

## CONSTITUTIONAL TRANSPLANT IN THE PEOPLE'S REPUBLIC OF CHINA: THE INFLUENCE OF THE SOVIET MODEL AND CHALLENGES IN THE GLOBALIZATION ERA

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*In this essay, I mainly focus on the constitutional transplantation in the People's Republic of China. Firstly, I briefly present the Chinese constitution-making process from the Qing dynasty to the Republic of China to show that both regimes had transplanted more or less liberal constitutional principles, rules and institutions into their domestic constitutional document. Then, because China and the Former Soviet Union shared the Marxism-Leninism, China's 1954 Constitution borrowed almost all the constitutional articles to various extents from the 1936 Soviet constitutional code. Though few articles of the 1977 Soviet Constitution have been imported into China's present 1982 Constitution, China's Constitution is still influenced by the Soviet model of constitution in many aspects related to the political and legal reform in the post-Mao era. Globalization brings many challenges to present-day China's Soviet-featured constitutional system. With China's accession to the WTO, a qualified judicial review mechanism is required to be established by the other Member States. However, China seems not to satisfy this obligation under the framework of the present legal system. In addition, a constitutional review mechanism is still absent in China. Besides, the modern Chinese legal system keeps silent on the domestic implementation of the UN international human rights treaties in view of the fact that Chinese international law theory was molded by Soviet's which took highly concerned on protection of its state sovereignty. Chinese authorities, on the other hand, take a vague attitude to universal human rights standards. They sometimes prefer to observe them, while in other cases, they are not willing to follow them. Besides that, the domestic effects of international law also depend on the outcomes of the struggle and compromise between the reformist and Chinese Marxist conservative.*

*Keywords: constitutional transplant; the evolution of China's constitutional system; the envisioned China's constitutional court; judicial review; China's human rights legislation.*

**Recommended citation:** Jizeng Fan, *Constitutional Transplant in the People's Republic of China: The Influence of the Soviet Model and Challenges in the Globalization Era*, 2(1) BRICS LJ (2015).

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### 1. A Brief Introduction of Chinese Constitutional History Prior to the People's Republic of China

The Chinese constitutionalist process began in the Qing dynasty. In 1898, Qing's Emperor Guangxu adopted the proposition presented by two influential intellectuals – Kang Youwei and Liang Qichao – who had proposed that the Qing regime should immediately start the political reform replacing the absolutist monarchic state with a constitutional state ruled by monarchy. However, the reform lasted just over 100 days after being cracked down on by the powerful conservative bureaucratic class who later detained the Emperor Guangxu in the Forbidden City until his death. Few years later, a more radical voice echoed from the Chinese radical intellectuals advocating the overthrow of the Qing's monarchical regime and calling for the founding a new Americanized republicanism.<sup>1</sup> Under the long pressures imposed by revolutionaries, as well as by those foreign governments who required

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<sup>1</sup> See T. Cheng, *On the Refined Democratic Regime for Chinese Political Reform*, in *The Selected Works of Xinhai Revolution in the Primary Ten Years 120* (S. Zhang & R. Wang, eds.) (2<sup>nd</sup> ed., 1963). Cheng Tianhua argued that 'the French writer Montesquieu has demonstrated to us the theory of separation of the power and attributed good governance to republicanism. It was widely seen as an ideal model by the state leaders and comparative politics scholars all of whom recognized the advantage of republicanism.' See also R. Zhou, *Revolutionary Army*, in *The Compilation of Chinese Modern History 1840–1949*, at 649 (Y. Dai, ed.) (1997). Zhou Rong claimed that for the establishment of a new state, China, should follow the United States constitutional model in all aspects.

that the Qing regime should reform its old-fashioned cruel feudal legal system into a modern civilized one, the conservative leader – the Empress Dowager – contritely acknowledged the inability of the old politics to meet the demands of the new condition. In the decree issued in the name of Emperor Guangxu, the Dowager claimed that ‘we should correct our shortcomings by adopting the best method and systems obtained in foreign countries, basing our future conduct upon a wise recognition of past errors.’<sup>2</sup> China drafted its first constitutional document in 1908 – ‘*The Outline of Imperial-Made Constitution*’<sup>3</sup> – where the Japanese Meiji constitutional model was adopted by Chinese authorities<sup>4</sup> inspired by the fact that Meiji Japan was the first oriental state that had successfully adopted the western model of government structure. Though the Outline of the Constitution was widely regarded as a quasi-constitutional document that mainly reflected the monarchy’s willingness to maintain absolutist monarchic rulings as well as to limit the constitutional rights of subjects, some liberal constitutional principles can still be perceived there.<sup>5</sup> For instance, the constitutional provision on separation of powers between the legislature and the judiciary was one of its impressive achievements: the national parliament has the exclusive power of law-making, while the judiciary had the capacity to determine cases according to laws approved by the members of parliament. Moreover, the Outline incorporated a series of basic constitutional rights: the liberty of freedom of speech, right to property, the right to a fair trial and the rights to liberty, etc.<sup>6</sup>

The effort to build a constitutionalist state ruled by monarchy, however, was in vain because the conservative Manchus were not willing to reform the Qing’s regime into a more liberal state to satisfy the needs of the Revolutionary Party and showed pale resistance to the political interference imposed by western imperialist states. The radical advocacy for terminating feudal monarchy ruling by force proposed by the Revolutionary Party gradually became the dominant consensus among Chinese liberals.<sup>7</sup> The leader of the revolutionaries, Sun Yatsen, called for China to become a state modeled on the United States after the end of the Qing dynasty.<sup>8</sup> The Qing’s regime came to an end in 1911 when Qing’s Former Military General Yuan Shikai peacefully forced the last Emperor of the Qing Dynasty, Pu Yi, to abdicate.<sup>9</sup> On January 1,

<sup>2</sup> Payson J. Treat, *Constitution Making in China*, 2 J. Race Dev. 147, 148 (1911).

<sup>3</sup> Treat, *supra* n. 2, at 151. ‘The Outline imperial-made constitution’ was not equal to a constitution with binding power, but it was merely progressive guide outline for Qing’s governmental operation.

<sup>4</sup> Z. Xie, *The Legislative History of Republic of China* 34 (2000); Y. Yang, *The Summary of Chinese Political System History* 323–25 (2001).

<sup>5</sup> Chongde Xu, *The Constitutional History of People’s Republic of China* 7 (Fujian Remin Press 2005).

<sup>6</sup> Xu, *supra* n. 5, at 7.

<sup>7</sup> Albert P. Blaustein, *The Influence of United States Constitution Abroad*, 12 Okla. City U.L. Rev. 435, 440 (1987).

<sup>8</sup> See Y. Sun, *Talking in Paris (from November 21 to 23, 1911)*, in *The Complete Works of Sun Yatsen* 563 (Y. Sun, ed.) (1981).

<sup>9</sup> Y. Ma, *From Constitutional Monarchy to Democracy Republican System*, 3 Anhui History Study 22, 27 (2011).

1912, the interim Government of the Republic of China was founded in Nanjing. Though heavily influenced by the US constitutional model,<sup>10</sup> the newborn regime did not completely adopt the Americanized presidential model in which the president of the Republic is granted abundant powers. In contrast, *The Interim Constitution of the Republic of China*, promulgated in 1912, adopted the cabinet system of the French model<sup>11</sup> with the prospective purpose of constraining the power of the future President Yuan Shikai who was a warlord but otherwise a well-recognized figure among western imperialists in possession of the capacity to maintain the stability of China in the post-Qing era. *The Interim Constitution* was partly inspired by the theory of Jean-Jacques Rousseau – sovereignty of the populace – in Art. 2 where it set forth that ‘the state sovereignty belongs to all citizens.’ From Art. 3 to Art. 6, it provided for the competences of the Senate, President of the Republic, State Council and Court. The senators were elected directly by the citizens. The President of the Republic would be elected by the approval of  $\frac{2}{3}$  of the senators, provided that a minimum of  $\frac{3}{4}$  of the members voted. The judges in the courts had the obligation of adjudicating litigations according to the positive law. Moreover, it assumed the constitutional principle of equality in Art. 5 that ‘all the people in the Republic of China are equal, without any distinction of race, social class or religion.’ From Art. 6 to Art. 15, the Interim Constitution followed the liberal constitutionalist model enshrining a series of liberal rights: freedom of speech, writing, association and assembly, the rights of privacy in correspondence, the freedom of migration, the freedom of religion, the rights of property and freedom of setting up private enterprise, *habeas corpus*, the rights to petition to the parliament or administrative officials and the rights to remedies from the court or other supervisory bodies. These new constitutional achievements had reflected the unrealistic desire of the Chinese republicans to build a new nation via the making and fulfilling of constitutionalism. However, the fate of the Interim Constitution inevitably came to an end when Yuan Shikai dissolved the Congress in 1914.

In the next 37 years, China fell into endless warfare. Two World Wars and an endless civil war, combined with continuous social chaos, caused the state regime frequent changes. Correspondingly, each regime similarly sought to claim legitimacy through

<sup>10</sup> Z. Nie, *One Constitution and One Era – Introduction of US Constitution in Late Qing Dynasty and Early Republic of China and Its Influence on Chinese Constitution-Making in Early Republic of China*, 5 *Tribune of Political Science and Law* 109, 109–25 (2005). Professor Nie claims that Interim Constitution of Republic of China was influenced by the 1787 US Constitution in five aspects: 1) similar with US constitutional principles, Interim Constitution stated that ‘the state sovereignty belongs to all the people;’ 2) actually, the constitutional rights embodied in the Ch. II were a series of concrete reflections of the abstract ideas of ‘natural rights’ and ‘social contract;’ 3) Interim Constitution borrowed the separation of power and constitutional rules on how construct a centralized government in federal level; 4) protection of private property; 5) followed the US model in the aspect of amending constitution in a rigid way for consolidating the stability of the Interim Constitution.

<sup>11</sup> Hungdah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan (with documents)*, 1993(2) *Occasional Papers / Reprints Series in Contemporary Asian Studies* 5, available at <<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1114&context=mscas>> (accessed Aug. 9, 2015).

the adoption and promulgation of a new constitution. From 1912 to 1946, there were, in total, five constitutions drafted by each central government. After 1949, the Chinese communists, as the winners of the civil war, joined the other left-wing democratic political parties forming the CCP-dominated National Political Consultative Conference [hereinafter NPCC]. This state body acted as the supreme political and legislative organ at the time. In order to comfort those non-communist elites who were the crucial figures for saving China from the economic crisis, the NPCC promulgated the constitutional statute '*The Common Program of Chinese Political Consultative Conference*' providing a large amount of basic liberal constitutional rights and a specific provision on the protection of property rights.<sup>12</sup> However, the Common Program was only an ideological political declaration without enforceable normative legal status. Article 1 provided the doctrines of the dictatorship of the proletariat and democratic centralism to show the newborn regime's communist identity. In order to stress its distinguishing features from the previous bourgeois regime, Art. 7 provided that the PRC would suppress 'all counter-revolutionary activities, severely punish KMT counter-revolutionary war criminals and other leading incorrigible counter revolutionary elements who collaborated with imperialism, committed treason against the fatherland and opposed the cause of the people's democracy.' Only 'members of the people' were afforded rights under law. 'People,' in a socialist context, was used to define those individuals who were in favor of the CCP's leadership, whereas feudal landlords, bureaucratic capitalists and reactionary elements were categorized as the 'people's enemies' who belonged to the category of 'citizens' only being imposed obligations under law. The late premier Zhou Enlai confirmed the above statement in '*The Report on the Process of Drafting of Common Program and Its Characteristic*:'

'People' and 'citizens' have distinct meanings. The former is a group comprising working class people, peasantry, petty bourgeois and national bourgeois, also including those patriots who have abandoned their the reactionary identities. The PRC government will expropriate the properties

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<sup>12</sup> See Z. Mao, *On Coalition Government*, in 2 Selected Works of Mao Zedong 1056–57 (Z. Mao, ed.) (2<sup>nd</sup> ed., 1991). Mao demonstrated his theory of New Democracy in his essay 'On Coalition Government'; he wrote: 'Some people suspected that the Chinese Communists are opposed to the development of individual initiatives, the growth of private capitals and the protection of private property, but they are mistaken. It is foreign oppression and feudal oppression that cruelly fetter the development of the individual initiative of the Chinese people . . . It is the very task of the New Democracy we advocate to remove these fetters and stop this destruction, to guarantee that the people can freely develop their individuality within the framework of society and freely develop such private capitalist economy as will benefit and not 'dominate the livelihood of the people,' and to protect all appropriate forms of private property.' He continued to refer to the necessity of the existence of the private economy in the next paragraph: 'In accordance with Dr. Sun's principles and the experience of the Chinese revolution, China's national economy at the present stage should be composed of the state sector, the private sector and the co-operative sector. But the state here must certainly not be one 'privately owned by the few,' but a new-democratic state 'shared by all the common people' under the leadership of the proletariat.' The English version is available at <[https://www.marxists.org/reference/archive/mao/selected-works/volume-3/mswv3\\_25.htm](https://www.marxists.org/reference/archive/mao/selected-works/volume-3/mswv3_25.htm)> (accessed Aug. 9, 2015).

of bureaucratic capitalists and the privately-owned land of feudal landlords. The government will classify them into two categories: 1) those reactionary elements who refuse to accept new policies will be oppressed severely; 2) those who actively cooperate with our work will be forced to labor in order to reform themselves and become socialist members. That is the people's democratic dictatorship.<sup>13</sup>

While the Common Program announced that the PRC was embedded in the principle of people's democracy, only several liberal rights were embodied in this document: the right to vote (Art. 4), freedom of speech, writing, assembly, and association (Art. 5), freedom of correspondence (Art. 5), freedom of domicile and freedom to change domicile (Art. 5), the freedom of religious belief (Art. 5), the right to demonstration (Art. 5), and equal rights of men and women in economic and social spheres (Art. 6). Unlike the constitutional rights provided by the European socialist constitutions, few social rights were embodied in the Common Program, and even the boundary of these fundamental liberal rights was hardly drawn up by lawyers because the language of the provisions was not normative, but a series of political declarations.

