitutions promulgated 1956, 1975 and 1978 which provided that “People’s Congresses in all levels adopts democratic-centralism”, the Chinese Constitution 1982 for the first time specified that “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.” Although the democratic election of People’s Congress provided in Chinese Constitution (1982) only materialized in township and county level so far, the trend is still clear.

As noted by Philip Kuhn, a constitutional project in contemporary China still faces many “old problems” with which it familiarized itself in the late imperial era, including the difficulties of “defining the boundaries of participation”, of “defining an acceptable relationship between

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190 “中国人民政治协商会议共同纲领”

191 “各级人民代表大会由人民用普选方法产生之。” See Article 12 of the Common Program of the Chinese People’s Political Consultative Conference


193 See Article 3, Chinese Constitution.
public interest and private interest”, and of “reconciling the needs of the central state with those of the local communities”. In the first section of this chapter, I will describe several factors that contribute to the plausibility of a Constitutional approach of political modernization in the medium-ranged future of China. In the second section, I will discuss some existing Constitutional designs proposed by scholars in the field. In the third section, I will introduce my idea of installing a Chinese Socialist Constitutionalism as a regime innovation based on the conceptual separation of “national polity (guoti)” and “political regime (zhengti)” proposed by Liang Qichao in late imperial China. A tentative timetable of the proposed model will be also provided.

1. The Plausibility of a Constitutional Approach in China

As noted by Andrew Nathan, “a new constitutionalism” as the solution to the China puzzle is only taken seriously by a few in the field, however, it “gains credibility from the improbability of the alternatives.” As we argued in the second chapter, the single party dominance in the new era seems to have a dis-establishment effect toward the capacity of “law” in the delivery of justice in China. Without realizing the country’s constitutional potential, the idea of “rule of law” seems a refurbished invitation to despotism. In comparison to a party-led implementation of “rule of law”, the constitutional approach is a far more plausible option that not only remain consistent with China’s centuries-long civic project of “implementing a government”, but also conform to the interests of both Communist Party and the Chinese people in an expeditiously

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194 Kuhn, 132

195 Nathan, 43
changing sociopolitical environment patroned by thirty years of economic development since 1978.

**A Consistent Choice**

As we pointed out previously, the “maintenance of stability” has risen to the top priority of the Communist Party in the first decade of the 21st Century. Such a task required the Party not only to instrumentalize “law” as a tool of social control, but also to maintain the coherence and consistency in, “route selections”, if any, in the future. During the 18th Party Congress, Hu Jintao showed his deck in his closing speech: “To uphold the great banner of Socialism with Chinese characteristics” and “To discard the old, rigid path of closing door, and to reject the evil path to change the Party’s banner.” By giving a heart-warming speech themed on the “China Dream”, paying a low-profile but symbolic visit to Shenzhen, and ordering the Party to use “new system of language” featuring naturalness and pragmatism, Hu Jintao’s successor, Xi Jinping, has successfully branded himself as the second Deng Xiaoping of China. He also made it crystal clear that the Party will hold onto Deng’s path (luxian) of “Socialism with Chinese characteristics” without any hesitation for that it has “successfully changed the destiny of 1.3 billion people and transformed China into an important power in the world.” Although China on media seems wavering between left and right every day, the reform agenda, if any, is rather confined to what had come up to the mind of Deng Xiaoping in the 1980s.

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196 “高举中国特色社会主义的伟大旗帜。”

197 “既不走封闭僵化的老路，也不走改旗易帜的邪路。”
As noted by Nathan and many other scholars, Chinese authorities launched “three waves” of Constitutional movements since Deng’s reform and open-up. The first wave resulted in the promulgation of Chinese Constitution(1982). The second wave occurred during the Thirteenth Party Congress under the Administration of Zhao Ziyang in 1987. And the third wave in early 1990s took forms of studies and conferences both in academia and within the NPC. As noted by many scholars in the East and the West, Chinese Constitution has transformed from its original form of “a mandate by which CCP organizes the public power”\(^{198}\) in 1950s to one that provided a conceptual balance of state power and civil rights in 1980s. The optimists argued that “the paramount authority of Constitution has been reaffirmed in China”\(^{199}\), while the pessimists held that “Chinese Constitution is dead”\(^{200}\) in court application. But a consensus between the two camps is that what has been left over by the Party-State is to subject its absolute authority to institutional constraints through realizing China’s constitutional potential in ways to be figured out. As emphasized by Xi Jinping, “the vitality and authority of the Constitution lies in the actions of enforcement”\(^{201}\) and the central task of the new administration is to “contain the power within a cage of regulatory mechanism.”\(^{202}\)

