
ARTICLE

THE DEVELOPMENT OF CHINESE CONSTITUTIONALISM

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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,¹ also known as the Treaty of Shimonoseki, after losing the first Sino-Japanese War.² 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.³ The intellectuals were infuriated and blamed the antiquated feudal system for the military defeat. Kang Youwei petitioned the Emperor to adopt a constitutional monarchy

1. Treaty of Shimonoseki, China-Japan, April 17, 1895.

2. HAO PING, PEKING UNIVERSITY AND THE ORIGINS OF HIGHER EDUCATION IN CHINA 97, 108 (2013).

3. After the intervention of Russia, France and Germany, Japan agreed to return Liaodong Peninsula to China for additional thirty million silver taels. *Treaty of Shimonoseki*, ENCYC. BRITANNICA, <http://www.britannica.com/event/Treaty-of-Shimonoseki> (last visited on Oct. 22, 2016).

and develop a western-style economy.⁴ In the Gongche Shangshu Movement, thousands of intellectuals in Beijing signed Mr. Kang's petition in support of the reform.⁵ 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.⁶ Subsequently, various social organizations emerged to engage in a discussion about how the Qing should carry out the new reforms.⁷

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.⁸ It seemed that the gentle, scholar-led reform movement would accomplish what other countries could only achieve through bloody revolutions.⁹ However, Kang and his colleagues were too naïve to realize that the sympathizing Emperor was nothing but a figurehead.¹⁰ In reality, it was Empress Dowager Cixi who was in firm control of the royal court, the military, and the country's financial resources.¹¹

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.¹² The Empress deposed the young Emperor in a military coup and had him poisoned to death.¹³ While Kang barely escaped by fleeing to overseas,¹⁴ 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*."¹⁵ 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.*

8. NELSON ZHANG, LAURENCE ZHANG, & LUXIA SONG, THE ZHANGS FROM NANXUN 123 (2010).

9. MICHAEL DILLON, CHINA: A CULTURAL AND HISTORICAL DICTIONARY 150 (1998) [hereinafter CULTURAL AND HISTORICAL DICTIONARY].

10. *Cixi, Empress dowager of China*, ENCYC. BRITANNICA, <http://www.britannica.com/biography/Cixi> (last visited on Oct. 22, 2016).

11. *Id.*

12. CULTURAL AND HISTORICAL DICTIONARY, *supra* note 9, at 150.

13. Eric Mu, *Reformist Emperor Guangxu Was Poisoned, Study Confirms*, DANWEI (Nov. 3, 2008), http://www.danwei.org/front_page_of_the_day/kindergarden.php [hereinafter *Reformist Emperor Poisoned*].

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. *Shibaigou Chen: Beijing Daexue Qianshen Jingshi Da Xuetang de Shenshi Kemi* (史海钩沉: 北京大学前身“京师大学堂”的身世揭秘) [*Shibaigouchen: 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.

17. QINDING XIANFA DAGANG (钦定宪法大纲) [CONSTITUTIONAL OUTLINE MADE BY THE IMPERIAL ORDER] translated in *The Outline of the Constitution Compiled by Imperial Order (1908)* (China), CHINA COPYRIGHT AND MEDIA (April 24, 2012), <https://chinacopyrightandmedia.wordpress.com/1908/08/27/the-outline-of-the-constitution-compiled-by-imperial-order/>.

18. XIANFA ZHONGDA XINTIAO SHIJIU TIAO (宪法重大信条十九条) [THE NINETEEN MAJOR ARTICLES OF THE CONSTITUTION] translated in *The Nineteen Major Articles of the Constitution (1911)* (China), CHINA COPYRIGHT AND MEDIA (April 24, 2012), <https://chinacopyrightandmedia.wordpress.com/1911/11/03/the-nineteen-major-articles-of-the-constitution/>.

19. *Id.*

20. *Reformist Emperor Poisoned*, *supra* note 13.

21. *Chinese Revolution 1911–1912*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Chinese-Revolution-1911-1912> (last visited on Dec. 12, 2016).

22. ZHONGHUA MINGUO LINSHI YUEFA (中华民国临时约法) [THE PROVISIONAL CONSTITUTION OF THE REPUBLIC OF CHINA] translated in *Provisional Constitution of the Republic of China (1931)*, CHINA-JOURNAL.ORG (May 31, 2016), <https://china-journal.org/2016/05/31/provisional-constitution-of-the-republic-of-china-1931/> [hereinafter PROVISIONAL CONSTITUTION].

23. 1912 Nian 1 Yue 1 Ri Sun Zhong Shan Jiuren Zhonghua Minguo Linshi Da Zongtong (1912年1月1日 孙中山就任中华民国临时大总统) [*Sun Yatsen Became the President of the Republic of China on January 1, 1912*], PEOPLE.COM.CN (2003-8-1), <http://www.people.com.cn/GB/historic/0101/24.html>.

24. *Chinese Revolution 1911–1912*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Chinese-Revolution-1911-1912> (last visited on Dec. 12, 2016).

25. *Yuan Shikai, President of China*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Yuan-Shikai> (last visited on Dec. 12, 2016).

his eighty-three-day long dynasty.²⁶ After Chiang Kai-shek took power, his government enacted the Constitution of the Republic of China for Period of Political Tutelage²⁷ in 1931, which served as a legal framework for Chiang's government until he was defeated by the Communist Party in 1949.²⁸

Since the establishment of the PRC, there have been four constitutions: the 1954 Constitution,²⁹ the 1975 Constitution,³⁰ the 1978 Constitution,³¹ and the 1982 Constitution.³² 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;³³ four out of five vice chairmen of the Chinese People's Political Consultative Conference, a provisional legislative body, were democrats or non-Party personages.³⁴ Since these non-Party intellectuals were trained in the previous regimes or in western countries, they did not necessarily support the idea of communism.³⁵ Under the Common Program,³⁶ a provisional constitution, the Party promised to share powers

26. *Id.*

27. PROVISIONAL CONSTITUTION, *supra* note 22.

28. See *Zhonghua Minguo Xun Zheng Shiqi Yuefa: Jianjie* (中华民国训政时期约法: 简介) [*An Introduction to the Constitution of the Republic of China for the Period of Political Tutelage*], CNLAWNN.COM (2015-06-02 00:09:27), <http://cnlawnn.com/flzy/html/?2834.html>.

29. XIANFA (1954) (China).

30. XIANFA (1975) (China).

31. XIANFA (1978) (China).

32. XIANFA (1982) (China).

33. Zhang Ming (张鸣), *Zhi Xian Yishi Beihou de Qu Zhong—Cong “Gongtonggangling” Dao 1954 Nian Xianfa* (制宪仪式背后的曲衷——从“共同纲领”到1954年宪法) [*The Legislative History: From “the Common Program” to the 1954 Constitution*], AISIXIANG.COM (2004-04-16 00:25:36), <http://www.aisixiang.com/data/13970.html> [hereinafter *From “the Common Program” to the 1954 Constitution*].

