

Emergence of a dual constitution in transitional China*

Surgimiento de una constitución dual en una China transicional

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ABSTRACT

With China's miraculous economic development in recent decades, it is difficult for traditional theories, either communist or liberal ones, to accurately reflect the reality of reform in China. Concepts such as "unwritten constitution" or "living constitution" have been studied in the context of China. However, these western concepts are unable to provide a holistic view of China's Constitution, especially after 1978. China's Constitution, centered on the Communist Party and the State, has been largely transformed since then. This article goes beyond the liberal approach and argues that a dual constitution has sprouted up in China, within which the Party's Constitution attempts to keep pace with that of the State. Specifically, the Party has been endeavoring to integrate itself into the State through political conventions and self-normalization. The dual constitution is unique in the sense that it departs from the model of Mao Zedong; it deviates from that of the Soviet Union and it does not follow the formalistic approach of Western countries in defining the nature of a constitution. This suggests that the status quo of China's regime and the direction of its constitutional reform can only be clarified by understanding the evolution of the dual constitution.

KEYWORDS

Chinese constitution; communist party; communist state; constitutional evolution; constitutional duality.

RESUMEN

Dado el asombroso desarrollo económico en las recientes décadas, es difícil para las teorías tradicionales, tanto las comunistas como las liberales, reflejar la realidad exacta de reforma en China. Conceptos como "Constitución no escrita" o "Constitución vigente" han sido estudiados en el contexto de China. No obstante, estos conceptos occidentales no muestran una mirada holística de la Constitución de China, especialmente después de 1978. La constitución de China, centrada en el Partido Comunista y en el Estado, ha sido transformada en gran medida.

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Este artículo va más allá de los enfoques liberales y discute que una constitución dual ha brotado en China, con la cual la Constitución de los partidos busca mantener el ritmo con el Estado. Específicamente, el partido ha intentado integrarse al Estado a través de convenciones políticas y de una auto-normalización. La constitución dual es única en el sentido de que parte del modelo de Mao Zedong, desviándose de la Unión Soviética y dejando de seguir un enfoque formalista de los países occidentales para definir la naturaleza de una constitución. Esto sugiere que el *status quo* del régimen de China y de la dirección de su propia reforma constitucional puede ser aclarado entendiendo la evolución de la constitución dual.

PALABRAS CLAVE

Constitución de China; Partido comunista; Estado Comunista; Evolución de la constitución; dualidad de la constitución.

INTRODUCTION

The National People's Congress of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress.

--Article 57 of the Constitution of the People's Republic of China 1982

The Communist Party of China leads the people in promoting socialist democracy ... It upholds and improves the system of people's congresses, the system of multiparty cooperation and political consultation under its leadership.

--Excerpted from the General Program, the Constitution of the Communist Party of China

There is no doubt that China¹, as a developing country, is still on a journey towards constitutionalism. However, China's efforts should not be underestimated. These can be seen, for example, in the way that China became the world's second largest economy in 2010². This leads to the argument that it is time for China to tell its own story: According to Sizhuo (2010) "the Chinese have the ability to create a great story. They are also definitely able to learn how to tell their own story, allowing China's story

to spread to the world and emotionally move it". Regarding China's economic transition, Justin Yifu Lin (cited in Callahan, W., 2013) visualizes that an emerging "China model" of economic development that combines authoritarian state governance and free market capitalism is taking shape. The proposed model could explain, to a certain extent, the rapid economic development that has taken place in a reformed China since 1978. However, it is highly controversial whether "China's constitutionalism" is also taking shape.

Recently, some Chinese left-wing thinkers, who celebrate state powers, have argued that constitutionalism is an idea that only belongs to the West and is inapplicable to China because its intention is to subvert the leadership of the Communist Party of China (CPC) and socialist sovereignty (Xiaoqing, Y., 2013, pp. 29-31). In contrast, Chinese liberals hold that constitutionalism is the common achievement of liberal civilization and should be viewed as a goal that the CPC should pursue in the future (Dayuan, H., 2012, pp. 40-43.). At least such debate proves that the CPC, as the ruling party, is not ruling the country on the basis of constitutionalism either in the eyes of advocates or opponents (Yongnian, Z., 2013). The most spirited

1- For the purpose of this article, China refers to the People's Republic of China (PRC), excluding the Hong Kong Special Administration Region, Macau Special Administrative Region and the territory of Taiwan. Transitional China starts from 1978 when Deng Xiaoping began to adopt the opening-up policy and implement all-round economic reform in China.

2 - China, as a transitional country, still faces many pressing problems to deal with, just like other transitional countries.

debate over the future of China's constitutionalism either condemns the Western model thoroughly, denying the validity of the multi-party system and democracy or praises the current communist China in the belief that China is forming a better model than those of Western countries. Some recent research even shows by partial data that nearly 70% of people in China think that the government is democratic and follows good governance³. During this seemingly prosperous period, it is understandable that many new voices have emerged to propose a multitude of different dreams, possibilities and futures for China. Admittedly, China's recent success, especially when contrasted with the continuing crisis in the West, is leading many intellectuals to think in new ways about China's future and the world's future. Nonetheless, very few details are clear about how China's constitutional regime has been evolving in reality.

Having said this, some authors have attempted to assess the current Chinese regime in order to form a suitable constitutional theory for China beyond the Western standards⁴. A typical example is the "unwritten constitution" constructed to expound China's political regime, because the written Constitution is incapable of describing the reality (Shigong, J., 2009, pp. 805-840). In fact, such an endeavor merely employs but does not clarify this concept, which originates in Britain and, therefore, in a completely different context (Yongkun, Z., 2011, pp. 26-33). In addition, some early scholarship attempted to explore China's constitutional development from a non-liberal perspective, centered, in particular, on the development of the National People's Congress (NPC) as a way of tracking the emergence of China's constitutionalism but this has generally been dismissed by liberal constitutionalists (Dowdle, M.,

(2002). Furthermore, some scholars are currently trying to use the concept of a "living constitution" to move beyond an analysis of the Constitution as a formal text and to shed light on the de facto constitutional order in China⁵. Even though they recognize the greater importance of the CPC or NPC in China's constitutional development from a non-liberal perspective, fewer details are given in terms of the interdependence of the CPC and the State, a relationship which has evolved for decades with a different vision from the traditional Party-State which simply implies that the Party commands, controls and integrates all other political organizations and institutions in China⁶.

Building on the current scholarship on China's Constitution, this article first elucidates why the concept of an "unwritten constitution" is misused and not suitable for China. It then moves on to show that China has been building a "dual constitution" structure comprised of the Party and the State interdependently since 1978. More specifically, it expounds (1) how the State under the dual constitution has been strengthened; (2) how the Party under the dual constitution has been normalized in practice; and (3) how the two evolve interdependently in reality. Finally, it suggests that China should orient and implement its constitutional reform incrementally, based on its de facto dual constitution.

1. CHINA'S UNWRITTEN CONSTITUTION?

The concept of an "unwritten constitution" was originally proposed by Dicey in order to interpret the situation in the British state which at present does not have a formal written constitution. However, in the context of China, it is well-known that the Chinese

3 - This survey was conducted by Prof Kang, L., (2013). "Is China Dream a Good Example?" at Duke University

4 - For recent discussion on Chinese constitutional theory, see Shigong, J., (2014). "Chinese-Style Constitutionalism: On Backer's Chinese Party-State Constitutionalism" 40 (2) *Modern China* 133-167 and Backer, L., (2014). "Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism" 40 (2) *Modern China*, pp.168-195.

5 - Some scholars use the concept "living constitution" to expound China's constitutional practice in an empirical approach. See Xin, H., (2012) "The Party's Leadership as a Living Constitution in China" 1 *Hong Kong Law Journal* 73-94; Peerenboom, R., (2012) "Social Foundations of China's Living Constitution" in Ginsburg, T., (2012) ed., *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012), pp 155-159.