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**An Emerging Stronger National People’s Congress**


201 “宪法的生命在于实施，宪法的权威也在于实施。” Said Xi Jinping On December 4th 2012 during the conference in commemoration of the 30th anniversary of the promulgation of the 1982 Constitution of PRC.

202 Said Xi Jinping on the 18th General Meeting of the CCDI, Central Commission for Discipline Inspection, 中央纪委检查委员会.
It is provided in Chinese Constitution that Chinese people exercises state power through the National People’s Congress and local people’s congresses at different levels\textsuperscript{203}. However, Chinese NPC for most of the time functioned as a “rubber stamp” instrumentalized by the CCP to legalize all its decisions. As noted by Nathan, party member make up from one half to over three-fourth of the membership and the Party instructs the NPC whom to elect and which bill to pass. And the NPC only meets once a year for ten to fourteen days, and its Standing Committee meets every two months for about a week. However, it is seen that since early 1990s, NPC has been transforming itself from a highly symbolic legislature into one that can, to some degree, mediate the different policy choices between the Communist Party and other groups of the society.

First of all, it is clearly seen in many cases that the NPC has been wielding greater legislative power than before. As noted by Michael Dowdle, the veto power of the NPC enables it to let party-tendered bills “languish or die” in committee, unless the tendering actors adequately addresses the NPC’s concern. According to him, by adopting such a tactic, the NPC “voted down” at least three party-supported legislative bills over the last two decade\textsuperscript{204}, and affected the “scope and content” of many legislative bills including China’s International Property law, Administrative Litigation Law, Company Law and Securities Law.\textsuperscript{205} In much more legislative cases, the NPC has shown a growing assertiveness and responsibility. In 1993, the NPC refused to consider party-submitted proposal of constitutional amendments, on the ground that a non-

\textsuperscript{203} See Chinese Constitution 1982, Article 2


\textsuperscript{205} Ibid, 3.
governmental organization such as the CCP is not entitled to propose legislation. In 1994, 337 members voted against the National Budget Law and another 274 abstained.206 In the same year, low approval rates for the Education Law forced the State Council to pledge to devote a greater portion of GDP to education.207 In 1997, dissenters in the NPC successfully vetoed a proposed amendment to the CL97 that grants public security personnel immunity from prosecution for actions performed on duty.

Besides its growing influence in China’s legislative development, the NPC has become a stronger political actor as well. In contrast to early decades when a position in the NPC was an “honorific but meaningless cinture”208 given to cadres whose abilities inspired little confidence in the party leadership,209 a position in NPC have been carrying significant political weight since 1980s. In 1992, only two-thirds of the deputies to NPC voted for the proposal of “Three Gorges Dam Project” favoured by Prime Minister Li Peng and stakeholder concerned in the power industry. 210 In 1995, a total of 1006 abstentions, invalid ballots and votes against the nomination of Jiang Chunyun (a close ally of Jiang Zemin) as vice-premier of the State Council were casted by the NPC.211 In 1996, the NPC casted hundreds of abstentions and votes against the work reports of the Chief-Judge of SPC and the Procurator-General of China.212 As noted by Dowdle,

206 Nathan, 45
207 Dowdle, 3
208 Ibid, 4.
210 Nathan, 45
211 Ibid.
212 Ibid.
votes against party-guided bills or low approval rates for the work reports of government sections, increasingly encourages the Party-state to acknowledge and respond to “institutional problems of incompetence and corruption” 213. Moreover, the NPC was the major sponsor of the China’s democracy initiatives in 1980s and it continues to support ongoing democratic experiments (shidian) in rural areas today.214

*The Best Bad Option*

As pointed out by Pan Wei and affirmed by many in the West, Chinese society is more interested in a “substantial political reform” as an institutional solution to China’s long enduring problems, rather than policy adjustments temporarily made for and ultimately subject to party interests. In comparison to other alternatives to the concurrent regime, a constitutional approach is one that well balances the “substantiality” of the reform yearned by the society and the “safety” of any political change prioritized by the Party.