34. *Id.*

35. *Id.*

36. GONGTONG GANG LING (共同纲领) [THE COMMON PROGRAM OF THE CHINESE PEOPLE'S POLITICAL CONSULTATIVE CONFERENCE] translated in THE COMMON PROGRAM AND OTHER DOCUMENTS OF THE FIRST PLENARY SESSION OF THE CHINESE PEOPLE'S POLITICAL CONSULTATIVE CONFERENCE (1950), <http://www.bannedthought.net/China/MaoEra/Government/CommonProgramOfCPPCC-1950.pdf>.

with democratic or non-Party affiliated personages.³⁷

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.³⁸ First, capitalists and small property owners still dominated the Chinese economy because the planned socialization process was not complete.³⁹ A new constitution, which would endorse the capitalistic nature of the economic system, would be no different from the Common Program.⁴⁰ Also, it would create a semantic hurdle for a socialist constitution to recognize the legitimacy of private businesses.⁴¹ 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.⁴²

Josef Stalin, however, urged China to adopt a constitution modeled after that of the Soviet Union.⁴³ According to Stalin, a constitution would help legitimize the Party's reign over the country.⁴⁴ 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.⁴⁵ Therefore, it was necessary for China to hold the National People's Congress and enact the constitution.⁴⁶ Second, through the election, the Party could use legitimate means to drive other parties out of the government.⁴⁷ 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.⁴⁸ Third, the Party could benefit from voluntarily sharing some non-essential powers with the other parties.⁴⁹ These parties would be grateful for the Party's "generosity."⁵⁰

37. See GONGTONG GANG LING pmb. ("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.*

46. *Sidalin de Sancı Jianyi* (斯大林的三次建议) [*Joseph Stalin's Three Suggestions*] NEWS.QQ.COM (2009-08-14 07:25), <http://news.qq.com/a/20090814/000612.htm>.

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 1953.⁵¹ However, the committee did begin work until a year later.⁵² The reason for the delay was that the democrats and capitalists worried the new constitution would curtail their rights.⁵³ Mao and his deputies patiently persuaded the suspicious democrats to support the new endeavor.⁵⁴

In January 1954, the committee began the drafting process.⁵⁵ Mao and his secretaries, none of whom had any formal legal training, became the drafters of China's first socialist constitution.⁵⁶ Mao urged the committee to study constitutions of the Soviet Union and other eastern European countries.⁵⁷ The committee also examined the 1946 French Constitution,⁵⁸ and several constitutions from previous regimes in China.⁵⁹ In fact, Mao admired the French constitution, especially for its cabinet system.⁶⁰ 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.⁶¹

In June 1954, Mao presented the draft constitution at a Central People's Government's conference and received overwhelming support.⁶² Mao hailed the draft constitution as a milestone in the socialist construction.⁶³ Fervent supporters proposed an amendment to name the constitution as

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Wu Guang Xiang (吴光祥), *Mao Ze Dong Jujue Ba Xianfa Ming Mingwei "Mao Ze Dong Xinfu" (毛泽东拒绝把宪法命名为"毛泽东宪法")* [*Mao Refused to Name the Constitution "Mao Ze Dong Constitution"*], HANQUL.COM (2010-09-08 09:55), <http://history.huanqiu.com/people/2010-09/1083431.html> [hereinafter *Mao Refused to Name the Constitution*].

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.⁶⁴ To legitimize the constitution, Mao and the central government turned the discussion of the draft constitution into a political fanfare.⁶⁵ It was reported that more than 150 million people participated in the discussion of the draft constitution and proposed numerous amendments.⁶⁶ On September 20, 1954, the first National People’s Congress unanimously passed the constitution.⁶⁷

A. *The 1954 Constitution*

Some Chinese scholars called the 1954 Constitution a replica or transplantation of the Soviet Constitution.⁶⁸ By establishing the People’s Congress, the communist Party gained control of the People’s representatives, which formed the government.⁶⁹ The purpose of the Soviet Constitution was to consolidate the power of the soviet government and strengthen Bolshevik leadership.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.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.”⁷² Following the same paradigm, the 1954 Chinese Constitution emphasized the authority of state rather than the basic rights of individual citizens.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.⁷⁴

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

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Liu Chun Ping (刘春萍), *Sulian Xianfa Xueshuo Dui Zhongguo Xianfa Xueshuo de Yingxiang* (苏联宪法学说对中国宪法学说的影响) [*The Influence of the Soviet Union’s Constitution on the Chinese Constitutional Development*], CHINALAWINFO.ORG (2014/9/9 13:28:37), <http://article.chinalawinfo.com/ArticleFullText.aspx?ArticleId=86438>.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

both domestic and international issues.⁷⁵ The preamble first emphasized Party's leading role in gaining China's independence and establishing the "People's democratic dictatorship."⁷⁶ 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."⁷⁷ 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."⁷⁸ 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.⁷⁹ Following the preamble are four chapters: General Principles; the State Structure; Citizens' Basic Rights and Duties; and the National Flag, Emblem and Capital.⁸⁰

The General Principles addressed two basic questions: who would hold state power and who owned the state economy?⁸¹ 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.⁸² The country was a People's democratic state led by the working class and based on the alliance of workers and peasants.⁸³ Second, the Constitution recognized multiple forms of ownership: state ownership and co-operative ownership.⁸⁴ 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.⁸⁵

In Chapter 2, the Constitution laid out the structure of the state, which is almost identical to the current state structure.⁸⁶ There were five major state organs: The NPC, the State President, the State Council, the Supreme

75. XIANFA (1954) (China).

76. *Id.* pmb1.

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.⁸⁷ The NPC, which consisted of representatives from the provincial level, held the highest power of the state.⁸⁸ 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.⁸⁹ It also had the power to make laws, decide "five-year plans," approve the state budgets, and decide on questions of war and peace.⁹⁰ In addition, the Congress functioned as a constitutional court, which had the power to annul regulations incompatible with the Constitution.⁹¹

The State President under the 1954 Constitution held more substantial power than under the current constitution.⁹² 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.⁹³

The State Council, also called the central government of China, had the highest administrative power.⁹⁴ Under the State Council, at the central level, were various ministries and commissions, and at the local level, provincial county governments.⁹⁵ The State Council was responsible for promulgating administrative measures, issuing decisions and orders, and adjudicating whether local rules were compatible with its regulations.⁹⁶ It also had the power to make legislative proposals, which the NPC often approved unanimously.⁹⁷

The Supreme People's Court was the highest judicial organ.⁹⁸ Even though the Constitution provided that the court exercise power independently,⁹⁹ the Party, in fact, had a firm control over judicial appointments.¹⁰⁰ 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.¹⁰¹

B. *Basic Rights and Duties*

The 1954 Constitution claimed that all PRC citizens were "equal before the law."¹⁰² The use of the term "citizen" was a surprise because the Party's previous constitutions used "People" instead of "citizens."¹⁰³ "People," as opposed to "enemy," is a political term, which means those who support socialism and the communist Party and unity of the country.¹⁰⁴ "Citizen" however, is an apolitical term, which refers those who merely bear Chinese nationality.¹⁰⁵ Thus, all "People are citizens, but not every citizen is in the class of 'People.'"¹⁰⁶ Such differentiation is rooted in the class struggle theory of the Marx-Leninism, which divided the entire world into two classes: the oppressing class and the oppressed class.¹⁰⁷ 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."¹⁰⁸ 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."¹⁰⁹ The Constitution used the term "citizens" only in the section concerning basic rights and duties.¹¹⁰

Under Section III of the Constitution, citizens enjoyed a wide range of freedom that is often found in Western constitutions.¹¹¹ 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 MINGUO LINSHI YUEFA ch. II (referring predominantly to "persons" and "people" under Chapter 2 titled "Rights and Duties of the People").

104. YU XINGZHONG, *Citizenship, Ideology, and the PRC Constitution in CHANGING MEANINGS OF CITIZENSHIP IN MODERN CHINA* 291–94 (Harv. Univ. Press 2002).

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.¹¹² 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.¹¹³ 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.¹¹⁴ The personal freedoms included rights to privacy.¹¹⁵ Citizens were not subject to warrantless arrest and their homes and correspondences were inviolable. Economic rights included the rights to work, rest, and seek assistance from the government when they were incapacitated by age or illness.¹¹⁶ For cultural rights, citizens had the freedom to engage in scientific research, literary and artistic creation, and other cultural activities.¹¹⁷ The law required the state to encourage and assist citizens’ creative endeavors in cultural pursuits.¹¹⁸

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.”¹¹⁹ He demanded that government officials set an example for the rest of the society for enforcing the Constitution.¹²⁰ However, Mao’s pledge did not fully convince democrats and independents.¹²¹ Mr. Huang, a prominent democrat, expressed his concerns about whether the Constitution would be truly implemented.¹²² He urged all the government officials, especially those in charge of management, supervision, and prosecution to abide by the Constitution.¹²³ 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.

