The Development of Chinese Constitutionalism

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ARTICLE

THE DEVELOPMENT OF CHINESE CONSTITUTIONALISM

CHENGLIN LIU*

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I. ABSTRACT

Since the establishment of the People’s Republic of China (PRC) in 1949, the country has enacted four constitutions. This Article provides a historical analysis of how the Communist Party of China (the Party) and its paramount leaders shaped each constitution, influenced the public perception of the law, and determined the method individual constitutional rights should be permitted. Through examining leading incidents that defined the PRC’s history, this Article provides a detailed examination of how the Party used a constitutional framework to achieve its specific agenda of the time.

II. THE DEVELOPMENT OF CONSTITUTIONALISM IN CHINA

Even though the current Chinese constitution only dates back three decades, the early efforts to establish constitutionalism started in the late 1800s after the Qing Dynasty (“Qing”) repeatedly suffered humiliating defeats in wars with foreign powers. In 1895, Qing was forced to sign the Treaty of Maguan, also known as the Treaty of Shimonoseki, after losing the first Sino-Japanese War. According to the treaty, the Qing were obligated to pay two billion silver taels and cede Taiwan, the Penghu islands, and the Liaodong Peninsula to Japan. The intellectuals were infuriated and blamed the antiquated feudal system for the military defeat. Kang Youwei petitioned the Emperor to adopt a constitutional monarchy.
and develop a western-style economy. In the Gongche Shangshu Movement, thousands of intellectuals in Beijing signed Mr. Kang's petition in support of the reform. Kang authored two influential books introducing the successful launch of constitutional monarchy in Japan and reforms in Russia. He also established the Society of National Strengthening, which attracted prominent scholars and high officials. Subsequently, various social organizations emerged to engage in a discussion about how the Qing should carry out the new reforms.

Even though Kang and his followers' efforts did not immediately change Qing policy, it stimulated open-minded elites, royal officials, and even the Emperor, who issued an official decree to embrace Kang's push for changes. It seemed that the gentle, scholar-led reform movement would accomplish what other countries could only achieve through bloody revolutions. However, Kang and his colleagues were too naive to realize that the sympathizing Emperor was nothing but a figurehead. In reality, it was Empress Dowager Cixi who was in firm control of the royal court, the military, and the country's financial resources. While Kang and his followers openly demanded for substantial changes, the conservative elite felt threatened and asked the Empress to crackdown on the reform movement. The Empress deposed the young Emperor in a military coup and had him poisoned to death. While Kang barely escaped by fleeing to overseas, six of his colleagues were executed in a vegetable market in Beijing, marking the tragic end of the so called "Hundred Days Reform" or "Wuxu Bianfa." Subsequently, the Empress abolished all programs initiated during the reform except the establishment

4. QIZHI ZHANG, AN INTRODUCTION TO CHINESE HISTORY AND CULTURE 421 (2015).
5. Id.
6. Id.
7. Id.
11. Id.
12. CULTURAL AND HISTORICAL DICTIONARY, supra note 9, at 150.
14. CULTURAL AND HISTORICAL DICTIONARY, supra note 9, at 150.
15. Id.
of Peking University. 16

In 1908, the Qing government issued the Constitutional Outline Made by the Imperial Order, 17 which was the first constitutional document in Chinese history. Shortly after the revolution broke out in 1911, the Qing government issued the Nineteen Constitutional Articles, 18 in which the Emperor offered a constitutional monarchy to appease the revolutionists. 19 However, the Emperor’s gesture did little to convince the revolutionaries and change the inevitable fate of the Qing dynasty. 20

After the fall of the Qing, revolutionists made numerous attempts to establish a democratic government. 21 Sun Yat-sen established the provisional government in Nanjing, which promulgated the Provisional Constitution of the Republic of China, 22 the first Western style constitution. 23 The constitution, however, did not take effect because Yuan Shikai, a military commander, swiftly forced Sun out of the government. 24 Under Yuan’s short reign, the government put out several drafts of the constitution, none of which became binding legal documents. 25 In the end, Yuan abolished the government and established

16 Shihaigou Chen: Beijing Daemen Qianshen Jingshi Da Xue tang de Shanxi Kiese (史海钩沉：北京大学前身“京师大学堂”的身世揭秘) [Shihaigouchen: Revealing the Secrets of the “Imperial University”— the Predecessor of Peking University], NEWS.CN (Oct 10, 26, 2010), http://education.news.cn/2010-10/26/c_12612593.htm.
19. Id.
his eighty-three-day long dynasty. After Chiang Kai-shek took power, his government enacted the Constitution of the Republic of China for Period of Political Tutelage in 1931, which served as a legal framework for Chiang's government until he was defeated by the Communist Party in 1949.

Since the establishment of the PRC, there have been four constitutions: the 1954 Constitution, the 1975 Constitution, the 1978 Constitution, and the 1982 Constitution. This Article examines the four constitutions promulgated by the Party.

III. THE 1954 CONSTITUTION

During the first few years of the PRC, the Party heavily relied on bureaucrats and intellectuals, collectively referred to as non-Party democrats, to administrate civil affairs in the country. Within the newly established central government, democrats held important central and local offices. For example, two-thirds of ministers in the cabinet were democrats; four out of five vice chairmen of the Chinese People's Political Consultative Conference, a provisional legislative body, were democrats or non-Party personages. Since these non-Party intellectuals were trained in the previous regimes or in western countries, they did not necessarily support the idea of communism. Under the Common Program, a provisional constitution, the Party promised to share powers

26. Id.
27. PROVISIONAL CONSTITUTION, supra note 22.
29. XIANFA (1954) (China).
30. XIANFA (1975) (China).
31. XIANFA (1978) (China).
34. Id.
35. Id.
with democratic or non-Party affiliated personages.  

In letters to Josef Stalin, Mao’s deputy Liu Shaoqi explained that China was not ready for a dramatic change of the state structure defined in the Common Programs. First, capitalists and small property owners still dominated the Chinese economy because the planned socialization process was not complete. A new constitution, which would endorse the capitalistic nature of the economic system, would be no different from the Common Program. Also, it would create a semantic hurdle for a socialist constitution to recognize the legitimacy of private businesses. Second, a new constitution that cemented the control of the communist Party would alienate the democrats who played a vital role in the post-war recovery and transition to a socialist economy.

Josef Stalin, however, urged China to adopt a constitution modeled after that of the Soviet Union. According to Stalin, a constitution would help legitimize the Party’s reign over the country. Without a constitution, enemies would claim that China had no law and the Party’s power came only from its military triumph, unsupported by the free will of the People. Therefore, it was necessary for China to hold the National People’s Congress and enact the constitution. Second, through the election, the Party could use legitimate means to drive other parties out of the government. Since non-communist parties were most likely drawn toward western ideologies, a government solely controlled by the Party would prevent exposing state secrets to enemy countries, such as the United States and the United Kingdom. Third, the Party could benefit from voluntarily sharing some non-essential powers with the other parties. These parties would be grateful for the Party’s “generosity.”

37. See GONGTONG GANG LING pmbl. (“The Chinese People’s Democratic Dictatorship is the state power of the people’s democratic united front composed of the Chinese working class, peasantry, petty bourgeoisie, national bourgeoisie and other patriotic democratic elements, based on the alliance of workers and peasants and led by the working class.”).  
38. From “the Common Program” to the 1954 Constitution, supra note 33.  
39. Id.  
40. Id.  
41. Id.  
42. Id.  
43. Id.  
44. Id.  
45. Id.  
47. From “the Common Program” to the 1954 Constitution, supra note 33.  
48. Id.  
49. Id.
Urged by Moscow, Mao hastily created a constitution drafting committee in January 1953. However, the committee did begin work until a year later. The reason for the delay was that the democrats and capitalists worried the new constitution would curtail their rights. Mao and his deputies patiently persuaded the suspicious democrats to support the new endeavor.

In January 1954, the committee began the drafting process. Mao and his secretaries, none of whom had any formal legal training, became the drafters of China's first socialist constitution. Mao urged the committee to study constitutions of the Soviet Union and other eastern European countries. The committee also examined the 1946 French Constitution, and several constitutions from previous regimes in China. In fact, Mao admired the French constitution, especially for its cabinet system. He commented,

As for crafting a constitution, the capitalist countries were pioneers. We can't totally deny the historical role of western constitutions, which were largely shaped during the revolutions in England, France, and the United States. Now, the capitalist constitutions have become no good, actually, very bad, because they have become a tool for [the ruling class] to cheat and exploit the oppressed class. Our constitution is socialist in nature and must be superior to the capitalist ones.

In June 1954, Mao presented the draft constitution at a Central People's Government's conference and received overwhelming support. Mao hailed the draft constitution as a milestone in the socialist construction. Fervent supporters proposed an amendment to name the constitution as

50. Id.
51. Id.
52. Id.
53. Id.
55. From "the Common Program" to the 1954 Constitution, supra note 33.
56. Id.
57. Mao Refused to Name the Constitution, supra note 54.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
the “Mao Zedong Constitution,” which Mao “humbly” rejected.\textsuperscript{64} To legitimize the constitution, Mao and the central government turned the discussion of the draft constitution into a political fanfare.\textsuperscript{65} It was reported that more than 150 million people participated in the discussion of the draft constitution and proposed numerous amendments.\textsuperscript{66} On September 20, 1954, the first National People’s Congress unanimously passed the constitution.\textsuperscript{67}

A. The 1954 Constitution

Some Chinese scholars called the 1954 Constitution a replica or transplantation of the Soviet Constitution.\textsuperscript{68} By establishing the People’s Congress, the communist Party gained control of the People’s representatives, which formed the government.\textsuperscript{69} The purpose of the Soviet Constitution was to consolidate the power of the soviet government and strengthen Bolshevik leadership.\textsuperscript{70} The Chinese Constitution shared the same goals. Soviet scholars criticized western constitutions for being abstract and giving a false impression that everyone was equal before the law, which was created by ordinary people.\textsuperscript{71} Rather than a bill of rights, “the Soviet Constitution was a battle banner for all freedom-loving People to struggle for peace and democracy, social and national liberations.”\textsuperscript{72} Following the same paradigm, the 1954 Chinese Constitution emphasized the authority of state rather than the basic rights of individual citizens.\textsuperscript{73} Chinese scholars explained that one of the objectives of the 1954 Chinese Constitution was to indoctrinate People with a socialistic morality and legal consciousness.\textsuperscript{74}

Following the Soviet style, the 1954 Chinese Constitution started with a long preamble, a typical political statement, which covered a wide range of

\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
both domestic and international issues. The preamble first emphasized Party’s leading role in gaining China’s independence and establishing the “People’s democratic dictatorship.” It highlighted remarkable achievements since the establishment of the PRC in 1949, such as “resistance to the United States’ aggression and aid to Korea, suppression of counter-revolutionaries, and the rehabilitation of the national economy.” It further laid out the major tasks that the Party would carry out in the near future, including socialist transformation of “agriculture, handicrafts and capitalist industry, and commerce.” After several slogan-like statements, the preamble praised the unbroken friendship with the Soviet Union and expressed China’s desire to work with other countries to contribute to the world peace and prosperity. Following the preamble are four chapters: General Principles; the State Structure; Citizens’ Basic Rights and Duties; and the National Flag, Emblem and Capital. The General Principles addressed two basic questions: who would hold state power and who owned the state economy? First, all the power in the PRC belonged to the People, who would exercise the power through the National People Congress (NPC) and local People’s Congresses controlled by the Party. The country was a People’s democratic state led by the working class and based on the alliance of workers and peasants. Second, the Constitution recognized multiple forms of ownership: state ownership and co-operative ownership. Even though the Constitution additionally recognized individual ownership and capitalist ownership, the state would gradually phase out private ownership to achieve the planned socialist economy.