6 - It holds that the Party-state, or "partocracy," accurately captures China's political reality. See Xia, M., "The Communist Party of China and the -Party-State-".

legal system does not function completely according to the current written Constitution and there is a wide gap between the Constitution on paper and actual constitutional practice. Therefore, China has been accused of being an authoritarian or even totalitarian regime with a Constitution that is something of a fake or is widely abused. Nonetheless, if the written Constitution is unable to describe the Chinese legal system, then by what constitutional rules does the regime operate? To answer this question, Jiang has elaborated the concept of an “unwritten constitution”.

His argument is mainly grounded on the two types of rules elaborated by Dicey. One is “the law of the constitution”, in the strictest sense, since these are rules which are enforced by the courts and the other is the “conventions of the constitution”, which consists of conventions, understandings, habits, or practice. He also refers to Wheare's statement as collateral evidence.

We are thinking of the distinction between those rules regulating a government – mostly rules of law – which are written down either in a Constitution or in some act of parliament or other legal document, and those other rules, mainly the customs and convention and usages regulating the government, which have usually not been precisely formulated and put in writing (Wheare, K., 1951).

Consequently, he infers that the existence and functioning of China's Constitution can be illustrated by different unwritten forms, such as the Party's Constitution, constitutional conventions, constitutional doctrine, and constitutional statutes. However, as shown below, his deliberate misinterpretation of “unwritten constitution” can be quite frustrating.

Although Dicey puts forward two types of rules which make up constitutional law in England. However, it is clear that the “conventions” here are not formal laws even if they may regulate the conduct of some members of the sovereign power. For example, “the

King must assent to, or (as it is inaccurately expressed) cannot ‘veto’ any bill passed by the two Houses of Parliament;” “the House of Lords does not originate any money bill.” A point in common is that if any or all of them were broken, no court would take notice of their violation (Dicey, A., 1915). Moreover, Dicey emphasizes that the distinction between laws and conventions is not the same as the difference between “written law” (or statute law) and “unwritten law” (or common law). Thus, some laws of the constitution which were at one time unwritten or common law may get legislated into written or statute law. On the other hand, the conventions of the constitution cannot be recorded in the statute book, though they may be formally reduced to writing⁷. Constitutional convention could be considered as a part of constitutional law in a broad sense and this implies that its status is equal with the laws of a constitution. However, the constitutional convention must be subject to the laws of the constitution (Freeman, E., 1876), according to the principles of the sovereignty of Parliament and the “rule of law” in Britain⁸. Dicey clearly states that:

Three such guiding principles gradually become apparent. They are, first, the legislative sovereignty of Parliament; secondly, the universal rule or supremacy throughout the constitution of ordinary law; and thirdly (though here we tread on more doubtful and speculative ground), the dependence in the last resort of the conventions upon the law of the constitution (Dicey, A., 1982).

Nonetheless, China's written Constitution, in practice, is often dismissed as merely a “rubber stamp” that has not fulfilled its function as prescribed by the Constitution. Jiang states that:

The Constitution of the PRC clearly stipulates a system of people's congresses based on the Soviet model, which is itself similar to the British parliamentary system. The NPC and its Standing Committee, as the organs that exercise sovereign power, are to possess

7 - As Dicey notes, the whole of our parliamentary procedure is nothing but a mass of conventional law; it is, however, recorded in written or printed rules. *Ibid*.

8 - Dicey clearly states these two guiding principles which truly underlie the English polity. See Dicey, A., (1959). *Law of the Constitution* (London: Macmillan Education Ltda.), pp 470-472.

a wide range of powers and the highest political authority ... Thus, what constitutes China as a nation-state is not the system of people's congresses established by the written constitution, but the leadership of the CPC within the system of multiparty cooperation that was formed during the revolution, promulgated in the preamble of the written constitution, and affirmed in political practice (Shigong, J., 2014).

Hence, he argues that the CPC leadership could be considered as the “unwritten constitution” in China, given that the written Constitution is malfunctioning in practice. Here, the concept of an “unwritten constitution” is used arbitrarily. First, its reference to Dicey's work is misused. As mentioned above, Dicey strictly refers to the “constitutional convention” and “unwritten law”, not “unwritten constitution”. Evidently, constitutional convention, subject to the laws of the constitution, is different from the “unwritten constitution” in China where it means that the CPC's leadership could prevail over the written Constitution. Secondly, in considering the constitutional convention Dicey suggests that this consists of “customs which (whatever their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, through the elective House of Commons, of the nation.” In contrast, in the context of China, the CPC's convention, to a certain extent, is able to prevail over the “people's sovereignty” as entrenched in the written Constitution. Third, it is evident that the “unwritten law” is a concept elaborated in common law jurisdiction, and it is doubtful whether it can be appropriately applied in socialist countries like China. Furthermore, at the institutional level, the evolution of “unwritten constitution” is grounded in Britain's parliamentary sovereignty and the “rule of law” principle in which the courts are the cornerstone for the development of common law. China's courts, in contrast, are still struggling to gain judicial

independence⁹. As it is widely accepted that China is still an authoritarian country under the rule of the CPC, it would not be fair to simply analyze China within such a narrow scope, purely based on a “similarity” with the British parliamentary system¹⁰.

Therefore, the concept of an “unwritten constitution” which is derived from the British experience is misused in the context of China, and is unable to reveal China's changing regime in this era of reform.

2. EMERGENCE OF A DUAL CONSTITUTION

The concept of “unwritten constitution” cannot fully capture China's political reality, however, it grasps the core of China's real polity partly by saying that “the fundamental law of China is the leadership of the CPC with multiparty cooperation, and it is that fundamental law which is the foundation of all of China's constitutional institutions and, finally, that sovereignty in China is made up of two bodies: the CPC and the NPC.”¹¹

It is widely acknowledged that China's Constitution is not enforceable judicially as it stipulates that only the NPC exercises the power to amend the Constitution and supervise the enforcement of the Constitution, and only the Standing Committee of the National People's Congress (NPCSC) can interpret the Constitution and supervise its enforcement, according to Article 62 and 67 of the Constitution. Moreover, in 2009, the Supreme People's Court (SPC) issued the Provisions on Citation of Legal Documents as Laws and Regulations in the Judgments, and this excludes the Constitution as a basis for judicial decisions. In this regard, in order to understand China's constitutional regime it is necessary to move beyond the traditional judicial review model that mainly focuses on the written Constitution. The argument made by Jiang has largely shifted attention away from the traditional

9 - For more details about the status of China's courts, see Peerenboom, R., (2010). *Judicial Independence in China* Cambridge: Cambridge University Press.

10 - Shigong, J., argues that the Constitution of the PRC clearly stipulates a system of people's congresses based on the Soviet model, which is itself similar to the British parliamentary system. p 23.

11 - *Ibid.*, pp 23-24.

constitutional studies in China which is focused on the written Constitution and which acknowledge the CPC's substantial involvement, since it is not a general party in the sense of political association but a political cornerstone in China's polity. As Jiang puts it:

The former [CPC] embodies the fundamental law that acts as the absolute constitution; the latter [NPC] embodies the fundamental law codified in the written constitution. Accordingly, there are two types of representatives of the people: the first are the CPC and other democratic parties, whose members are social elites in every field and every class, and who enjoy the support of the masses by virtue of their political ideals, historical mission, and class interests; the second is the NPC, whose members are democratically elected through a legal process.¹²

Therefore, the concept of an “unwritten constitution” which is derived from the British experience is misused in the context of China, and is unable to reveal China's changing regime in this era of reform.