Before the adoption of the Constitution in 1954, the Common Program had performed a provisional constitutional role in the PRC political system<sup>14</sup> in view of the fact that it had incorporated the fundamental rules on organs of state power (Ch. II), the military system (Ch. III), economic policy (Ch. IV), cultural and educational policy (Ch. V), policy towards nationalities (Ch. VI) and foreign policy (Ch. VII). The later process of drawing up China's Communist Constitution had been pre-designed in Art. 12 which determined that 'All-China People's Congress shall be the supreme organ for exercising state power.' Though it was not normative, the Common Program actually created a harmonized relationship among non-Socialist elites, democratic political parties and intellectuals who were treated well under the earlier ruling of the Chinese Communist Party [hereinafter CCP]. The document consolidated the legitimacy of the CCP, as well as being favored by intellectuals. Regarding its exceptional effects, Mao had even intended to terminate the constitution-making plan.<sup>15</sup> However, Stalin's interference finally forced Mao to give up his ideas. In 1952, the CCP's Central Committees proposed that the NPCC require the Chinese Administrative Committee to start the constitution-making process.<sup>16</sup>

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<sup>13</sup> Xu, *supra* n. 5, at 57–58.

<sup>14</sup> Mauro Mazza, *La Cina*, in *Diritto costituzionale comparato* 616, 617 (Paolo Carrozza et al., eds.) (Laterza 2009). Mauro Mazza stated: 'Il Programma commune . . . è considerabile alla stregua di una Costituzione provvisoria soltanto di fatto, nel senso che ebbe la funzione di Carta costituzionale pur non avendone il corrispondente valore giuridico-formale.'

<sup>15</sup> X. Xia & F. Ding, *Reference and Transplantation: Constitutional Culture's Influence of the Soviet Union on New China*, 2012(6) *Journal of Hunan University of Science & Technology* (Social Science Edition) 48.

<sup>16</sup> Xu, *supra* n. 5, at 107.

## 2. The Genealogical Relationship between the Soviet Constitution and China's Constitution

The term 'genealogical' is first used by Professor Choudhry for describing the phenomenon of 'the birth of one constitutional order from the other.'<sup>17</sup> The Soviet governance model rapidly migrated to emerging socialist states in Asia, Africa, East Europe and Latin America since the Soviet model of socialism had displayed its influential ideological power, as well as great achievements in economic recovery and establishments of social infrastructure. The Soviet model had some unique characteristics in the fields of constitutional principles, state bodies' structure and constitutional rights theory. Under the interference of Soviet Chauvinism in the Stalin Era, the Soviet model became prestigious for the constitutional drafters in almost all the emerging socialist states after World War II.

The Soviet model of constitution had both substantive and formal impact on China's constitution-making. Sharing ideologies was the main reason for China borrowing Soviet constitutional rules and institutions in view of the fact that China's ruling elites staunchly believed that the Soviet model was the only route to reach the ultimate communist heaven. In this sense, ideology acted as a mainstream force that was used to 'persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.'<sup>18</sup> Thus, constitution-making guided by the Soviet model in 1950<sup>5</sup> China could not simply be regarded as the transplantation of needs, nor merely as having the sole purpose of following the prestigious Soviet model on paper, but also as the pursuit of a common socialist goal of building a human communist paradise.<sup>19</sup>

### 2.1. Close Relations between the 1954 PRC Constitution and the 1936 Soviet Constitution

The Soviet constitutional model was not compatible with the liberal principle of the separation of powers, according to liberal doctrine in which the government is not merely divided into several divisions, but also the competence of each division has to be constrained by the other governmental branches. No supreme state organ thereby could be empowered into omnipotence. In contrast, the Soviet constitutional model was embedded in the dictatorship of the proletariat essentially repelling all the liberal constitutional theories based on the doctrine of the separation of powers. In the 1936 Soviet Constitution, the National Supreme Soviet was the

<sup>17</sup> Sujit Choudhry, *Globalization in Search of Justification: Towards a Theory of a Comparative Constitutional Interpretation*, 74 Ind. L.J. 819, 838 (1999), available at <[http://papers.ssrn.com/abstract\\_id=1624070](http://papers.ssrn.com/abstract_id=1624070)> (accessed Aug. 9, 2015).

<sup>18</sup> Robert W. Gordon, *Critical Legal History*, 36 Stan. L. Rev. 57, 108 (1984), available at <[http://digital-commons.law.yale.edu/cgi/viewcontent.cgi?article=2361&context=ffs\\_papers](http://digital-commons.law.yale.edu/cgi/viewcontent.cgi?article=2361&context=ffs_papers)> (accessed Aug. 9, 2015).

<sup>19</sup> Dingjian Cai, *History and Revolution – the Process of Legal Order Construction in New China 256–59* (China University of Political Science & Law Press 1999).

supreme state organ having been empowered into an omnipotent body. The chief members of other state bodies – the premiers of the Soviet Union, the Chief Justice of the Supreme Court and the General Attorney of the national Procuracy – were elected, appointed, dismissed or impeached directly by the representative of the supreme state organ. All the state bodies accountable to the Supreme Soviet had their constitutional obligations supervised by the Supreme Soviet through the submission of an annual report presented during the plenary session every year. With the purpose of guaranteeing a proletarian regime that was absolutely controlled by the will of the Supreme Soviet, it acted as the authority holding exclusive legislative power within the Soviet constitutional order. Since Chinese ruling elites favored the Soviet constitutional model and China's legal education was completely oriented towards Soviet ideology, it was not surprising to find a number of provisions in China's constitutional code similar to those found in Soviet constitutional texts.<sup>20</sup> Mao Zedong, chairman of the constitution-drafting committee, had even reminded constitution-making committee members to carry out an in-depth study of the 1936 Soviet Constitution,<sup>21</sup> Soviet legal theories were also accepted as orthodox in Chinese legal education. The college textbooks on constitutional law that were widely used by students in law departments were directly translated from Russian, and some selected Russian professors were even sent to China to teach constitutional law courses at Renmin University.<sup>22</sup> Legal journals and books published in China were filled with translated works on the Soviet legal system.<sup>23</sup>

China's 1954 Constitution practically designed its state apparatus structures, as well as state bodies' competence, modelled on the Soviet Constitution.<sup>24</sup> Articles 22 and 23 provided that the National People's Congress [hereinafter NPC] had exclusive competence to handle legislation, whereas local governments were unable to share the same competence with the NPC. Article 27 provided that the Prime Premier of the State Council, the Chief Justice of the Supreme Court and Chief Prosecutor were elected or appointed by NPS, as well as that these state bodies were subject to NPC supervision. Socialist constitutional principles written in Soviet constitutional texts were copied from the 1936 Soviet Constitution. Influenced by the doctrine of dictatorship of the proletariat written in Art. 1 of the 1936 Constitution, Art. 1

<sup>20</sup> There were 44 constitutional articles partially or wholly borrowed from the 1936 USSR Constitution.

<sup>21</sup> Q. He, *Legal Transplantation* 191 (2008).

<sup>22</sup> C. Liu, *The Effect of Soviet Union's Constitutional Theories on China's Constitutional Theories*, 2012(4) *North Law Journal* 37.

<sup>23</sup> H. Yu, *Thought about the Transplantation of Jurisprudence Education from Soviet in PRC – the Relationship between the Jurisprudence Education Transplantation and the Legal System Modernization*, 2004(3) *Journal of Yili Education College* 17; Liu, *supra* n. 22, at 34. From June 1949 to November 1956, there were 51 Russian works translated into Chinese, with 80% of works being on constitutional science.

<sup>24</sup> X. Li, *The Analysis of The Constitution Transplantation of 1954 China's Constitution from 1936 Soviet Constitution*, in *The Seminar Works of 'Soviet Legal Model Impact on China'* (2001).



declared that China's socialist regime was founded by the working class in alliance with peasants. Meanwhile, Art. 2 stated that all the state bodies would adhere to a 'democratic centralized principle' which was commonly recognized as the basic constitutional principle among socialist states.

In order to lead the country into a socialist state, the ownership of productive materials was the focal point in China's constitution-making process. Under the influence of ownership categories established by the Soviet Constitution, Art. 5 clarified that state-owned and cooperative society-owned productive materials were two main constitutionally recognized categories. Moreover, Art. 6(2), copied from the Art. 5 of the Soviet Constitution, claimed that mineral and water resources, forests and desert lands were state-owned. Both constitutions similarly claimed that the state promoted the planned economy, protected property rights to labor incomes, savings and personal objects in daily usage and safeguarded the rights to inheritance.

The Soviet judiciary model had substantively influenced China's judicial system. The people's jurors' institution that was embodied in Art. 75 was borrowed directly from Art. 103 of the Soviet Constitution in order to ensure ordinary citizens had rights to participate in the hearing of cases and were afforded exactly the same competence as professional judges. Both socialist regimes had declared adherence to the principle of judicial independence in constitutional texts. Moreover, the procuracy system was one of the only socialist judicial mechanisms found within all communist states. The system was designed by Lenin who perceived that an independent body which was manipulated by the Central Party Committees responsible for supervising the governmental organs was a crucial body to formulate unified legal order and consolidate proletariat rulings within a nation state having a vast territory, diverse local custom and culture.<sup>25</sup> Lenin articulately stated the competence and function of procuratorates in compliance with his blueprint: 'the only power of the procuratorate is to file the case before the court' and 'they must guarantee the unification of the legal order regardless of diverse local customs.' Even in the hierarchical relations within the procuracy system, Lenin stressed that 'the local procuratorates have to be accountable to the central procuratorial bodies, but independent of local administrative and judicial authorities.'<sup>26</sup> Inspired by Lenin's blueprint and Art. 117 of the Soviet Constitution, Art. 83 of China's Constitution, maintaining relative independence without being subjected to the external interference, proclaimed that the 'local procuratorial systems independently exercise their power without interference by the other state organs.'

Influenced by the Soviet constitutional model, China's 1954 Constitution provided abundant constitutional rights and obligations which were placed in Ch. III, after Ch. II embodied the structure, mandates, and competences of the various state bodies

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<sup>25</sup> H. Zheng, A Study of Transplanting Prosecutorial System into People's Republic of China from Former Soviet Union: LL.M. Thesis 18 (Tianjin University of Commerce 2011).

<sup>26</sup> Vladimir I. Lenin, Lenin's Selected Works [Chinese edition] 702-05 (1972).

in constitutional sequence, which symbolized that both socialist states were highly centralized politically. The operation of state apparatus for the consolidation of proletariat rule was considered far more important than the guarantee of fundamental rights.<sup>27</sup> The 1954 PRC Constitution impressively incorporated not merely liberal rights, but also a bundle of social rights aimed at demonstrating its socialist identity. However, China's Constitution drafters rejected Soviet social rights standards in view of the fact that the nation's finances in the 1950<sup>s</sup> meant that China was unable to ensure people enjoyed social rights of equivalent standards to those enjoyed in the Soviet Union.<sup>28</sup> On the other hand, the Soviet political and civil rights model was completely borrowed into China's constitutional rights system. For instance, the texts Art. 86(1)<sup>29</sup> concerning rights to vote was also literally copied in a 'cut-and-paste' fashion from Soviet Arts. 135(1)<sup>30</sup> and 137.<sup>31</sup> In the liberal rights categories, freedom of expression (Art. 87), the rights of liberty (Art. 89), the rights of privacy of correspondence, and the rights of inviolability of the homes of citizens were similar to Soviet constitutional Articles 125, 127, and 128.<sup>32</sup> Though someone might claim that these liberal rights were not something new and that they could easily be found in several constitutional documents promulgated in the Qing and Republic of China eras, socialist characteristics of these liberal rights were apparently perceived in the written rules. For instance, China's constitutional provision of freedom of expression did not merely prescribe on paper that citizens were able to express their opinion in various ways, but also inspired by the Soviet model, established as a State burden the responsibility to provide the material assistance to citizens to fulfill their liberal rights. The definition of liberal rights in a socialist context was no longer confined to negative rights but rather the State's positive obligation was the cornerstone for the full realization of liberal rights.