In Chapter 2, the Constitution laid out the structure of the state, which is almost identical to the current state structure. There were five major state organs: The NPC, the State President, the State Council, the Supreme

75. XIANFA (1954) (China).
76. Id. pmbl.
77. Id.
78. Id.
79. Id.
80. Id. ch.1–4.
81. See id. ch. 2 (“All power in the People’s Republic of China belongs to the people.”); see also id. ch. 6 (“The state sector of the economy is the socialist sector owned by the whole people.”).
82. Id. ch. 2–3.
83. Id. ch. 5–8.
84. Id. ch. 5–7.
85. Id. art.10.
86. XIANFA ch. 2 (1954).
People’s Court, and Procuratorate. The NPC, which consisted of representatives from the provincial level, held the highest power of the state. The Congress was responsible for electing the President and Vice President of the State, Premier of the State Council, the President of the People’s Supreme Court, and the Chief Procurator of the Supreme People’s Procuratorate. It also had the power to make laws, decide “five-year plans,” approve the state budgets, and decide on questions of war and peace. In addition, the Congress functioned as a constitutional court, which had the power to annul regulations incompatible with the Constitution.

The State President under the 1954 Constitution held more substantial power than under the current constitution. In addition to ceremonial functions, such as receiving foreign dignitaries, the State President commanded the armed forces. In a state of emergency, the President had the power to convene and chair a supreme state conference.

The State Council, also called the central government of China, had the highest administrative power. Under the State Council, at the central level, were various ministries and commissions, and at the local level, provincial county governments. The State Council was responsible for promulgating administrative measures, issuing decisions and orders, and adjudicating whether local rules were compatible with its regulations. It also had the power to make legislative proposals, which the NPC often approved unanimously.

The Supreme People’s Court was the highest judicial organ. Even though the Constitution provided that the court exercise power independently, the Party, in fact, had a firm control over judicial appointments. Similarly, the Supreme People’s Procuratorate, the

87. Id.
88. Id. ch. 2, art. 21–23.
89. Id. ch. 2, art. 27.
90. Id. ch. 2, art. 31.
91. Id.
92. Compare XIANFA § 2 (1954) (granting the President the power to convene the Supreme State Conference as its chairman), with XIANFA § 2 (1984) (omitting the Presidential power to convene the Supreme State Conference).
93. Id. ch. 2, § 1, art. 43.
94. Id. ch. 2, § 3.
95. Id. ch. 2, art. 51–65.
96. Id. ch. 2, § 3, art. 49.
97. Id. ch. 2, § 3.
98. Id. ch. 2, § 6, art. 79.
99. Id. ch. 2, § 6, art. 78.
100. See id. ch. 2, § 5, art. 80 ("The Supreme People's Court is responsible and accountable to
highest prosecutorial organ was also subject to the Party's firm control.  

B. Basic Rights and Duties

The 1954 Constitution claimed that all PRC citizens were "equal before the law." The use of the term "citizen" was a surprise because the Party's previous constitutions used "People" instead of "citizens." "People," as opposed to "enemy," is a political term, which means those who support socialism and the communist Party and unity of the country. "Citizen" however, is an apolitical term, which refers those who merely bear Chinese nationality. Thus, all "People are citizens, but not every citizen is in the class of People." Such differentiation is rooted in the class struggle theory of the Marx-Leninism, which divided the entire world into two classes: the oppressor class and the oppressed class. After the proletarians became the ruling class, the law must reflect the change and deprive "enemies" of all the power and vest it in the "People." With this differentiation in mind, it is not difficult to understand why the Constitution provided that all the power belonged to the "People" not "citizens." The Constitution used the term "citizens" only in the section concerning basic rights and duties.

Under Section III of the Constitution, citizens enjoyed a wide range of freedom that is often found in Western constitutions. There were four categories of rights: political rights, personal freedom, economic rights, and cultural rights. The political rights included the rights to vote and stand for election; freedom of speech, press, assembly, association, and

the National People's Congress or, when the National People's Congress is not in session, to its Standing Committee.

101. See id. ch. 2, § 5, art. 84 ("The Supreme People's Procuratorate is responsible and accountable to the National People's Congress or, when the National People's Congress is not in session, to its Standing Committee.").

102. Id. ch. 2, § 5, art. 85.

103. Compare XIANFA ch. 3 (1954) (making numerous references to "citizens" under Chapter 3 titled "Fundamental Rights and Duties of Citizens"); with ZHONGHUA MINGGUO LINSHI YUEFA ch. II (referring predominantly to "persons" and "people" under Chapter 2 titled "Rights and Duties of the People").


105. Id.

106. Id.

107. Id.

108. Id.

109. Id.

110. Id.

111. See XIANFA (1954) (enumerating numerous freedoms and rights enjoyed by citizens).
demonstration. One unique aspect of the Constitution is that it required the state to provide “necessary material facilities” for the citizens to realize their political rights. In addition, citizens had the right to make written or oral complaints to the state against government officials for violation of law or neglect of duty. The personal freedoms included rights to privacy. Citizens were not subject to warrantless arrest and their homes and correspendences were inviolable. Economic rights included the rights to work, rest, and seek assistance from the government when they were incapacitated by age or illness. For cultural rights, citizens had the freedom to engage in scientific research, literary and artistic creation, and other cultural activities. The law required the state to encourage and assist citizens’ creative endeavors in cultural pursuits.

C. Quickly Forgotten

During the drafting process, it seemed that Mao was serious about creating a functional constitutional framework. In a discussion session, Mao commented, “It is entirely possible and it is necessary to put this draft Constitution into force... [The] whole nation, one and all, should observe it... To fail to observe the constitution is to violate it.” He demanded that government officials set an example for the rest of the society for enforcing the Constitution. However, Mao’s pledge did not fully convince democrats and independents. Mr. Huang, a prominent democrat, expressed his concerns about whether the Constitution would be truly implemented. He urged all the government officials, especially those in charge of management, supervision, and prosecution to abide by the Constitution. Huang’s concerns were grounded in reality. What

112. Id. ch. 3, art. 86, 87.
113. Id. ch. 3, art. 87.
114. Id. ch. 3, art. 97.
115. Id. ch. 3, art. 90.
116. Id. ch. 3, art. 89, 90.
117. Id. ch. 3, art. 95.
118. Id. ch. 3, art. 94, 95.
120. Id.
122. Id.
123. Id.
happened in the next few years after the passage of the Constitution proved that a simple pledge was inadequate to ensure that Party would abide by the Constitution.

D. The Case of Hu Feng

Hu Feng was a prominent writer, literary, and art theorist. In the 1930s, he joined the League of Left-wing Writers in Shanghai opposing the Kuomintang regime and supporting the Communist revolution. Due to his contribution to the development of communist literature, Hu was appointed a member of the China Federation of Literary and Art Circles (CFLAC) and the China Writers Association (CWA). In 1954, Hu was elected as a People’s deputy of the First National People’s Congress (NPC), which passed the 1954 Constitution. Under Article 37 of the 1954 Constitution, no deputy to the NPC may be arrested or placed on trial without the consent of the NPC or its Standing Committee.

With high honors and prominent positions in the literary circle, Hu became increasingly assertive in his belief that literature should be independent of political influence. He complained that Party’s control of literature suffocated creativity and withered cultural production. For his heterodox belief, Hu was purged from the Party and sent to prison for more than two decades without a formal trial. After Hu was arrested, the NPC retroactively deprived Hu’s of his deputy status. Like many other intellectuals who were prosecuted, Hu did not have any chance to confront the evidence and defend himself. In addition, the government carried out a nationwide purge of the so-called “the Hu Feng Anti-Revolutionary Clique,” implicating more than 2,100 persons, of whom ninety-two were arrested, sixty-two isolated, and seventy-three suspended from their jobs. Of seventy-eight persons, who were named as core elements of the Hu Clique, sixty-one were either suspended from

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125. Id.
126. Id.
127. Id.
128. XIANFA ch. 3, § 1, art. 37 (1954)
129. The 1955 Hu Feng Incident, supra note 124.
130. Id.
131. Id.
132. Id.
133. Id.
134. Id.
work or sent to labor camps.\textsuperscript{135}

Hu was finally released from prison two years after Mao’s death, but the Party was slow to acknowledge the wrongful prosecution and very reluctant to rehabilitate him. Hu died in 1985 without knowing that he was finally regarded as a faithful communist writer by the Party. In 1988, the Party issued a supplemental declaration claiming that Hu was wrongfully prosecuted based on unfounded evidence.\textsuperscript{136}

E. \textit{Hu’s Arguments}

First, Hu opposed the Party’s ideological remolding campaign, in which writers were forced to accept a “predetermined Communist world view.”\textsuperscript{137} While supporting the Party’s leadership in general, Hu argued that communism should address realistic issues encountered in everyday life. The Party should predicate its policies on the “life demands of the masses” rather than on dogmatic application of Marxism. In fact, Hu’s interpretation of realism was similar to western views.\textsuperscript{138} “If we go as far as to use Marxism as a substitute for realism, then we will block artistic endeavor and will destroy art itself.”\textsuperscript{139} Therefore, he called writers to disregard Mao’s dictates and free the literary realm from the control of the Party.\textsuperscript{140}

Second, Hu opposed the Party’s directives that required writers focus solely on “bright things” and ignore backwardness and darkness.\textsuperscript{141} He asserted that emphasizing brightness would only force writers to write something that was not true.\textsuperscript{142} “If everybody wrote of the bright side then the struggle for future improvement of life would become impossible.”\textsuperscript{143} He also disputed the Party’s emphasis on writing about the life of peasants, workers and soldiers, whom the Party regarded as strong allies. Hu believed that as long as a writer could provide an accurate portrayal of the surroundings in which the writer lived in, he or she would serve the Party’s purpose.\textsuperscript{144} He claimed that the narrow focus mandated by the Party would cause writers to overlook significant issues in real

\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} MERLE GOLDMAN, LITERARY DISSENT IN COMMUNIST CHINA 140 (1971).
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 141.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 142.
\textsuperscript{142} Id.
\textsuperscript{143} Id. 142.
\textsuperscript{144} Id.
life.\textsuperscript{145}

Third, Hu blamed the Party controlled publication system for lack of competition because there were only a few Party sanctioned journals for writers to publish their works.\textsuperscript{146} The official journals had a strict inspection and supervision system, which often filtered out the works by liberal writers.\textsuperscript{147} Hu argued that "the Party should establish a system to protect and help the writer, but not to command him."\textsuperscript{148} Therefore, he proposed to establish seven or eight journals independent from the influence of the Party and government.\textsuperscript{149} While Hu agreed that the new journals should be subject to the Party’s approval, he maintained that the editors, regardless of their Party affiliations, should be able to make their independent decisions.\textsuperscript{150} He hoped that the competition among journals would foster creativity and ensure that best ideas were disseminated.

Of all Hu’s offenses, the most serious one is his criticism of the Party’s control of public opinion.\textsuperscript{151} In a private letter to his friend in 1950, which was intercepted by police without a warrant, Hu complained that some Party officials suppressed dissents.\textsuperscript{152} As a result, ordinary writers did not really know what was permissible to say.\textsuperscript{153} He criticized the Party for creating a suffocating environment for writers and readers by applying, what he ingeniously termed, "uniformity of public opinion," or "the rule of non-speech" (Yulun Yilü).\textsuperscript{154} Hu’s accurate and precise depiction of the Party’s policy on literary freedom instantly caught Mao’s attention.\textsuperscript{155} From then on, Hu’s fate was determined to be a political prisoner for the next two decades, the rest of Mao’s life time.\textsuperscript{156}

\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 143.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} The 1955 Hu Feng Incident, supra note 124.
\textsuperscript{152} Id.
\textsuperscript{153} Id.; MICHAEL DILLON, CHINA: A MODERN HISTORY 295–96 (2010) [hereinafter DILLON, MODERN HISTORY].
\textsuperscript{154} The 1955 Hu Feng Incident, supra note 124; Mao Zedong (毛泽东), Bo “Yulun Yilü” (驳“舆论一律”) [In Refutation of “Uniformity of Public Opinion”], in MAO ZEDONG XUANJI DIWU JUAN (毛泽东选集 第五卷) [MAO ZEDONG’S SELECTIVE WORKS (vol. 5)] (May 24, 1955) translated in Selected Works of Mao Tse-tung: In Refutation of “Uniformity of Public Opinion” (Article Criticizing the Counter-Revolutionary Hu Feng Clique), MARXISTS.ORG, https://www.marxists.org/reference/archive/mao/selected-works/volume-5/msww5_42.htm (last visited Nov. 13, 2016) [hereinafter Bo “Yulun Yilü”].
\textsuperscript{155} The 1955 Hu Feng Incident, supra note 124.
\textsuperscript{156} Id.; DILLON, MODERN HISTORY, supra note 153, at 295–96.
F. Mao's Response

In response to Hu's criticism, Mao vented his anger in a scathing essay entitled In Refutation of "Uniformity of Public Opinion." In the essay, Mao delineated the meaning of freedom of speech in a unique way. In summary, whether a person deserved the right to speak freely depended on what class to which the person belonged. In Mao's world, there were two polarized classes: the People and counter-revolutionaries (enemies). A person must belong to either one or the other. The People were allowed to express themselves freely, but the counter-revolutionaries had no such right. Mao mandated, "the counter-revolutionaries must behave themselves and are not allowed to be unruly in word or deed. In this respect, it is not only public opinion that is uniform, but the law too." In reality, what Mao pronounced in the essay was not merely a literary work, but law.