It is a fact that the key element of China's Constitution has two parts and is different from the models of other liberal countries. Nonetheless, it is untenable to take the “is” proposition as an “ought” one, i.e. the fact that the CPC's leadership is absolute does not mean that it ought to be absolute and become the fundamental law in China. Admittedly, this may be an effective way to legitimize the CPC's ruling based on the status quo; but the “intention” to maintain the CPC's legitimacy by deriving “ought” from “is” is questionable. In addition, it does not reveal the substantial relationship between the CPC and NPC, and under what conditions such dual mechanism operates in practice.

Empirically, there is no doubt that both the CPC and the NPC have played a crucial role in China's transition. To a certain extent, China resembles other countries if the constitution beyond the written Constitution is considered. As Tushnet states that:

In the context of the US, a constitutional order is more like a small-c British constitution than it is like the document called the United States Constitution. Moreover, just as scholars of constitutionalism have found it productive to think about the British constitution, it is productive to think about a constitutional order that goes beyond judicial doctrine and the written Constitution to encompass relatively stable political arrangements and guiding principles (Tushnet, M., 2003).

Similarly, it will be more productive to think about China's small-c constitution which is incapable of being fully disclosed by the written Constitution.

Essentially, China's Constitution has been evolving under a dual structure consisting of the Party Constitution and the State Constitution, both of which are indispensable and cannot be underestimated. Consequently, the issues of (1) how the dual constitutional has emerged and (2) under what condition the Party and the State under the dual constitution are interdependent, need to be addressed.

2.1 Strengthening of the State Constitution

Historically, China mainly transplanted the political system of the Soviet Union after its establishment in 1949, and adopted mostly legal nihilism under the era of Mao (Tsou, T., 2012). The former Vice-President of China, Liu Shaoqi, once said to a constitutional scholar that “it is meaningless to study constitutional law in China” (Xinwang, S., 2011). However, this statement is particularly ironic given that he later sought to claim his constitutional rights when he was being persecuted during the Cultural Revolution. Needless to say, the People's Congress system and the State Constitution at this time were merely a “rubber stamp” to serve the empire or a tool to strengthen the leader's charismatic authority¹³. Thus, under Mao's totalitarian regime, there was no doubt that the society was

12 - *Ibid.*, p 24.

13 - The case is similar at the turn of the century when parliament was implanted in China in an attempt to save the empire when imperial rule was at jeopardy due to the invasion from abroad and the threat of revolution and constitutionalism movement from within (Yang, Y., 1936).

subject to the strict and all-round control of the CPC. And it was no surprise that the 3rd NPC fell into a state of paralysis for almost ten years which means that the provisions embedded in the Constitution but subject to the will of CPC could not be implemented strictly.

Over the past three decades, China has undergone unprecedented economic and legal reform and has taken a different road towards constitutionalism. Learning from previous lessons, the Party has realized the importance of the “rule of law” principle.

The newly adopted Constitution in 1982 has been playing an increasingly significant role in this. For example, it expressly limits the tenure of the State President and Vice-President, the Premier and the Vice-Premiers, and the Chairman and Vice-Chairmen of the NPCSC, and the President of the SPC and the Procurator-General of the Supreme People's Procuratorate (SPP) to two consecutive five-year terms, a model followed by virtually all local governments. These term limits have been applied by the party leadership ever since Deng Xiaoping initiated the cadre retirement reform in 1982 (Qianfan, Z., 2010). It is fair to say that relevant provisions have been enforced strictly, particularly in regard to the state structure that forms such a central part of the Constitution.

However, by Western standards, many authors condemn China's Constitution as simply a “facade” because it lacks any meaningful judicial mechanism for implementation and is left unguarded against official violations (Qianfan, Z., 2010). This is especially so after the rise and fall of Qi Yuling v. Chen Xiaoqi et al (Zhiwei, T., 2010), which appears to give no hope for the future of the judicial enforcement of China's Constitution. In 2001, the SPC's interpretation of constitutional provisions in relation to Qi Yuling opened up the possibility – greeted enthusiastically – for the judicial application

of China's Constitution in deciding cases. By the end of 2008, however, this path was foreclosed by the SPC itself when it announced that judicial interpretation had lost its legal effect. It has been argued that judicial implementation of the Constitution was viewed as a potential threat to the party leadership, and there were rumors that the SPC had circulated an internal directive forbidding the courts from following the Qi Yuling decision. This might explain the de facto demise of that decision's potential for judicializing the Constitution. In December 2008, the SPC published a document that officially voided the legal effect of several judicial explanations retrospectively, among which Qi Yuling was the only one without even a brief explanation¹⁴. Thus, the critique of China's Constitution as merely existing to maintain the government's image is understandable.

This conclusion, however, is mainly drawn from a Western “court-centered” approach. It overlooks the fact that the Constitution has been strengthened and enforced by other state actors. In particular, the NPC, as the highest organ of state power stipulated by the Constitution¹⁵, has not ceased its operations since 1978. During this time, the functions and powers exclusively owned by the NPC in accordance with the Constitution: to amend the Constitution; to elect the President and the Vice-President of China; to decide on the choice of the Premier of the State Council upon nomination by the President; to elect the Chairman of the Central Military Commission (CMC); to elect the President of the SPC; and to elect the Procurator-General of the SPP, have never been exercised by other state actors¹⁶. In this regard, to say that China's Constitution is not justiciable does not mean that the Constitution could not be enforced in other ways.

It is clear that China's Constitution adopts the People's Congress system as its foundation, unlike Western political systems, such as the parliamentary sovereignty in Britain or separation of powers in the United States. Hence, it will be more effective to

14 - The 7th Decision of the Supreme People's Court to Repeal Relevant Judicial Interpretations Released before 2007, 18 December, 2008.

15 - The Constitution of the People's Republic of China, art 57.

16 - *Ibid.*, art 62.

assess the implementation of the Constitution through the operation of the People's Congress system, not merely from the judicialization of the Constitution.

The People's Congress system has been progressively strengthened over the past three decades. The congresses have been held routinely in accordance with the Constitution of 1982, namely, it meets in session once a year and is convened by its Standing Committee¹⁷. As noted by O'Brien, it would be a mistake to conclude that the NPC and the Chinese political system after 1978 still closely resemble their predecessors under Mao. A review of legislative activities will show that the NPC has come to occupy a new position in China, though it is still non-liberal (Xiaoli, Z., 2012 and O'Brien, K., 1990).

Firstly, after a lapse of two full decades, legal drafting resumed in 1978 and, by 2010, the NPC and NPCSC had passed 232 national laws. Meanwhile, local people's congresses passed more than 8800 local rules. This has formed the basis of a comprehensive legal system in China with a distinctive Chinese quality, and includes seven categories of law subjects covering all aspects of political, economic, cultural and social life (Sixi, C., 2010). The NPC has occupied a position at the center of a horizontally and vertically integrated legislative system, linked sideways to the State Council, ministries, and Party, and downwards to regions via local congresses (O'Brien, K., 1990, pp. 164).

Secondly, the NPC's institutional supervision has been strengthened. In practice, the supervision may be conducted by the full NPC, its committees, or

individual deputies, and it may be directed at state functionaries or the institutions they head. Supervision may be personal and sporadic or it may be institutional and regular.¹⁸

Thirdly, the deputies have been playing a more dominant role in each NPC session. It has been perceived that the incisive interpellations and angry deputy speeches have become a common occurrence at NPC sessions in the decades after 1979. For example, deputies at the 1988 convening criticized Premier Li Peng's suggestion that intellectuals moonlight to supplement their incomes, saying that it was an "improper measure" that would interfere with teaching and research and would "damage long-term national interests". Moreover, several deputies openly disagreed with General Secretary Zhao Ziyang's assessment that such a policy was "necessary and possible"¹⁹. The key difference here is that the deputies are free to argue as they please in their speeches and votes as long as they "sought truth from facts" and served the public interest²⁰. Thus, as Vice Chairman of the NPC Law Committee Zhang Youyu once put it:

Some deputies are dissatisfied with the status quo on work outside meetings ... and would like to do even more. They ask to intervene directly in government, judicial, and procuratorial work, or to directly handle mass appeals, complaints, and proposals (Youyu, Z., 1983).