119. Mao Zedong, Speech at the Thirtieth Session of the Central People’s Government Council: On the Draft Constitution on of the People’s Republic of China (June 14, 1954), https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_37.htm.

120. *Id.*

121. Liu Zheng (刘政), *1954 Nian Xianfa Shixing Sannian Hou Weishenme Bei Zhujian Qi Fei*, (1954年宪法施行三年后为什么被逐渐弃废) [*Why the 1954 Constitution Was Abandoned After Three Years of Implementation*] CHINA.COM.CN, <http://www.china.com.cn/chinese/zhuanti/zgxf50n/559687.htm> (last visited Nov. 12, 2016).

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.¹²⁴ In the 1930s, he joined the League of Left-wing Writers in Shanghai opposing the Kuomintang regime and supporting the Communist revolution.¹²⁵ 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).¹²⁶ In 1954, Hu was elected as a People's deputy of the First National People's Congress (NPC), which passed the 1954 Constitution.¹²⁷ 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.¹²⁸

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.¹²⁹ He complained that Party's control of literature suffocated creativity and withered cultural production.¹³⁰ For his heterodox belief, Hu was purged from the Party and sent to prison for more than two decades without a formal trial.¹³¹ After Hu was arrested, the NPC retroactively deprived Hu's of his deputy status.¹³² Like many other intellectuals who were prosecuted, Hu did not have any chance to confront the evidence and defend himself.¹³³ 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.¹³⁴ Of seventy-eight persons, who were named as core elements of the Hu Clique, sixty-one were either suspended from

124. 1955 *Nian Hu Feng Shijian Shimo* (1955年胡风事件始末) [*The 1955 Hu Feng Incident*], XINHUA.NET (2005-01-25 14:24:07), http://news.xinhuanet.com/banyt/2005-01/25/content_2505298.htm [hereinafter *The 1955 Hu Feng Incident*].

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.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.¹³⁶

E. *Hu's Arguments*

First, Hu opposed the Party's ideological remolding campaign, in which writers were forced to accept a "predetermined Communist world view."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.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."¹³⁹ Therefore, he called writers to disregard Mao's dictates and free the literary realm from the control of the Party.¹⁴⁰

Second, Hu opposed the Party's directives that required writers focus solely on "bright things" and ignore backwardness and darkness.¹⁴¹ He asserted that emphasizing brightness would only force writers to write something that was not true.¹⁴² "If everybody wrote of the bright side then the struggle for future improvement of life would become impossible."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.¹⁴⁴ He claimed that the narrow focus mandated by the Party would cause writers to overlook significant issues in real

135. *Id.*

136. *Id.*

137. MERLE GOLDMAN, LITERARY DISSENT IN COMMUNIST CHINA 140 (1971).

138. *Id.*

139. *Id.* at 141.

140. *Id.*

141. *Id.* at 142.

142. *Id.*

143. *Id.* 142.

144. *Id.*

life.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.¹⁴⁶ The official journals had a strict inspection and supervision system, which often filtered out the works by liberal writers.¹⁴⁷ Hu argued that “the Party should establish a system to protect and help the writer, but not to command him.”¹⁴⁸ Therefore, he proposed to establish seven or eight journals independent from the influence of the Party and government.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.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.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.¹⁵² As a result, ordinary writers did not really know what was permissible to say.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*).¹⁵⁴ Hu’s accurate and precise depiction of the Party’s policy on literary freedom instantly caught Mao’s attention.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.¹⁵⁶

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 143.

149. *Id.*

150. *Id.*

151. *The 1955 Hu Feng Incident*, *supra* note 124.

152. *Id.*

153. *Id.*; MICHAEL DILLON, CHINA: A MODERN HISTORY 295–96 (2010) [hereinafter DILLON, MODERN HISTORY].

154. *The 1955 Hu Feng Incident*, *supra* note 124; Mao Zedong (毛泽东), *Bo “Yulun Yilu”* (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/mswv5_42.htm (last visited Nov. 13, 2016) [hereinafter *Bo “Yulun Yilu”*].

155. *The 1955 Hu Feng Incident*, *supra* note 124.

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."*¹⁵⁷ In the essay, Mao delineated the meaning of freedom of speech in a unique way.¹⁵⁸ 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.¹⁵⁹ 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."¹⁶⁰ 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.¹⁶¹ Among the People, he reasoned, some were advanced and others were backward.¹⁶² When the two groups of People had freedom to express their ideas and compete with each other, the advanced would prevail over the backward.¹⁶³ It was neither possible nor correct to have "uniformity of public opinion" among the People.¹⁶⁴ 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 . . ."¹⁶⁵

On the contrary, the counter-revolutionaries deserved no freedom because they would exploit the freedom to resist the revolution and restore their own rules.¹⁶⁶ 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.¹⁶⁷ Mao made it a crime for counter-

157. *Bo "Yulun Yili"*, *supra* note 154.

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.¹⁶⁸ He believed that it was perfectly legitimate for the Party to “exercise dictatorship over them.”¹⁶⁹ First, they exploited the People in the previous regime and now it was the time for the People to take revenge on their enemies.¹⁷⁰ The counter revolutionaries must be subject to the People’s rule in the new world.¹⁷¹ Second, the defeated counter-revolutionaries were in the minority.¹⁷² Even if a pure democratic rule were applied here, it would be justified that the majority had the right to suppress the minority.¹⁷³ In the absence of a bill of rights, the minority was unworthy of legal protection.¹⁷⁴ Thus, it did not matter to Mao or the Party whether they found the Party’s harsh rules unbearable.¹⁷⁵ In fact, Mao was enthusiastic to see the counter-revolutionaries shivering in the terror under the Party’s democratic dictatorship.¹⁷⁶ 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”¹⁷⁷ 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.¹⁷⁸

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

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.

178. *Bo “Yulun Yili”*, *supra* note 154.

expression: the People, not the enemies. Unfortunately, this was not the case because Mao frequently shifted the line between the two classes.¹⁷⁹ 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.¹⁸⁰ 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."¹⁸¹

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.¹⁸² 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.¹⁸³ 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.¹⁸⁴ 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

179. Qian Liqun (钱理群), *Mao ZeDong yu Hu Feng Shijian* (毛泽东与胡风事件) [*Mao Zedong and the Hu Feng Incident*], 21CCOM.NET (2013), http://www.21ccom.net/articles/ljsj/ljsj/article_2013050782866.html.

180. *Id.*

181. Bo "Yulun Yilu", *supra* note 154.

182. See XIANFA art. 87 (1954) (granting all citizens freedom of speech).

183. Fan Jinxue (范进学), *1954 Nian Xianfa Shishi Ji Pingjia* (1954年宪法实施及评价) [*A Comment on the Implementation of the 1954 Constitution*], XIEBIE DAXUE XUEBAO (ZHEXUE SHEHUIKEXUE BAN) (西北大学学报 (哲学社会科学版)) [Xibei University Journal (Philosophy and Social Sciences Edition)] 20 (2014) [hereinafter *Implementation of the 1954 Constitution*].