While Mao was fully aware that freedom of speech was essential for a society to progress, he only allowed the People to enjoy such freedom because they supported him and the Party. Among the People, he reasoned, some were advanced and others were backward. When the two groups of People had freedom to express their ideas and compete with each other, the advanced would prevail over the backward. It was neither possible nor correct to have "uniformity of public opinion" among the People. In fact, "it is a crime to suppress freedom, to suppress the People's criticism of the shortcomings and mistakes of the Party and the government or to suppress free discussion in academic circles ..." On the contrary, the counter-revolutionaries deserved no freedom because they would exploit the freedom to resist the revolution and restore their own rules. In case of any disputes between the People and counter-revolutionaries, the working class and the Party had to suppress the latter by invoking dictatorship.

158. Id.
159. Id.
160. Id.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
167. Id.
revolutionaries to speak or act freely. He believed that it was perfectly legitimate for the Party to “exercise dictatorship over them.” First, they exploited the People in the previous regime and now it was the time for the People to take revenge on their enemies. The counter revolutionaries must be subject to the People’s rule in the new world. Second, the defeated counter-revolutionaries were in the minority. Even if a pure democratic rule were applied here, it would be justified that the majority had the right to suppress the minority. In the absence of a bill of rights, the minority was unworthy of legal protection. Thus, it did not matter to Mao or the Party whether they found the Party’s harsh rules unbearable. In fact, Mao was enthusiastic to see the counter-revolutionaries shivering in the terror under the Party’s democratic dictatorship. He vividly conjured an image of his enemies suffocated by misery:

Thus Hu Feng and counter-revolutionaries of his kind find [“the rule of non-speech”] inconvenient for them. Their inconvenience is exactly what we want and is exactly what is convenient for us . . . . By “coercion” Hu Feng means our coercing those on the side of counter-revolution. Yes, they tremble with fear, feeling “like the miserable daughter-in-law always afraid of being beaten” or worrying that “a mere cough is being recorded.” We consider this excellent too. Nothing like this had ever happened in thousands of years either. Only after the Communist Party led the People through a long and arduous struggle were these scoundrels made to feel so uncomfortable. In a word, the day of joy for the People is a day of woe for the counter-revolutionaries.

It seemed that Mao made a bright-line rule on who had the freedom of

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168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. In a traditional Chinese family, the daughter-in-law was in the lowest hierarchy of the social ladder. She was subordinate not only to her husband, but also to her father and mother-in-law. Sometimes, a lucky daughter-in-law lived to see her sons get married. Only by then would she have an opportunity to direct orders to the new daughters-in-law and remedy all the sufferings in her early life. It was miserable to be a young daughter-in-law in ancient China. Mao used an analogy here to illustrate how miserable it was to be suppressed by the Party.
expression: the People, not the enemies. Unfortunately, this was not the case because Mao frequently shifted the line between the two classes. As a result, even the members of the People’s class lived in terror because they did not know when they would be shuffled to the opposite class. Before Hu voiced his dissent, as a prominent writer and a member of the People’s Congress, he was an elite in the class of People. Hu was shocked to learn that his status was changed from the “head of literary clique” to the “head of anti-Party clique,” then finally to the “head of counter-revolutionary clique” within a short period of time. For Hu, the direct legal consequence from the change of status was that he was imprisoned for the rest of Mao’s life. He had enough time to ponder what Mao meant in the essay by saying “counter-revolutionaries must behave themselves and are not allowed to be unruly in word or deed.”

By allowing freedom only for one of the two classes, Mao created inequity in the newly founded country. The non-speech rule that Mao pronounced was a blatant violation of equality before the law, one of the fundamental principles in the 1954 Constitution. However, the freshly minted Constitution was no longer relevant because Mao’s order trumped any constitutional provisions contrary to his view.

When intellectuals increasingly demanded their constitutional rights, Mao’s view of law completely changed. In 1958, Mao blamed law and regulations for restricting the force of production, creating waste and causing bureaucracy. When the relationship with the Soviet Union began to deteriorate, Mao seemed to regret copying Soviet law. He complained that the Soviet style of law became roadblocks for the Party in conducting its business. Despite paying occasional lip service to the law, Mao did not have any faith in law. He believed that the Party should not be bound by a legal system:

While law is necessary, we have our own way of dealing with things... we can’t rule the majority of the society by using law. People should develop...

180. Id.
181. Id. "Yuan Yihi", supra note 154.
182. See XIANFA art. 87 (1954) (granting all citizens freedom of speech).
184. Id. at 20.
habit. Criminal law and civil law have so many provisions, who can remember all of them? I wrote the Constitution, but I can’t remember it clearly now. Most of our rules and regulations are from the judicial bureau. We basically don’t rely on them for maintaining social order. Instead, we rely on meetings and resolutions. We hold a meeting four times a year . . . . All resolutions from those meetings are laws. Meetings are law as well.185

Liu Shaoqi, Mao’s deputy and designated successor at the time, echoed, ‘Do we need ‘rule of law’ or ‘rule of men.’ In practice, we need ‘rule of men.’ Law is only for reference.’186

Following Mao’s guidance, the Party’s legal and political committee issued an order claiming that it was not necessary to enact criminal law, civil law, and criminal procedural law.187 As a result, the NPC halted the law making process completely only a few years after the enactment of the Constitution.188 At the same time, schools across the country cancelled their constitutional law course.189 Furthermore, the Central Government abolished the Ministry of Justice, Ministry of Supervision, and the Legal Affairs Office.190 As Mao’s disrespect for the law grew, the NPC ceased to serve even its symbolic role in political affairs. From 1964 to 1975, the NPC did not convene a single session despite the Constitution requiring it to meet once a year.191

G. Anti-rightist Movement and Freedom of Expression

The impact of the Anti-Hu Feng campaign was far reaching.192 Initially, Mao and the Party were satisfied with Hu Feng and his sympathizers being completely silenced.193 However, the Party quickly realized that the campaign also had a chilling effect on all Chinese intellectuals, whose expertise was indispensable for China’s economic recovery.194 In an internal meeting, Zhou Enlai, one of the best educated


186. Id.

187. Id.

188. Id.

189. Id.

190. Id.


192. KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION TO THOUGHT REFORM 100 (2d ed. 2004).

193. Id.

194. Id.
party leaders, assured that the majority of Chinese intellectuals were loyal to the Party.\(^{195}\) Therefore, he called for improvement of the relationship between the Party and intellectuals.\(^{196}\)

In addition, developments in the Soviet Union also contributed to the change of the Party’s approach towards intellectuals.\(^{197}\) In 1956, three years after Stalin’s death, Nikita Khrushchev openly denounced Stalin and blamed him for the atrocities perpetrated on the loyal party members and ordinary citizens during purges.\(^{198}\) The fall of Stalin’s cult awakened intellectuals in Budapest, where protesters demanded a more democratic political system.\(^{199}\) The Soviet Union quickly sent troops to crush the protesters leaving 2,500 dead, and 200,000 more in exile.\(^{200}\)

The Budapest Incident served as a wakeup call for Mao as he feared that the same uprising would happen in China.\(^{201}\) In searching for answers, Mao’s first reaction was that “overly repressive policies towards intellectuals had alienated them.”\(^{202}\) He warned that isolation of intellectuals would increase the danger of unrest.\(^{203}\) He criticized Stalin for overly emphasizing class struggle without allowing dissenting intellectuals to express their ideas.\(^{204}\) Likening anti-Marxist thoughts to vaccination, Mao argued that the Party should be exposed to those thoughts so that it could develop an antibody to defend attacks from the enemies.\(^{205}\)

\(^{195}\) Dillon, Modern History, supra note 154, at 298.

\(^{196}\) Lieberthal, supra note 192, at 100.

\(^{197}\) Id.


\(^{200}\) Id.

\(^{201}\) See Lieberthal, supra note 192, at 101 (“The 1956 uprisings in Poland and Hungary, though, made clear that explosive conflict could erupt in societies ruled by Communist parties.”).

\(^{202}\) Craig Dietrich, People’s China: A Brief History 105 (1986).

Developments in the Soviet Union also encouraged party efforts to improve ties with the Chinese intelligentsia. Both the 1955–1956 thaw toward Soviet literature and Khrushchev’s dramatic de-Stalinization speech at the Twentieth Party Congress of the Communist party of the Soviet Union in February 1956 created ripple effects in China. The former simply made it appropriate for the Chinese to follow the Soviet lead in relaxing pressures on intellectuals. The latter, however, had more profound repercussions.

Lieberthal, supra note 192, at 100.

\(^{203}\) Dietrich, supra note 202, at 105.

\(^{204}\) Id.

\(^{205}\) Mao Zedong (毛泽东). Zai Sheng Shi Zizhiqiu Dangwei Shuji Huiyi Shang de Jianghua 1957 Nian 1 Yue (在省市自治区党委书记会议上的讲话 1957年1月) [Talks at a Conference of
Therefore, Mao told the Party’s top leaders that allowing dissenting opinions would not cause social unrest and the Party should not prevent a small number of people from staging a protest or even going on a strike. Mao ridiculed some unconvincing leaders by saying, “The protesters are not armed with guns. Why do you fear them?” According to Mao, allowing freedom of expression served two purposes: good criticisms could help the Party make improvements and ill-intentioned criticism would reveal the true enemies and the Party would know where the threats came from. During a conference for provincial Party leaders, Mao animatedly illustrated his point:

We should allow democratic personages to challenge us with opposing views and give them a free hand to criticize us. Criticisms from democratic personages can be of only two kinds, those that are wrong and those that are not. Criticisms that are not wrong can help remedy our shortcomings while wrong ones must be refuted. As for such types as Liang Shu-ming, if they want to fart, let them. That will be to our advantage, for everybody can judge whether the smell is good or foul, and through discussion the majority can be won over and these types isolated. If they want to create trouble, let them have their fill of it. He who perpetrates many injustices is doomed to self-ruin. The falser their words and the greater their mistakes, the better, and the more isolated they will become and the better they will educate the people by negative example.

Against this backdrop, Mao unveiled his notorious policy of “letting a hundred flowers bloom and a hundred schools of thought contend,” often referred to as the “Two-Hundred Policy.” The thrust of the “Two-Hundred Policy” was that the Party encouraged intellectuals and the


206. Id.
207. Id. (“Stalin failed to see the connection between the struggle of opposites and the unity of opposites. We adhere to the concept of the unity of opposites and adopt the policy of letting a hundred flowers blossom and a hundred schools of thought contend. When fragrant flowers are blossoming, you will inevitably find poisonous weeds growing. This is nothing to be afraid of, under given conditions they can even be turned to good account.”).
209. Id.
210. Id.
211. JONATHAN SPENCE, THE SEARCH FOR MODERN CHINA 570 (1st ed. 1990) [hereinafter SEARCH FOR MODERN CHINA].
revolutionary masses to freely and openly voice their opinions on Party officials as well as the Party’s policies, rules, and regulations.