Moreover, in 2005, the NPC promulgated the Procedures for Handling Questions and Interpellations from Delegates in order to strengthen the role of deputies, which undoubtedly was a move towards a more open and consultative system (Yan, L., 2015)²¹.

17 - *Ibid.*, art 61.

18 - There are several forms of supervision in practice, such as: (1) criticism of ministry or State Council officials by deputies in small-group meetings, (2) inspection of local government organs and economic enterprises by groups of NPCSC or NPC deputies, and (3) institutional oversight of subordinate administrative agencies by NPC committees.

19 - Deputies in small-group meetings at plenary session could also criticize state officials for immorality, incompetence, and mistaken priorities. *Ibid.*, p 165.

20 - NPC deputies are able to speak for regions or occupational groups and pressed for "allocation responsiveness," so as to draw leadership attention to their claims and to nudge policies in a desired direction. *Ibid.*, p 170.

21 - In fact, the rise of law making and the corresponding erosion of Party central control over the process creates a tremendous opportunity for that process to be opened further to broader society. When Party Centre is giving legislators fewer, more ambiguous, signals about its wishes, and has, in any case, substantially lowered the penalties for disobeying those wishes, the legislators will feel free to perform their functions.

Voting Results of 12th National People's Congress (17th March, 2013)

Number of Deputies	Total: 2986; Absent: 38; Present: 2948			
Work Reports	Affirmative Votes	Negative Votes	Abstentions	N° Votes
Report on the work of the Government	2799	111	44	4
Report on Edonomic, Social, Development plan	2665	221	60	2
Report on China's Central and Local Budges	2307	509	127	5
Report on the work of the 11th National People's Congress Standing Committee	2733	160	51	4
Report on the work of the Supreme People's Court	2218	605	120	5
Report on the work of the Supreme People's Procuratorate	2339	485	121	3

Source: China Daily, 17th March, 2013.

Today it is normal for delegates to question officials during the session of the NPC. For example, in 2009, the delegates from Henan Province question the minister of Education about the unequal distribution of education resources nationwide (Xiaoyun, E., 2015). Accordingly, the voting of deputies has become more effective, albeit limited. In accordance with the State Constitution, it is the NPC deputies who decide the reports on the work of government by voting to reflect the degree of satisfaction. For example, due to the poor performance of the SPC, 605 negative votes -the highest yet- were cast in the NPC session of 2013.

Furthermore, in some areas, the single-candidate elections have been replaced by the competitive elections, and this has given deputies more freedom with regard to their right to vote. For instance, 161 NPCSC members were elected from 174 nominees during the 2013 plenary session. Sometimes, CPC

nominees may not be approved for senior positions. For example, in the 1995 Plenary Session, over one-third of the deputies failed to support the CPC's nominee for Vice-Premier Jiang Chunyun. Over a quarter of the deputies also failed to support State Council proposals for a draft Banking Law and a draft Education Law (Dowdle, M., 1997).

Comparatively, the NPC's representation mechanism is different from that of liberal democracies where the executive may strive to manipulate the legislature by lobbying, political canvassing, etc. However, essentially, as Pitkin puts it, representation entails regular, institutionalized responsiveness and can only be discussed in reference to the overall structure and functioning of a political system (Pitkin, H., 1967). It has been recognized that the representation in legislature, like decision-making influence, is not as clear-cut as it may first appear. Their idea is based on the observation that representatives are not the

constituency's puppet, but human beings with their own consciousness. Such consciousness will decide, at least potentially, its role or function. They thus stress the deputy's role orientation rather than the relationship between decision-making, roll-call voting and the constituency's views (Eulau, H., and Karsps, P., 1977).

Hence, the legislator's sense of representation and willingness to represent clearly has a part to play in applying the legislature's potential capacity to have real influence (Hu, S., 1993). Thus, in having a broad horizon beyond the Western paradigm of representation through a multi-party system, the representation of legislature is by no means a dichotomous variable. Rather, we should be able to assign "points" to the various legislatures and place them on a continuum of representation, or at least put them in a broad topology according to their representation levels. In this sense, an NPC comprised of deputies also has its paradigm of representation, although the level may be lower than that of liberal democracies. As such:

The existence of certain representation in non-democratic legislature becomes understandable, and can be explained, and compared. It is the configuration of the component aspect of representation that might yield viable theories of representation other than representative government only, in the modern complexity of society (Hu, S., 1993).

Therefore, even though the form of representation may be different and the activities do not resemble legislative supervision as found in liberal democracies, in a weakly institutionalized system with a very strong executive they serve similar ends (O'Brien, K., 1990, pp. 165).

In addition, at the local level, the congress system has also been strengthened. The Local People's Congresses (LPCs) are able to turn down Party nominees for State leadership. A survey of 18 out of 27 provincial LPCs around 1988 found that they vetoed 49 of 712 Party nominees (a rejection rate

of 4%) (Dingjian, C., 1998). In 2006, the NPCSC adopted the Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels. It provided more details about the functions and powers of LPCs, including (1) hearing and deliberating on Special Work Reports of the People's Government, the People's Court and the People's Procuratorate; (2) examining and approving Final Accounts, hearing and deliberating the Plans for National Economy and Social Development and the Reports on the Implementation of Budgets, and hearing and deliberating on Audit Reports; (3) inspecting the implementation of laws and regulations; (4) examining the archival filing of regulatory documents; (5) inquiry and interrogatory; (6) investigating special issues; and (6) deliberating on and deciding cases concerning dismissals from office²². This undoubtedly shows the tremendous development of LPCs and their strengthened role in local politics. In practice, for instance, due to the increasing unsatisfactory performance, such as miscarriages of justice by some courts, the LPC Standing Committee vetoed the Work Report of People's Court, for example, at Hengyang city in 2007. It also vetoed the Work Report of Local Government, for instance, at Zhengzhou city in 2006 (Le, Y., 2008). Another example is that the LPC Standing Committee did not approve the appointment of the chief procurator at Bingzhou city according to Article 101 of the Constitution. At the same time, LPCs have had to pioneer "new forms" of strong measures that are not given in laws, instead of simply grumbling about problematic systems. These new measures include examination and appraisal of the responsibility system of department law enforcement (*bumen zhifa zerenzhi*), law supervision papers (*falv jianrushu*) and individual case supervision (*gean jiandu*).

Therefore, to say that China's Constitution is merely a facade is mainly based on liberal views which assume that the courts must be at the center of the implementation of the Constitution (Qianfan, Z., 2010). However, as has been illustrated above, in the

22 - For more details, see The Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels, promulgated by the National People's Congress Standing Committee.

context of China, the real foundation of the State Constitution is not the court system but the People's Congress system because of its fundamental role in creating and maintaining other state actors, including the courts, in accordance with the Constitution (Dowdle, M., 2002)²³.

2.2 Normalization of Party Constitution

Although the State Constitution has been strengthened, no one can deny the fact that China is still a party-state where the ruling party plays a decisive role in practice. It is fair to say that it is almost impossible to understand China's constitution without looking at the workings of the CPC.