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 civil 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

185. Yang Guoli (阳国利), *Te Gao: Mao Zedong Wannian Xianfa Guan Fazhan Bianhua Tan Xi*, (特稿: 毛泽东晚年宪法观发展变化探析) [*A Study on the Evolution of Mao Zedong's Views on the Constitution in His Later Years*] ZHONG HONG WANG (2011-08-22 16:01:25), <http://www.crt.com.cn/news2007/News/wrgs/11822161258IEEEGCBGC8CD47IHK98.html>.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Implementation of the 1954 Constitution*, *supra* note 184, at 19.

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.*

198. *Id.*; Richard Cavendish, *Stalin Denounced by Nikita Khrushchev*, HIST. TODAY, vol. 56, issue 2 (Feb. 2 2006), <http://www.historytoday.com/richard-cavendish/stalin-denounced-nikita-khrushchev>.

199. *Soviets Puts Brutal End to Hungarian Revolution*, HIST. CHANNEL, <http://www.history.com/this-day-in-history/soviets-put-brutal-end-to-hungarian-revolution> (last visited Nov. 13, 2016).

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 Zizhiqu 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.²⁰⁶ Mao ridiculed some unconvinced leaders by saying, "The protesters are not armed with guns. Why do you fear them?"²⁰⁷ 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.²⁰⁸ 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.²⁰⁹

Against this backdrop, Mao unveiled his notorious policy of "letting a hundred flowers bloom and a hundred schools of thought contend,"²¹⁰ often referred to as the "Two-Hundred Policy."²¹¹ The thrust of the "Two-Hundred Policy" was that the Party encouraged intellectuals and the

Secretaries of Provincial, Municipal and Autonomous Region Party Committees of January 1957)], MAO ZEDONG XUANJI DIWU JUAN (毛泽东选集 (第五卷)) [MAO ZEDONG'S SELECTIVE WORKS (vol. 5)], translated in *Talks at a Conference of Secretaries of Provincial, Municipal and Autonomous Region Party Committees (January 1957)*, MARXISTS.ORG, https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_57.htm (last visited Nov. 13, 2016).

206. *Id.*

207. *Id.*

208. *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.²¹² 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.²¹³ 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."²¹⁴

In the beginning, the intellectuals did not immediately act upon Mao's calls for opinions and criticisms on the Party's policies.²¹⁵ 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.²¹⁶ After Mao's repeated calls for intellectuals to contribute to the country by voicing their unfettered opinions, intellectuals gradually opened up.²¹⁷ 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.* ("Intellectuals 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.

genuinely tolerate dissenting opinions.²¹⁸ Seeing no restriction from the party, intellectuals broadened the scope of the criticism.²¹⁹ In the campaign, the intellectuals vigorously protested the Party's following policies and practices:²²⁰

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.²²¹ The intellectuals began to influence farmers and workers, the Party's strong allies.²²² Mao was convinced that his enemies had taken advantage of the campaign to overthrow the Party.²²³ 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.²²⁴ Subsequently, Mao quickly launched the "Anti-Rightist" movement to quash the intellectuals.²²⁵ At least 300,000 intellectuals²²⁶ were branded as "Rightists," a label that ruined not only their careers but also their family members' careers as well.²²⁷ They were removed from their jobs, purged, and disgraced.²²⁸

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.²²⁹

IV. THE CULTURAL REVOLUTION (1966–1976)

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.²³⁰ He also inspired like-minded writers, who published their works under the joint pseudonym of "Three-Family Village."²³¹ All of the works were critical of the Party's policy failures, which had caused ordinary people to suffer throughout the various campaigns.²³² When Mao decided to punish Wu Han and other writers, he met strong resistance from Peng Zhen, the Party Secretary of Beijing.²³³ While admitting his lack of supervision, Peng insisted that Wu Han's work was purely academic in nature.²³⁴ Therefore, it was not serious enough for the Party to use the means of class struggle.²³⁵ 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."²³⁶

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.²³⁷ Mao thought that the Marxists and the revolutionary mass no longer controlled leadership in the majority of units across the country.²³⁸ Mao maintained that, "capitalist roaders"²³⁹ 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.²⁴⁰ Furthermore, the capitalist roaders had their agents in provinces, municipalities, autonomous regions, and even in central government departments.²⁴¹

To counter this “grave threat,” Mao argued that the previous small-scale methods of dealing with opposition had not been effective.²⁴² Only through a Cultural Revolution, could the Party expose the dark side of the counter-revolutionary capitalist roaders and regain power from them.²⁴³ In essence, a Cultural Revolution was a struggle between classes where one class would destroy another.²⁴⁴ Mao believed one Cultural Revolution was not sufficient; therefore, he called for a Cultural Revolution every several years to purify the Party.²⁴⁵ Mao called his own theory “continuing the revolution under the dictatorship of the proletariat theory.”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.²⁴⁷

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

240. *Id.*

241. *Id.*

242. *Id.* at 604–06.

243. *Id.*

244. *Id.*

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>.

246. Guanyi Jianguo Yilai Dang de Ruogan Lishi Wenti de Jueyi, 1981 Nian 6 Yue 29 Rizhi, Zhongong Shiyijieliu Zhong Quanhui Yizhi Tonguo (关于建国以来党的若干历史问题的决议, 1981年6月27日至, 中共十一届六中全会一致通过) [Resolution on Certain Questions in the History of Our Party Since the Founding of the People’s Republic of China, adopted by the Sixth Plenary Session of the Eleventh Central Committee of the Communist Party of China on June 27, 1981], translated in *Resolution on Certain Questions in the History of Our Party Since the Founding of the People’s Republic of China*, MARXIST.ORG, <https://www.marxists.org/subject/china/documents/cpc/history/01.htm> (last visited Nov. 13, 2016).

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).

248. SEARCH FOR MODERN CHINA, *supra* note 211, at 604.

249. *Id.*

250. *Id.*

sent to prison indefinitely.²⁵¹ A year later, Wu and his wife died of unknown causes and their daughter subsequently committed suicide in prison.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.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."²⁵⁴

Deng Pufang, a son of Deng Xiaoping, was purposely locked in a laboratory with highly radioactive materials.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.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.²⁵⁷ During her isolation, she was raped and tortured.²⁵⁸

251. Wu Han (*Zhongguo Zhuming Lishi xuejia* (吴晗 (中国著名历史学家)) [*Wu Han (A Famous Chinese Historian)*]) BAIDU BAIKE, <http://baike.baidu.com/view/23373.htm> (last visited Nov. 13, 2016); see also *Gan Tian Dong de Shengsi Qing—Zhuming Xue zhe Wu Han de Kuangsi Zhi Lian* (感天地生死情——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).

252. *Id.*

253. Liu Zheng (刘政), *1954 Nian Xianfa Shixing Sannian Hou Weishenme Bei Zhujian Qi Fei*, (1954年宪法施行三年后为什么被逐渐弃废) [*Why the 1954 Constitution Was Abandoned After Three Years of Implementation*] CHINA.COM.CN, <http://www.china.com.cn/chinese/zhuant/zgxf50n/559687.htm> (last visited Nov. 12, 2016).

254. *Id.*

255. Harrison E. Salisbury, *In China, 'A Little Blood,'* N.Y. TIMES (June 13, 1989), <http://www.nytimes.com/1989/06/13/opinion/in-china-a-little-blood.html>.

256. *Id.*

257. Sheila Melvin, *Zhang Zhixin: The Woman Who Took on the 'Gang of Four,'* CAIXINONLINE (11.28.2015 15:11), <http://english.caixin.com/2015-11-28/100879233.html>; see also *Heroes from Everyday Life: Zhang Zhixin*, CHINA.ORG.CN, http://www.china.org.cn/china/60th_anniversary_people/2009-09/17/content_18547110.htm (last

Since she refused to keep silent before her execution, revolutionary guards cut her throat and severed her tongue.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.²⁶⁰ Seventy thousand people were prosecuted and more than thirty thousand died as result of humiliation and torture.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.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 died²⁶³ in the violence and as many as thirty-six million were persecuted.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).²⁶⁵ The Resolution acknowledged that

visited Dec. 12, 2016).