To energize the intellectuals, Mao delivered his important speech entitled, “On the Correct Handling of Contradictions among the People,” which was not immediately published. According to Mao, there were two kinds of contradictions: “contradictions among the People” and “antagonistic contradictions” between the People and enemies. The two contradictions called for totally different solutions. The Party would resolve contradictions among the People through discussion, education, and persuasion. Mao assured that only a very small number of contradictions were antagonistic and they would be solved through violent struggle, in which the enemies were banished. Trying to set a basic tone of the campaign, Mao stated, “A movement of ideological education carried out seriously, yet as gently as a breeze or a mild rain . . . and large meetings of criticism or ‘struggle’ should not be held.”

In the beginning, the intellectuals did not immediately act upon Mao’s calls for opinions and criticisms on the Party’s policies. They feared for reprisal because the Party’s heavy-handedness during the Hu Feng Incident was still fresh in their minds and there was no guarantee that the Party would not do the same to them. After Mao’s repeated calls for intellectuals to contribute to the country by voicing their unfettered opinions, intellectuals gradually opened up. By May 1957, the intellectuals began to complain about the newly established government and its functionaries probably because they believed that the Party would

212. LIEBERTHAL, supra note 192, at 101.

[Mao] divided [“the issue of conflicts of interest in China”] into two categories: “antagonistic contradictions” and “contradictions among the people.” Mao asserted that “contradictions among the people” can be resolved through discussion. He suggested that only a small number of contradictions under socialism are “antagonistic,” meaning they cannot be resolved by reasonable discourse. These “antagonistic” contradictions would inevitably be handled through violent struggle, in which the “enemy” would be vanquished.

Id.

213. Id.
214. Id.
215. SEARCH FOR MODERN CHINA, supra note 211, at 569.
216. See id. (“Intellecuals throughout China watched . . . not daring to speak out until clearer signs were given. Mao had to use all his influence to get a full Hundred Flowers campaign going. ‘I am not encouraging the people to make disturbances; I am not holding riot-promoting conferences,’ Mao told supporters . . ., presumably summarizing the complaints he knew party hard-liners were making against him.”).
217. Id. at 569–70.
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221 genuinely tolerate dissenting opinions. Seeing no restriction from the party, intellectuals broadened the scope of the criticism. In the campaign, the intellectuals vigorously protested the Party’s following policies and practices:

1. Rigid control over intellectuals;
2. Harsh treatment of counterrevolutionaries in the previous mass campaigns;
3. Blindly following the Soviet Union;
4. Low living standards;
5. Banning foreign literature;
6. Economic corruption among party leaders;
7. Special privileges enjoyed by party leaders;
8. Serious violation of human rights in the previous mass campaigns;
9. Manipulating elections;
10. Forcing farmers to join collectives; and
11. Lack of freedom of expression.

To Mao’s surprise, the “Two-Hundred” campaign went completely out of his control. The intellectuals began to influence farmers and workers, the Party’s strong allies. Mao was convinced that his enemies had taken advantage of the campaign to overthrow the Party. He revised his speech “On the Correct Handling of Contradictions among the People” to only allow intellectual freedom in the context of discussions for the purpose of strengthening of socialism. Subsequently, Mao quickly launched the “Anti-Rightist” movement to quash the intellectuals. At least 300,000 intellectuals were branded as “Rightists,” a label that ruined not only their careers but also their family members’ careers as well. They were removed from their jobs, purged, and disgraced.

218. Id. at 570.
219. Id.
220. Id.
221. Id. at 572.
222. Id. at 570.
223. Id. at 572.
224. Id.
225. Id.
226. Id.; GRAHAM HUTCHINGS, MODERN CHINA: A GUIDE TO A CENTURY OF CHANGE 113 (1st ed. 2001). By Hutchings’s estimate, there were as many as a half million intellectuals who were branded as “Rightists.” Id.
227. SEARCH FOR MODERN CHINA, supra note 211, at 572.
Many of them were sent to labor camps or jail where they remained for the next twenty years to receive re-education.  

The direct trigger of the Cultural Revolution was Wu Han’s critical writings, including a play entitled, “the Dismissal of Hai Rui from Office.” By using a historical figure, Wu insinuated that the Party leadership was out of touch with the common people. He also inspired like-minded writers, who published their works under the joint pseudonym of “Three-Family Village.” All of the works were critical of the Party’s policy failures, which had caused ordinary people to suffer throughout the various campaigns. When Mao decided to punish Wu Han and other writers, he met strong resistance from Peng Zhen, the Party Secretary of Beijing. While admitting his lack of supervision, Peng insisted that Wu Han’s work was purely academic in nature. Therefore, it was not serious enough for the Party to use the means of class struggle. Peng’s resistance reinforced Mao’s view that the revolution had lost momentum because many important positions within the Party were taken by those who deviated from the socialist path, often referred to as “capitalist roaders” or “roaders.”  

Mao believed that even after the Party took control of China, a large number of representatives of the bourgeoisie who were counter-revolutionary revisionists had managed to creep into the Party, the government, the army, and all walks of life in the cultural field. Mao thought that the Marxists and the revolutionary mass no longer controlled leadership in the majority of units across the country. Mao maintained that, “capitalist roaders” had formed a bourgeois headquarters inside the Party’s central committee, which had a revisionist political agenda and

228. HUTCHINGS, supra note 226, at 113.  
229. Id.  
230. SEARCH FOR MODERN CHINA, supra note 211, at 600.  
231. Id.  
232. Id. at 600–01.  
233. Id. at 602–03.  
234. Id.  
235. Id.  
236. Id.  
237. Id. at 603–05.  
238. Id. at 603.  
239. Id. (“Mao declared that many party bureaucrats ‘were taking the capitalist road’ even as they mouthed the slogans of socialism.”).
organizational scheme.\textsuperscript{240} Furthermore, the capitalist roaders had their agents in provinces, municipalities, autonomous regions, and even in central government departments.\textsuperscript{241}

To counter this "grave threat," Mao argued that the previous small-scale methods of dealing with opposition had not been effective.\textsuperscript{242} Only through a Cultural Revolution, could the Party expose the dark side of the counter-revolutionary capitalist roaders and regain power from them.\textsuperscript{243} In essence, a Cultural Revolution was a struggle between classes where one class would destroy another.\textsuperscript{244} Mao believed one Cultural Revolution was not sufficient; therefore, he called for a Cultural Revolution every several years to purify the Party.\textsuperscript{245} Mao called his own theory "continuing the revolution under the dictatorship of the proletariat theory."\textsuperscript{246}

A revolution is not a dinner party, or writing an essay, or painting a picture, or doing embroidery; it cannot be so refined, so leisurely and gentle, so temperate, kind, courteous, restrained and magnanimous. A revolution is an insurrection, an act of violence by which one class overthrows another.\textsuperscript{247}

In 1966, the Party, at Mao's direction, began to purge the cultural bureaucracy.\textsuperscript{248} Peng Zhen and other Party officials in the Ministry of Culture were the first to fall.\textsuperscript{249} Both Wu Han and his wife were subject to public humiliation and torture.\textsuperscript{250} In 1968, Wu Han was arrested and

\begin{itemize}
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id. at 604–06.
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Id.
\item \textsuperscript{245} Internal Discussion Document on Socialist Transition: China—Continuing the Revolution Under the Dictatorship of the Proletariat, MARXIST.ORG (Sam Richards, Paul Saba trans., Revolutionary Communist League of Britain 1991), https://www.marxists.org/history/erol/uk.hightide/transition.htm.
\item \textsuperscript{247} Quotations from Mao Tse Tung ch. 2, MARXIST.ORG, https://www.marxists.org/reference/archive/mao/works/red-book/ch02.htm (last visited Nov. 13, 2016).
\item \textsuperscript{248} SEARCH FOR MODERN CHINA, supra note 211, at 604.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\end{itemize}
sent to prison indefinitely.\textsuperscript{251} A year later, Wu and his wife died of unknown causes and their daughter subsequently committed suicide in prison.\textsuperscript{252}

Since Mao’s goal was to weed out political rivalry, high ranking officials did not enjoy extra protection. Mr. Liu Shaoqi, the President of China, was publicly humiliated and subsequently jailed and tortured to death.\textsuperscript{253} While wielding a copy of the 1954 Constitution, Liu argued:

“I am the President of China. It does not matter how you treat me, but I want to defend the dignity of the President of China. Only through trials and NPC proceedings can my presidency be impeached. What you are doing to me is humiliating the dignity of our country . . . I am a citizen, why am I forbidden to speak? The Constitution protects every citizen’s personal rights. Those who encroach upon the Constitution should be punished by law.”\textsuperscript{254}

Deng Pufang, a son of Deng Xiaoping, was purposely locked in a laboratory with highly radioactive materials.\textsuperscript{255} To escape the radiation, the junior Deng jumped out of the window from a high building and became paralyzed for the rest of his life.\textsuperscript{256} Speaking against Mao or his policies was considered the worst crime. Zhang Zhixin was sent to the labor camp and then sentenced to death without a trial because she criticized the Great Leap Forward movement and the Cultural Revolution.\textsuperscript{257} During her isolation, she was raped and tortured.\textsuperscript{258}

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{251}] Wu Han (Zhongguo Zhumin Lishi neijia (吴晗 (中国著名历史学家)) [Wu Han (A Famous Chinese Historian)] BAI DU BAIKE, http://baike.baidu.com/view/23373.htm (last visited Nov. 13, 2016); see also Gan Tian Dong de Shengyi Qing—Zhumin Xuezhe Wu Han de Kuangshi Zhi Lian (感天动地生死情——著名学者吴晗的旷世之恋) [A Sense of Heaven and Earth Life and Death Situation—Love Masterpieces of Famous Scholar Wu Han], NEWS COMMUNIST PARTY CHINA, http://cpc.people.com.cn/GB/85037/7858853.html (last visited Nov. 13, 2016) (telling the tragic love story of Wu Han and his wife and their inevitable deaths while in government custody).
\item[	extsuperscript{252}] Id.
\item[	extsuperscript{254}] Id.
\item[	extsuperscript{256}] Id.
\end{enumerate}
\end{footnotesize}
Since she refused to keep silent before her execution, revolutionary guards cut her throat and severed her tongue.\textsuperscript{259} According to an official account, at least one hundred million people were implicated during the Cultural Revolution in a country with a population of seven hundred million.\textsuperscript{260} Seventy thousand people were prosecuted and more than thirty thousand died as result of humiliation and torture.\textsuperscript{261}

Ironically, the so-called “Cultural Revolution” did nothing to improve culture. On the contrary, it caused unprecedented destruction of Chinese culture and education. During the Cultural Revolution, colleges remained closed, and students were sent to mountainous areas and the countryside. College professors, writers, and medical doctors were demonized and sent to “cowshed” (labor camp) to receive re-education. By the end of the Cultural Revolution, one-fourth of the population in China was illiterate or semi-illiterate. Science and technology lagged far behind western countries.

By the Party’s official account, the destructive effect of the Cultural Revolution was unprecedented. During this horrific period, the legal system ceased to function. Law schools were closed. Judges and prosecutors were removed and sent to the countryside to receive re-education. Without warrants, revolutionary guards broke into homes, seized and damaged property, and arrested whomever they deemed counter-revolutionaries.\textsuperscript{262} It is not known exactly how many people died in the Cultural Revolution due to lack of data and the government’s political will to release the official documents. It is estimated that three million people died\textsuperscript{263} in the violence and as many as thirty-six million were persecuted.\textsuperscript{264}

In 1981, after long deliberation, the Party elders offered the first assessment of the Cultural Revolution, which was entitled the Resolution of Several Problems in the Party’s History Since the Founding of People’s Republic of China (the Resolution).\textsuperscript{265} The Resolution acknowledged that

\begin{itemize}
  \item visited Dec. 12, 2016.
  \item 258. Id.
  \item 259. Id.
  \item 261. Id.
  \item 262. Id.
  \item 263. JUNG CHANG & JON HALLIDAY, MAO: THE UNKNOWN STORY 569 (2005).
  \item 264. RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, MAO’S LAST REVOLUTION, 262 (2006); Austin Ramzy, China’s Cultural Revolution, Explained, N.Y. TIMES (May 14, 2016), http://www.nytimes.com/2016/05/15/world/asia/china-cultural-revolution-explainer.html?r=0.
  \item 265. Guanyu Jianguo Yilai Dang de Ruogan Lishi Wenti de Jueyi
\end{itemize}
it was Mao, rather than the masses, who initiated and led the Cultural Revolution, which caused serious setbacks and losses to the Party, the People, and the state. Despite Mao’s contribution to China’s independence from foreign powers, his mistake during the Cultural Revolution was disastrous.  