In one hand, a constitutional approach is in alignment with the bottom-up pursuit of a limited government, the rule of law and greater political participation. To incrementally expand the popular election of people’s representatives from township and county to higher levels, will certainly do the job by delivering “equality of rights” (argued by Thomas Paine’s as the true basis of a representative government) to Chinese people, but will not necessarily be conducive to liberal democracy which will risk the Party’s interest in multiparty competitions. On the

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213 Dowdle, 3.

214 Ibid, 4.
other hand, it might be the only approach with which the Party’s long term goal of “Socialist democracy” (consists of “people’s mastery of the country, renmin dangjia zuozhu”, “adherence to party dominance, jianchi gongchandang lingdao” and “rule according to the law, yifa zhiguo”) could be brought to fruition in the future. It is the only way that party interests and civil rights could be reconciled and prevented from fall apart. As pointed by Qiao Shi, a former member of the Politburo of CCP known as a liberal thinker within the Party, the People’s Congress should be enhanced and given full play in order to ensure that state power can be exercised by people. In addition, a constitutional approach provides a good remedy to the problem of rising “local mafia states” as a by-product of thirty years of political decentralization and economic growth. Enhancing the supervisory power of the local People’s Congresses (in the forms of work report appraisal, supervision over individual cases, or even the implementation of a constitutional review system) would effectively make local governments more consultative.

As pointed out by Nathan, whether the Chinese Communist Party remains in power or not is already high on the agenda of Post-Deng political reformers. At a life-or-death conjuncture, the incremental implementation of a constitutional government provide the Party a best bad option, which in one hand cripples its absolute authority and confines it to a framework of constitutionalism, but on the other hand, re-legitimize the party dominance by remaking the party’s political ideal into one that conforms with the need of the society. Replacing both ultranationalism and performance legitimacy, the good intention of the Party to hold onto constitutionalism and consistently provide protection over human rights will serve as a renewed and stabilized source of legitimacy.

215 Nathan, 44
2. Existing Alternative Constitutional Designs: On Jiang Qing and Jiang Shigong’s Models

In his *A Confucian Constitutional Order*, Chinese Confucianism advocate, Jiang Qing, offered an alternative Constitutional design based on “The Way of the Humane Authority” 216 believed by him and Daniel A. Bell as a better model than democracy in China. Giving expression to the idea that ancestral bloodline determines one’s political conviction and moral attainment, Jiang’s “Confucian Constitutional State” consists of a symbolic monarch, which is required to be the heir of the Confucius, and a tricameral legislature made up of the “House of Exemplary Person”, the “House of the Nation” and the “House of People”. Jiang’s model hold that: i) The House of Exemplary Persons should be headed by a great scholar, and candidacy for its membership should be nominated by scholars, examined on their knowledge of Confucian Classics, and assessed by progressively holding higher and greater public positions, like in China’s imperial past; ii) The House of the Nation should be headed by a direct descendant of the Confucius, and its members should be selected from descendants of other great sages and rulers, along with some representative from religions; and finally, iii) The House of People should be elected either by popular votes, or as representatives from occupations. According to Jiang, the “House of the Exemplary Persons” have the final and exclusive veto power, in order to protect the supremacy of sacred legitimacy of Confucian tradition. There are thousands of ways to critique Jiang’s model as a preposterous suggestion suffused with ideas centered around a romanticized and impracticable combination of Confucianist reformism with modern parliamentary system. The

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unfeasibility of Jiang’s model mainly stems from its ignorance of the fact the highest political ideal of the Party-state within 100 years has been specified by Deng Xiaoping to be “Socialism” instead of any other usable philosophical preoccupations in ancient times. However, it is not entirely a futile labour. A noticeable merit is that it identified the legitimacy crisis of CCP and brought into discussion a “House of People” based on popular election.