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<sup>27</sup> X. Zhu, *Inspection on the Transplant of China 1954 Constitution from the Former Soviet Union 1936 Constitution*: LL.M. Thesis 13–14 (Xingtan University 2011).

<sup>28</sup> Jizeng Fan, *Constitutional Transplant in PRC: The Communism Russian Legacy and Globalized Era Challenge*, 2014(20) *Federalismi.it* 9, <<http://federalismi.it/document/28102014120404.pdf>> (accessed Aug. 9, 2015).

<sup>29</sup> All the citizens of PRC, who have reached the age of eighteen, have the rights to vote and stand for election, irrespective of their nationality, race, sex, occupation, property status, and length of residence, except insane person and person deprived by law of rights to vote and stand for election. Women have the same rights to stand for election.

<sup>30</sup> All citizens of the USSR, who have reached the age of eighteen, irrespective of race or nationality, religion, educational and residential qualification, social origin, property status, and past activities, have the right to vote in the election of deputies and to be elected, with the exception of insane persons and persons who have been convicted by a court of law and whose sentence includes the deprivation of electoral rights.

<sup>31</sup> Women have rights to elect and to be elected on equal terms with all other citizens.

<sup>32</sup> D. Han, *Foreign Constitution's Influence on the Process of 1954 Constitution-Making*, *Journal of Comparative Law*, 2014(4) 57–58.

## **2.2. The 1977 Soviet Constitution and China's 1982 Constitution: Sharing the Commonality on the Route to Socialist Legality**

One of the distinguishing features of constitutions in communist states was the phenomenon of constant rewriting, accompanied by the changes in the balance of class forces. Osakwe correctly stated with regard to this phenomenon that

the life expectancy of a socialist constitution is very short in comparison to that of its western counterpart, and each new constitution seeks to consolidate the past gains as well as lay out the path for the future growth and thus serves as an effective link between past, present and future.<sup>33</sup>

Post-Stalin rulers, despite still adhering to the principles of the 1936 Soviet Constitution, silently started a process of political exorcism with the intention of purging inappropriate relics of the cult of Stalin's personality which had remained in the Soviet 1936 Constitution.<sup>34</sup> Similarly, China's new ruling elites in post-Cultural Revolution sought to eliminate the guideline of class struggle which was a ruling style favored by Mao Zedong, while trying to recover the economy and consolidate the party rule under the Four Cardinal Principles emerged as the main goals in the short term.<sup>35</sup>

Though few scholars had ever agreed that many developments were achieved compared with the Stalin Constitution,<sup>36</sup> some progress could more or less be perceived from the new constitutional texts. Due to the defrosting of bilateral relations between the two superpowers and the effect of the 1975 Final Helsinki Accord, Soviet leaders considered partially importing the western ideas of 'rule

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<sup>33</sup> Chris Osakwe, *The Common Law of Constitutions of the Communism-Party State*, 3 Rev. Socialist L. 155, 159.

<sup>34</sup> Christopher Osakwe, *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. Pa. L. Rev. 1350, 1352 (1979), available at <[http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4875&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4875&context=penn_law_review)> (accessed Aug. 9, 2015).

<sup>35</sup> Randall Peerenboom, *China's Long Match toward Rule of Law 55* (Cambridge University Press 2002). The Preamble of 1982 Chinese Constitution requires the adherence of all of the nation's people to the four cardinal principles: upholding the fundamental principle of the socialist road, of the dictatorship of proletariats, of the leadership of the communist party, and of the Marxist-Leninist and Maoist thought.

<sup>36</sup> Bernard A. Ramundo, *The Brezhnev Constitution: A New Approach to the Constitutionalism*, 13 J. Int'l L. & Econ. 41, 53-55 (1978-79). Ramundo argued that the 1977 USSR Constitution 'creates no meaningful expectations in the mind of new ordinary Soviet citizens, it fails to promulgate a new developmental policy for soviet society; "[t]he impact of citizens' involvement (in the drafting process) is questionable; '[a]s it turned out, the 1977 Constitution is more noteworthy for what it did not do than for what it did; "[t]o the dismay of many constitutionalists, the new constitution does not significantly alter the political structure of the government. It does not confer upon the USSR Supreme Court the power of constitutional review of federal and state legislation, it does not grant to the court the authority to render an advisory opinion, either *sua sponte* or at the request of the USSR Supreme Soviet or Presidium, on a bill pending before legislature.'

of law' and 'constitutionalism.'<sup>37</sup> Unlike the 1936 Soviet Constitution, the Brezhnev Constitution was entitled to build the State embedded in advanced socialist legality. Article 4 stipulated that the Soviet state and all its bodies ensure, on the basis of socialist law, the maintenance of legal order and safeguard the interests of society and the rights and freedoms of the citizens. Article 173 affirmed that, as the Constitution acted as the supreme legal document within Soviet legal order, all laws and other acts of the state bodies should be promulgated in conformity with it. Consequently, all the state bodies should observe constitutional orders, even if some party leaders claimed that some of constitutional rules hindered their political rulings, these contested rules could not be revised except through a rigid legal procedure in which at least the proposition would be approved by no less than  $\frac{2}{3}$  of all the deputies of each chamber.

Compared with the silence on the role of the Communist Party of the Soviet Union [hereinafter CPSU] in the 1936 Soviet constitutional order, the 1977 Constitution defined the role of the CPSU as the vanguard of all the people in the Preamble. Article 6, functioning as the mirror of Brezhnev's argument that the 'Party will have a growing role to play in the building effort and that direction is toward the increase of power for the Party,'<sup>38</sup> articulately confirmed that the Soviet Union was a party-state where all the state bodies or political policies must be handled or monitored by the CPSU. As a 'leading and guiding force of Soviet society' and the 'nucleus of the political system, and of all state organization and public organization,' the CPSU 'determines the general perspective of the development of the society and the course of home policy, directs the great constructive work of the soviet people and imparts a planned, systematic and theoretically substantiated character to their struggle for the victory of communism.' The 1936 Soviet Constitution ignored the constitutional status of the CPSU. It was hard to gauge the exact constitutional role the CPSU took from the constitutional texts, but only to know it was the 'vanguard for building the communism that is the nucleus of all organization and state bodies.' In contrast, Art. 6(3) of the 1977 Constitution seemed to put the CPSU's power under the limitation of socialist legality where 'all the party organization shall function within the framework of the Constitution of the USSR,' indicating that even the ruling party's activities should be accountable within the framework of the Soviet Constitution. Despite the fact that this provision could

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<sup>37</sup> Paolo Carrozza, *Il diritto socialista*, in *Diritto costituzionale comparato*, *supra* n. 14, at 583, 592; Ramundo, *supra* n. 36, at 43. Brezhnev suggested that the possibility that a new dedication to the constitutionalism may be evolving in the Soviet Union. In the closing speech to the Supreme Soviet, Brezhnev declared his dedication to the fulfillment of all the parts of the Soviet Constitution: '[T]he adoption means that every article and provision of the Constitution must be fully inserted into the living practice of the day-to-day activities of all the state organs, all persons in the office, and all Soviet citizens everywhere, we have not created a constitution as a stage prop. It has to be fulfilled, and will be fulfilled in all its parts. It has to become and will become a powerful instrument in the further development and deepening socialist democracy.'

<sup>38</sup> Ramundo, *supra* n. 36, at 47.

be viewed as a starting point for Soviet walking into a constitutional state where the Soviet leaders seemed to sincerely observe the constitution as a measure to limit the CPSU's omnipotence, their true expectation was simply that the new constitution would eradicate a phenomenon of no power separation between CPSU's organs and state bodies that often occurred in the Stalin era.<sup>39</sup>

One of the impressive characteristics of the 1977 Soviet Constitution was the provision declaring that the Soviet Union had entered into a mature construction of socialism which 'ensures the enlargement of rights and freedom of citizens and continuous improvement of their living standards as social, economic, and cultural development programs are fulfilled.' Indeed, the 1977 Soviet Constitution enlarged the number of both liberal and social rights. In order to emphasize the privileged status of constitutional rights in the new Soviet Constitution, the bill of rights was put into Ch. VII before the provisions on state bodies. This constitution was influenced by the Helsinki Final Act of 1975 and UN human rights treaties.<sup>40</sup> Some new liberal rights were added into the new constitutional text,<sup>41</sup> including the rights to citizenship (Art. 33), the rights to association (Art. 51), the rights to lodge a complaint against the actions of officials, public and state organs (Art. 58), the rights to protection by the court against the encroachment on honor and reputation, life and health, dignity and property (Art. 57) and the rights to compensation for damage (Art. 58) were written for the first time into the constitution code. However, we have to bear in mind that the consequence of adding several new liberal rights to the constitution was a compromise between the Soviet and liberal states in the Helsinki Accords.<sup>42</sup> The new constitution was criticized largely for having little effect on the respect for

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<sup>39</sup> Ramundo, *supra* n. 36, at 47.

<sup>40</sup> *Id.* at 61. Article 27 in Ch. IV which concerns that 'the USSR relationship with other states is based on the following observance: respect for human rights and fundamental freedom . . . and fulfillment in good faith of obligation arising from the generally recognized principles and rules of international law, and from the international treaty signed by the USSR' essentially restate the fundamental principles contained in the Basket One of the Final Act of the Conference on the Security and Cooperation in Europe, called 'Helsinki Final Act.' This included the 'respect for human rights and fundamental freedoms.' The incorporation of principles of the Helsinki Final Act and expansion of the coverage of economic, social and civil rights reflected the influence of the review of compliance with the Final Act which began preliminarily in Belgrade on June 1977. The public debate on the drafting and adoption of the USSR Constitution were fully in swing from the beginning to the end. The substantive review commenced on October 4, 1977, the same day when Brezhnev addressed his speech to Supreme Soviet urging the adoption of the new constitution. His speech was full of preoccupation with the foreign criticism of the human rights situation in the Soviet Union, a key review of the Helsinki Final Act, and the expectation that the new constitution would demonstrate that 'social, economic and political rights and freedom of citizens could be broader, clearer and fuller than before and anywhere else.'

<sup>41</sup> Carrozza, *supra* n. 37, at 592.

<sup>42</sup> Constance Coughlin, *Monitoring of Helsinki Accords: 1977 Belgrade*, 10 Case W. Res. J. Int'l L. 511, 516 (1978). Soviet delegate Vorontsov declared in a conference that '[t]he New Soviet Constitution just adopted embodied all basic principles of the Helsinki principles.'

individual rights under the Soviet totalitarian collectivism guideline.<sup>43</sup> Dissidents who were a group of intellectuals expressing and asserting opposing political opinions still suffered severely consistent suppression by criminal penalties,<sup>44</sup> extrajudicial forced disappearance or forced psychological treatment.<sup>45</sup>

Two new social rights – the right to housing and the right to enjoy cultural benefits – were borrowed from the International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR] into the 1977 Constitution. Some constitutional social rights had expanded their scope of meanings keeping in pace with the domestic economic growth and with purpose of guaranteeing the interests of the working class. The rights to work (Art. 40) covered the rights to one's occupation, trade or job in keeping with one's inclination, abilities, occupational training and education, and with 'due account of the needs of society.' The right to support in old age extended to the protection of those citizens who had lost their breadwinners. The subjects of social security had been extended to those members of collective farms. The state had the obligation to promote the employment of handicapped and elderly citizens. The right to education (Art. 45) was expanded to 'all forms of free education' in which the State had responsibility of popularizing secondary school education in the whole Union and supplying free textbooks to compulsory school students. Those entitled to free medical services, the aged, sick and disabled could, under the 1936 Constitution, enjoy the rights to protection with a range of services: 'free and qualified medical care,' 'measures to improve the environment,' and 'research to prevent and reduce the incidence of the disease and ensure the citizens a long and active life.'

Though Brezhnev promoted some progressive constitutional reform since the 1970<sup>5</sup>, Soviet constitutionalism was still largely divergent from the liberal models due to the differentiated ideas on the nature of a constitution. The 1977 Soviet Constitution, though recognized as a supreme legal order within the domestic legal system, had no commitment to the nature of a constitution as being fundamental and inviolable. Rights and freedom of the citizens could be limited arbitrarily in the

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<sup>43</sup> Yuri Andropov wrote that '[t]he socialist system makes the exercise of collective rights and the duty of working people the mainspring of social progress. At the same time, the interest of Individuals is by no means ignored. The Soviet Constitution grants Soviet citizens broad rights and freedom and at the same time emphasizes the priority of public interest, serving which is the supreme expression of civic awareness.'