A. 1975 and 1978 Constitutions

The 1975 Constitution completely changed the state structure set forth in the 1954 Constitution. Unlike any previous legislative enactments, the 1975 Constitution was an explicit political statement that endorsed what Mao and the allies perpetrated during the Cultural Revolution. To highlight Mao’s theory regarding class struggle, the 1975 Constitution substantially repealed basic rights guaranteed in the previous constitution. As a result, it had only thirty articles, the shortest constitution in China’s history. Under the 1975 Constitution, the guiding principle for the country was “continuing revolution under the proletarian dictatorship,” which means that the overriding task for China was to carry out a class struggle until the capitalist roaders were wiped out from the country. The 1975 Constitution wholeheartedly endorsed Mao’s vision for the country. For example, the Constitution made revolutionary committees permanent parts of local People’s Congresses. Revolutionary committees had the power to appoint judges and supervise their adjudication processes. The Constitution


266. Id.
267. XIANFA (1975).
268. WU JIAQUING & DU CHENGMING (吴家清 & 杜承铭), XIANFA XUE (宪法学), 76 (2008).
270. Compare XIANFA (1975) (containing only thirty articles), with PROVISIONAL CONSTITUTION, supra note 22 (containing eighty-nine articles), XIANFA (1954), XIANFA (1978) (containing sixty articles), and XIANFA (1982) (containing 138 articles).
272. Id.
274. Id. ch. 2, § 5, art.25.
also legitimized violent methods that were frequently utilized by the so-called revolutionary mass during the Cultural Revolution.\textsuperscript{275} In addition, the Constitution eliminated the state presidency.\textsuperscript{276} Since Mao's primary goal was to purge political rivals during the Cultural Revolution, the 1975 Constitution outlawed any possibility of competition, making Mao the paramount leader. The subsequent 1978 Constitution kept the basic structure of the 1975 version largely unchanged.\textsuperscript{277}

B. Lessons Learned from the Cultural Revolution

Soon after Mao's death in 1976, a group of Party elders, who were purged or sidelined during the Cultural Revolution, spared no efforts to rectify Mao's wrongdoing.\textsuperscript{278} First, the elders swiftly arrested Mao's widow, Jiang Qing and her three followers, or "the Gang of Four."\textsuperscript{279} Since Mao was still revered by the indoctrinated masses, the elders blamed "the Gang of Four" for all the atrocities during the Cultural Revolution.\textsuperscript{280} Jiang Qing and her followers were put on trial and given the death penalty with a two-year suspension, which was subsequently commuted to a life imprisonment.\textsuperscript{281} Then, the elders made Deng Xiaoping the next paramount leader of China in 1978.\textsuperscript{282} Deng is widely accredited for steering China in a new direction.\textsuperscript{283} When asked how to prevent the Cultural Revolution from happening again, Deng Xiaoping replied:

We need to establish a [new] system to prevent the tragedy. In the past, our system was heavily influenced by feudalism, such as personality cult, the patriarchalism, and the life tenure of cadres in leading posts. We are determined to prevent repeating the same mistakes by way of reform. China has a long history of feudalism. As a result, it lacks the socialist democratic and legal system. We are earnestly trying to establish such a system. Only

\textsuperscript{275} Id. ch. 1, art. 12.
\textsuperscript{276} See id. ch. 2 (containing no provision for the State President position despite naming all other state organs).
\textsuperscript{277} The basic structure for both constitutions consists of a preamble, and four chapters centered on general principles, structure of the state, citizens' rights and duties, and national symbols including the capital. XIANFA (1975); XIANFA (1954).
\textsuperscript{278} EZRA F. VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA 218–22, 244 (2011).
\textsuperscript{279} Id.
\textsuperscript{280} Id. at 240–41, 263.
\textsuperscript{281} HUTCHINGS, supra note 226, at 92–93.
\textsuperscript{282} Id.
\textsuperscript{283} Id.; VOGEL, supra note 278, at 227, 240–42.
by doing so can we prevent another cultural revolution from happening again.284

Deng was instrumental in deciding key issues in the process of drafting the new constitution.285 First, regarding whether the Constitution should reflect the Party’s leadership, some intellectuals believed that there should be legal limits on the Party’s absolute power.286 While realizing the importance of establishing a constitution, most Party elders only regarded law as a tool to maintain social order and achieve the economic goals.287 They believed that when there were conflicts between the Party and the Constitution, the Party should prevail.288 The elders insisted that the Party’s leadership be a formal section of the Constitution. Deng took a pragmatic approach by adding the Party’s leadership in the Preamble of the Constitution, not the main text.289 By doing so, the Constitution did not appear overly political in nature as it did in the previous versions, yet the dominant role of the Party was evident.290 As a result, the “four basic guiding principles” were added to the Preamble: (1) the leadership of the Party; (2) the Marxism-Leninism, Mao Zedong Thought, and Deng Xiaoping Theory; (3) the People’s democratic dictatorship; and (4) the Socialist road.291 The relevant section of the Preamble is excerpted below:

Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents, the Chinese People of all nationalities will continue to adhere to the People’s democratic dictatorship and the socialist road, persevere in reform and opening to the outside world, steadily improve socialist institutions, develop the socialist market economy, develop socialist democracy, improve the socialist legal system and work

286. CHOW, supra note 271, at 74–76.
287. Id.
288. Id.
289. Id.
290. Id.
291. VOGEL, supra note 278, at 262.
hard and self-reliantly to modernize the country's industry, agriculture, national defense and science and technology step by step and promote the coordinated development of the material, political and spiritual civilizations, to turn China into a socialist country that is prosperous, powerful, democratic and culturally advanced.292

Second, some scholars proposed that the new Constitution should take the opportunity to establish bifurcated chambers similar to those in western democracies.293 The democratic parties would form an upper house and the People's Congress a lower house.294 All decisions and laws would need to go through the two chambers.295 Deng disagreed, "If the two chambers are not in agreement, it is very difficult to coordinate between the two. We will need a one-chamber Congress, i.e., the People's Congress as the highest organ of the state. In this way, it is much easier to get things done."296

Deng later stated his point more clearly, "While the democratic parties may voice their opinion or critics, they don't have legitimate power to question or supervise the government. Please note the difference between democratic parties and the People's Congress."297 As a result, the Constitution defines the NPC as the highest organ of the state power and democratic parties have no role in managing state affairs.298

Third, whether or not to create the position of State President was a very sensitive issue in Chinese politics.299 For Mao Zedong, it was regretttable to create the State President in the 1954 Constitution that he drafted.300 Mao believed that Liu Shaoqi used the Presidency as a platform to compete with him for power.301 One of main reasons for Mao to instigate the Cultural Revolution was to quash his rivals and consolidate power. In the 1970s, General Lin Biao, Mao's close deputy and hand-chosen successor, once again raised the idea of creating the State Presidency.302 Shortly after, Lin and his family died in an airplane crash

294. Id.
295. Id.
296. Id.
297. Id.
298. XIANFA ch. 3, § 1, art. 57 (1982).
300. Id.
301. SEARCH FOR MODERN CHINA, supra note 211, at 617; CHOW, supra note 271.
302. JONATHAN SPENCE, MAO ZEDONG 157-62 (1999); DILLON, MODERN HISTORY, supra note 153, at 329-49.
allegedly on his way to defect to the Soviet Union.  

While drafting the new Constitution, some Party elders raised the same issue again, albeit, very cautiously. They believed that it was necessary for China to have an official head of the county in dealing with foreign dignitaries. However, the elders did not reach a consensus on what type of power the Constitution should grant to the State President. Some argued that the State President should have the ability to veto to prevent the concentration of power. Deng agreed that it was beneficial for China to have a state president, but he insisted that the Office of the President should have no substantial power. It should not have the power to manage state affairs, make any final decisions, or interfere with state politics. When a member of the committee asked Deng to be the President, he refused. Then the member told Deng, “If you don’t want to be the President, we should not create the position.” Deng replied, “Somebody else can be the President. If the country needs it, we should not design the position just for a particular person.” As a result, the new constitution made the State President a figurehead who only performs ceremonial and symbolic duties.

Fourth, another sensitive issue was the creation of the CMC in the Constitution. The 1954 Constitution granted the State President power to command the armed forces, but the power did not take effect. The 1975 Constitution abolished the Presidency and made it clear that the military belonged to the Party. As a result, Mao, the Chairman of the Party, became the commander of the military. The 1978 Constitution kept the structure intact. During the drafting of the new Constitution, some committee members proposed that the new Constitution make the State

303. SEARCH FOR MODERN CHINA, supra note 211, at 616–17.
305. Id.
306. Id.
308. Id.
309. Id.
310. Id.; VOGEL, supra note 278, at 262.
311. State Central Military Commission, supra note 304.
312. Id.
313. Id.
314. Id.
315. Id.
President the commander of the military as in the 1954 Constitution.\textsuperscript{316} Others urged that the Constitution should explicitly state “the People Liberation Army is the armed force under the absolute leadership of the Party.”\textsuperscript{317} Deng disagreed. He maintained that the State President and the Chairman of the CMC should be two separate positions with the possibility of combining the two positions into one.\textsuperscript{318} According to the provisions that Deng drafted, the Chairman of the CMC should be elected by and responsible to the NPC.\textsuperscript{319} However, there was no requirement for the Chairman to make an annual report to the NPC.\textsuperscript{320} The term limit should not apply to the Chairman of the CMC.\textsuperscript{321}

To relieve fears that the military could move away from the Party’s leadership, the Party Central Committee issued a notice to assure that the CMC belongs to both the Party and the state.\textsuperscript{322} As a result, the Party’s CMC and the state’s CMC are merged into one entity.\textsuperscript{323} In Chinese, it is called “yitao banzi, liangkuai paizi,” meaning that the same office and members have two identities.\textsuperscript{324}

Fifth, except for those who were disgraced during various political campaigns, Mao and his allies worked until the very end of their lives.\textsuperscript{325} After Mao’s death, old revolutionary guards who continued to occupy important positions resisted the new changes.\textsuperscript{326} Life-tenure posed a serious problem for Deng to carry out his reform and open policies.\textsuperscript{327} He advocated imposing age and term limits for leading positions both in the government and the Party.\textsuperscript{328} As Deng saw it, term limits would allow young generations to assume key government positions and make the country more energetic and prosperous.\textsuperscript{329} The new Constitution provided an important opportunity for Deng to institutionalize the changes.\textsuperscript{330} Therefore, except for the Chairman of the CMC, all major

\begin{center}
\begin{tabular}{l}
\textsuperscript{316} Id. \\
\textsuperscript{317} Id. \\
\textsuperscript{318} Id. \\
\textsuperscript{319} Id. \\
\textsuperscript{320} Id. \\
\textsuperscript{321} Id. \\
\textsuperscript{322} Id. \\
\textsuperscript{323} Id. \\
\textsuperscript{324} Deng Xiaoping Guided the 1982 Constitution, supra note 285; State Central Military Commission, supra note 305. \\
\textsuperscript{325} Deng Xiaoping Guided the 1982 Constitution, supra note 285. \\
\textsuperscript{326} Id. \\
\textsuperscript{327} Id. \\
\textsuperscript{328} Id. \\
\textsuperscript{329} Id. \\
\textsuperscript{330} Id. \\
\end{tabular}
\end{center}
leaders of the state organs are limited by two consecutive five-year terms.331

V. 1982 CONSTITUTION

According to Article 2 of the Constitution, “All power in the People’s Republic of China belongs to the People. The organs through which the People exercise state power are the National People’s Congress and the Local People’s Congresses at different levels."332 Article 57 defines the NPC as “the highest organ of state power."333