2.2.1. CPC's Legitimacy Challenged

Originally, the establishment of the CPC was facilitated by the Soviet Union. However, as Lubman states, this changed after the Culture Revolution:

China attempted to employ legislation and administrative rules as essential tools in governing China. The Chinese leadership, departing from their previous reliance on policy declarations and their disregard of formal legal rules, has moved to elevate such rules into primary sources of authority (Lubman, S., 1999).

In fact, since 1978 the CPC has been transformed from a revolutionary party to a governing party, embracing the notion of socialist democracy and the rule of law (Duanhong, C., 2008). In this way, it has departed from the Soviet Union. As White points out, the reason for this was that Deng and his associates were seeking to build up the NPC. As a non-party organization, it was composed of socially prestigious individuals who would wholeheartedly support the party policy and work for its implementation. Through the NPC, the Party sought to integrate the polity and to organize it around the principle of one-party rule (Yan, L., 2015 and Xiaoli, Z., 2012). The role of the CPC's control over the NPC is crucial since deputies give voluntary assent and support to the CPC in this ultimate goal. However, as noted above, with the

development of the People's Congress system, the CPC has inevitably had trouble in maintaining its discipline, and the most important leaders have hardly been able to maintain their unambiguous authority. Ironically, in the quest to legitimize its own authority, the CPC planted a thorn in its side which cannot be readily removed. In addition, different from the period when ideology played an important role in the controlling communist power, under the open-door policy together with Western technology and investment came "Western bourgeois liberalism". To a certain extent, the official ideology is in disarray and the CPC is no longer able to achieve an ideological consensus as Mao did. The ideological crisis is further exacerbated as the Party does not have a coherent ideology that justifies its ultimate vision, goals and concrete strategy in terms of Marxist concepts (Hu, S., 1993).

Furthermore, Party discipline is more difficult to maintain as a result of a more open society, with more opportunities to rise up the social ladder other than through a career in the cadre or as a government employee. Party membership, which was previously very valuable because of its connection to a successful political career, has thus greatly, if not totally, lost its attractiveness (Dickson, B., 2014).

Indeed, how to maintain the CPC's legitimacy is a challenging issue since the adoption of the open door policy was adopted in China. Given that the CPC prioritizes the People's Congress system intentionally, the CPC has to enshrine the State Constitution which maintains the high profile of the People's Congress system. Without this, it would be difficult for the CPC to maintain its authority behind the scenes. Formally, the NPC, as the highest organ of state power, has its constitutional legitimacy, albeit a weak one, grounded in the way it allows for representation. However, the CPC has no such legitimacy in the State Constitution and only receives a mention in the relevant statement in the Preamble: "The victory in China's New-Democratic Revolution and the successes in its socialist cause have been

23 - Some scholars have attempted to illustrate the development of China's constitutionalism from non-court centered view.

achieved by the Chinese people of all nationalities, under the leadership of the Communist Party of China". Of course, this cannot provide the legitimacy of the CPC's rule over the country after the Revolution. Therefore, the NPC's legitimacy, based on the State Constitution, is able to prevail over that of the CPC. Due to this, it is understandable that over some incidents, people could appeal to the NPC to challenge the CPC's rule by invoking the provisions and under the banner of the State Constitution; a situation that could lead to crisis. The CPC has, in fact, realized that the strengthening of the People's Congress system may be a threat to it if not handled properly. Hence, it has been attempting to normalize its mechanisms based on the operation of the People's Congress in practice.

2.2.2. CPC's Normalization

A very innovative measure taken by the CPC has been to combine itself with, and adhere to, the People's Congress system. At the central level, the Chairman of the NPCSC (legislative branch), the Premier (executive branch) and others, appointed in accordance with the State Constitution, are members of the Standing Committee of the CPC's Politburo²⁴. In order to reconcile the Party Constitution with the State Constitution, it is now a political convention for the Party to hold its plenary session of the National Congress of the CPC first in order to decide the composition of the Central Committee of the CPC (205 members and 171 alternate members) and the Central Commission for Discipline Inspection of the CPC (130 members); and only then to form the Politburo of the Central Committee (25 members), Central Military Commission (CMC), Standing Committee of the Politburo (7 members) and the General Secretary of the Central Committee. It has been a political convention that the General Secretary must serve as the Chairman of the Party's CMC concurrently. This is because the Chairman

acts as a commander -in-chief and he can deploy troops, controls the country's nuclear weapons, and use the budget after it is approved by the NPC or NPCSC (Mackerras, C., 2001). This is compatible with the CPC's Convention which states that the: "Party commands the gun" (dang zhihui qiang). This has been legalized by Article 19 of the Law of the People's Republic of China on National Defence which stipulates that the armed forces of the PRC are subject to the leadership of the Communist Party of China.²⁵

During the session of the National Congress of the CPC, the Party is able to prepare, discuss and decide issues of national importance, including the personnel structure of the state organs, in accordance with the Party Constitution. It can then follow this up by obliging the NPC to adjust and make the decision formally in accordance with the State Constitution.

At the beginning of the NPC's plenary session, it is the CPC that suggests the nominees, initially to the NPC Presidium, which then submits the list to the deputies for final discussion and decision. These nominees are supposed to assume the posts of new NPC, President, Vice-President and Chairman of the CMC of the State. At the initial stage of the NPC election, the General Secretary will be elected by deputies to assume the posts of President and Chairman of the CMC of the State. This is considered a constitutional convention in China. It has been recognized that the General Secretary of the Party should assume the offices of State President and Chairman of the CMC concurrently in order to maintain political stability as history shows that political tragedies, such as the Cultural Revolution, have their origins, to a certain extent, in the division of offices, the so-called "trinity system". For example, Mao Zedong was Chairman of the Party and Chairman of the Military Commission of the Party, while Liu Shaoqi was the President of the

24 - Currently, Xi Jinping is the General Secretary of the Standing Committee of the CPC's Politburo, elected in accordance with the Party Constitution.

25 - In addition, the People's Liberation Army is subject to the CPC's absolute leadership, and the highest authority is headed by the CMC of the CPC and the CMC of the State. These two, in fact, exist in the form of "one body with two names". Regulations for the Chinese People's Liberation Army on Political Work (issued by the CPC's Central Committee) art. 4.

State according to the State Constitution. Even so, it should be noted that the context in the era of Mao was substantially different to the subsequent strengthening of the NPC.

In the second stage of the plenary session of the NPC, it is the General Secretary of the CPC with the new status of State President and Chairman of the CMC of the State who nominates the Premier and Vice-Chairman and members of the CMC and presents these to the NPC for a decision. Meanwhile, the President of the SPC and Procurator General of the SPP are nominated by the NPC Presidium and presented to the NPC for a final decision. The final stage of the election is to form a cabinet according to the Premier's nominations.

Such conventions have largely reconciled the Party with the State without hindering the operation of the NPC, and all other state organs including the SPC and SPP have been created by the NPC according to the State Constitution. On the one hand, the CPC's involvement in the State Constitution has been normalized by its earlier Party congress and the incorporation of state cadres into the Party. The Premier, the leader of the highest organ of executive power, and the Chairman of the NPCSC – the highest organ of legislative power, are both members of the Standing Committee of the Politburo. On the other hand, the CPC has learned how to convert its Party's leadership into the State's leadership through the NPC according to the State Constitution. For example, the exercising of military power by the CPC before 1982 was not grounded on the State Constitution but rather on the Party Constitution in that the CPC was omnipotent over the society at that time. However, with the development of the rule of law (Peerenboom, R., 2002)²⁶ the State Constitution of 1982 established the Chairmanship of the CMC of the State. This allows the CPC to transfer its Party's role in exercising military power into a constitutional one by the political convention that the Chairman of

the Party's CMC is the Chairman of the State's CMC concurrently.