<sup>44</sup> Two criminal legal provisions were often cited for prosecuting dissidents' activities: 1) Art. 70 of the RSFSR Criminal Code set forth that '[a]gitation and propaganda carried out with the purpose of subverting and weakening the Soviet regime or in order to commit a particular dangerous crime against the State, the dissemination of said purpose of slanderous invention defamatory to the Soviet political and social system, as well as the dissemination and production or the harboring the said purpose of literature of similar content;' 2) Art. 190(1) provided that '[t]he systematic dissemination in oral form of deliberately and false invention, deliberately discrediting the Soviet political and social system, as well as the production and dissemination in written, printed and other forms of works of similar content, shall be punished by the deprivation of freedom for a term not exceeding one year or by a fine of not more than one hundred roubles.'

<sup>45</sup> Albert Szymanski, *Human Rights in Soviet Union* 282–84 (Zed Books 1984).

name of collective and national interests, whilst constitutional rights were defined as a tool guarding the Soviet socialist regime, rather than human beings' natural inherent necessities.<sup>46</sup> Thus, the Soviet regime's interests, rather than individual rights, were considered the ultimate interest of a Soviet citizen's life.<sup>47</sup> Meanwhile, social and economic constitutional rights could not be realized by a judicial decision considering that the violation of these categories of rights can hardly be remedied by court judgments, relying rather on the distribution of resources as well as on economic growth dominated by the State.<sup>48</sup>

The 1977 Soviet Constitution actually has some substantive inspiration on China's new ruling elites in the post-Mao era who purported to completely reject the extreme leftist ideology generated by the Cultural Revolution and wished to return to the 'good old days of the 1950'<sup>49</sup> though no Chinese scholar has, until now, even noticed or argued about the influence of the Soviet Constitution on China's 1982 constitution-making. In the Sixth Plenary Session of the Eleventh Central Committee of the CCP, Central Committee members approved the 'Resolution for Several Historical Issues of the Party since the Establishment of the PRC', stating:

A the fundamental task of the socialist revolution is to gradually establish a highly democratic socialist political system. Inadequate attention was paid to this matter after the founding of the People's Republic of China, and this was one of the major factors contributing to the initiation of the 'cultural revolution' . . . We must turn the socialist legal system into a powerful instrument for

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<sup>46</sup> Ramundo, *supra* n. 36, at 49. Brezhnev addressed his speech on the drafting of the constitution in May 1977: 'It goes without saying, comrades, that the draft constitution proceeds from the assumption that the rights and freedoms of the citizens cannot and must not be used against our socialism system, to the detriment of the interests of Soviet people. The draft, therefore, plainly states, for example, that the exercise by the citizens of their rights and freedom should in no way damage the interests of the society and the state or infringe on the rights of other citizens, and that political freedom is granted in keeping with the interests of the working people and for the purpose of consolidating the socialist systems.' In his later passage in the same speech, he referred to the function of rights and freedom under the framework of socialism legality: 'We want the citizens of the USSR to have a sound knowledge of their rights and freedoms and of the ways and means for exercising them, we want them to be able to apply these rights and freedom in the interests of communist construction, and to have a clear understanding of the close connection with honest fulfillment of their civic duties.'

<sup>47</sup> Thomas E. Towe, *Fundamental Rights in the Soviet Union: A Comparative Approach*, 115 U. Pa. L. Rev. 1251, 1264 (1967), available at <[http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6224&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6224&context=penn_law_review)> (accessed Aug. 9, 2015). Soviet professor Malinsky stated: 'The capitalist law is based on the abstract "natural rights" of an individual; it places the individual in the center of the world, surrounds him with a cult and therefore establishes the limits on the government . . . However, the proletariat state sets limits not to itself but to its citizens. A collective body called the state, rather than the individual citizens, is at the center of proletariat law.'

<sup>48</sup> David Lane, *Human Rights under State Socialism*, 32 Political Studies 349, 353–55. doi:10.1111/j.1467-9248.1984.tb01531.x

<sup>49</sup> William C. Jones, *The Constitution of the People's Republic of China*, 63 Wash. U. L.Q. 707, 712 (1985), available at <[http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2203&context=law\\_lawreview](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2203&context=law_lawreview)> (accessed Aug. 9, 2015).

protecting the rights of the people, ensuring order in production, work and other activities . . . The kind of chaotic situation that was obtained in the ‘cultural revolution’ must never be allowed to happen again in any sphere.

Several days later, the NPC made a final decision to start the preparations for constitution-making. Ye Jianying, the chairman of the constitution drafting committee, stressed: ‘[We] might draw some experience of constitution-making from the other advanced states, particularly borrowing some from new socialist constitutions.’<sup>50</sup>

Article 6 of 1982 China’s Constitution was obviously inspired by Art. 4(2)<sup>51</sup> and Art. 173<sup>52</sup> of the Soviet Constitution, which provides that ‘[n]o laws, administrative action or local regulation may contravene the Constitution. All state organs, political parties, social and enterprise institutions and armed forces abide by the Constitution and other laws. No organization or individual is privileged beyond the Constitution,’ indicating that Art. 6 itself has constituted China’s constitutionalism order under socialist legality in two aspects: 1) the constitution takes the role of the supreme order with which all the other statutes should be in compliance; 2) the activities of the ruling party should observe the constitutional order. It significantly means that China’s ruling elites would like to follow the 1977 Soviet model to construct their own socialist legal system on the basis of the constitution as well as avoid replacing the decision of state and local bodies with the resolution or decision made by the ruling parties on any occasion. However, unlike the Soviet Union’s 1977 Constitution, China’s 1982 Constitution has neither articulately displayed the concrete political role of the Chinese Communist Party [hereinafter CCP] nor did it demonstrate the mandates of the CCP within the constitutional order. The constitution solely poses an abstract citizens’ obligation in the Preamble ‘adherence to the leadership of the CCP’ being the foundational cornerstone of China’s socialist regime. Indeed, the CCP’s constitutional role is an unwritten rule which can actually determine the activities of all Chinese state and public bodies. Followed implicitly, Soviet Article 6(2), a non-substantial constitutional provision could constrain CCP interference with national or local state bodies’ affairs, whereas nearly all the chief-leaders in national or public organs are party members appointed by the relevant party committee. It is by no means a case of the CCP having the competence to rule the people directly, but rather that the will of the party has to be endowed with legitimacy through the processing of NPC approval. The relationship has also been confirmed by an interview with a Chinese professor who has quoted the original statement of Peng

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<sup>50</sup> Xu, *supra* n. 5, at 354.

<sup>51</sup> State organization, public organization and officials shall observe the Constitution of the USSR and Soviet Law.

<sup>52</sup> The Constitution of the USSR shall have supreme legal force. All laws and other acts of state bodies shall be promulgated in compliance with it.



Chen, the former Chief of the Committee of the NPC, concerning the relationship between the CCP and the NPC, stating:

According to the Constitution, people handle and exercise their power through the People's Congress. However, adherence to the leadership of the Party does not contradict the fact that all the powers belong to the people since the Party's leadership focuses on political direction. Any political determination of the Party cannot be imposed on the people directly because it has no binding power. It has binding power only when the will of party has been transformed into will of people through the National People's Congress.<sup>53</sup>

Considering the actual dominant status of the CCP in relation to the NPC, as well as the number of high posts in the NPC occupied by communist elites and more than 70% of representatives being CCP's members, a proposal submitted by the CCP could hardly be blocked. The NPC was thereby widely viewed as an ironical 'rubber stamp' by western observers.<sup>54</sup>

Following the new Soviet constitutional model, the section of rights of citizens is located before the section of state bodies showing the legitimacy of a socialist state based on respect for human rights, in sharp contrast with the socialist style of ruling during the Cultural Revolution period.<sup>55</sup> Apart from that, some new constitutional rights can trace their origins to the 1977 Soviet Constitution. The rights to remedy embodied in Art. 41 of China's Constitution is inspired on Art. 51 of the Soviet Constitution providing that if a citizen's rights are to be harmed by any state or public authorities or their agents, the citizen can pursue the remedies from the court by filing lawsuits. However, Chinese victims were not able to gain access to judicial remedy immediately after the adoption of the new constitution, but can only resort to the specific petition bodies (*xin fang*) which are capable of negotiating with state organs regarding the remedy before the Administrative Litigation Law (ALL) came into effect in 1989. The right to dignity (Art. 38) is the other distinguishing example borrowed from Art. 57 of the Soviet Constitution<sup>56</sup> for comforting people with painful memories from the decade of the Cultural Revolution when innocent

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<sup>53</sup> See Yang Jingyu's *Memories to the 1982 Constitution-Making: The Debate on Whether Incorporation of Four Cardinal Principles into 1982 Constitution*, Chinanews (Sep. 11, 2014), <<http://www.chinanews.com/gn/2014/09-11/6579284.shtml>> (accessed Aug. 9, 2015).

<sup>54</sup> See *The Biggest Rubber Stamp – the National People's Congress of China*, Guardian (Mar. 3, 2007), <<http://chinaview.wordpress.com/2007/03/04/the-biggest-rubber-stamp-the-national-peoples-congress-of-china/>> (accessed Aug. 9, 2015).

<sup>55</sup> Hungdah Chiu, *The 1982 Chinese Constitution and Rule of Law*, 1985(4) Occasional Paper / Reprints Series in Contemporary Asian Studies 6, available at <<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1068&context=mscas>> (accessed Aug. 9, 2015) .

<sup>56</sup> *Id.*

individuals were oppressed or tortured by cruel and inhumane punishment beyond what was established by law.<sup>57</sup> The right to dignity, however, has not gained special normative status like in Basic German Law, it only takes a declarative constitutional role implying that Deng's socialist regime would thoroughly break the connection with Mao's ruling style featured by endless class struggle.

In Soviet constitutional rights theory, rights cannot be realized separately from the performance of duties. The law encourages the citizens' observance of social duties. Performance of obligations and duties guaranteed the fulfillment of rights as Art. 59 of the Soviet Constitution provided that '[c]itizens' exercise of their rights and freedom is inseparable from the performance of their duties and obligations.' Article 59 which was a crucial source of understanding interactive relationship between 'rights and duties' clarified articulately that Soviet citizens could enjoy the full rights and freedoms contained in the Constitution on the condition that '[e]njoyment of citizens of these rights and freedom must not be to the detriment of the interest of society or the state, or infringe on the rights of other citizens.'<sup>58</sup> Inspired by the Soviet duty-based rights theory, China's Constitution has incorporated the new doctrine of 'the inseparability of rights and duties' into Art. 51<sup>59</sup> which provides that '[t]he citizens of the People's Republic of China, in exercising their freedom and rights, may not infringe upon the interests of the state, of the society or of the collective or upon the lawful freedoms and rights of other citizens.' Actually, the predominant influence of the Soviet 'duty-based' model lasted no more than a decade and disappeared with the end of the Soviet Union.<sup>60</sup> Legal theorists, under the impacts of liberalist legal thought, began to favor a new 'rights-based' theory proposed by Zhang Wenxian who asserts that rights are the cornerstone of the justification of legal systems *erga omnes*, as well as that the fulfillment of rights is the goal of the performance of duties.<sup>61</sup> The 'rights-based' theory proposed by Chinese scholars has little or nothing in common with the any of the varied concepts of the 'rights-based' theory rooted in western legal philosophy, but is rather a type of neo-Marxism in which individual interests or rights

<sup>57</sup> Roberta Cohen, *People's Republic of China: The Human Rights Exception*, 9 Hum. Rts. Q. 447, 448–49 (1987), reprinted in 1988(3) Occasional Paper / Reprints Series in Contemporary Asian Studies, available at <<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1085&context=mscas>> (accessed Aug. 9, 2015). The author cited from the hearing in the US congress that '[t]he Chinese press reported that many of the verdicts on the 1.13 million people convicted between 1966 and 1976 had been unjustified, and that many individuals had been "persecuted to death"... It was estimated that altogether 100 million people had suffered political persecution.'

<sup>58</sup> Ramundo, *supra* n. 36, at 48.

<sup>59</sup> Xu, *supra* n. 5, at 391.

<sup>60</sup> Jizeng Fan & Xiaojun Mu, *A Reflection on China's Development of Human Rights in the Last 30 Years*, 9(4) China Human Rights Magazine (China Society for Human Rights Studies) (2010), available at <[http://www.chinahumanrights.org/CSHR/Magazine/Text/t20100803\\_631256\\_4.htm](http://www.chinahumanrights.org/CSHR/Magazine/Text/t20100803_631256_4.htm)> (accessed Aug. 9, 2015).