A. The NPC and NPC Standing Committee

The NPC is composed of around three thousand People’s deputies who are elected by the provincial People’s Congresses334 for a five-year term.335 The NPC Standing Committee allocates the number of deputies among twenty-two provinces, four municipalities directly under the central government, five autonomous regions, two special administrative districts, Taiwan, and the People’s Liberation Army.336 The allocation is based on population and other policies that ensure adequate representation of women, minority groups, and the army. Over 70% of NPC deputies are Party members.337

Within two months of the election, the NPC Standing Committee from the previous Congress conducts background checks of the 3,000 newly elected NPC deputies and calls for the first session of the new NPC. To prepare for the first session, the Standing Committee groups the 3,000 deputies into delegations according to the geographic areas where the deputies were elected. Each delegation elects a head deputy, usually the Secretary of the Party Provincial Committee. For example, during the 12th session of the NPC, the head deputy of Liaoning Province was Wang

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331. See XIANFA ch. 3, § 1, art. 66 (1982) (imposing term limits on the Chairman and Vice-Chairmen of the Standing Committee of the National People’s Congress); XIANFA ch. 3, § 2, art. 79 (1982) (imposing term limits for the President and Vice-President).
332. Id. ch. 1, art. 2.
333. Id. ch. 3, § 1, art. 57.
334. Id. ch. 1, art. 2.
335. Id. ch. 3, § 1, art. 57.
Min, the Secretary of the Party Liaoning Committee. The head deputy leads the discussion of NPC agendas within each delegation and reports to the formal NPC session. During delegation meetings, deputies are often highly scripted and thus spontaneous conversations are rare.339

Before the first session of the NPC, the previous NPC Standing Committee holds a preparatory meeting, during which the Presidium and Secretary-General are elected.340 Even though the 90-member Presidium is a transitory organization within the NPC, it plays a pivotal role in shaping the government. According to the NPC Organic Law, the Presidium has the power to nominate all of the most important state leaders—the President and Vice President of the State, the Chairman of the CMC, the President of the People’s Supreme Court, the Procurator-General of the People’s Supreme Procuratorate, and the Chairman, Vice Chairman, Secretary-General, and members of the NPC Standing Committee.341 Before presenting the nominees to the NPC formal session for a vote, the Presidium consults with his delegates.342 In the elections for the most important state leaders, the Presidium nominates the exact number of candidates for the post to be filled.343 For the election of members of the NPC Standing Committee, which are less important than state leaders, the Presidium nominates 5% more than the number of the posts to be filled.344

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339. As an example of a typical example of a prepared statement at NPC sessions, a deputy first praises the state leadership for guiding the country, then expresses the his or her desire to implement the state plan. See Renda Daibiao Tadan Foyan Gao (人大代表讨论发言) [Deputy’s Speech], CDDH.COM, http://www.chddh.com/yanjianggao/62580.html (last visited Nov. 14, 2016).


341. Id. art. 13.

342. Id.

343. See CHOW, supra note 271, at 92–95 (“The members of the NPC Standing Committee are elected from among its members by the NPC from a list of names submitted and approved by the CPC …… The Party core group is an executive council that sets the agenda and organizes the meetings of the Standing Committee. The Party core group also supervises the larger NPC Party memberships group and through this organization can direct all party members how to vote in the case of legislative bills, nominations, or resolutions.”).

A cursory review of the voting records during the NPC elections shows the unanimous nature of the NPC. The following chart is a voting tally from the fourth meeting of the 12th Session of the NPC in 2013, which elected the top leaders of the most important organs of the state structure.\(^\text{345}\) There was only one candidate for each government post to be filled. Each deputy cast an up or down vote on the specific candidate nominated by the Presidium. Abstention is permitted, but deputies are prohibited from writing in other candidates.\(^\text{346}\)

<table>
<thead>
<tr>
<th>Positions</th>
<th>Number of Candidates</th>
<th>Yes</th>
<th>No</th>
<th>Abstentions</th>
<th>Total Votes</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>President of the State</td>
<td>1</td>
<td>2,952</td>
<td>1</td>
<td>3</td>
<td>2,956</td>
<td>99%</td>
</tr>
<tr>
<td>Chairman of the CMC</td>
<td>1</td>
<td>2,955</td>
<td>1</td>
<td>3</td>
<td>2,959</td>
<td>99%</td>
</tr>
<tr>
<td>Premier of the State Council</td>
<td>1</td>
<td>2,940</td>
<td>3</td>
<td>6</td>
<td>2,949</td>
<td>99%</td>
</tr>
<tr>
<td>Chairman of the NPC</td>
<td>1</td>
<td>2,952</td>
<td>5</td>
<td>4</td>
<td>2,961</td>
<td>99%</td>
</tr>
<tr>
<td>Chairman of the CPPCC</td>
<td>1</td>
<td>2,188</td>
<td>4</td>
<td>1</td>
<td>2,193</td>
<td>99%</td>
</tr>
<tr>
<td>President of the Supreme People's Court</td>
<td>1</td>
<td>2,908</td>
<td>26</td>
<td>23</td>
<td>2,957</td>
<td>98%(^\text{347})</td>
</tr>
<tr>
<td>Procurator-General of the Supreme People’s Procuratorate</td>
<td>1</td>
<td>2,933</td>
<td>18</td>
<td>5</td>
<td>2,956</td>
<td>99%(^\text{348})</td>
</tr>
</tbody>
</table>

Except for some members of the NPC Standing Committee, NPC

\(^{345}\) This data is based on reports no longer officially available from the PRC, but can be verified with the author.

\(^{346}\) How are National Leaders Elected?, supra note 344.


\(^{348}\) Id.
deputies do not work full-time for the NPC. Every year in March, the NPC deputies travel to Beijing and attend the annual session of the NPC for two or three weeks. For the rest of the year, deputies remain in their regular jobs until the next annual meeting commences. Nevertheless, the Constitution grants the NPC broad powers in the following four areas:

1. Legislative power: The NPC can amend the Constitution with the consent of 2/3 of NPC deputies. In addition, it supervises the enforcement of the Constitution and enacts basic laws such as civil law, criminal law, and administrative laws.

2. Power to select major state leaders: The NPC has the power to elect the state President, Vice-President, the Chairman of the Central Military Commission (CMC), the President of the Supreme People's Court, and the Procurator-General of the Supreme People's Procuratorate. Upon the President's nominations, the NPC decides on the choice of Premier, Vice-Premiers, and other important staff members of the State Council; upon the Chairman of the CMC's nominations, the NPC decides on members of the CMC.

3. Power to approve important state measures: The NPC examines and approves the national economic and social development plans, the state budget and the reports on their implementation. In addition, it approves the establishment of provinces and special administrative regions. It also makes the determination of when the country will go to war.

4. Adjudication power: The NPC can alter or annul inappropriate decisions of the NPC Standing Committee.

B. The NPC Standing Committee

Upon the NPC Presidium's nomination, the NPC elects the NPC Standing Committee, which is composed of around 160 members. The NPC Standing Committee members cannot hold office in administrative, judicial, or procuratorial organs of the state. The law, however, does

349. CHOW, supra note 271, at 91–95.
350. XIANFA ch. 3, § 1, art. 64 (1982).
351. Id. ch. 3, § 1, art. 62.
352. Id.
354. THE NPC ORGANIC LAW, supra note 343, art. 23.
not prohibit the members from working for the Party, universities, research institutions, or private enterprise. Only a small portion of the Standing Committee members work full-time for the NPC. The Chairman, assisted by several Vice-Chairmen, leads the NPC Standing Committee. The Chairman and Vice Chairmen cannot serve more than two consecutive five-year terms. There are no term limits for NPC Standing Committee members and NPC members. The Secretary-General handles the day-to-day business of the NPC Standing Committee.

The Constitution grants more power to the NPC Committee than to the NPC.

1. Legislative power: The Standing Committee enacts other laws than basic laws, interprets and enforces the Constitution and laws. It amends laws when the NPC is not in session.

2. Power to approve state measures: When the NPC is not in session, the NPC Standing Committee examines and approves the national economic and social development plans, the state budget and the reports on their implementation.

3. Power of supervision: The NPC Standing Committee supervises the work of State Council, the CMC, the People, and the PSP's work.

4. Adjudication power: It also can annul State Council's regulations, decisions and orders, which the NPC Standing Committee deems contrary to the Constitution and laws. It also can annul any local laws, which it deems contrary to the Constitution and laws.

5. Power to select state leaders: When the NPC is not in session, the NPC Standing Committee decides on the choice of ministers, state councilors, auditors, and Secretary-General of the State Council upon the nomination of the State Council; members of the CMC upon the nomination of the CMC Chairman; the Vice President, judges, members of the Adjudication Committee of the People's Supreme Court upon

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355. See id. (limiting NPC Standing Committee members from holding public office in only three organs of the State).
356. THE NPC ORGANIC LAW, supra note 343, art. 24.
357. XIANFA ch. 3, § 1, art. 66 (1982).
358. See id. (declining to establish term limitations for NPC Standing Committee members and NPC members).
359. THE NPC ORGANIC LAW, supra note 343, art. 25.
the nomination of the President of the Court; Vice Procurator-General, procurators, members of the Procuratorial Committee upon the nomination of the Procurator-General. The NPC Standing Committee also decides on the choice of Provincial Procuratorate-General upon the nomination of the Procurator-General.

6. Power to decide on foreign relations: It appoints or dismisses ambassadors to foreign countries, and enters into or annuls treaties with foreign countries. When the NPC is not in session, it has power to declare war if the country faces foreign armed invasion or fulfills international treaty obligations on common defense. It has the power to decide general or partial mobilization of troops, and declare a state of emergency.

7. Ceremonial powers: The NPC Standing Committee confers state medals, honors, and decides on the titles and ranks for the military and diplomats. It also has the power to grant amnesty.

8. Other powers granted by the NPC.

The Election Law as amended in 2010 lays out the procedure for China’s Congressional elections. Below the NPC are three levels of People’s Congresses in a descending order: provincial, city, and county or township. Only the county People’s Congresses are directly elected by local people. The NPC and Congresses at the provincial and city levels are elected by the Congresses one level below.

Generally, citizens over eighteen years old, regardless of ethnicity, race, gender, occupation, family background, religious beliefs, education, property status, or length of residence have the right to vote and stand for election. Citizens with mental illnesses confirmed by the election commission and others legally deprived of political rights are not eligible.

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360. XIANFA ch. 3, § 1, art. 67 (1982).
362. Id. art. 5.
363. Id. art. 8.
364. Id.
365. Id. art. 3, 26.
to vote.\textsuperscript{366}

The Standing Committees of the NPC and local People’s Congresses appoint election commissions and conduct Congressional elections at the corresponding levels.\textsuperscript{367} The election commissions are responsible for districting election zones, registering voters, conducting background checks of voters, setting the dates for election, adjudicating voting irregularity complaints, and certifying and announcing the election results to the public.\textsuperscript{368}

The most important function of the election commissions is to make the final decision on which candidates will be on the ballots.\textsuperscript{369} Political parties, People’s organizations, can nominate candidates.\textsuperscript{370} Ten or more voters can also jointly nominate candidates.\textsuperscript{371} The total number of candidates is between 33\% to 100\% more than number of positions available.\textsuperscript{372} For example, if the number of the People’s deputies to be elected is thirty, the number of candidates should be more than forty but not exceed sixty. Above the county level, where the deputies are elected indirectly, the number of candidates is more than the number of deputies to be elected by 20\% to 50\%.\textsuperscript{373} If the number of candidates nominated exceeds the number deputies to be elected by 100\% or more, the election committee makes the decision according to the majority voter’s preference.\textsuperscript{374} If the voters disagree with which candidates should be on the ballot, the committee may call a pre-election.\textsuperscript{375} However, the law is unclear how the pre-election is held.\textsuperscript{376}

The fixed ratio between candidates and deputies is to spur competition among candidates, but it does not mean that open campaigns are permitted.\textsuperscript{377} Unlike in the United States, the candidates in China are prohibited from soliciting votes directly from their respective constituencies.\textsuperscript{378} In fact, it is very dangerous to stage any public campaign. Attacking a candidate’s character and fitness is particularly risky

\textsuperscript{366} Id.
\textsuperscript{367} Id. art. 8–10.
\textsuperscript{368} Id.
\textsuperscript{369} In addition to the Communist Party of China, there are 8 other political parties.
\textsuperscript{370} The Election Law, supra note 361, art. 29.
\textsuperscript{371} Id.
\textsuperscript{372} Id. art. 30.
\textsuperscript{373} Id.
\textsuperscript{374} Id. art. 31.
\textsuperscript{375} Id.
\textsuperscript{376} Id.
\textsuperscript{377} Id. art. 33.
\textsuperscript{378} Id. art. 34.
because it may violate criminal law against libel and slander.\footnote{379} There are numerous recent cases where internet users have been imprisoned for allegedly defaming government officials.\footnote{380} Therefore, the only information the voters know about the candidates is from the resumes disseminated by the election commission.\footnote{381} The commissions are responsible for conducting background checks of the candidates and introducing them to voters.\footnote{382} The Election Law requires the election commission to post candidates’ resumes at least two days before the election.\footnote{383}

Theoretically, state power comes from people at the local level.\footnote{384} In practice, however, there is no real connection between the people and the NPC because the candidates at each level of the Congressional elections are controlled by the Party.\footnote{385} Therefore, the will of the people is lost in the several layers of indirect elections. In addition, decades of propaganda and indoctrination of communism have effectively suppressed individualism. It is considered a high virtue to sacrifice one’s personal interests for the good of the country. As a result, the People have become much more self-censored and refrained from expressing their true desires during the Congressional elections.