More importantly, the CPC has formed a convention on how to maintain its leadership on establishing or amending a Constitution in practice. This was seen in practice as early as 1954 where it was the CPC that first initiated a proposal to establish a Constitution. According to such a proposal, the Central Government decided to establish a Constitution-drafting Committee and proceeded accordingly.

At the same time, the CPC established a Constitution-drafting Team to draft the Constitution. In essence, it was the CPC's Constitution-drafting Team that drafted the constitution exclusively, and then submitted the draft to the Constitution-drafting Committee for a procedural follow-up (Zhiwei, T., 2014). By analogy, in terms of constitutional amendments, for example, in 2004, it was the Standing Committee of the Politburo that decided the general principles on constitutional amendments first. In the meantime, the Chairman of the NPCSC, subject to the Politburo, was appointed as the head of the Central Constitutional Amendments Group. After seeking advice from opinions or recommendations from local governments, non-communist parties' communities, experts etc., the draft proposal was adopted first at the plenary session of the 16th CPC's Central Committee.

It was then adopted by the sixth plenary session of the NPCSC on the proposals by the CPC Central Committee, and ultimately voted on at the NPC session. It would appear that the CPC has played a dominant role by exercising its exclusive authority on drafting and amending the Constitution before it enters into legal procedures. As regards other statutes, due to the reinforced role of the State Constitution, national legislatures have become more autonomous and assertive since the CPC issued the

26 - China adopts the thin theory of rule of law. As analyzed by Peerenboom, whereas a thick theory or substantive theory of the rule of law would incorporate elements of political morality like the forms of government, the economic models or the various conceptions of human rights, a thin theory would put forward formal or instrumentalist aspects of the rule of law that would rest on a system of laws that are general, published, prospective, clear, coherent, applicable, stable and implemented.

Central Document 8, that is, Several Opinions of the Central Committee on Strengthening Leadership over Lawmaking Work in 1991. The Document clearly indicates that Party leadership over the NPC should henceforth be rather general and not involve micro-management (Tanner, M., 1994).

Subsequently, there has been a wide retreat by the party from the NPC's actual legislative drafting process, as well as from many other aspects of the NPC's constitutional operations (Dowdle, M., 1997). Certainly, this is not to deny that the CPC can still exercise significant influence over legislatures through its Politburo.

For example, the Chairman and some Vice-Chairmen of the NPCSC are members of and subject to the Politburo, and the nomenklatura system, namely the Party Centre's list for NPC appointments which includes all members of the NPCSC Party Group (*dangzhu*), plus all NPCSC members, as well as the leaders of all the Special Committees under the NPCSC. The Politburo pre-approves the final list of all candidates for the NPCSC (Tanner, M., 1994).

Furthermore, at the local level, it has been a common practice for the Party Secretary, during his/her term, to assume the chairmanship of the Local People's Congress Standing Committee. From 2013, at the provincial level, party secretaries of all 24 provinces apart from Beijing, Shanghai, Tianjing, Chongqing, Xinjiang, Xizang and Guangdong assume the chairmanship of the Local People's Congress Standing Committee in the same way. Such a practice effectively integrates the Party with the local government. On the one hand, this could strengthen the leadership of the Party over the government; on the other hand, it maintains the operation of the Local People's Congresses according to the State Constitution (Beijing News 2013).

Additionally, the CPC creates a consultative body -the People's Political Consultation Conference

(PPCC)- to "receive societal feedback on governance, to improve the quality of public service and to incorporate influential social leaders into the establishment through limited political empowerment and controlled participation" (Xiaojun, Y., 2011). By involving non-Communist social elites and societal leaders in the PPCC, the CPC is able to create patron-client networks, allocate preferential treatment and consolidate its ties with elites and leaders in society. Currently, it is a political convention that the NPC holds each plenary session immediately following the PPCC's meeting; these are always mentioned in parallel as "the two meetings" (*lianghui*). In this regard, the PPCC plays a supplementary but essential role to that of the People's Congress through its participation in Party and State mechanisms.²⁷

Besides the political conventions, the CPC as a ruling party also endeavors to comply strictly with the "rule of law" principle, which has been imbedded in the State Constitution since 1999.²⁸ Overall, such efforts towards its normalization can be seen in at least three ways.

Firstly, the CPC attempts to build up a systematic intra-party rule system which must be obeyed strictly in accordance with the "rule of law" principle. In particular, in 2013, according to the Party Constitution the CPC promulgated the new Regulation on Intra-Party Rules (*zhongguo gongchandang dangnei fagui zhiding tiaolie*) in order to systematize the party rules. The Regulation clearly states that the enactment of the party rules must be in accordance with the State Constitution and laws which illustrates the CPC's insistence on the rule of law.

Secondly, the CPC has been endeavoring to be an open party, especially since the Central Committee of the CPC issued the Resolution on Improving Party's Governing Capacity in 2004, stipulating that the Party will increase the transparency in Party affairs, and enhance the transparency of the Party's work so that

27 - The role of PPCC has been increasingly important than expected in China's politics.

28 - Article 5 of the Constitution of the People's Republic of China (1982) states: "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law."

Party members can understand and participate in Party affairs.²⁹ Previously, the Party was secretive about its composition and operations (McGregor, R., 2010).

Now, the public can gain access to more and more resources on the Party. In an unprecedented move, the CPC has been increasing its transparency by establishing specific websites and disclosing greater amounts of relevant information by strictly adhering to the legal requirements of open government. In particular, the working procedures of the Party's Discipline Inspection Commission have become transparent to the public.

Thirdly, the CPC has been positioned with the equivalent status of the government. In relation to this, the CPC is not a party in the ordinary sense of a political association. Some CPC departments are separate but with the equivalent status of the government while others are merged with the government, such as the CPC Taiwan Affairs Office under the Party Constitution and the Taiwan Affairs Office of the State Council under the State Constitution. Both fall within the term, "one body with two names" (yige jigou, liangkuai paizi). The personnel of CPC departments also fall within those who perform public duties in accordance with law and have been included in the state administrative staff whose wages and welfare are borne, in practice, by the state. Also, according to the Civil Servant Law of the People's Republic of China, it is the CPC that assumes the administration of cadres.³⁰

As illustrated above, both political conventions and the CPC's endeavors to systematize and legalize its intra-party rules show the normalization of the Party Constitution according to the "rule of law" principle, thereby strengthening the Party's authority in the new era.

3. Evolution of a Dual Constitution

The strengthening of the People's Congress system and the normalization of the CPC illustrates the emergence of the dual constitution in a reformed China, comprising the Party Constitution and the State Constitution. Thus, it would be unfair and biased to evaluate China's Constitution if either one was overlooked.

However, how the dual constitution should evolve is another issue that needs to be addressed in the process of looking for the direction of Chinese political reform. To this end, based on the structure of the dual constitution, four dimensions must be borne in mind in order for China to achieve constitutionalism: dual congresses, dual judiciaries, dual executives and the military system.

3.1. Dual Congresses

The first task is to determine how to combine the functions of the Party Congress and the State Congress. In fact, the CPC has been attempting to adopt intra-party democracy or competitive mechanisms within the party since 1987 (Yongnian, Z., 2013). For example, the 17th National Congress of the CPC adopted some forms of competitive mechanism and enlarged the scope of competitive election inside the Party (Communist Party of China News, 2007). This shows the CPC's intention to legitimize its rule by incorporating some degree of democracy into the Party. However, this has to be guaranteed by upholding the State Constitution and the rule of law. Otherwise, as pointed out by Zheng, the competitive mechanism may lead to political chaos or tragedies, as illustrated by the case of Bo Xilai (Yongnian, Z., 2013). Nonetheless, the CPC's Congress operates not on the model of Western democracy but rather as an elitist democracy with an election being conducted after the selection process by the CPC. Incorporating a democratic factor inside the Party indicates a direction in the evolution of the

29 - Resolution on Improving Party's Governing Capacity (issued by the fourth plenary session of 16th Central Committee of the CPC on September 2004), sec 9, para 5.