Different from Jiang Qing’s “Confucian Constitutional Order”, legal scholar Jiang Shigong provided a model that more takes the Party into consideration. Jiang’s design of a Chinese Constitutional State based on his idea of the division of “written constitution” and “unwritten constitution”. Challenging traditional formalism as the basis of legitimacy evaluation in both the West and the East, Jiang argues that Western constitutionalism have compelled “developing countries to deviate from their cultural traditions and to enact ‘written constitution’ in line with Anglo-European standards.”217 Denying Zhang Qianfan’s idea that China has a Constitution without Constitutionalism218, Jiang Shigong argues that China’s “written constitution” is just a part of a greater “unwritten constitution” Or in the word of Larry Backer, it is “an isolated island in a great sea of non-legal but constitutional rules.” Jiang hold that the character of a constitution is determined by the manner in which the state was created219. The PRC as “a multiparty system led by CCP”220 was created in order to institutionalize the victory of the Communist revolution and therefore political character of the state should adhere to party


218 Zhang, 952-950

219 Backer, 123

ideology. Such a nation-building arrangement predated and hence survived China’s first constitutional enactment in 1954. In Jiang Shigong’s constitutional design, the CCP as a articulator of China’s unwritten constitution, “exercises the power of substantiative political decision-making through deliberation in political consultation with the democratic parties, while the NPC and its Standing Committee review and endorse the decisions, thereby granting them legality as required in the written constitution.”221 It is seen in Jiang’s constitutional design that the consultative nature of CCP stems from its political consultation with the democratic parties, and the NPC shall continue to function as a “rubber stamp”. However, the PRC in neither 1950s nor 2010s functioned as a coalition government featuring meaningful political consultation with democratic parties as promised by Mao in 1945. Since democratic parties functions as the “deaf’s ears” while NPC as the “rubber stamp”, Jiang Shigong’s model fails to provide “checks and balances” required for any modern constitutional order. His “single party constitutional state” in which CCP represents “the highest constitutional value and is both above and beyond written constitution”, seems to be another invitation to dictatorial arbitrariness instead of “rule of law”. Overlooking the influence of globalization and changing socio-political patterns of Chinese society, Jiang Shigong seems to have milked the cow of “Chinese particularism” too much and too late.

A problem shared by both Jiang Qing and Jiang Shigong is that they refused a conceptual separation of “national polity (guoti)” and “political regime (zhengti)”, as conceptualized by Liang Qichao in late imperial era. Jiang Qing built the entire parliamentary system based on

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Confucian ethics and hence reduced its practicability to none. While Jiang Shigong constructed his “single party constitutional state” in strict accordance with Deng Xiaoping’s understanding of party-state relationship in China. As noted by Backer, in Deng’s notion of separated powers, the state is to serve the people in everyday affairs, while the Party is to serve the state by providing it with a value system. It is seen that in Deng’s constitutional cosmology, the Party is the omnipotent regime of truth and knowledge, while NPC is the legalizing tool and the government is the one who do the job and take the blame. As we discussed previously, China is in need of “a substantial political reform” instead a new way of sugarcoating authoritarianism. Refusing to constrain party ideology into a cage of “national polity” and thus to enable the government to function as a neutralized “political regime”, Jiang Shigong’s design contribute little to the resilience of the party dominance and the easement of state-society tension. In order to solve such a problem, I will introduce in next section my design of a “Chinese Socialist Constitutionalism” based on the separated notions of “national polity (guoti)” standing for the nation’s highest political ideal and the “political regime (zhengti)” standing for a neutralized state apparatus at work.


As we discussed previously, one of the premises underlying in Liang Qichao’s constitutional thought is a conceptional separation of “national polity (guoti)” as a generalization of the nation’s political ideal, and the “political regime (zhengti)” referring to the highly concretized state apparatus at work. The ideal “national polity” in late Qing, as proposed by Liang Qichao,
should be a virtuous monarchy attained the Confucianist “Kingly Way” by allowing popular sovereignty to partake his absolute power. While in practical level, the leader of the “political regime”, or Head of Government, whose rights derives from the legislature, functions as the de facto political leader of a state. The separation of “national polity” and “political regime” is required by the already separated notions of “fundamental principles (ti)” and “practical application (yong)”. The Ti-Yong, or namely Essence-Practice division came to describe a consensus among late Qing social elites that China should maintain its own style of learning to preserve Chinese “essence” of its polity, and meanwhile learn from the West in “practical applications” in order to achieve the goal of self-strengthening in terms of economic and infrastructural development.