<sup>61</sup> W. Zhang, *Analysis of Context and Concept of 'Rights-Based' Theory – Socialist Law Is a New Type of 'Rights-Based' Category*, 1990(4) China Legal Science 28–29.

have to harmonize with collective and state rights.<sup>62</sup> As a result, individual rights still lack for dominant legal status in relation to collective or state rights.

It is worth mentioning that during the process of drafting the Constitution, some drafters proposed following the Soviet bicameral system for reconstructing the structure of the NPC. Wang Shuwen, the director of the Law Institute of the Social Science Academy, had suggested that the NPC could be composed of two chambers: the chamber of nationalities and the chamber of professions.<sup>63</sup> Unfortunately, this proposal, though supported by many constitutional experts who believed that the imagined model could better check the centralized power of the NPC, failed to be adopted in the final draft due to the disapproval of Deng Xiaoping.<sup>64</sup>

### 3. Challenge to China's Constitutionalist Regime in a Globalized Era

With the snowball effect of the democratization that spread from Poland to East Germany where the people called for the building of efficient liberal states overthrowing long-time totalitarian regimes,<sup>65</sup> the communist regime in Eastern Europe failed to survive the crisis of legitimacy.<sup>66</sup> The constitutional order reconstructed in the post-communist states recovered those liberal constitutional principles, such as the separation of powers, judicial independence, and a multi-party political system, which are shared in all western constitutional models.<sup>67</sup> As a strategic response to the crisis of legitimacy in Russian communist rule, Gorbachev proposed a package of political reforms with the purpose of transforming totalitarian regime into a semi-totalitarian communist regime under the banner of '*perestroika*' ('reconstruction') and '*glasnost*' ('transparency'),<sup>68</sup> including strengthening the constitutional effect on limiting CPSU's activities and supervising the legitimacy of administration as well as respecting human rights.<sup>69</sup> Gorbachev pushed political reform toward building

<sup>62</sup> W. Zhang, *The Scope of Legal Philosophy Study* 24 (2001).

<sup>63</sup> Xu, *supra* n. 5, at 357–58.

<sup>64</sup> X. Deng, *3 Selected Works of Deng Xiaoping* 290 (2<sup>nd</sup> ed., 1993).

<sup>65</sup> Andrew G. Walder, *The Decline of Communist Power: Element of a Theory of Institutional Change*, 23 *Theory and Society* 297 (1994), available at <[https://sociology.stanford.edu/sites/default/files/publications/walder-ts\\_1994.pdf](https://sociology.stanford.edu/sites/default/files/publications/walder-ts_1994.pdf)> (accessed Aug. 9, 2015).

<sup>66</sup> Marek M. Kamiński, *How Communism Could Have Been Saved: Formal Analysis of Electoral Bargaining of Poland in 1989*, 98 *Public Choice* 83, 83 (1999).

<sup>67</sup> Laura Montanari, *Le nuove democrazie dell'Europa centro-orientale*, in *Diritto costituzionale comparato*, *supra* n. 14, at 519.

<sup>68</sup> See Russell Bova, *Political Dynamics of the Post-Communist Transition: A Comparative Perspective*, 44 *World Politics* 113, 114 (1991) doi:10.2307/2010425; see also Jerry F. Hough, *Russia and West: Gorbachev and Political Reform* 209–12 (Simon & Schuster 1988).

<sup>69</sup> Bova, *supra* n. 68, at 118. Actually, the 'glasnost era' came to represent a large package of liberalizing reforms that included greater protection of individuals from the coercive power of state, expanded freedom of expression and association, easing some restriction on travel and emigration, and a new tolerance towards religious activities.

political democratic institutions with the help of the grass-roots class.<sup>70</sup> Abolishing the one-party dictatorship regime and holding the Soviet presidential election and referendum brought him great international reputation in the year of 1990. However, the consistency of the reform was interrupted by the other high-ranking conservative CPSU's figures who initiated a *coup d'état* at the moment Gorbachev was on vacation far away from the Kremlin. Though the conspiracy failed, Gorbachev had to resign his post of General Secretary of the CPSU after returned to Moscow, admitting that he was not capable of conducting the advancement of this semi-authoritarian state regime along the planned course of his blueprint, when Russian Federation president Yeltsin, who decreed the suspension of the Russian Communist Party on the grounds that it was involved in the *coup d'état*, which had violated the law of Russia and the Soviet Union, gained far more actual powers and popular support than Gorbachev, who lost credibility among his party colleagues. In addition, with the independence of and the rising nationalism in Union Republics, the consequence was that Gorbachev was reluctant to mobilize the army to suppress the tendency of separatism in the republics finally caused communism to lose its legitimate power in the whole USSR.

China's communist regime successfully overcame the political crisis in 1989 by using military force. In fear that the CCP would lose ruling power, Deng Xiaoping, the then boss of the CCP, limited his reforms merely to the economic realm.<sup>71</sup> According to Deng, the CCP's legitimacy derives from economic growth and social wealth which could naturally bring happiness to individuals who would then be in favor of the CCP's ruling insofar as their material requirements could be satisfied.<sup>72</sup> He then exerted his personal influence to drive a profound economic reform, building a market capitalist economy to involve China in the global economic competition. On the other hand, he took a very prudent attitude towards China's democratization and political reform. He afforded no tolerance to those who held opinions against the leadership of the CCP and disregarded the international interference in human

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<sup>70</sup> Bova, *supra* n. 68, at 120. During the course of the February 1989 visit to Ukraine, he appealed to his public supporters to help fight enemies of reform.

<sup>71</sup> See David Shambaugh, *Deng Xiaoping: Politician*, 1993(135) *The China Quarterly* 457–58. doi:10.1017/S0305741000013874

Zhao Ziyang, the former General Secretary of the Chinese Communist Party, addressed the Thirteenth National Conference of the CCP in 1987 declaring that 'all the colleagues should stick to "one central task, two basic points:" one central task means our socialist construction should be based on economic construction in order to enhance the level of material life of the people; the two basic points are the adherence to four cardinal principles and the policy of reform and openness.'

<sup>72</sup> Deng Xiaoping delivered his speech during his inspection in the South of China in 1992, stating: 'If we did not adhere to socialism, implement the policy of reform, or open to the outside world, we would find ourselves in a blind alley . . . That is the only way to win the trust and support of the people . . . Why was it that our country could remain stable after the June 4<sup>th</sup> incident? It was precisely because we carried out reform and implemented the opening up policy, thereby promoting economic growth and raising the living standard.'

rights records. Generally, Deng carried out a completely new neo-authoritarian route in China that is a mix of a semi-liberal economy with political authoritarianism.<sup>73</sup>

Deng's neo-authoritarian reform brought China obvious development in terms of economic growth.<sup>74</sup> In this model, central and local state bodies were able to consistently promote or reform economic policy relying on their unchallenged power. However, individual interests and freedom were accordingly violated or ignored because the local authorities were exclusively concerned with GDP achievements which might have brought the officials a chance of promotion to the higher posts in the Chinese party-state bureaucracy.<sup>75</sup> Some critics correctly predicted that the development based on the present neo-authoritarian model must be unsustainable since China's authorities focus exclusively on the economic growth and consolidation of its state regime at the cost of individual rights. Therefore, some intellectuals required that the Chinese government adapt their developmental policy to sustainable ways in compliance with the model of the rule of law in order to constrain the administrative bodies' activities and subject local party activities to accountability.<sup>76</sup> In addition, given that China has had an active role in international affairs, liberal states required that the Chinese government should respect human rights, observe the common WTO rules preventing unfair competition and protect intellectual rights in compliance with international standards.<sup>77</sup> Thus, China's party-state government had to think over the measures to transform a party-dominant constitutional system, influenced by the former soviet constitutional model, into a new refined order which would be both compatible with socialist legality and capable of adapting to universal values in the globalization era. In this section, I focus my research on two areas: judicial (constitutional) review reform and implementation of UN human rights treaties.

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<sup>73</sup> Raviprasad Narayanan, *The Politics of Reform in China: Deng, Jiang and Hu*, 30(2) Strategic Analysis 332–35 (2006), available at <[http://idsa.in/system/files/strategicanalysis\\_rnarayanan\\_0606.pdf](http://idsa.in/system/files/strategicanalysis_rnarayanan_0606.pdf)> (accessed Aug. 9, 2015).

<sup>74</sup> John Wong, *The Economics of the Nanxun*, in *The Nanxun Legacy and China's Development in the Post-Deng Era* 35, 35 (John Wong & Yongnian Zheng, eds.) (Singapore University Press 2001).

<sup>75</sup> See Canfa Wang, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 Vt. J. Envtl. L. 159, 171, available at <<http://vjel.vermontlaw.edu/files/2013/07/Chinese-Environmental-Law-Enforcement.pdf>> (accessed Aug. 9, 2015). See also Abigail R. Jahiel, *The Organization of Environmental Protection in China*, 1998(156) *The China's Quarterly* 757 doi:10.1017/S030574100005133X. Jahiel argues in this essay that the high-growth, resource-intensive development strategy China has pursued, coupled with norms and institutional relationships designed for economic decentralization has given officials at provincial level, and lower, the means and incentives to develop their economies. The pervasive emphasis on development, consumerism and profits in government proclamation and throughout society has further provided local government with justification to intervene against regulation – such as environmental protection – deemed unfavorable to growth.

<sup>76</sup> Z. Zi, *The Chinese Model of Economic Growth is Unsustainable*, Sina China (Dec. 18, 2011), <<http://business.sohu.com/20111218/n329387175.shtml>> (accessed Aug. 9, 2015).

<sup>77</sup> Peerenboom, *supra* n. 35, at 492.

### **3.1. The Way to Build a Chinese Judicial and Constitutional Review Mechanism**

#### *3.1.1. Judicial Review in WTO Affairs within China's Legal Order*

Being a member of World Trade Organization, Chinese authorities have no choice but to observe to the universal rules of the WTO. Having a judicial review mechanism for administrative acts is one of the basic requirements for every member state to join the WTO, according to Art. X(3)(b) of the GATT:

Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.

Similarly, the amended Agreement on the Implementation of Article VI of GATT, in Art. 13 on judicial review provides:

Each member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews within the meaning of Article 11. Such tribunals or procedures should be independent of the authorities responsible for the determination or review in question.

The amendment of the WTO rules obviously requires Member States to establish a qualified review tribunal, independent of the authorities responsible for the determination or review in question, which conflicts with China's current constitutional system modeled on Soviet theories,<sup>78</sup> as a Chinese court's competence, according to Art. 127 of 1982 Constitution, is limited to the determination of the case pursuant to positive statutes without having an active mandate to examine the constitutionality and legality of administrative regulations.<sup>79</sup> Consequently, the United States and other members scrutinized the legal documents submitted with China's application to join the WTO because an earlier report confirmed that China did not have a qualified judicial review institution. China's government replied to them rapidly stating that China agrees to establish, among the other things, tribunals for prompt review of certain WTO-administrative actions.<sup>80</sup> Under Art. 2(D)(1) of the

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<sup>78</sup> M. Ulric Killion, 'Building up' China's Constitution: Culture, Marxism, and the WTO Rules, 41 Loy. L.A. L. Rev. 563, 572 (2008), available at <<http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2617&context=llr>> (accessed Aug. 9, 2015).

<sup>79</sup> Peerenboom, *supra* n. 35, at 317.

<sup>80</sup> Veron M.-Y. Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 Am. J. Comp. L. 77, 78 (2004), available at <<http://carnegieendowment.org/files/AJCL1.pdf>> (accessed Aug. 9, 2015).

Protocol on Accession of the People's Republic of China, China's government promised those tribunals 'shall be impartial and independent of the agency entrusted with administrative enforcement . . .'

However, according to Art. 67 of the 1982 Chinese Constitution, the National People's Congress Standing Committee [hereinafter NPCSC] is the only state body empowered with competences of judicial (constitutional) review and interpretation, including:

- 1) the interpretation and enforcement of the Constitution;
- 2) the interpretation of legislation;
- 3) the annulment of administrative regulations, decisions and orders of State Council that contravene the Constitution and the law;
- 4) the annulment of those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the central government that contravene the Constitution, the law and administrative regulations.

In contrast, according to the Administrative Litigation Law of the People's Republic of China [hereinafter ALL] adopted in 1989, the judiciary bodies have competence to change the administrative act, only in cases where the administrative authority has infringed the principle of proportionality, by changing the amount of the fine imposed by said authority. Article 12 limits the competence of administrative courts: the judiciary cannot adjudicate the administrative litigations below:

- 1) those concerned with disputes on the legality of administrative rules and regulations, or decision and orders with general binding force formulated and announced by administrative bodies;
- 2) specific administrative acts that shall, provided by law, be finally decided by the administrative bodies.