258. *Id.*

259. *Id.*

260. ZHANG SHIYI (张士义), ZHONGGUO GONGCHANDANG LISHI JIANMING DUBEN 1921–2011 (中国共产党历史简明读本1921–2011) [A CONCISE HISTORY OF THE COMMUNIST PARTY OF CHINA] 212 (Hongqi Chubanshe (红旗出版社) 2011).

261. *Id.*

262. *Id.*

263. JUNG CHANG & JON HALLIDAY, MAO: THE UNKNOWN STORY 569 (2005).

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.

265. Guanyu Jianguo Yilai Dang de Ruogan Lishi Wenti de Juexi

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.²⁶⁶

A. 1975 and 1978 Constitutions

The 1975 Constitution²⁶⁷ 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.²⁶⁸ To highlight Mao's theory regarding class struggle, the 1975 Constitution substantially repealed basic rights guaranteed in the previous constitution.²⁶⁹ As a result, it had only thirty articles, the shortest constitution in China's history.²⁷⁰ 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.²⁷¹ The 1975 Constitution wholeheartedly endorsed Mao's vision for the country.²⁷² For example, the Constitution made revolutionary committees permanent parts of local People's Congresses.²⁷³ Revolutionary committees had the power to appoint judges and supervise their adjudication processes.²⁷⁴ The Constitution

(关于建国以来党的若干历史问题的决议) [The Resolution on Certain Questions in the History of Our Party Since the Founding of the People's Republic of China] *translated in The Resolution on Certain Questions in the History of Our Party Since the Founding of the People's Republic of China*, MARXISTS.ORG, <https://www.marxists.org/subject/china/documents/cpc/history/01.htm> (last visited Nov. 13, 2016). The Resolution was passed unanimously in the 11th CPC Party Congress the sixth meeting on June 29, 1981.

266. *Id.*

267. XIANFA (1975).

268. WU JIAQUING & DU CHENGMING (吴家清 & 杜承铭), XIANFA XUE (宪法学), 76 (2008).

269. *Compare* XIANFA ch. 3 (1954) (containing seventeen articles under the title "The Fundamental Rights and Duties of Citizens"), *with* XIANFA ch.3 (1975) (containing only four articles under the title "The Fundamental Rights and Duties of Citizens").

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).

271. DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 73-74 (2d ed., West 2009).

272. *Id.*

273. XIANFA ch. 2, § 3, art. 22 (1975).

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.²⁷⁵ In addition, the Constitution eliminated the state presidency.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.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.²⁷⁸ First, the elders swiftly arrested Mao's widow, Jiang Qing and her three followers, or "the Gang of Four."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.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.²⁸¹ Then, the elders made Deng Xiaoping the next paramount leader of China in 1978.²⁸² Deng is widely accredited for steering China in a new direction.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

275. *Id.* ch. 1, art. 12.

276. *See id.* ch. 2 (containing no provision for the State President position despite naming all other state organs).

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).

278. EZRA F. VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA 218–22, 244 (2011).

279. *Id.*

280. *Id.* at 240–41, 263.

281. HUTCHINGS, *supra* note 226, at 92–93.

282. *Id.*

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

284. *Deng Xiaoping Tan Weihe Zhi Hui Zhongguo You Wenge* (邓小平谈为何只会中国有文革) [*Deng Xiaoping on Why the Cultural Revolution Happened Only in China*], QQ.COM (2014-12-02), <http://xw.qq.com/cmsid/CUL2014120201094101>.

285. Wang Hanbin (王汉斌), *Deng Xiaoping Qinzi Zhidao Qicao 1982 Nian Xianfa* (邓小平亲自指导起草1982年宪法) [*Deng Xiaoping Personally Guided the Drafting of the 1982 Constitution*], PEOPLE.COM.CN (Sept. 28, 2004, 15:05), <http://people.com.cn/GB/14576/15017/2814469.html> [hereinafter *Deng Xiaoping Guided the 1982 Constitution*].

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 regrettable 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

292. XIANFA pmb. (1982).

293. *Deng Xiaoping Guided the 1982 Constitution*, *supra* note 285.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. XIANFA ch. 3, § 1, art. 57 (1982).

299. *Deng Xiaoping Guided the 1982 Constitution*, *supra* note 285.

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.³⁰³

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 country in dealing with foreign dignitaries.³⁰⁴ However, the elders did not reach a consensus on what type of power the Constitution should grant to the State President.³⁰⁵ Some argued that the State President should have the ability to veto to prevent the concentration of power.³⁰⁶ 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.³⁰⁷ When a member of the committee asked Deng to be the President, he refused.³⁰⁸ Then the member told Deng, "If you don't want to be the President, we should not create the position."³⁰⁹ Deng replied, "Somebody else can be the President. If the country needs it, we should not design the position just for a particular person."³¹⁰ As a result, the new constitution made the State President a figurehead who only performs ceremonial and symbolic duties.³¹¹

Fourth, another sensitive issue was the creation of the CMC in the Constitution.³¹² The 1954 Constitution granted the State President power to command the armed forces, but the power did not take effect.³¹³ The 1975 Constitution abolished the Presidency and made it clear that the military belonged to the Party.³¹⁴ As a result, Mao, the Chairman of the Party, became the commander of the military. The 1978 Constitution kept the structure intact.³¹⁵ 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.

304. Shan Xu (山旭), *Guojia Zhongyangjun Shivei Yuanhui Rube Sheli* (国家中央军事委员会如何设立) [How to Set Up the State Central Military Commission], SOHU.COM (April 2, 2013 10:19), <http://news.sohu.com/20130402/n371468757.shtml> [hereinafter *State Central Military Commission*].

305. *Id.*

306. *Id.*

307. *State Central Military Commission*, *supra* note 304.

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.³¹⁶ Others urged that the Constitution should explicitly state “the People Liberation Army is the armed force under the absolute leadership of the Party.”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.³¹⁸ According to the provisions that Deng drafted, the Chairman of the CMC should be elected by and responsible to the NPC.³¹⁹ However, there was no requirement for the Chairman to make an annual report to the NPC.³²⁰ The term limit should not apply to the Chairman of the CMC.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.³²² As a result, the Party’s CMC and the state’s CMC are merged into one entity.³²³ In Chinese, it is called “yitao banzi, liangkuai paizi,” meaning that the same office and members have two identities.³²⁴

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

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Deng Xiaoping Guided the 1982 Constitution*, *supra* note 285; *State Central Military Commission*, *supra* note 305.

325. *Deng Xiaoping Guided the 1982 Constitution*, *supra* note 285.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

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

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.

336. Shierjie Quanguo Renda Yici Huiyi Zai Jing Bimu (十二届全国人大一次会议在京闭幕) [The 12th NPC Concluded Its First Session in Beijing], NAT'L PEOPLE'S CONG. (2013-03-18), http://www.npc.gov.cn/npc/dbdhhy/12_1/2013-03/18/content_1789174.htm [hereinafter 12th NPC Report].

337. Qian Tan Dangan Renda Daibiao de Shuangchong Shenfen Wenti (浅谈党员人大代表的双重身份问题), [On the Double Identity of Party Members and Deputies], SCIMAO.COM (2015-07-05 20:36), <http://www.scimao.com/read/2474918>.

Min, the Secretary of the Party Liaoning Committee.³³⁸ 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

338. *Shierjie Quanguorenda Eri Huiyi Ge Daibiaotuan Tuanzhang, Fu Tuanzhang Mingdan (jianli)* (十二届全国人大二次会议各代表团团长、副团长名单 (简历)) [*The List of the Heads of the Delegations for the Second Session of the 12th National People’s Congress (With CV)*], CE.CN (2014-03-05 9:00), http://district.ce.cn/newarea/sddy/201403/05/t20140305_2418633.shtml.