In fact, the Deng Xiaoping’s “open up and reform” in 1978 marked a new wave of Ti-Yong (Essence-Practice) separation in Chinese intellectual history. His famous quote, “it doesn't matter whether the cat is black or white, as long as it catches mice” is self-explanatory of such a conceptual separation. As stated by Deng Xiaoping in CCP’s theory-discussing meeting (more precisely Wuxuhui222, meeting for non-practical matters) in 1979, the Four Cardinal Principles223 constituted of four unalterable stances of the Communist Party, functions at the “ti (fundamental principles)”, in contrast to “economic development as the central task” as the “yong (practical applications)” in China’s reform era. Deng Xiaoping’s ti-yong concept further enabled a theoretical separation of “national polity(guoti)” and “political regime (zhengti)” in the new era. In the realm of principle (ti), the “national polity” of China should hold onto a

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222 “务虚会”

223 “四项基本原则”
Socialist road and the leadership of CCP as stated in the *Four Cardinal Principles*. In the realm of application (*yong*), bold reforms have to be carried out in order to serve of the central task of economic development. Such a conceptual separation would enable the party state in one hand to hold onto Socialism as its highest political ideal, and on the other hand, to achieve political modernization needed for sustainable development in joint effort with the society. The merit of such a separation lies in that it serves as the start of a set of peaceful and incremental political transition, of which the ceiling is the adherence to the CCP leadership like a “Constitutional Monarch” of China in a modern world. Following parts of this section will provide a Chinese Socialist Constitutional State redesigned under the separated notions of “ti” and “yong”.

*Contents of Chinese Socialist Constitutional State:*

As pointed out by Philip Kuhn, it remains to be seen in the 21st century whether a modern Chinese state can be designed without reference to a doctrinaire and centralized authority, and if it can, Chinese constitutional agenda will still be addressed on their terms, in stead of the the West’s. Author of this thesis is optimistic about that China’s political modernization is toward an constitutional end, and believes that China’s constitutional design should in one hand act as a continuation of its Confucianist and Socialist past, and in another hand, function as a modern political regime giving sovereignty to its people. An Alternative constitutional design for China should balance political stability prioritized by Chinese authority and political participation needed by the people. A Chinese Socialist Constitutional State consists of a separation of “national polity” and “political regime”, an empowered election-based bicameral legislature, a
neutralized government, an independent judiciary, a constitutional review system, social consultative organizations and strong media supervision. In contrast to Pan Wei’s design in which the central stage has been given to legal system, an empowered legislature consists of two election-based houses (House of the National Polity and House of the Common Wills) plays the central role in a Chinese Socialist Constitutional State designated to well balance the state authority and civil rights. Under such a system, people exercises state power through people’s congresses at all levels, and both horizontal and vertical accountability of governmental behaviour would be established. An overview of the components of the Chinese Socialist Constitutional State and their interactions is provided in the Figure 1, followed by detailed explanations.
Figure 1: Chinese Socialist Constitutional State
1) Separated “National Polity” and “Political Regime”: As a provider of long term and normalized reinforcement of “Socialism with Chinese Characteristics” as China’s national polity (guoti), the Chinese Communist Party continue to advise governments at different levels about basic principles and long term goals of their governance. As a development to Deng Xiaoping’s idea that CCP should avoid micro-management\(^{224}\), the Party should withdraw from appointment of government personell, court personell, and law and policy making, all of which shall be taken care of by China’s empowered legislature at corresponding levels. The Party is entitled to run its local offices, propaganda arms, self-disciplinary organs, party-owned properties, and to remain absolute control over China’s PLA. Party Secretaries at all levels serve as advisors to government heads, and provide custody over party interests in corresponding jurisdictions. The CCP elects its General Secretary through either inner-party democracy (dangnei minzhu) or under the tradition of democratic centralism (minzhu jizhongzhi) during the National Congress of the CCP commencing every five years. And CCP nominates its newly elected General Secretary to National People’s Congress as China’s Head of the State (guojia yuanshou), who carries out both constitutional and ceremonial duties. More over, one house of China’s bicameral legislature, the House of National Polity in NPC, is also constituted by party members selected by CCP internally.