30 - Civil Servant Law of the People's Republic of China, art 4.

Party Constitution. The experience of Vietnam has shown that a competitive election could be practiced inside the Party successfully. During the period of the 11th National Congress of Communist Party of Vietnam, 175 members of the Central Committee of the Communist Party of Vietnam were elected out of 218 candidates in 2011. The multi-candidate election proportion is more than 70% in terms of the election for members of the Politburo (International Herald Tribune, 2011). Accordingly, the interpellation system has been adopted and practiced effectively in Vietnam.

Comparatively, the current framework under the dual constitution does not hinder the CPC from being capable of action and judgment, capable of initiating its activities, and having the machinery for the expression of the wishes of the represented. The CPC may respond to these wishes unless there are good reasons not to, as is similarly required by a representative government (Pitkin, H., 1967).

In fact, the current legal system has provided a framework for the CPC's integration with the People's Congress system. According to Article 21 of the Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China (2004 Amendment), members of the standing committee of local people's congresses, the Chairmen and Vice-Chairmen of the people's congresses, Governors and Deputy Governors, Presidents of the People's Courts and Chief Procurators of the People's Procuratorates at local levels have to be nominated by the presidiums of the people's congresses at the corresponding levels or jointly nominated by deputies.

For the subsequent election mechanism, thirty or more deputies to the people's congress at the provincial level, or twenty or more deputies to the people's congress at the prefecture level, or ten or more deputies to the people's congress at the county level may nominate, with joint signatures, the candidates mentioned above³¹. For the former

election mechanism, as the Party Secretary assumes the Chair of the Local People's Congress Standing Committee, the way to nominate the candidate by the presidiums of the people's congresses is manipulated by the CPC virtually. However, the law does not close the door for the later election mechanism which may activate China's democracy incrementally.

For instance, in 2011, Cao Tian, an influential Chinese writer, announced that he would run for mayor of Zhengzhou City as an independent candidate. Such action is consistent with the Constitution and relevant laws. However, he was deterred, in practice, by a tax inspection or other measures. Even so, with the rapid economic development, this sort of activity cannot hinder the middle class's pursuit of freedom and democracy. As of 7 June 2011, it is estimated that more than 127 independent candidates in local elections had declared their candidacies (China: Update on the Independent Candidate Campaigns, 2011).

This reflects the fact that the monopoly of the election by the CPC has been loosened slightly due to societal development. In the long run, assuming that the CPC continues to reform itself in relation to democracy and the rule of law, it will be a breakthrough for the CPC to embrace such a competitive mechanism in accordance with the Constitution and relevant laws. As such, it is crucial to encourage the CPC to reform further in order to maintain its political dominance in competitive elections.

As it is now virtually impossible for the CPC to exist without the strengthened NPC, as was the case from the mid-1960s until the end of the Culture Revolution, and the issues decided by the CPC must be reviewed by deputies' voting in the NPC, it is inevitable that the CPC will allow for and defer to the development of NPC and local people's congress, given the continued smooth evolution of the dual constitution. At the same time, such allowance and deference may

31 - The Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China. (2004) Amendment, art 21.

further strengthen the authority of the CPC as it conforms to the principles of democracy and the rule of law.

Therefore, under the dual constitution, the reform is expected to move towards a situation where the State Constitution, as the highest law, prevails over the Party Constitution. In addition, the CPC can further strengthen its authority through its own reforms in accordance with the State Constitution and laws, thereby playing an overarching role in the NPC and local people's congresses.

3.2. Dual Judiciaries

Similarly, in a broad sense, it is possible to grasp the dual structure of the judiciary under the dual constitution. On the one hand, according to the State Constitution, China has a formal judicial system, including the courts and procuratorates. On the other hand, based on the Party Constitution, the Party has its discipline inspection system – the Discipline Inspection Commission, and the Political-Legal Committee inside the Party.

It is a fact that, in practice, the court system can be manipulated by the Party. At the institutional level, the presidents of the courts at different levels are members of the Political-Legal Committee of the CPC concurrently. Moreover, the Adjudication Committee under the leadership of the President of the courts is “the highest judicial organization of a people's court, which plays an important role in summing up the judicial experiences and hearing hard, complicated and important cases”³². However, no specific definition of the “complicated and important cases” is given in practice. Therefore, due to the requirement for the Adjudication Committee to adhere to the Party's leadership on the work of

people's courts³³, such a mechanism can be used to review and modify the opinions of the adjudicating judges (Xin, H., 2012). In this way the collective decision³⁴ made by the courts in China could be manipulated by the will of the Party if the case concerned gains regional or national importance in the view of the Committee.³⁵

At the same time, to a certain extent, the Party is able to manipulate the procuratorate in practice through its own extralegal discipline inspection system. In China's criminal justice system, for most corruption cases, it is the Discipline Inspection Commission of the CPC that first interrogates the Party members as cadres according to the disciplinary procedures of the Party, and then transfers the case to the procuratorate for prosecution according to legal procedures.

A typical example is the case of the Party Secretary of Chongqing City – Bo Xilai – who was detained and interrogated first by the Discipline Inspection Commission and then transferred to the Procuratorate of Jinan City for prosecution in accordance with the law (Pei, M., 2012). Nonetheless, such extralegal detention (shuanggui) employed by the Discipline Inspection Commission is unconstitutional, as the Legislation Law of the People's Republic of China, enacted by the NPC, stipulates that: “the following matters can be regulated by laws only: ... (4) Crime and its punishment; (5) Sanctions resulting in citizens being deprived of their political rights, and coercive measures resulting in a limitation of the freedom of their person”³⁶.

The Party has realized that such extralegal practice may undermine its authority and it has taken many measures to regulate its extralegal activities inside the Party. For instance, “shuanggui can be used only

32 - Notice of the Supreme People's Court on Issuing the Implementation Opinions on Reforming and Improving the Judicial Committee System of the People's Court (2010), para 3.

33 - *Ibid.*, para 2.

34 - In China, all decisions made by the court are issued in a collective way, i.e. judge's personal opinion does not appear in the decision. Rather, only names of the adjudicating judges appear in the decision.

35 - Notice of the Supreme People's Court on Issuing the Implementation Opinions on Reforming and Improving the Judicial Committee System of the People's Court (2010), para 3, 4, 5.

36 - Legislation Law of the People's Republic of China 2000, art 7, 8.

by organs at the district level. Supervision and review mechanisms have also been introduced. Moreover, shuanggui can be sanctioned only by a plenary session of a commission's standing committee, and must be approved by organs at the provincial level" (Sapio, F., 2008). Thus, the number of units that can carry out detention has been considerably reduced. Furthermore, the CPC has recently decided to cancel such extralegal detention in the near future and this is to be replaced by legal detention according to the State Constitution and relevant laws (Australian Journal, 2013). Remarkably, this implies that the CPC's normalization is moving towards implementing the principle of rule of law according to the State Constitution.

Interestingly, besides adherence to the Party's leadership, the SPC operates smoothly under the People's Congress system by insisting that the courts will "consciously accept the supervision of the people's congresses, safeguard the dignity and authority of the Constitution and laws, and safeguard the legal rights and interests of the people"³⁷. In fact, no one can deny that, according to the Constitution and relevant laws, judicial independence has been designed under the People's Congress system, i.e., the court is created by and is responsible for the People's Congress system.