In order to adapt the Chinese administrative legal system to WTO standards, in August 2002, the Supreme People's Court [hereinafter SPC] promulgated a judicial interpretation requiring the judicial review of WTO-related administrative actions according to ALL.<sup>81</sup> In November 2002, the SPC promulgated two other judicial interpretations to prescribe that first-instance anti-dumping and countervailing ALL cases should be tried by the provincial highest court where the defendant administration bodies were located, or by any intermediate court appointed by the SPC.<sup>82</sup> Though some legal rules concerning the judicial review of administrative acts have been incorporated into the Chinese legal system through judicial interpretation,

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<sup>81</sup> Supreme People's Court Rules Concerning the Several Questions about the Adjudication of Administrative Cases Relating to the International Trade, at <<http://adr.ccpit.org/typeinfo2.aspx?t1=20&t2=59&t3=0&id=332>> (accessed Aug. 9, 2015).

<sup>82</sup> Supreme People's Court Rules Concerning the Several Questions about Application of Law in Adjudicating Anti-Dumping Administrative Cases, at <<http://www.customs.gov.cn/Default.aspx?TabID=20149&InfoID=110978&ctl=InfoDetail&mid=51150&ContainerSrc=%5BG%5Dnотitle>> (accessed Aug. 9, 2015); Supreme People's Court Rules Concerning the Several Questions about Application of Law Adjudicating Countervailing Administrative Cases, at <<http://dcj.mofcom.gov.cn/article/zcfb/cn/200504/20050400072112.shtml>> (accessed Aug. 9, 2015).

deficiencies still remain, leaving the Chinese judicial review mechanism below the required standards. The relevant competent courts are able to merely review and invalidate the concrete administrative activity in WTO litigation, having neither the competence to annul the abstract administrative act nor the local and central administrative regulations that are in contrast with WTO rules. The Central government, however, has claimed that all laws and regulations inconsistent with WTO legal systems were repealed or amended before China acceded to the WTO. The relevant ministries, departments and specific commissions reported to the State Council that they have engaged in the review of over 2300 laws and regulations according to WTO legal standard, after which they identified 830 of them in need of repeal and 325 of them in need of revision.<sup>83</sup> It is noted that the identification of inconsistencies is sometimes easy, whereas sometimes it is hard and 'takes a high level of expertise and a full hearing by a dispute settlement panel in the context of a particular set of facts.'<sup>84</sup> It is a reasonable doubt that some laws and regulations that do not comply with WTO rules still remain in the Chinese legal system. After China's accession to the WTO, a flood of new regulations regarding the implementation of WTO rules were adopted. However, there were no related formal judicial or administrative mechanisms provided for scrutinizing them with WTO standards. Although two newly-founded offices – the Department of WTO affairs and China WTO Notification and Enquiry Center – could supposedly be assumed as the competent administrative tribunals for picking out those abstract administrative acts and other legal documents non-compliant with WTO rules, as well as being able to provide the fair and prompt administrative remedies, it is still uncertain whether these offices are able to maintain their independence and efficiency when they are subjected to the Commercial Department which is a sub-division of the State Council.

Besides, China is not a typical state, centralizing the legislative competence in the NPC or State Council after Legislative Law was adopted in 2000. Significantly, local governments handle extensive legislative powers<sup>85</sup> other than those powers exclusively reserved to national authority as set forth in Art. 8. In this case, the local governments have competence to make local decrees and regulations regarding international trade affairs. There is no question that the legitimacy of local decrees and administrative regulations derive from the law in higher hierarchical statutes. If in contravention of higher hierarchy, local statutes are to be declared invalid by the relevant authorities. However, the local administrative regulation comes into effect on

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<sup>83</sup> Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 Wash. U. Global Stud. L. Rev. 97, 104 (2003), available at <[http://papers.ssrn.com/abstract\\_id=366200](http://papers.ssrn.com/abstract_id=366200)> (accessed Aug. 9, 2015).

<sup>84</sup> Clarke, *supra* n. 83, at 105.

<sup>85</sup> Law is narrowly defined in China's legal system as 'made and promulgated by the NPC and NPCSC'. Legal documents which are 'made and promulgated by the provincial people's congress, municipalities' people's congress and people's congress of major cities approved by State Council' are named as 'decrees'.



the day of promulgation without needing to wait for confirmation by the State Council. In fact, there is no formal mechanism applied by the State Council to effectively and efficiently supervise the legality of these regulations promulgated at regional levels other than that local governments are imposed a legal obligation to send those newly-made local regulations to the Central government for filing. Hence, considering the modern supervisory system and the fact that China has suffered many years of internal barriers within their trans-regional markets and central governments have not had the capacity to remove them for a long time, the other WTO Member States therefore have reason to worry that local regulations would intentionally protect the local business at the cost of free and fair competition with imported goods and services. The local courts, reliant on the local finances to survive, were reluctant to adjudicate litigations concerning commercial trade in opposition to the local administration in the cases that local authorities have an immediate interest in these legal disputes, not to mention the limited resources of the local judicial system that lacked qualified judges, had heavy workloads, faced corruption and had limited powers.<sup>86</sup>

Influenced by the dualist legal system modeled on the Soviet Union, international treaties within China's legal system cannot be applied by the domestic court unless the specific provision in legislation allows it. Two ways of transforming international treaties into domestic legal systems with binding power have been recognized by experts:

1) legislative transformation: the relevant authority can transform the international rule into a domestic system through a domestic law-making procedure. The new law could commonly be regarded as a domestic creation rather than an international treaty;

2) intermediate incorporation: the international treaties can be incorporated through specific reference in domestic legislation.

Can Chinese tribunals apply the WTO treaties directly to examine the conventionality of domestic regulation or expand review power to domestic legislation? The reply from China is essentially negative. Chinese delegates argued that transformation or incorporation is the specifically obligatory legal procedure for empowering international treaties, particularly since Chinese representatives in the meeting of WTO Working Party claimed that China will commit to WTO rules by 'revising existing laws and enacting new ones in full compliance with the WTO agreements.'<sup>87</sup>

The deficiency of Chinese tribunals on the protection of WTO rules within China's legal system is no less than a concrete example that reflects the realities of the weak judicial review mechanism and China's limited court mandate. According to Art. 126, the competence of local courts is limited to adjudicating the case according to the law. Judges have to keep silent as to the validity of local decrees, or lack thereof, in case they contravene superior ones. According to Legislative Law, modeled on the

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<sup>86</sup> Clarke, *supra* n. 83, at 107.

<sup>87</sup> *Id.* at 100.

Soviet Union, the capacity to review the legalities of local decrees belongs exclusively to the NPCSC. One decade ago, a local judge in Henan Province, who intended to challenge this legal order, declared the invalidity of a local decree given that it had contravened the national legislation enacted by the NPC. She was subsequently dismissed for 'making a mistake.'<sup>88</sup>

### 3.1.2. *Building up a Constitutional Review Model Compatible with China's Constitutional Framework?*

Some Chinese legal experts assert that it is more pressing to build an effective constitutional review mechanism than an ordinary judicial review mechanism considering that the former could forcefully supervise all the political organs, including the CCP, and guarantee the implementation of constitutional rights.<sup>89</sup> The call to establish a constitutional review mechanism within the Chinese legal system as a channel to human rights protection has been intensified since China's constitutional amendment added 'state respect and guarantee of human rights' into Art. 35(2) in 2004. Legal scholars and human rights advocators consistently advise Chinese authorities to fulfill their promise of human rights protection as provided in Art. 35 by the implementation of the Constitution by courts as well as to interpose an independent *ad hoc* judicial body specifically in charge of supervising the constitutionality of legislation and other statutes.<sup>90</sup> However, China's 1982 Constitution, following the Soviet model, shaped China's legal system on the basis of the doctrine of the dictatorship of the proletariat, in which the NPCSC has exclusive competence to interpret legislation and constitutional provisions as well as guarantee the constitutional order. Unfortunately, none of the constitutional acts provide us with any guidance or guarantee that China's constitutional order will be supervised by the NPCSC, nor does any constitutional provision explicitly authorize the NPCSC to examine the constitutionality of a legislative act approved by itself or by the NPC. The absence of the latter institution might lead to the assumption that the NPCSC might have turned the constitutional review mechanism into a 'dead law' if it were reluctant to carry out constitutional review on the legislation approved by the NPCSC itself. Even if the NPCSC could interpret the Constitution through a proceeding, no constitutional procedure mechanism could prevent its members from abusing their power, namely,

<sup>88</sup> *The Judge of Luoyang in Heinan Province Declared the Invalidity of Local Decree*, <<http://jpck.zju.edu.cn/eln/201003011515410031/page.jsp?cosid=1614&JSPFILE=page&LISTFILE=list&CHAPFILE=listchapter&PATH=201003011515410031&ROOTID=9331&NODEID=9641&COUNT=2&DOCID=0>> (accessed Aug. 9, 2015).

<sup>89</sup> H. Li & J. Liu, *The Discussion on Chinese Model of Constitutional Review*, 2011(2) *Journal of the Party University of Shijiazhuang City Committee of CPC* 16.

<sup>90</sup> See W. Zhang, *Implementation of Constitution and Establishment of Commission on Constitutional Review*, 21ccom.net (Dec. 9, 2012), <<http://www.21ccom.net/plus/view.php?aid=72705>> (accessed Aug. 9, 2015); see also Surya Deva, *The Constitution of China: What Purpose Does It (Not) Serve?*, 2(2) *Jindal Global L. Rev.* 76, available at <[http://papers.ssrn.com/abstract\\_id=1918793](http://papers.ssrn.com/abstract_id=1918793)> (accessed Aug. 9, 2015).

they might distort the reasonable meaning of the Constitution to suit their intention in order not to invalidate their approved legislation. Despite the absence of an explicit constitutional mechanism to review the constitutionality of legislation, the State and Administrative Law Division [hereinafter SALD] under the Legal Affairs Committee of the NPCSC might be covertly in charge of the work of examining the constitutionality and legality of local decrees and administrative regulations. The internal workings of SALD are unfamiliar to the public which certainly raises our doubts as to the constitutionality of the constitutional review procedure manipulated by SALD. The main concern is the absence of transparency of the internal working regulations having prevented people from knowing its working procedures. People have no way of accessing information on the official website of the SALD or manage to look up information regarding its working procedure in the yearbook compiled by the NPC. Moreover, the principle of due process could be potentially undermined. The staff members of the SALD, usually composed by some qualified legal experts, could review the constitutionality of local decrees in the absence of the local delegates concerned, so the constitutional provisions would be interpreted not by public discursive hearing proceedings nor published in legal documents. Meanwhile, the legitimacy of this covert competence of the SALD could be questioned given the fact that though China's Constitution merely confers the competence to interpret the Constitution to the NPCSC, no legislation or other statutes, until now, explicitly provided that the mandate of constitutional interpretation could be transferred to an affiliated division to the NPCSC. Therefore, if the SALD is really involved in this covert constitutional review, it must be a constitutional review devoid of constitutionality.

Resorting to comparative research might inspire us to find a model compatible with China's constitutional order. Anglo-American judicial review is based on the decentralized common law tradition where both federal and state judges may hear cases related to constitutional disputes. Constitutional litigation does not have any special status in relation to other kinds of litigation. The constitutionality of statutes can be examined only on the condition that the litigant parties request it or if the disputes are related to constitutional issues. The court will not make any abstract decision concerning the constitutionality of specific statutes. Only SPC's interpretations generate decisions that are binding on all the other lower courts.<sup>91</sup> Federal judges cannot nullify the legislative statutes even if they are determined unconstitutional.<sup>92</sup> The European model of constitutional review, derived from Hans Kelsen's theory<sup>93</sup>, posits that the creation of a distinct organ outside the ordinary court system – the

<sup>91</sup> Gustavo F. de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. Pa. J. Const. L. 977, 979 (2014), available at <<http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1436&context=jcl>> (accessed Aug. 9, 2015).

<sup>92</sup> Mario Comba, *Gli Stati Uniti d'America*, in *Diritto costituzionale comparato*, *supra* n. 14, at 127, 151.