2) An Empowered Bicameral Legislature: Under the design of a Chinese Socialist Constitutional State, the Chinese NPC and LPCs at different levels would take the form of bicameral legislature in order to balance state authority and civil rights. The House of National

\(^{224}\) Jiang (2014), 147.
Polity, will be elected by CCP internally through either inner-party democratic procedures or under its tradition of democratic centralism. In contrarily, the House of Common Wills would be constituted through popular election under the system of universal suffrage. The House of National Polity wields no more constitutional authority than the House of Common Wills, and vice versa. The candidacy for the Head of the Government (de facto political leaders) and Chief Judge of SPC (highest authority of judiciary and its associated constitutional review system) would be alternately nominated by one of the two houses and finally approved by the other through popular votes, however, none of the two can nominate both of the two positions in a same election cycle. Any bill proposed by each of the two houses shall be approved by the other and finalized by Head of the State, namely General Secretary of CCP, before its promulgation. And any order of the Head of the State, shall be associated with the name of the Head of Government and the Chief Judge of SPC before going into effect. According to Statistics, the total number of deputies of NPC raised from 1226 in 1954 to 2987 in 2013, and seats of party members tripled from 668 to 2099 in corresponding years. In another word, the number of party members in NPC raised from 54.5% to 70.3%, and non-party seats reduced from 45.5% to 29.7%. In order to increase the efficiency and pave the way for further reforms to the legislature, the NPC should reduced its size to between 700 to 2000, and to incrementally transform into the aforementioned two houses. The two houses should function on a daily basis and members of the houses, withdrawn from any public or private posts, shall be allowed to hold personal offices as a professional people’s representative.

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225 Nathan, 45
3) **A Neutralized Executive Power:** In the Chinese Socialist Constitutional State, the Head of the Government and ministers are nominated under the agreement of a balanced bicameral legislature and finalized by the honorary Head of the State. The CCP, withdrawn from appointment of personnel and policy making, only supervises the government’s adherence to a Socialist political ideal and reinforces people’s political allegiance to such a constitutional order, in which CCP is the ceiling of any bold reforms. Party Secretaries at all levels stand aloof from executive affairs and provide corresponding government heads only with theoretical advices. Civil servants in grass-root level branches of government (e.g. section staff, or *keyuan*) remain selected by civil service exams. Grass-root level civil servants remain to be promoted to posts of section chief (*kezhang*), division chief (*chuzhang*), and chief of bureau (*juzhang*) on a meritocratic basis. However, county executive (*xianzhang*), city mayor (*shizhang*) and provincial governor (*shengzhang*) shall be appointed under the agreement of the bicameral local People’s Congresses at different levels. All governmental behaviours are held horizontally accountable to the Constitutional Court at different levels, and vertically accountable to the general public through people’s representative in the legislature and strong media supervision. A Ministry of Election is to be established in the Chinese Socialist Constitutional State in order to ensure electoral fairness in different levels.

4) **Judicial Independence and Constitutional Review System:** Under the new system, the Chief Judge of SPC and Chief judges in local jurisdictions are respectively appointed by NPC and People’s Congresses in corresponding levels. Both Communist Party and local government no longer control the appointment and disciplinary of judges. The constitutional review system
further protects the judiciary from governmental interference. Judges are expected to make adjudicative decisions on their own on the basis of Chinese Constitution and according to legal codes, and they would not be internally disciplined for reversed cases caused by different understanding of law and facts. Local courts report to local legislature, and receives professional trainings (e.g. judicial interpretations of new legal codes) from higher courts. Severe misconducts of judges shall be reported to the local Constitutional Court, and all trials involving local court personnel should take place at another unrelated jurisdiction. As we mentioned above, the candidacy for the Chief Judge of SPC (highest authority of judiciary and associated constitutional review system) and the Head of the Government (de facto political leaders) would be alternately nominated by one of the two houses and finally approved by the other through popular votes, and none of the two can nominate both of the two positions in a same election cycle. Same rules applies to local legislature in appointing local chief judges. Such an institutional arrangement provides check and balance on the powers of both government and the judiciary. In one hand, constitutional courts at different levels provide constitutional reviews over governmental behaviours upon well-grounded requests filed by people’s representative, social organizations, or Chinese citizens. On the other hand, the chief judges nominated by one house will not manage to abuse the power of constitutional review in avoidance of being replaced by a new candidate nominated by the other house in the next round. The constitutional review system also functions as a legal mechanism where corrupted officials in the executive and rent-seeking deputies in the legislature could be put on trials.
5) **Social Consultative Organizations and Media Supervision:** Last but not least, an empowered and professionalized legislature re-establishes state’s contact with the society, which is almost absent in concurrent Chinese political system in which non-elected CCP members make up to the vast majority of NPC and its Standing Committee. In the new system, People’s representatives regularly solicit suggestions for bills and policies from social consultative organizations in order to serve the need of their electoral districts. Media under the new constitutional order only subject to governmental censorship regarding contents inciting subversion of China’s national polity (e.g. Socialist road and adherence to the leadership of CCP), but are allowed to actively exercise its supervisory power over government, legislature, judiciary and the general public within the limit of law.