C. Ms. Shen Jilan, the Longest Serving People’s Deputy

What should Party members in the NPC should do if there is a conflict between the Party and the state? People’s deputies who are Party members must obey the Party’s disciplinary rules.\footnote{386}

\footnote{379} See China Issues New Internet Rules That Include Jail Time, BBC.COM (Sept. 9, 2013), http://www.bbc.com/news/world-asia-china-23990674 (reporting new official guidelines threatening prosecution for any online posts that leads to protest or unrest). As an official court spokesperson stated: “No country would consider the slander of other people as ‘freedom of speech.”’ \textit{Id.}


\footnote{381} The Election Law, \textit{supra} note 361, art. 31.

\footnote{382} \textit{Id.}

\footnote{383} \textit{Id.}

\footnote{384} \textit{Id.} art. 37.

\footnote{385} \textit{Independent People’s Congress Election Hopeful Jailed}, \textit{supra} note 380.

\footnote{386} Renda Yu Dui Dui Zhidu He Quanli Wenbi de Chanju (人大与党：对制度和权力问题的阐述) [Congress and the Party: An Analysis of System and Power Issues], CHINA.COM.CN, http://www.china.com.cn/chinese/zhuanti/rdzd/661462.htm [last...
They must not violate Party's policies, resolutions and directives. People's deputies first are Party members, thus they must not violate Party’s rules just because they are People’s deputies. Of course, the Party should not issue unreasonable orders. A Party member, no matter whether he is a People’s deputy or government official, must obey the Party’s policies.387

Shen Jilan, who has served twelve sessions of NPC for fifty-nine years, recently said, “I have never cast a nay vote, but that does not mean that I agree all the time. As I understand, democracy means that I cast a yes vote if I agree. If I don’t agree, I will still cast a yes vote and keep my disagreement to myself.”388 When asked if she met voters, she replied, “Our election is democratic, so I have never interacted with voters.”389 Regarding the use of internet for the public to seek information, Shen commented, “I think that the internet should be controlled. One cannot say whatever he wants to say on the internet. Everyone should follow the rule on the use of internet, because this country is a socialist country under the leadership of the Party. Whoever wants to use the internet must first get the permission of the Party.”390 Shen’s comments may seem unpolished, but she spoke to what she believed in. Even though it is rare to have any other deputies to be as candid as Shen, virtually every member of the Congress follows the same belief as Shen.391

D. Case Study: Election Fraud Case, Hunan Hengyang 2014

On December 28, 2013, the Party Hunan Province Committee (Hunan Party) announced the investigation result of a rare election fraud case in Hengyang City.392 In January 2013, the Hengyang City People’s Congress held a meeting to elect seventy-six out of ninety-three candidates as provincial People’s deputies representing Hengyang City.393 The
investigation revealed that fifty-six candidates paid 110 million Yuan ($18 million) to bribe 518 city deputies and sixty-eight election officials. The Hunan Party claimed that both the amount of money and number of People involved was unprecedented. The case seriously undermined the credibility of the government and posed a serious challenge to the People’s Congress system. It asked all government officials to learn a lesson from the case to prevent fraud from happening again in the future. The NPC spokesman commented, “We must not take corruption and violations in election procedures lightly and such offenses must get serious punishment.”

The Hunan Party declared the city Congressional election void and dismissed 512 Congressional members. It also disciplined the Party members implicated in the case according to the Party’s internal rules before referring the case to the police department for a criminal investigation. In August 2014, Tong Mingqian, who was in charge of supervising the election, was sentenced to five years in prison for neglecting public duty and failing to stop election fraud. In addition, sixty-nine Congressional members and government officials were sentenced to various prison terms.

Some scholars unearthed further details of this case which were not in the Party’s official report. One puzzling aspect of the case is that since the People’s Congress is the weakest entity in the state structure, often referred to as a “rubber stamp” institution, why do entrepreneurs and government officials pay bribes to get “elected” as People’s deputies? The answer is complicated. First, the status as a People’s deputy offers an extra layer of legal protection for personal freedoms and property ownership. According to the Constitution, national People’s deputies to the NPC may not be arrested or put on criminal trial without the permission of the

394. Id.
395. Id.
396. Id.
397. Id.
398. Id.
399. Id.
400. Id.
401. Id.
403. Id.
NPC. Similarly, local People’s deputies at or above the county level enjoy the same legal immunity. Such immunity has become increasingly appealing to private entrepreneurs whose freedom and property are frequently subject to harassment by the government.

In recent years, Bo Xilai staged a public campaign called “Changhong Dahei” or “Sing Red and Strike Black,” in which Mr. Bo encouraged People to sing patriotic and revolutionary songs (red songs) from the Mao era and crack down on criminal gangs (black society). By doing so, Mr. Bo hoped to win grassroots support for his ambition for higher office in the central government. During the campaign, the Chongqing government prosecuted a great number of private entrepreneurs who were allegedly involved in gang activities. After speedy trials, in which legal counsel was denied or suppressed, the entrepreneurs were sentenced to prison and their property seized. Some local government officials were also accused of providing protection for the “criminal gangs” and imprisoned. For ordinary entrepreneurs and newly minted business tycoons across the country, Bo’s campaign was extremely terrifying. Buying legal immunity that comes with being a People’s deputy is considered just a part of the cost of doing business. Even though the government can instruct the Congress to revoke a deputy’s legal immunity, it will take time to go through the formal process. For fear of inviting unnecessary publicity and scrutiny, the Congress is generally reluctant to

404. Id.
406. Hengyang Election Scandal Thought, supra note 402.
408. Id.
409. Id.
410. Id.
411. Id.

https://commons.stmarytx.edu/thestmarylawjournal/vol48/iss2/3
initiate the impeachment process.\footnote{413}{Id.}

Second, being a People’s deputy offers unique opportunities for an entrepreneur to connect with high officials and other business leaders during the Congressional meetings.\footnote{414}{Id.} Informal groupings and other venues, such as dinners and outings sometimes are equally important for building strong “guanxi” or connections, which are essential for business success. In addition, as a People’s deputy, the entrepreneur has a say in selecting deputies for the Congress at the next level.\footnote{415}{Bo Xilai was at one point considered as a very possible candidate for promotion to the Politburo Standing Committee. Bo Xilai Found Guilty of Corruption by Chinese Court, BBC.COM (Sept. 22, 2013), http://www.bbc.com/news/world-asia-china-24170726.} When like-minded candidates with ambition for higher offices solicit the entrepreneurs’ vote, they both know exactly how the “transaction” will work out.

Third, by the scholar’s account, entrepreneurs in the scandal were not the only ones who bribed the city’s congressional members to get elected as provincial deputies.\footnote{416}{Bo Xilai Found Guilty of Corruption by Chinese Court, BBC.COM (Sept. 22, 2013), http://www.bbc.com/news/world-asia-china-24170726.} Government official candidates, such as departmental heads, also paid bribes for the same purpose.\footnote{417}{Id. (discussing Xilai’s use of public funds to increase his political power).} This may sound odd because being a People’s deputy is not a full time job. It is often regarded as a symbolic position, which has no real power over any government departments.\footnote{418}{Id.} However, the legal immunity accorded to People’s deputies appeals equally to government officials especially during various campaigns. In addition, being a provincial People’s deputy increases an official’s chance for promotion. When several officials are competing for one promotion, everything being equal, Congressional member status can be crucial. More importantly, the officials convicted for bribing deputies to get elected, in fact, did not pay out of their own pocket but from the public fund at their disposal.\footnote{419}{Hengyang Election Scandal Thoughts, supra note 402.}

E. The President

According to the Constitution, the President or Vice President must be over forty-five years old, have the right to vote and can stand for election.\footnote{420}{B. Xianfa, supra note 271, § 2, art. 79 (1982).} The term of President and Vice President is the same as that of the NPC, and they cannot serve more than two consecutive five-year
terms.  

The State President of China is a symbolic and ceremonial position according to the Constitution. However, the President can be the paramount leader if the same person is concurrently holding the positions of the Chairman of the CMC and the Secretary-General of the Party. Without the other two positions, the President does not have real power. Only upon the decisions by the NPC and NPC Standing Committee, can the President announce laws, appoint or dismiss the Premier and other important members of the State Council, confer state medals of honor, declare amnesty, state of emergency, war, mobilization, dispatch or call back diplomats, ratify or abrogate treaties with foreign nations.

F. The State Council

The State Council is also called the Central People’s Government of China. The Constitution defines it as “the executive body of the highest organ of state power” and “the highest organ of state administration.” The State Council is composed of the Premier, several Vice Premiers, State Councilors, Ministers, Commissioners, the Auditor-General, and Secretary-General. The Premier, Vice Premier, and State Councilors cannot serve more than two consecutive 5-year terms. There are no term limits for Ministers, Commissioners and other department heads in the State Council.

The Premier is in charge of the overall work of the State Council. Each week, the Premier presides over an executive meeting attended by Vice Premiers, State Councilors, and the Secretary General to discuss important matters, including draft laws and regulations. Sometimes, the Premier holds plenary meetings.

The State Council directs the works of ministries and of all governments at local levels. Internally, the State Council compiles the national

421. Id.
422. Id. ch. II, § 2, art. 80–81.
423. Id.
424. Id.
425. Id. ch. II, § 3, art. 85.
426. Id.
427. Id. ch. II, § 3, art. 86.
428. Id. ch. II, § 3, art. 87.
429. See id. ch. II (establishing term limits for only the Premier, Vice Premier and State Councilors).
430. Id. ch. II, § 3, art. 86–88.
431. Id.
432. Id. ch. II, § 3, art. 89.
budget and draws development plans for the nation’s economy, education, science, culture and family planning. It decides on the size of administrative organs, and "appoints or removes administrative officials." It also directs civil affairs, public security and judicial administration. In the event of crisis, the State Council can declare a state of emergency. Externally, it conducts foreign affairs and approves or rejects treaties and agreements with foreign nations.

The State Council enacts administrative regulations and issues decisions according to the law. It also has the power to make legislative proposals to the NPC. In fact, over 70% of the laws passed by the NPC and NPC Standing Committee are proposed by the State Council.

The State Council can alter or annul inappropriate administrative orders or regulations issued by ministries or local government. It also has the power to approve the geographic boundaries of provinces, and the establishment and geographic division of cities and counties.