<sup>93</sup> Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J.L. & Pol. 183, 183 (1942).

constitutional court – that merges the institutional forms and behavior of judicial institutions, with the limited political task of interpreting the constitution generally and the legitimacy of actions by other state organs (including judiciary organs) and private parties. Due to the fact that continental judicial review is to some extent associated with parliamentary supremacy and does not trust ordinary judges' capacity to set aside the lawful statute, the ordinary or administrative judges in continental law countries cannot nullify any legislation during the process of adjudication, only the judges in constitutional courts have the power to do so.<sup>94</sup> It is impossible for the PRC to borrow either the German or US constitutional models due to the fact that both of them are incompatible with China's centralized judiciary system. Meanwhile, the doctrine of dictatorship of the proletariat embraced by the CCP would be incompatible with the US constitutional mechanism embedded in the doctrine of check and balance. The Soviet model of constitutional provisions can neither be interpreted nor applied by the judiciary bodies. In 1955, a specific Reply to Xinjiang Higher Court issued by the SPC, inspired by Soviet constitutional theory, clarified that 'it is inappropriate for the Constitution to be used as the legal basis for conviction and punishment in a criminal judgment.' Although this Reply did not refer to the inappropriateness of citing the Constitution as an authoritative legal source for determining the criminal case, it later became an unwritten rule that Chinese judges were not permitted to cite constitutional rules in case determination until 2001.<sup>95</sup> Huang Songyou, a former Vice-Chief Justice of the SPC, even sought to bring US Supreme Court doctrine, as in *Marbury v. Madison*, into the *Qi Yuling* case in order to take the competence of constitutional interpretation away from the NPCSC, as well as to establish constitutional precedence on the direct judicial application of constitutional rights within the Chinese legal system. Huang replied to the Shandong Highest Court in 2001 with a bold statement that

upon analysis, we hold, on the basis of the facts of this case, that Chen Xiaoqi and others have violated Qi Yuling's fundamental rights to receive education in accordance with the provision of the Constitution relative to violations committed with involving a person's identity. Because this violation has resulted in actual damage, commensurate civil liability . . .

Besides the wording of Justice Huang's Reply, he is a high-profile advocate of building Chinese constitutional mechanisms based on the US model, in which local courts are able to apply the Constitution directly in the adjudication of cases.<sup>96</sup>

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<sup>94</sup> Comparative Constitutional Law 461 (Vicki C. Jackson & Mark Tushnet, eds.) (Foundation Press 1999).

<sup>95</sup> Jerry Z. Li & Sanzhan Guo, 6. *China*, in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* 158, 162 (Dinah Shelton, ed.) (Oxford University Press 2011).

<sup>96</sup> Guobin Zhu, *The Norm and Concept of China's Constitutional Rights: Inheritance, Evolution, and Prospective*, in *Constitutional Rights and Constitutionalism: Studies of Constitutional Problems in Contemporary China* 1, 38 (Hualing Fu & Guobin Zhu, eds.) (University of Hong Kong Press 2012).

However, his effort was in vain as in 2007 when the SPC annulled Huang's Reply without substantive reason. Professor Tong has argued that the very reason was that Huang's Reply itself was unconstitutional, without political basis, since Huang's intention to extend the judicial powers as much as US Supreme Court Justice did in the *Marbury* case undermined China's constitutional order embedded in the doctrine of dictatorship of the proletariat.<sup>97</sup> Two years later, new '*Rules Concerning the Citation of Law and Regulation in the Judgment*' were promulgated implicitly ruling out the legitimacy of the citation of constitutional provisions in case determination and judgment drafting. On the other hand, a continental constitutional court under the German model can hardly be compatible with China's present legal system too. Having a specific independent court that lies independent from the ordinary judiciary system, as well as from the other legislative and administrative systems, acting as a supervisor to guarantee constitutional order might conflict with the NPC authority where the will of the NPC directly derived from the 'people,' is the ultimate. No external authorities could legitimately limit or annul legislation approved by the NPC within the socialist legality.

To some extent, the French or former Soviet constitutional review mechanisms might be partially useful to Chinese legal scholars as two inspired models compatible with the Chinese constitutional order. The French Constitutional Council (*Conseil Constitutionnel*) is an independent political council composed of nine members appointed respectively by the President of the Republic, and the Presidents of the Senate and the National Assembly. The appointed members cannot be ministers or members of parliament. Before their promulgation, acts of parliament have to be referred to the constitutional council for constitutional review. The decision to declare the unconstitutionality of bills of law by the constitutional council could deprive their chances of potential validity, in a model where the constitutional council guarantees the French legal culture that any valid law should be maintained its binding power after promulgation.<sup>98</sup> Though the Chinese constitutional system is not compatible with any independent judicial and constitutional review body, the French model inspires us, in the aspect of its functions 'enshrine and control political reality.'<sup>99</sup> The Soviet Union did not have a constitutional court until Gorbachev's regime when the Supreme Soviet adopted the constitutional amendment to build a new Committee of Constitutional Supervision [hereinafter CCS] under the structure of the National Congress of Deputies.<sup>100</sup> The CCS members were elected by the Congress for a term of

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<sup>97</sup> Z. Tong, *Constitutional Application Should Follow the Road Stipulated by the Constitutional Itself*, 2008(6) China Legal Science 38.

<sup>98</sup> Enrico Grosso, *La Francia*, in *Diritto costituzionale comparato*, *supra* n. 14, at 158, 186.

<sup>99</sup> John Bell et al., *The Principles of French Law* 139 (Oxford University Press 1998).

<sup>100</sup> Herbert Hausmaninger, *The Committee of the Constitutional Supervision of USSR*, 32 Cornell Int'l L.J. 287, 287-91 (1990), available at <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1240&context=cilj>> (accessed Aug. 9, 2015) [hereinafter Hausmaninger, *The Committee*].

10 years from among the 'specialists in the field of politics and law' and consisted of a chairman, a deputy chairman, and 21 members, including one representative from each republic. Under the Soviet Constitution (Art. 126) and the Law on Constitutional Supervision in the USSR, the CCS could, at the request of the other high authorities or on its own initiative, examine the constitutionality of laws and legality of certain normative acts. In the case of violation of a non-human rights provision of the Soviet Constitution by a federal statute, a presidential decree or a government ordinance, the CCS could only issue a finding of unconstitutionality and illegality which could suspend the legal effect of the legislative and administrative act. The CCS could appeal to respected organs to revise the normative acts within 30 days. Between its first official announcement in May 1990 and the decision to dissolve it, on December 23, 1991, the CCS produced fewer than two dozen findings. Most of these findings nullified the human rights violation by federal legislative and executive authorities. In many human rights cases, the CCS often examined the domestic legal federal and some republics' legal documents with the standards embodied in the international human rights treaties since it insisted on their supremacy over Soviet law.<sup>101</sup>

Preventive examination of the constitutionality of the law in order to guarantee the unification of constitutional order and respect for fundamental rights are the impressive functions shared by both constitutional review models. Given the members' relationship with high up political party figures, the functions of both models are not merely devoted to the review of the constitutionality of statutes, but also act as the forum forming the consensus on constitutional rules among the different political parties as well as political organizations and associations. In my view, China needs a highly political constitutional court to avoid the political clash between the diverse interest groups during the transitional period if the Chinese elite determine to walk towards democratization. However, the French Constitutional Council, though established in a highly political manner, has several obvious French characteristics which would be difficult to import into Chinese legal system. It was described as 'a canon aimed at parliament,' protecting the executive branch from the encroachment of the statute voted by the parliament. In contrast, the supreme power of the NPC essentially rejects any forms of external supervision by other state bodies. The French model could, nevertheless, be altered within the Chinese constitutional order into a consultative organ composed by the legal experts properly elected or appointed. Those elected members could be given the competence to examine the constitutionality of statutes before their promulgation, and offer advice to the NPC on legal or constitutional amendments in case that statute is inferior in contrast with the constitution or constitutional rights which has provided a lower standard of protection than UN human rights treaties. However, their conclusions would have

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<sup>101</sup> Herbert Hausmaninger, *From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court*, 25 *Cornell Int'l L.J.* 305, 310–11 (1992), available at <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1285&context=cilj>> (accessed Aug. 9, 2015).

no binding powers on state organs because the NPC or NPCSC, having the final say, could choose to adopt the suggestions or not.

The former Soviet model, which has been strongly proposed by some Chinese scholars,<sup>102</sup> is potentially the most adaptable to the Chinese constitutional order given the ideology shared more than two decades ago. A relatively independent constitutional court, established under the framework of the National Congress of Deputies, was composed by legal and political experts with broad powers to review the constitutionality of various legal documents in compliance with the constitution and international human rights treaties. Indeed, this model could protect human rights abstractly through the nullification of statutes which were determined to violate the constitution and international human rights treaties, but the CCS could by no means touch the constitutionality of the CPSU's concrete policy related to national affairs. The debate on the legality of the establishment of this institution never stopped, because Art. 121(4) of the 1977 Soviet Constitution delegated the power of constitutional interpretation and supervision of the implementation of the constitution only to the Presidium of the Supreme Soviet<sup>103</sup> which has a similar constitutional status to the NPCSC, rather than any independent constitutional court, not to mention that the existence of this model only lasted less than one year. Regarding the legitimate crisis of the Soviet CCS, China's constitutional court might be settled within the framework of the NPCSC reviewing the final draft before promulgation as the French Constitutional Council did.

Indeed, several scholars who have been, to a greater or lesser extent, influenced both by the French model and former Soviet model proposed that a new constitutional committee can be established within the framework of the NPCSC<sup>104</sup> in which the members are afforded extensive competence to examine the constitutionality of the contested legal document. I partly agree with this argument simply because it is compatible with China's constitutional order. Meanwhile, the selection of committee members should be compatible with our political circumstance. In the French model, the candidates are respectively nominated by several state leaders who usually come from different political parties. Correspondingly, the NPCC, who has traditionally acted as a consultative political body and whose representatives are composed of the CCP and remaining democratic parties, religious or non-political party members, could nominate the candidate list of China's envisioned constitutional court.

In the long term, the NPCC was widely regarded as a vase displaying the CCP's hypocritical democracy serving its 'united front' strategy with the CCP financing the activities of democratic political parties, as well as providing them benefits, in

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<sup>102</sup> W. Liu, *Several Question on the Establishment of Constitutional Examination System*, 2003(6) *Jiangsu Social Sciences* 122

<sup>103</sup> Hausmaninger, *The Committee*, *supra* n. 100, at 287.

<sup>104</sup> X. Zhou, *The Research on the Several Question of China's Constitutional Review*: LL.M. Thesis 44 (Nanjing Normal University 2011).

exchange for their political support to the CCP as the eternal ruling party. However, democratic political parties would be reluctant to compromise with the ruling party at the cost of sacrificing their political identities forever. As political parties, they endeavour to exert their own influence on state policy as much as they can. The CCP has to deal very prudently with the political opinion of democratic political parties as well as other non-communist NPCC representatives, as the former CCP General Secretary Hu Jintao stated:

We should uphold and improve the system of the People's Congress, the system of multiparty cooperation and political consultation under the People's Congress . . . All these will promote the continuous self-improvement and development of the socialist political system.<sup>105</sup>

Hence the CCP's willingness to spare more space for democratic parties engaging in political activities, otherwise suspicions would be raised that NPCC functioned merely as a political vehicle to support the CCP's rule. Consequently, it is possible to organize a new constitutional committee within the NPCSC, whose members could be elected by the NPC from a candidate list proposed by NPCC representatives. All eight democratic parties respectively reserve at least one nominee as member in the final list. These judges, as representatives of state sovereignty, would be entitled to the independent mandate of interpreting the constitution and examining the constitutionality of national legislation, in a centralized manner, before its promulgation and controlling central administrative regulation, as well as local decrees after their promulgation under the framework of the NPCSC. Consequently, the advantage of this envisioned model could effectively guarantee the unification of the constitutional order and the protection of fundamental rights without being undermined by the lower statute. Moreover, this constitutional review compatible with China's constitutional theory could ensure constitutional interpretation based on political consensus rather than only on the will of the communist party.

### **3.2. Human Rights: UN Human Rights Treaty Impacts on China's Human Rights Legislation**

Though the Soviet Union was a historical concept more than two decades ago, the legacy of Soviet rights theory still exerts a strong influence on China's human rights affairs, including guiding human rights legislation and sometimes shaping China's human rights jurisprudence significantly. The ruling elites and some scholars, even to this day, still limit human rights education to Soviet theory as the main

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<sup>105</sup> Jintao Hu, *Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in All Respects: Report to the 17<sup>th</sup> National Congress of CCP (Oct. 15 2007)*, <[http://news.xinhuanet.com/english/2007-10/24/content\\_6938749.htm](http://news.xinhuanet.com/english/2007-10/24/content_6938749.htm)> (accessed Aug. 9, 2015).



measure to defend the dominant status of Marxist ideology. One of the CPP-backed scholars even asserted, after the 1989 Tiananmen incident:

We are therefore facing the urgent task of coming to grips with the theory of this issue and educating the broad masses, in particular young students, on how to utilize a Marxist perspective to achieve a thorough and correct understanding of human rights.<sup>106</sup>

It revealed that the Chinese ruling elites still confine 'human rights' to a discourse with the highly political and ideological sense of the early 1990<sup>5</sup>. However, the NPC, on the other hand, has ratified six out of nine UN core human rights treaties as well as two Protocols. Moreover, the Chinese State Council ratified the International Covenant on Civil and Political Rights [hereinafter ICCPR] in 1998. Despite the fact that these UN treaties could be directly applied by the domestic courts, they have a potential effect on legislative reform related to human rights legislation, particularly in the field of social and economic rights. In this subsection, more attention should be paid to the influence of UN human rights treaties on Chinese legislative reform.