*Timetable for Chinese Socialist Constitutionalism*

As shown in the figure 2 below, the installation of Chinese Socialist Constitutionalism consist of five stages, namely eras of party-led self-cleaning (less than five years), liberalization (five to ten years), constitutional development (ten years or more), constitutional consolidation (ten years or more) and the ultimate era of socialist democracy. In the stage of self-cleaning, the central task of the Party is to avoid legitimacy crisis by combating corruption in full blast and incrementally honoring basic human rights provided for in the constitution. In the stage of liberalization, the state initiates to empower its legislation in all levels higher than county, and to allow media and social consultative organizations to play a greater role. In the stage of Constitutional development, the Party starts to redefine itself within the framework of Chinese
Constitution and to expand popular election of People's Representative to levels higher than municipality. In the stage of Constitutional Consolidation, election of people’s representative will be expanded to national level and a division of “House of National Polity” and “House of Common Wills” will be incrementally introduced to the legislature. And in the last stage of Socialist Democracy, the Party-state would successfully reconcile the party interest with the need of the people, and its effort in persistently holding onto Chinese Socialist Constitutionalism would replace any other informal legitimacy sources (e.g. ultranationalism or economic performance). Chinese people would be satisfied in a relatively long run with their exercise of state power through legislature, and a much higher lever of rule of law provided for in a matured Chinese Socialist Constitutional State. Detailed reform packages of each stage are provided in the figure.2.

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<th>Stages</th>
<th>Packages</th>
<th>Lengths</th>
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| 1. Self-Cleaning | a. anti-corruption campaigns and the establishment of an independent anti-corruption agency (as suggested by Pan Wei)  
                      b. strengthened control over society coordinating with party-led self-cleaning efforts of the state  
                      c. honoring basic constitutional rights | No more than 5 Years |
| 2. Liberalization | a. liberalizing media supervision  
                        b. reducing the role of political-legal system  
                        c. expanding popular election of People's Representative from county to municipal level.  
                        d. empowering the People’s Congress in municipal level and below  
                        e. experimenting Constitutional Review System in municipal level | 5 to 10 years |
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| 3. Constitutional Development | a. redefined role of the Party in, and other necessary amendments made to, Chinese Constitution  
b. expanded human rights protection  
c. expanding popular election of People’s Representative to provincial level  
d. empowered legislature in provincial level and below  
e. experimenting Constitutional Review System in provincial level | 10 years or more |
| 4. Constitutional Consolidation | a. expanding popular election to the level of National People’s Congress  
b. incrementally introducing bicameral legislature to township, county, municipal, provincial and national levels.  
c. establishing Constitutional Review System in all levels higher than township | 10 years or more |
| 5. Socialist Democracy        | a. the establishment of Socialist democracy: (People’s mastery of the country through People’s Congresses; Adherence to Socialist path and party’s dominance; Rule according to the law)  
b. re-legitimized single party dominance  
c. CCP holding onto power until need for multi-party competition emerges from within the legislature in exceptional occasions or in extremely long run. | N/A              |

**Figure. 2 Timetable of Chinese Socialist Constitutionalism**

As we discussed above, the Constitutional project in contemporary China faces many “old problems” with which it familiarized itself in the late imperial era, as noted by Philip Kuhn. The Chinese Socialist Constitutionalism proposed in this thesis well answers Kuhn’s questions. First of all, it well defines the “boundaries” of political participation by incrementally introducing popular elections of people’s congresses to municipal, provincial and national level. Secondly, it provides an acceptable relationship between “public interest” and “private interest” by implementing effective mechanisms preventing misappropriation of public power for any
personal ends. And most importantly, it successfully reconciles the needs of the central state with those of the local communities by re-arranging the highest political ideal of the Party into one that conforms with the pursuit of the society.