Underneath the State Council are various ministries, commissions, bureaus, the People’s Bank of China, institutions, ad hoc commissions, and corporations. There are twenty-five ministries and commissions in charge of various sectors of China’s economy and important state affairs. For example, the Ministry of Health is responsible for managing the health care systems, setting standards for medical education, and supervising physicians and health care providers. The Ministry of Foreign Affairs is responsible for implementing China’s diplomatic principles, policies and laws and handling “diplomatic activities between leaders of the Party and the state with foreign leaders.” Another example is the National Development and Reform Commission (NDRC). Its responsibilities include drawing long-term economic development

433. Id.
434. Id.
435. Id. ch. II, § 3, art. 89.
436. Id.
437. Id.
438. Id. ch. II, § 3, art. 89.
439. See CHOW, supra note 271, at 154.
441. Id.
442. Id. ch. II, § 3, art. 90.
443. All the ministries and other organizations are listed in the State Council website, http://www.gov.cn/guowuyuan/zuzhi.htm.
plans, monitoring the national economic development including consumer prices, and approving large-scale construction projects. In recent years, the NDRC has evolved from being a research institution into a powerful law enforcement agency of the Anti-Monopoly Law. In August 2014, the NDRC imposed a 1.2 billion RMB fine on twelve Japanese auto parts makers. Qualcomm, General Motors, Volkswagen and other multinational giants were under NDRC’s investigation for their alleged competitive activities in the Chinese market. Microsoft was under the Administration of Industry and Commerce, also under the State Council, for alleged anti-competitive activities. The State Council also has a number of bureaus charged with specific tasks. Some bureaus are administratively equal to ministries and commissions, but some are not the same. For example, the State Intellectual Property Office handles patent applications and disputes. The China Food and Drug Administration approves new drugs, supervises the production of pharmaceutical products, and ensures food safety.

The State Administration of Press, Publication, Radio, Film and Television (SAPPRFT)’s objective is to “support the leadership of the

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447. See US CHAMBER COM., THE COMPETING INTEREST IN CHINA’S COMPETITION LAW ENFORCEMENT: CHINA’S ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY 1-5 (2014), https://www.uschamber.com/sites/default/files/sml_final_090814_final_locked.pdf (discussing that since China enacted its Anti-Monopoly Law in 2007, it has utilized the NDRC as a means of empowering increased market share in native companies by investigating alleged “monopolistic conduct” of foreign origin); see also Main Functions of the NDRC, NAT’L DEV. REFORM COMM’N (including the authority of the NDRC to “to set and adjust the price of important commodities that are regulated by the state and important tariffs and charges and according to relevant legislations investigate and deal with price monopoly and promote the balance of international payments”).


450. Id.


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Party, focus on ‘correct propaganda’ as their guiding principle, and have a firm grasp of ‘correct guidance of public opinion.’”\textsuperscript{454} To fulfill the task, the SAPPRFT draws policies for the development of propaganda in the communication industry.\textsuperscript{455} It is in charge of “cleaning” the cultural market by organizing public campaigns against pornographic works and illegal products, such as publications by unsanctioned religious groups and non-governmental organizations.\textsuperscript{456} In addition, the SAPPRFT has the power to approve the import of foreign cinematographic products.\textsuperscript{457} On August 19, 2014, the SAPPRFT ordered several websites to stop broadcasting American TV series, including “The Good Wife,” “The Practice,” “The Big Bang Theory,” and “House of Cards” because they may have pornographic scenes.\textsuperscript{458} The SAPPRFT subsequently lifted the ban.\textsuperscript{459}

The State Council Xinhua also directs the News Agency, the state’s mouthpiece.\textsuperscript{460} Additionally, the academic institutions, including the Academy of Social Sciences, the Academy of Sciences, the Academy of Engineering, and China’s State Natural Science Foundation are directly under the State Council.\textsuperscript{461}

G. The Central Military Commission (CMC)

The Central Military Commission (the CMC) directs the entire armed forces of China.\textsuperscript{462} The CMC is composed of a chairman, several vice chairmen, and members.\textsuperscript{463} The Chairman of the CMC is responsible to the NPC and its Standing Committee.\textsuperscript{464} Unlike the top leaders of other state organs, the Chairman of the CMC is not subject to term
restrictions.\textsuperscript{465} Under the CMC are four offices: General Staff, General Political Department, General Logistics Department, and General Armament Department.\textsuperscript{466}

Even though the Constitution only devotes two articles on the CMC,\textsuperscript{467} the prestige associated with being the Chairman of the CMC cannot be underestimated. In fact, it is impossible to be a dominant leader in Chinese politics without being the CMC Chairman. The tradition can be traced back to the revolutionary era when Mao Zedong led the Party to military victories. Mao once famously stated, “Political power grows out of the barrel of a gun.”\textsuperscript{468} The tradition has lived on even in times of peace. Before the 1982 Constitution, the CMC was not a part of the government, but under the direct control of the Party.\textsuperscript{469} Mao remained as the Chairman of the CMC until his death in 1976.\textsuperscript{470} Deng was the paramount leader of China from the 1980s to 1990s, but he never assumed the position either as the General Secretary of the Party or the President of the State.\textsuperscript{471} Instead, he was the Chairman of the CMC from 1981 to 1989.\textsuperscript{472} Deng effectively used his leadership in the army to initiate the economic reforms, successfully transforming China’s planned economy to a market economy.\textsuperscript{473} In 2003, Jiang Zeming retired from the positions of the President of the State and the Secretary-General of the Party due to the term limits, but he stayed on as the CMC Chairman for another two years before his retirement in 2005.\textsuperscript{474}

\textsuperscript{465} Id.
\textsuperscript{467} XIANFA ch. 3, § 4, art. 93, 94 (1982).
\textsuperscript{468} Quotations from Mao Tse Tung ch. 5, MARXIST.ORG, https://www.marxists.org/reference/archive/mao/works/red-book/ch05.htm (last visited Nov. 13, 2016).
\textsuperscript{469} See XIANFA ch. 3, § 2, art. 42 (1954) (establishing the Chairman of the People’s Republic of China as the Chairman of the Council of National Defense).
\textsuperscript{470} VOGEL, supra note 278, at 229–30.
\textsuperscript{471} Id. at 218–48.
\textsuperscript{473} See VOGEL, supra note 278, at 218–19 (describing Deng’s policy of sending senior officials abroad to observe western economies, including Hong Kong, to assist “Chinese developments in finance, industry, and management”).
H. Basic Rights and Obligations

The Constitution enumerates a series of basic rights. Every citizen is entitled to these rights and must perform the duties required by the Constitution and law. In 2004, the People’s Congress amended the Constitution by adding: “the state respects and protects human rights.” The Constitution grants citizens a wide range of rights, but imposes duties at the same time.

(1) Political rights: Citizens enjoy the right to vote and stand for election and the right to petition the government. In addition, citizens enjoy freedom of speech, press, assembly and free association. The right to protest and demonstrate are also guaranteed in the Constitution.

(2) Personal rights: Citizens’ personal freedom, personal dignity, right to property, and right to privacy are inviolable. No arrest can be made without a valid warrant. Unlawful search and seizure is prohibited by law.

(3) Social welfare: The Constitution protects workers and government functionaries’ rights to work, rest, and retirement. They have the right to receive social benefits. However, the law remains silent as to whether the same benefit will extend to rural residences. The sick or senior citizens have the right to receive state assistance.

(4) Education and science: Education is both a right and duty for citizens. Every citizen has freedom to engage in scientific research, literary and artistic creation, and other cultural pursuits.

(5) Women, marriage, and families: The state applies the principle of equal pay for equal work to men and women alike. Women enjoy same rights as men. Marriage, family, mothers, and children are protected by law. A husband and wife must carry out a family planning policy. In addition, the Constitution imposes a duty on adults to take care of their parents, a unique

478. Id. ch. 2, art. 34–35.
479. Id. ch. 2, art. 36–40.
480. Id. ch. 2, art. 42–45.
481. Id. ch. 2, art. 47.
provision that may not exist in any other jurisdictions.482

(6) Duties to the motherland: The Constitution imposes various duties on citizens to protect and defend the motherland. Citizens have a duty to pay taxes, serve in the military or militia, and safeguard the unity, safety, and dignity of the country.483

I. Weak Demand for Freedom of Expression

Compared with the 1954 Constitution, the 1982 Constitution commands more respect both from the Party and ordinary citizens.484 In the post-Mao period, the party has rarely resorted to the large-scale mass campaigns that were used in the past.485 Since 1989, the Party rarely used Mao’s approach to round up wayward intellectuals by baiting them with the so-called “Hundred Flowers Policy.”486 After years of being tamed through violent means, Chinese intellectuals have become politically sophisticated and uniquely skillful in understanding the Party’s policies. In a sense, the Party has successfully “domesticated” the egoistic intellectuals.487 Except for a handful of vocal dissenters, the majority of intellectuals have forged strong alliances with the Party for the following reasons.

First, the Party sets clear perimeters for intellectuals. For example, the Party issues internal directives, which prohibit discussion of certain sensitive topics, such as universal values, freedom of press, constitutionality, citizen’s rights, the party’s past mistakes, crony capitalism, and judicial independence in classrooms. The Party secretaries regularly hold university-wide study meetings to ensure that professors and students understand the Party’s requirements. The meetings can take various forms, including a lecture series, controlled discussion sessions, and occasionally via “educational” movies. Unlike those in the 1950s, who had no knowledge of the serious consequences of their expressions, the intellectuals today are normally aware of the risks associated with violating the Party’s lines and how to avoid the risks. Some university professors lost their jobs or even personal freedom due to their “incorrect” comments that ridicule or challenge the Party on social media, but they

482. Id. ch. 2, art. 48–50.
483. Id. ch. 2, art. 51–56.
485. See HUTCHINGS, supra note 226, at 114–15 (discussing the CPC’s dilemma in balancing their need to maintain political dominance against “dissidents” while allowing sufficient flexibility to stimulate economic reform).
486. SPENCE, THE SEARCH FOR MODERN CHINA, at 570.
knew that they would be punished.

Second, the National Social Sciences Foundation (NSSF) encourages scholars to do research on the topics that are beneficial to the Party.\(^{488}\) Therefore, only those who strictly toe the Party line have a chance to receive prestigious grants. The NSSF provided grants for the following topics in 2015: the study of the Party Secretary General’s theory on ideological education; the logic of the choice of the socialist road with Chinese characteristics; the impact of the socialist core values on China’s current ideological trends; study on popularization of Marxism through media in new China; the study of China’s road and modern Marxism; study of Marxist values; etc.\(^{489}\) The grantees receive not only financial support for their research but also the endorsement from the state, which opens up opportunities for a promotion in their academic careers or for political offices in the government. For young scholars, the incentive is enormous to conduct the research in the direction set by the Party. The Party has learned that encouragement is more effective than punishment to reach the Party’s goals.

Third, the Party has developed effective means to encourage young college students to support the party without being involved in mass campaigns. In universities, the Party and the Communist Youth League direct student organizations and their activities. From freshman year, students strive to join the Party. They choose to do so not necessarily because of the appeal of the communist ideology but because the prestige that a party member carries in seeking various opportunities, including job placement.\(^{490}\) Working for the government as civil servants or at state-owned enterprises remains the ideal job for most young college graduates. Being a Party member certainly increases the chances of getting that dream job. In addition, parents and grandparents, who have been through the turbulent times in the 1950s and 1960s, frequently advise the young students not to engage in any activities unapproved by the Party. Unlike intellectuals in the past, the current young students are more practical and self-censored. For them, freedom of expression carries less value than economic opportunities in the booming economy.


\(^{489}\) Id.

\(^{490}\) Erik Eckholm, *At China’s Colleges, a Rush to Party, as in Communist*, N.Y. TIMES (Jan. 31, 1998), http://nyti.ms/2hRaCTf.
VI. CONCLUSION

Without an effective implementation system, the broad rights and freedom in the Constitution remain largely symbolic. Even though the 1982 Constitution is widely regarded as the best constitution in PRC's history, it is far from being a functional legal framework, which confers enforceable rights to citizens. In practice, judges do not have the power to rule on constitutionality of government regulations and actions. Thus, lawyers rarely base their arguments on constitutional provisions. In academia, faculty and students are discouraged to engage in an in-depth discussion on constitutionalism. Theoretically, the NPC has the power to annul laws and regulations that it deems contrary to the Constitution. Due to its institutional weakness and lack of professional arbitrators, the NPC has rarely exercised that power. Therefore, the government and state owned enterprises have no reason to act within the legal limits set by the Constitution.