On this point it is similar to the British parliamentary system. Hence, such a constitutional framework does provide a possibility for future judicial reform to restrain or even eradicate the party's manipulation or interference behind the scenes on the condition that the People's Congress system has been developed to the extent that the court is only responsible to it. However, due to the dominant influence of the Party, China's judicial reform is incremental, rather than a one-off, towards depoliticization. According to the newly released 4th Five-year Reform Outline for People's Courts (2014-2018), the ongoing judicial

reform attempts to depoliticize and delocalize local courts by centralizing the nomination of judges to the High People's Courts at provincial level. At the same time, the financial and material recourses of local courts will be allocated directly by the provincial governments. At least, it shows that reform can make local courts more independent in accordance with the law, and less interfered with by the Party and local governments, though party politics may still have its place at the higher level.

The fourth plenary session of the 18th National Congress of the CPC has decided to focus on "the rule of law". In fact, it has signaled the CPC's decision to improve its own regulation of the rule of law. This could also be seen in the Five-Year Planning Outline for Central Intra-Party Regulation Formulation Work (2013-2017) which has an emphasis on the rule-of-law-based party governance and intra-party democracy. Given that the Party continues to operate in accordance with the principle of rule of law, it could be expected that judicial reform will move in the direction of judicial independence stipulated by the State Constitution and be strengthened further incrementally.

3.3. Dual Executive and Military Systems

As to the executive system, China has consistently developed a law-based government since 1978 and has had many achievements in this area. For example, the Regulation of the People's Republic of China on the Disclosure of Government Information in 2008 has encouraged the government to become more transparent. Accordingly, citizens have gained a legal right to apply for the disclosure of government information.³⁸ In parallel, as mentioned above, the Party's departments are also endeavoring to operate based on the law. Correspondingly, relevant laws, for example, the Interim Provisions of the State Council for Veteran Cadres to Leave Their Posts in

37 - News of the Supreme People's Court on Issuing the Implementation Opinions on Reforming and Improving the Judicial Committee System of the People's Court (2010), para 2.

38 - In order to implement the Regulation and protect people's rights concerning disclosure of government information, the Supreme People's Court has issued the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Administrative Cases about Open Government Information (2011).

Order to Rest, issued by the State Council, have been promulgated to regulate the activities of the government Party, as well as the Party (Hartcher, P., 2012 and Pan Wei, P., 2009).³⁹ Meanwhile, their homogeneous nature can also be glimpsed by the common practice of general offices of the CPC and state administration of issuing national directives jointly.⁴⁰ Given that the rule of law has been established, there will be no problem for the departments of the Party and the State to operate either separately or jointly in practice.

Regarding the military system, the State Constitution has provided a constitutional framework under which the Chairman of the CMC of the State, elected by the NPC, can exercise the military power and is responsible to the NPC and NPCSC (article 94). It is the NPC that decides on questions of war and peace, or the NPCSC that decides, when the NPC is not in session, on the proclamation of a state of war in the event of an armed attack on the country or in fulfilment of international treaty obligations concerning common defence against aggression (article 62, 67). Furthermore, the President of the State has the power to declare a state of war and issue a mobilization order (article 80).

However, due to the existence of the Chairman of the CMC of the Party, there is a potential time interval during the hand-over period, i.e., the military power of the Party and the State (two chairmanships) may be exercised by two persons separately at the same time⁴¹. In practice, due to the dominant role of the CPC, the smooth transfer from the Chairman of the CMC of the Party to that of the State can be guaranteed. Meanwhile, it is a practice that two CMCs coexist in the form of “one body with two names”, i.e. with the same staff, which guarantees

the military power to be exercised smoothly and integrally without any split.

Nonetheless, the constitutional role of the Chairman of the CMC of the State has sometimes been misused sometimes. For example, during the time interval in 2013, it was the Chairman of the CMC of the Party, Xi Jinping, who was entitled to grant military ranks to the military personnel rather than the Chairman of the CMC of the State, Hu Jintao. This largely illustrates the Party's insistence on the principle of the “Party commands the gun”. Yet, according to the State Constitution, it is the Chairman of the CMC of the State, not of the Party, that should be strengthened in order to accord with the rule of law, because the military cannot belong to any individual or party, rather, it has to be nationalized (Carter, L., 2012).⁴²

CONCLUSIONS

Since the end of Cold War, various Eastern European countries have embarked on different roads towards Western style liberal democracy. At the same time, over the past decades, some remaining socialist countries, in particular China and Vietnam, have undergone in-depth reforms in many fields. As observed, many developing countries have already come to understand that full-scale liberal democracy does not solve all their problems (Li, E., 2013).

After more than three decades of development, China has witnessed its rise in a different way. At this moment, new futurologists may provide a number of alternatives to the universal concept of Western modernity but they have not yet grasped the essence of China's development from a non-liberal perspective, with regard to its constitutional regime. As illustrated above, the status quo is that a dual

39 - To this point, it is argued that China could enjoy the leadership of CPC under the rule of law, but without a Western style democracy.

40 - For example, the Provisions on Party Organ and Government Personnel's Personal Investment in Securities is circulated by the General Office of the CPC Central Committee and the General Office of the State Council jointly in 2001.

41 - In practice, for example, in September 2004, Hu Jintao, the Chairman of the CMC of the Party granted military ranks to the military personnel, while Jiang Zemin was the Chairman of the CMC of the State.

42 - In fact, it has been perceived that, in China, People's Liberation Army (PLA) has always been a branch of the ruling Communist Party of China (CPC). Recently, more people appealed for shifting the army's allegiance from the Party to the state.

constitution comprising the Party and the State has emerged, which cannot be explained merely by the traditional Party-state theory under which the Party can fully penetrate into and control the State, as occurred in the era of Mao Zedong.

As a result of several political incidents, namely, the Cultural Revolution (1967-1977) and the Tiananmen Incident 1989, the CPC has realized the importance of the People's Congress system in facilitating and strengthening its political rule. Ironically, the development of the People's Congress system has become a thorn in the CPC's side which cannot be readily removed, and, furthermore, it may pose some threat to the CPC as it lacks true legitimacy. However, the CPC has taken many pragmatic measures to integrate its own mechanisms with the People's Congress system through political conventions and its own normalization based on the rule of law.

The emerged dual constitution maintains the smooth operation of the People's Congress in accordance with the State Constitution. Meanwhile, it opens a door for the further reform of the CPC. However, the approach is different from that of liberal democracies. Optimistically, based on the dual constitution, China is more likely to continue strengthening the People's Congress system by upholding the State Constitution while the Party Constitution, accompanied by reform will defer to the State Constitution.

Specifically, the Party's congress, the quasi-judicial Discipline Inspection Commission inside the Party, the Party's departments and CMC under the Party Constitution can play their political role in practice, but should defer and be subject to the development of the People's Congress, the court system, the law-based government and the CMC of the State under the State Constitution. Undoubtedly, it will be a challenge for the CPC to construct its competitive mechanism inside the Party.

Comparatively speaking, the experience of Vietnam has shown that the Party could move towards democracy and maintain its leading role in the

political system at the same time, while the National Assembly or Local People's Councils can operate smoothly in accordance with the State Constitution (Sidel, M., 2009). To some extent, Vietnam's reform is also moving towards a dual constitution. Moreover, after decades of Party and State reform, its Constitution was amended in 2013 to include the Party's leadership and it could be seen that the CPV was a force leading the State and society. However, all Party organizations operate within the framework of the Constitution and the law. Such a practice, at least, can signal the possibility that China is moving forward under a dual constitution.

It is widely perceived that China continues to fulfill its grand aspirations in its economy through in-depth reform; however, at the same time it is encountering nagging political uncertainties (Callahan, W., 2013). Although it must be borne in mind that "prediction is hazardous, particularly about the future" (Tushnet, M., 2003), by relying on the emerged dual constitution it appears that there is a way for China to move forward incrementally but, to a great extent, not based on the Western experience which definitely cannot be guaranteed.

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