However, although the CCP may want to adapt itself to the new political habitat in an age of growing civilian awareness, they would not give in a minute inch on a purely voluntary basis. And thus the implementation of the Chinese Socialist Constitutionalism is by no means an exclusively “top-down” course of events. Contrarily, a constitutional approach of political modernization could only materialize at the joint efforts made by both “state” and “society”. An equilibrium between the society demanding political participation and the Party protecting vested interest, would only be reached through lengthy but constructive periods of negotiation, in which continuous bottom-up striving has to be a major player.
CONCLUSION: 
Towards Chinese Socialist Constitutionalism

As we discussed in previous chapters, China’s legal reform has arrived at a crossroad under single party dominance in the new era. The future course of it might be a progressive one toward political and legal modernization, or a retrogressive one leading to the ultimate show down between the state and the society. One of the hottest ongoing debates in China after the 18th National Congress of CCP is one between “Constitutionalism” and “Socialism”. When marking the 30th anniversary of China’s 1982 Constitution, Xi Jinping said: “we must firmly establish, throughout society, the authority of the Constitution and the law and allow the overwhelming masses to fully believe in the law”. Xi also addressed that “no organization or induvodual has the privillege to overstep the Constitution and the law, and any violation of the Constitution and the law must be investigated.” However, when reformers aimed to promote Constitutionalism as a consensus for political reform in their articles for Southern Weekly (nanfang zhoumo)226 and Yanhuang Chunqiu227, unlawful counterattacks against Constitutionalists and their publications became even more rampant.

Traditional views within the CCP hold that “constitutionalism only belongs to capitalism”, yet this paper argues that a constitutionalist approach is not only consistent with China’s centuries-long civic pursuit of political modernization, but also serves as an essential preparation for any Socialist political ideal to be carried out in China. As we discussed in the second chapter, the

226 Nanfang Zhoumo 南方周末 is a weekly newspaper, considered the most liberal and outspoken in China.
227 Yanhuang Chunqiu 炎黄春秋 is a reformist monthly journal created in 1991 by liberal thinkers within the Communist Party.
Communist Party in the new era is having a disestablishment effect toward China’s “rule of law” in terms of professionalism and procedural justice in both realms of civil and criminal justice. Without constitutional and democratic preparations made to China’s legislature in the first place, “law” as a growingly politicized instrument of social control under the concurrent Communist governance, will never get the chance to “rule”. The Chinese Socialist Constitutional State provided in this thesis as an alternative design aims to reconcile the difference between a Socialist path and a Constitutional path by suggesting a conceptual and institutional separation between “national polity (guo ti)” and “political regime (zheng ti)”, which finds a safety “way out” for the Communist Party, and grant China’s bicameral legislature its “full play”. Under the proposed system, the party attains “kingly rule” by allowing popular sovereignty to partake its absolute power, while remains its control over matters involving the Four Cardinal Principles made by Deng.

As noted by Chinese scholar Liu Yu, mega-trends pointing to China’s democratization have already been identified, however, the form of democracy that China will ultimately adopt remains uncertain.228 Being conducive to Socialist democracy made up of “people’s mastery over the country” (i.e. empowered legislature based on popular election), “rule according to the law” (i.e. independent judiciary and neutralized government) and “leadership of the Communist Party” (i.e. Communist Party as the provider of the highest political ideal), the Chinese Socialist Constitutional State is capable of resolving most foreseeable state-society tensions and mediating different policy choices among the people. Superseding any informal legitimacy

sources (ultranationalism and performance legitimacy), the kingly intention of the Party to hold onto Socialist constitutionalism and to consistently provide protection over human rights, will serve as a renewed and stabilized source of legitimacy in a relatively long term.
BIBLIOGRAPHY

(In Alphabetical Order)