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 Taidun Fayan Gao* (人大代表讨论发言) [*Deputy’s Speech*], CDDH.COM, <http://www.chddh.com/yanjiangao/62580.html> (last visited Nov. 14, 2016).

340. ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DAI BIAO DAHUI (中华人民共和国全国人民代表大会组织法) [THE ORGANIC LAW OF THE NATIONAL PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA] art. 5, translated in ORGANIC LAW OF THE NATIONAL PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA, LAWINFOCHINA, <http://www.lawinfochina.com/display.aspx?id=31&lib=law> [hereinafter THE NPC ORGANIC LAW].

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.”).

344. Hao Yalin & Tian Yu (郝亚琳 & 田雨), *Guojia Lindaorren Shi Zenyang Xuanju Chansheng de?* (国家领导人是怎样选举产生的?) [*How are National Leaders Elected?*], EASTDAY.COM (2014-9-2

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 forth meeting of the 12th Session of the NPC in 2013, which elected the top leaders of the most important organs of the state structure.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.³⁴⁶

Positions	Number of Candidates	Yes	No	Abstentions	Total Votes	Percent
President of the State	1	2,952	1	3	2,956	99%
Chairman of the CMC	1	2,955	1	3	2,959	99%
Premier of the State Council	1	2,940	3	6	2,949	99%
Chairman of the NPC	1	2,952	5	4	2,961	99%
Chairman of the CPPCC	1	2,188	4	1	2,193	99%
President of the Supreme People's Court	1	2,908	26	23	2,957	98% ³⁴⁷
Procurator-General of the Supreme People's Procuratorate	1	2,933	18	5	2,956	99% ³⁴⁸

Except for some members of the NPC Standing Committee, NPC

12:45:53), <http://news.eastday.com/c/20140902/u1a8317807.html> [hereinafter *How Are National Leaders Elected?*].

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.

347. *Gaopiao Dangxuan Zhongquangcao Jian Mingzhangliang Gao Shunying Renmin Quidai Tuijin Gongzheng Sifa* (高票当选周强曹建明掌两高 顺应人民期待 推进公正司法) [*Zhou Jianming Overwhelming Elected to Become President of the Supreme People's Court and the General of the Supreme People's Procuratorate and will Meet the People's Expectation by Promoting Justice and Upholding the Law*], GUHANTAI.COM (2013-03-16 14:45:31), <http://news.guhantai.com/2013/0316/217960.shtml>.

348. *Id.*

deputies do not work full-time for the NPC.³⁴⁹ 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.³⁵⁰ In addition, it supervises the enforcement of the Constitution and enacts basic laws such as civil law, criminal law, and administrative laws.³⁵¹
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.³⁵²

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.³⁵³ The NPC Standing Committee members cannot hold office in administrative, judicial, or procuratorial organs of the state.³⁵⁴ 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.*

353. See *Shierjie Quanguoren Dacheng Weihui Wuinyan Mingdan Gongbu Gong 161 Ren* (十二届全国人大常委会委员名单公布 共161人) [*Second Session of the NPC Standing Committee Announced the Names of Its 161 Members*], GUNACHA.CN (2013-03-15 00:014:16), http://www.guancha.cn/politics/2013_03_15_131919.shtml.

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.³⁵⁵ 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.³⁵⁶ The Chairman and Vice Chairmen cannot serve more than two consecutive five-year terms.³⁵⁷ There are no term limits for NPC Standing Committee members and NPC members.³⁵⁸ The Secretary-General handles the day-to-day business of the NPC Standing Committee.³⁵⁹

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

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.³⁶⁰

The Election Law as amended in 2010 lays out the procedure for China's Congressional elections.³⁶¹ Below the NPC are three levels of People's Congresses in a descending order: provincial, city, and county or township.³⁶² Only the county People's Congresses are directly elected by local people.³⁶³ The NPC and Congresses at the provincial and city levels are elected by the Congresses one level below.³⁶⁴

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.³⁶⁵ Citizens with mental illnesses confirmed by the election commission and others legally deprived of political rights are not eligible

360. XIANFA ch. 3, § 1, art. 67 (1982).

361. Zhonghua Renmin Gong Heguo Quanguo Renmin Daibiao Dahui He Difang Geji Renmin Diabiao Dahui Xuanju Fa (2015 Xiuzheng) (中华人民共和国全国人民代表大会和地方各级人民代表大会选举法 (2015 修正)) [Election Law of the People's Republic of China for the National People's Congress and Local People's Congresses at All Levels (as amended in 2015)], NAT'L PEOPLE'S CONG. CHINA (Aug. 29, 2015), http://www.npc.gov.cn/npc/xinwen/2015-08/31/content_1945578.htm [hereinafter The Election Law].

362. *Id.* art. 5.

363. *Id.* art. 8.

364. *Id.*

365. *Id.* art. 3, 26.

to vote.³⁶⁶

The Standing Committees of the NPC and local People's Congresses appoint election commissions and conduct Congressional elections at the corresponding levels.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.³⁶⁸

The most important function of the election commissions is to make the final decision on which candidates will be on the ballots.³⁶⁹ Political parties, People's organizations, can nominate candidates.³⁷⁰ Ten or more voters can also jointly nominate candidates.³⁷¹ The total number of candidates is between 33% to 100% more than number of positions available.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%.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.³⁷⁴ If the voters disagree with which candidates should be on the ballot, the committee may call a pre-election.³⁷⁵ However, the law is unclear how the pre-election is held.³⁷⁶

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

366. *Id.*

367. *Id.* art. 8–10.

368. *Id.*

369. In addition to the Communist Party of China, there are 8 other political parties.

370. The Election Law, *supra* note 361, art. 29.

371. *Id.*

372. *Id.* art. 30.

373. *Id.*

374. *Id.* art. 31.

375. *Id.*

376. *Id.*

377. *Id.* art. 33.

378. *Id.* art. 34.

because it may violate criminal law against libel and slander.³⁷⁹ There are numerous recent cases where internet users have been imprisoned for allegedly defaming government officials.³⁸⁰ Therefore, the only information the voters know about the candidates is from the resumes disseminated by the election commission.³⁸¹ The commissions are responsible for conducting background checks of the candidates and introducing them to voters.³⁸² The Election Law requires the election commission to post candidates' resumes at least two days before the election.³⁸³

Theoretically, state power comes from people at the local level.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.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.³⁸⁶

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.'" *Id.*

380. See Qiao Long, *Independent People's Congress Election Hopeful Jailed in China's Jiangxi*, RADIO FREE ASIA (Aug. 25, 2016), <http://www.rfa.org/english/news/china/independent-peoples-congress-election-hopeful-jailed-in-chinas-jiangxi-08252016105705.html> [hereinafter *Independent People's Congress Election Hopeful Jailed*] (reporting the detentions and police harassment of activists seeking to run as an independent candidates critical of the regime following a warning from the Chinese Communist Party stating that "there is 'no such thing' as an independent candidate").

381. The Election Law, *supra* note 361, art. 31.

382. *Id.*

383. *Id.*

384. *Id.* art. 37.

385. *Independent People's Congress Election Hopeful Jailed*, *supra* note 380.

386. *Renda Yu Dang: Dui Zhidu He Quanli Wenti de Chanshu* (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

visited Nov. 17, 2016).

387. *Independent People's Congress Election Hopeful Jailed*, *supra* note 380.

388. Lian Qingchuan (连清川), *Shenjian Yu Renda Zhidu* (申纪兰与人大制度) [*Shen Jilan and the NPC System*] N.Y. TIMES—CHINA ED. (March 7, 2013), <http://cn.nytimes.com/opinion/20130307/cc07lianqingchuan/>.

389. *Id.*

390. *Laomo Daibiao Shen Jilan: Wang Ye Ying Youren Fuan Buishi Shei Xian Nong Jiu Neng Nong* (劳模代表申纪兰: 网也应有管不是谁想弄就能弄) [*Model Worker Deputy Ji Shenlan: The Web Is Not Something Anyone Should Be Able to Get On; It Should Be Controlled*]. SOHU.COM (Mar. 6, 2012), <http://news.sohu.com/20120306/n336791943.shtml>.

391. *Id.*

392. *Hunan Election Fraud a Harsh Lesson: Legislature*, XINHUA (Aug. 21, 2014), http://www.china.org.cn/china/2014-08/21/content_33302031.htm.

393. *Id.*

investigation revealed that fifty-six candidates paid 110 million Yuan (\$18 million) to bribe 518 city deputies and sixty-eight election officials.³⁹⁴

The Hunan Party claimed that both the amount of money and number of People involved was unprecedented.³⁹⁵ 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.³⁹⁶ The NPC spokesman commented, "We must not take corruption and violations in election procedures lightly and such offenses must get serious punishment."³⁹⁷

The Hunan Party declared the city Congressional election void and dismissed 512 Congressional members.³⁹⁸ 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.³⁹⁹ 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.⁴⁰⁰ In addition, sixty-nine Congressional members and government officials were sentenced to various prison terms.⁴⁰¹

Some scholars unearthed further details of this case which were not in the Party's official report.⁴⁰² 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.⁴⁰³ 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.*

402. *Cong Hengyang Hui Xuan An Kanzhong Guo Xuanju Cuzai de Wenti He Gaijie Fangxiang* (从衡阳贿选案看中国选举存在的问题和改革方向) [From the Hengyang Election Scandal: Some Thoughts on the Problems of the Chinese Election System and How to Reform It], 21CCOM.NET (April 11, 2014), http://www.21ccom.net/articles/zgyj/gmht/article_20140411104198.html [hereinafter *Hengyang Election Scandal Thoughts*].

403. *Id.*

NPC.⁴⁰⁴ Similarly, local People's deputies at or above the county level enjoy the same legal immunity.⁴⁰⁵ Such immunity has become increasingly appealing to private entrepreneurs whose freedom and property are frequently subject to harassment by the government.⁴⁰⁶

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).⁴⁰⁷ By doing so, Mr. Bo hoped to win grassroots support for his ambition for higher office in the central government.⁴⁰⁸ During the campaign, the Chongqi government prosecuted a great number of private entrepreneurs who were allegedly involved in gang activities.⁴⁰⁹ After speedy trials, in which legal counsel was denied or suppressed, the entrepreneurs were sentenced to prison and their property seized.⁴¹⁰ Some local government officials were also accused of providing protection for the "criminal gangs" and imprisoned.⁴¹¹ 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.⁴¹² 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.*

405. ZHONGHUA RENMIN GONG HEGUO DIFANG GEJI RENMIN DAIBIAO DAHUI HE DIFANG GEJI RENMIN ZHENGFU ZUZHIFA (中华人民共和国地方各级人民代表大会和地方各级人民政府组织法) [THE GENERAL ASSEMBLY PEOPLE'S REPUBLIC OF CHINA LOCAL PEOPLE'S CONGRESSES AND LOCAL PEOPLE'S GOVERNMENTS ORGANIZATIONAL LAW] art. 35, (Oct 27, 2004), <http://www.people.com.cn/GB/14576/28320/39838/39842/2947955.html> (last visited Nov. 18, 2016) (as amended in 2004).

406. *Hengyang Election Scandal Thoughts*, *supra* note 402.

407. Zheng Wang, *It's All About Mao*, N.Y. TIMES (Aug. 22, 2013), <http://www.nytimes.com/2013/08/23/opinion/its-all-about-mao.html>.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. See Michael Forsythe, *Chinese Businessman Linked to Corruption Scandals Dies in Prison, Reports Say*, NYTIMES.COM (Dec. 6, 2015), http://www.nytimes.com/2015/12/07/world/asia/china-xu-ming-dies-prison.html?rref=collection%2Ftimestopic%2FBo%20Xilai&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=5&pgtype=collection&r=0 (attributing the decedent's pre-conviction business success as well as many other similar businessmen to making themselves "indispensable to party officials and their families").

initiate the impeachment process.⁴¹³

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.⁴¹⁴ 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.⁴¹⁵ 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.⁴¹⁶ Government official candidates, such as departmental heads, also paid bribes for the same purpose.⁴¹⁷ 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.⁴¹⁸ 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.⁴¹⁹

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.⁴²⁰ 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

413. *Id.*

414. *Id.*

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>.

416. *Bo Xilai Found Guilty of Corruption by Chinese Court*, BBC.COM (Sept. 22, 2013), <http://www.bbc.com/news/world-asia-china-24170726>.

417. *Id.* (discussing Xilai's use of public funds to increase his political power).

418. CHOW, *supra* note 271, at 91–95.

419. *Hengyang Election Scandal Thoughts*, *supra* note 402.

420. XIANFA ch. II, § 2, art. 79 (1982).

terms.⁴²¹

The State President of China is a symbolic and ceremonial position according to the Constitution.⁴²² 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.⁴²³ 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.⁴²⁴

F. *The State Council*

The State Council is also called the Central People's Government of China.⁴²⁵ The Constitution defines it as "the executive body of the highest organ of state power" and "the highest organ of state administration."⁴²⁶ The State Council is composed of the Premier, several Vice Premiers, State Councilors, Ministers, Commissioners, the Auditor-General, and Secretary-General.⁴²⁷ The Premier, Vice Premier, and State Councilors cannot serve more than two consecutive 5-year terms.⁴²⁸ There are no term limits for Ministers, Commissioners and other department heads in the State Council.⁴²⁹

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.⁴³⁰ Sometimes, the Premier holds plenary meetings.⁴³¹

The State Council directs the works of ministries and of all governments at local levels.⁴³² 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.⁴³³ It decides on the size of administrative organs, and "appoints or removes administrative officials."⁴³⁴ It also directs civil affairs, public security and judicial administration.⁴³⁵ 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.⁴³⁶

The State Council enacts administrative regulations and issues decisions according to the law.⁴³⁷ It also has the power to make legislative proposals to the NPC.⁴³⁸ In fact, over 70% of the laws passed by the NPC and NPC Standing Committee are proposed by the State Council.⁴³⁹

The State Council can alter or annul inappropriate administrative orders or regulations issued by ministries or local government.⁴⁴⁰ It also has the power to approve the geographic boundaries of provinces, and the establishment and geographic division of cities and counties.⁴⁴¹

Underneath the State Council are various ministries, commissions, bureaus, the People's Bank of China, institutions, ad hoc commissions, and corporations.⁴⁴² There are twenty-five ministries and commissions in charge of various sectors of China's economy and important state affairs.⁴⁴³ 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.⁴⁴⁴ 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."⁴⁴⁵ 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.

440. XIANFA ch. II, § 3, art. 89 (1982).

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>.

444. *About Us: What We Do*, NAT'L HEALTH FAM. PLAN. COMM'N PRC (2014-05-07), http://en.nhfpc.gov.cn/2014-05/07/c_46917.htm.

445. *Main Responsibilities of the Ministry of Foreign Affairs of the People's Republic of China*, MINISTRY FOREIGN AFF. PRC (2014), http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zyzz_663306/.

plans, monitoring the national economic development including consumer prices, and approving large-scale construction projects.⁴⁴⁶ In recent years, the NDRC has evolved from being a research institution into a powerful law enforcement agency of the Anti-Monopoly Law.⁴⁴⁷ In August 2014, the NDRC imposed a 1.2 billion RMB fine on twelve Japanese auto parts makers.⁴⁴⁸ Qualcomm, General Motors, Volkswagen and other multinational giants were under NDRC's investigation for their alleged competitive activities in the Chinese market.⁴⁴⁹ Microsoft was under the Administration of Industry and Commerce, also under the State Council, for alleged anti-competitive activities.⁴⁵⁰ The State Council also has a number of bureaus charged with specific tasks.⁴⁵¹ 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.⁴⁵² The China Food and Drug Administration approves new drugs, supervises the production of pharmaceutical products, and ensures food safety.⁴⁵³

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

446. *Main Functions of the NDRC*, NAT'L DEV. REFORM COMM'N, <http://en.ndrc.gov.cn/mfndrc/> (last visited Nov. 18, 2016).

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/aml_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").

448. *Riben Shier Jia Quiyue Shishi Qiche Ling Bujian He Zhou Cheng Kiage Longduan Bei Guojia Fazhan Gaige Wei Fakuan 12.35 Yi Yuan* (日本十二家企业实施汽车零部件和轴承价格垄断被国家发展改革委罚款12.35亿元) [*Twelve Japanese Auto Parts and Bearings Manufacturers Fined 1.235 Billion Yuan for Price Fixing by the National Development and Reform Commission*], NAT'L DEV. REFORM COMM'N (2014-08-20), http://www.ndrc.gov.cn/fzgggz/jgidyfld/jjszhd/201408/t20140820_622757.html.

449. Michael Lelyveld, *China Hits Foreign Firms with Monopoly Law*, RADIO FREE ASIA (2014-08-18), http://www.rfa.org/english/commentaries/energy_watch/monopoly-08182014110913.html.

450. *Id.*

451. *State Council Organization Chart*, STATE COUNCIL PRC (Aug. 28, 2017 1:17 PM), http://english.gov.cn/state_council/2014/09/03/content_281474985533579.htm.

452. *Overview*, ST. INTELL. PROP. OFF. PRC (2009-01-09), http://english.sipo.gov.cn/about/basicfacts/200904/t20090415_451001.html.

453. *About CFDA: Main Responsibilities*, CHINA FOOD DRUG ADMIN., <http://eng.sfda.gov.cn/WS03/CL0756/> (last visited Nov. 18, 2016).

Party, focus on ‘correct propaganda’ as their guiding principle, and have a firm grasp of ‘correct guidance of public opinion.’⁴⁵⁴ To fulfill the task, the SAPPRT draws policies for the development of propaganda in the communication industry.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.⁴⁵⁶ In addition, the SAPPRT has the power to approve the import of foreign cinematographic products.⁴⁵⁷ On August 19, 2014, the SAPPRT 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.⁴⁵⁸ The SAPPRT subsequently lifted the ban.⁴⁵⁹

The State Council Xinhua also directs the News Agency, the state’s mouthpiece.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.⁴⁶¹

G. *The Central Military Commission (CMC)*

The Central Military Commission (the CMC) directs the entire armed forces of China.⁴⁶² The CMC is composed of a chairman, several vice chairmen, and members.⁴⁶³ The Chairman of the CMC is responsible to the NPC and its Standing Committee.⁴⁶⁴ Unlike the top leaders of other state organs, the Chairman of the CMC is not subject to term

454. US CONG.-EXEC. COMM’N, CHINA, 2006 ANNUAL REPORT ch. V, <https://www.cecc.gov/publications/annual-reports/2006-annual-report> (last visited Nov. 18, 2016).

455. *Id.*

456. *Id.*

457. *Id.* ch. VII.

458. Mei Ju “*Shenghuo Da Baozha*” Zai Huaxiajia (美剧 “生活大爆炸” 在华下架) [*US Drama “Big Bang Theory” Banned in China*], VOA.COM (2014. 05. 09), <http://www.voachinese.com/content/chuck-lorre-lashes-back-chinese-ban-20140508/1910536.html>.

459. Michelle FlorCruz, *China “Big Bang Theory” Ban Lifted: First American TV Series to Stream Under New Media Restrictions*, INT’L BUS. TIMES (07/10/15 2:19 PM), <http://www.ibtimes.com/china-big-bang-theory-ban-lifted-first-american-tv-series-stream-under-new-media-2003720>.

460. *State Council Organization Chart*, STATE COUNCIL PRC (Aug. 28, 2017 1:17 PM), http://english.gov.cn/state_council/2014/09/03/content_281474985533579.htm.

461. *Id.*

462. XIANFA ch. 3, § 4, art. 93 (1982).

463. *Id.*

464. *Id.* ch. 3, § 4, art. 94.

restrictions.⁴⁶⁵ Under the CMC are four offices: General Staff, General Political Department, General Logistics Department, and General Armament Department.⁴⁶⁶

Even though the Constitution only devotes two articles on the CMC,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."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.⁴⁶⁹ Mao remained as the Chairman of the CMC until his death in 1976.⁴⁷⁰ 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.⁴⁷¹ Instead, he was the Chairman of the CMC from 1981 to 1989.⁴⁷² Deng effectively used his leadership in the army to initiate the economic reforms, successfully transforming China's planned economy to a market economy.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 2005.⁴⁷⁴

465. *Id.*

466. *Organizations of the Central Military Commission (CMC)*, CHINA.ORG.CN (May 20, 2003), http://www.china.org.cn/english/features/state_structure/64577.htm.

467. XIANFA ch. 3, § 4, art. 93, 94 (1982).

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).

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).

470. VOGEL, *supra* note 278, at 229–30.

471. *Id.* at 218–48.

472. See Zhongguo Gongchandang Dishiyijie Zhongyang Wei Yunhui Diluci Quanti Huiyi Gongbao (中国共产党第十一届中央委员会第六次全体会议公报) [The 11th CPC Congress 6th Plenary Session Announcement] (June 29, 1981), PEOPLE.COM.CN, <http://cpc.people.com.cn/GB/64162/64168/64563/65374/4441926.html> (last visited Nov. 19, 2016) (announcing the election of Deng Xiaoping as the Chairman of the Central Military Commission).

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").

474. *NPC Accepts Jiang's Resignation from Post*, CHINADAILY.COM (Mar. 9, 2005 05:59), http://www.chinadaily.com.cn/english/doc/2005-03/09/content_423123.htm.

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.⁴⁷⁵ In 2004, the People's Congress amended the Constitution by adding: "the state respects and protects human rights."⁴⁷⁶ The Constitution grants citizens a wide range of rights, but imposes duties at the same time.⁴⁷⁷

- (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.⁴⁷⁸
- (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.⁴⁷⁹
- (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.⁴⁸⁰
- (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.⁴⁸¹
- (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

475. XIANFA ch. 2, art. 33 (1982).

476. XIANFA ch. 2, art. 33 (1982), *amended by* XIANFA amend., art. 24 (2004).

477. XIANFA ch. 2, art. 33 (1982).

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.

484. XIANFA ch. 2, art. 33 (1982), amended by XIANFA amend., art. 24 (2004).

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.

487. HUTCHINGS, *supra* note 226, at 114–15.

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.

488. Guanyu 2015 Nian Guojia Sheke Jijin Niandu Xiangmu He Qingnian Xiangmu Lixiang Mingdan de Gong Shi (关于2015年国家社科基金年度项目和青年项目立项名单的公示) [Public Notice of Research Projects Supported by National Social Science Fund Grants], NAT'L PLAN. OFF. PHIL. SOC. SCI. (June 10, 2015 9:26), <http://theory.people.com.cn/n/2015/0610/c40531-27131748.html>.

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.