Influenced by the traditional Soviet concept of international law, China's Constitution keeps silent on the domestic judicial application of international human rights treaties. Individuals, according to orthodox Chinese academic opinion, are not eligible subjects of international law. Wang Tieya, the most influential international law professor in contemporary China, has argued in a textbook that

though international human rights treaties have granted numerous rights to individuals, the contracting state, rather than the individuals, is the object of the these international treaties whose binding power derives from the agreement among sovereign states. Hence, individuals are direct beneficiaries rather than the subjects within the international human rights framework.<sup>107</sup>

Wang's theory corresponds to Soviet Professor Kozhevnikov's point of view in the 1950<sup>5</sup> having argued that 'the very essence of international law . . . whose purpose is to regulate the relations between the states on the basis of their sovereign equality.'<sup>108</sup> International law in this sense is incapable of being a source of law respectively claimed and applied by individuals and courts, though it has binding power on the State, unless permitted by specific domestic legal provisions. This theory clarifies

<sup>106</sup> Edward Wu, *Human Rights: China's Historical Perspective in Context*, 4 *Journal of the History of International Law / Revue d'histoire du droit international* 335, 356 (2002), available at <[http://papers.ssrn.com/abstract\\_id=1716779](http://papers.ssrn.com/abstract_id=1716779)> (accessed Aug. 9, 2015).

<sup>107</sup> Tieya Wang, *Textbook on International Law* 77 (Law Press 1995).

<sup>108</sup> *Международное право: Учебник* [Mezhdunarodnoe pravo: Uchebnik [International Law: Textbook]] 7 (Fyodor I. Kozhevnikov, ed.) (Gosyurizdat 1957).

the reason why Chinese UN delegate Zhang Kening has declared that international human rights treaties come into effect immediately after ratification by the National Congress,<sup>109</sup> but actually Chinese courts have, to date, no record of any case adjudicated through the direct application of rules provided by UN human rights treaties.<sup>110</sup> China's Legislative Law does not provide guidance for the application of UN human rights treaties, while the SPC's Rules Concerning Citation have created a stumbling block to directly apply the UN treaties on the grounds that all citations should be confined to domestic law. As a result, the transformation of international human rights treaties through a legislative approach has become possibly the most effective measure for the incorporation of UN human rights standard into the domestic legal system.<sup>111</sup>

Chinese delegates always declare reservations if some specific provisions could not be fully realized in the Chinese legal system. For instance, Chinese delegates have explained the reason for their reservation with regard to Art. 8 of ICESCR on its initial State Report to the UN Committee on Economic, Social and Cultural Rights [hereinafter UN CESCR], with these words:

[It] is a developing country, in view of constrains relating to the level of the country's economic and social development, even though the Covenant comes into force in China, not all its articles have been fully realized. The degree of enjoyment of certain rights does not yet reach the requirement of the Covenant.<sup>112</sup>

Otherwise, China would have the obligation, under the Convention, to transform those non-reserved provisions into domestic law through the legislative approach. Since there is no specific human rights act in China, the NPC usually transforms the UN standards on human rights into domestic human rights legislation. In order to ascertain what exact role the UN human rights treaties take in China's legislative process, it is necessary to focus on the comparative research on the interaction between UN treaties and Chinese human rights legislation with the help of government reports, as well as

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<sup>109</sup> China's delegate replied to the questions how China could prevent suspects or defendant from torture in the condition that there is no definition of 'torture' in Chinese system with these words: 'When China acceded to any convention, it became binding as soon as it entered into force. China then fulfill its obligation, and it was not necessary to draft special law ensure the conformity.'

<sup>110</sup> H. Zuo, *The Studies on Treaties' Direct Application*, 2008(3) Legal Studies 93.

<sup>111</sup> Björn Ahl, *Statements of the Chinese Government before Human Rights Treaty Bodies: Doctrine and Practice of Treaty Implementation*, 12(1) Australian Journal of Asian Law (2010), available at <<http://www.cesl.edu.cn/eng/upload/201106214057582.pdf>> (accessed Aug. 9, 2015). Ahl agrees with the opinion that with regard to human rights treaties impossibly applying in domestic courts, 'current Chinese practice indicates that obligation under human rights treaties are implemented indirectly by way of transformation ...'

<sup>112</sup> Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 Chinese Journal of International Law 445, 450 (2007). doi:10.1093/chinesejil/jmm015

the lectures or papers of drafters. Unfortunately, very few academic works or legislative materials refer to the issue. According to the *Introduction of the Chinese Legislative Process* published in the NPC official website, comparative research on the legislation or practice of foreign countries or regions is the compulsory work of the experts' panel in the process of drafting preparation.<sup>113</sup> International treaties' norms, even those ratified by the Chinese government, seem not be a compulsory source of consideration because the expert panel is not explicitly required to consider international treaties. However, UN human rights treaties have been actually taken into account by the drafters in the drafting process regardless of whether those treaties are ratified by the NPC or not. Ms. Xin Chunying, the Vice-Chairperson of the Legislative Affairs Committee in charge of a legislative project on women's rights, admitted in one of her lectures that the equal rights of men and women to enjoy social welfare, and the rights to enjoy social security during the period of pregnancy and breastfeeding, enshrined in 1992 China's Law on Protection of Women's Rights and Interests, were directly borrowed from the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>114</sup> Evidence concerning the comparative role of UN human rights treaties in the process of domestic legislative work could also be perceived from some Instructive Reports on Drafts to the Law Commission in the NPC. For instance, Zhu Mingshan, the Vice-Chairman of the Internal and Judicial Affairs Committee in charge of revising Law on the Protection of Minors, delivered the Instructive Report on the Law on Protection of Minors with reference to the UN human rights treaties, stating that

given that China has acceded to the Convention of Children Rights and the UN Standard of Minimum Rules for the Administration of Justice for Juvenile Delinquency, in both of which the principles of the 'best interests of children' and 'maximum protection of children' are embodied, some revised provisions manifesting the spirit of the two aforementioned international treaties have been incorporated into the given draft bill.<sup>115</sup>

Apart from this evidence, even the drafters of the new revised Law on the Protection of Women's Rights and Interests have broadly taken the comparative approach in the drafting process, they have not only confined their studies to the UN documents on women's rights but have also studied the successful experience of the protection of women's rights in foreign countries.<sup>116</sup>

<sup>113</sup> *The Introduction of Basic Legislative Process in Our Nation*, <[http://www.npc.gov.cn/npc/sjb/2013-02/19/content\\_1755104.htm](http://www.npc.gov.cn/npc/sjb/2013-02/19/content_1755104.htm)> (accessed Aug. 9, 2015).

<sup>114</sup> C. Xin, *Building the Institution of Social Security with Chinese Characteristic*, *KeXue Shibao* (Jan. 20, 1999), <<https://www.iolaw.org.cn/showArticle.aspx?id=1213>> (accessed Aug. 9, 2015).

<sup>115</sup> M. Zhu, *Instructive Report on the Draft Bill of Law on Protection of Minors (Revised Draft Bill)*, <<http://www.npc.gov.cn/npc/oldarchives/zht/zgrdw/common/zw.jsp?label=wxzlk&id=357674&pdmc=1524.htm>> (accessed Aug. 9, 2015).

<sup>116</sup> The Writing Group, *The Interpretation of 'Law on the Protection of Women Rights and Interests' 2* (2005).

Some Instructive Reports failed to refer to the relevant UN human rights treaties, but this does not indicate that drafters have not thought over international human rights treaties. On the contrary, they might be inspired by some UN treaties which were inappropriately publicly announced as explicit sources of inspiration at the time, given that China was not yet an official contracting state. For instance, the Instructive Report on the Law on the Protection of Disabled Citizens kept silent on the role of the Convention on the Rights of Persons with Disabilities [hereinafter CRPD] in several draft bills,<sup>117</sup> while supplementary material on the draft preparation revealed the evidence that drafters had been actually influenced by the CRPD in some aspects. For instance, 'accessibility' is a basic CRPD's requirement for states to ensure disabled persons' access to social facilities and services, which is one of the fundamental reasons for China's new legislation adding various concrete measures to ensure the realization of rights of persons with disabilities in daily life.<sup>118</sup>

Moreover, drafters involved in legislative reforms concerning highly sensitive or controversial issues were reluctant to refer the UN human rights treaties in order not to give the impression that the new legislation was a result of concessions to external pressure. Abolishing capital punishment as a universal dynamic consensus is a consistently sensitive issue in China. The exact number of executions per year is well-recognized as China's state secret. The NPCSC consistently approved two Criminal Law Amendments in 2011 and 2014 in order to reduce the number of crimes eligible for capital punishment. Though scholars<sup>119</sup> and state-controlled media<sup>120</sup> commonly admitted that the ICCPR and the international tendency to abolish capital punishment are two relevant factors leading China's ruling elites to that amendment, Li Shishi, one of the vice-chairpersons of the Legislative Affairs Committee in charge of the criminal law reform, did not refer to UN human rights treaties or to this international dynamic tendency in his Instructive Reports on No. 8 Amendment of the Criminal Law Code.<sup>121</sup> Besides, Re-education through Labor System, an institution of administrative detention borrowed from the Soviet Union, was abolished by the NPC's Decision adopted by the NPCSC in 2013. China's court had no capacity to hear cases concerning

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<sup>117</sup> X. Li, *Instructive Report on the Draft Bill of Law on the Protection of Persons with Disabilities*, <[http://www.npc.gov.cn/npc/zt/2008-06/03/content\\_1494743.htm](http://www.npc.gov.cn/npc/zt/2008-06/03/content_1494743.htm)> (accessed Aug. 10, 2015).

<sup>118</sup> *The Brief Introduction of Accessibility*, <[http://www.npc.gov.cn/npc/zt/2008-02/27/content\\_1400282.htm](http://www.npc.gov.cn/npc/zt/2008-02/27/content_1400282.htm)> (accessed Aug. 10, 2015).

<sup>119</sup> R. Liu, *Criminal Law Scholar: Why China's Capital Punishment is Concerned Too Much*, *Zhongguo Qingnian Bao* (Nov. 25, 2014), <[http://news.china.com.cn/2014-11/25/content\\_34142434.htm](http://news.china.com.cn/2014-11/25/content_34142434.htm)> (accessed Aug. 10, 2015).

<sup>120</sup> *Consistently Reducing the Number of Crimes Eligible to Capital Punishment Is the Crucial Step towards Civilization of Rule of Law*, <<http://opinion.people.com.cn/n/2014/1028/c159301-25925678.html>> (accessed Aug. 10, 2015).

<sup>121</sup> S. Li, *Instructive Report on the Draft Bill of No. 8 Amendment of the Criminal Law Code*, <[http://www.npc.gov.cn/huiyi/lfzt/xfxa8/2011-05/10/content\\_1666058.htm](http://www.npc.gov.cn/huiyi/lfzt/xfxa8/2011-05/10/content_1666058.htm)> (accessed Aug. 10, 2015).

the sentence of re-education through labor because the Public Security Bureau made decisions and carried out the detention on those 'minor' infringements that were crimes. The maximum duration of the detention was as long as four years, which was far more than the minimum duration of the fixed-term of imprisonment according to the Chinese Criminal Law Code. The System obviously violated Art. 9(4) ICCPR, which provides '[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, so that the court may decide without delay on the lawfulness of his detention . . .' The fact of the violation was also admitted by the scholars with an official background.<sup>122</sup> However, all the proposals by representatives to abolish Re-education through Labor System were submitted on the grounds that the System itself had contravened the Constitution, the Criminal Law Code, the Criminal Procedural Law as well as the Legislative Law. Unfortunately, no proposals mentioned that the System violated Art. 9(4) ICCPR.

Unlike the western legal system embedded in the concepts of 'rule of law' and 'human rights' which are rooted in natural justice, the party's will is still the guideline of Chinese legislation. Thus, the Chinese legal system is the instrument handled by the ruling party for serving and defending the stability of the socialist regime. The incorporation of UN human rights standards into its legislation could be accepted only if they add positively to the consolidation of party rulings or guarantee the stability of society, otherwise the Chinese ruling elites might not observe these UN standards. For instance, as it is known to all human rights scholars that most liberal rights provided in UN human rights treaties could be limited only by law, according to which doctrine, peaceful political dissidents' rights to express their political opinions could not be deprived unless their activities are in conflict with public order or morals in democratic societies. This UN concept of liberal rights could hardly be accepted by China's ruling elites even after China's future accession to the ICCPR. The ruling elites fear that UN human rights standards would arm dissidents and undermine the consolidation of China's socialist legality. The judgment of the *Liu Xiaobo* case was a good example of this argument. The *Liu* decision violated rights of expression provided by Art. 19 ICCPR on the grounds that the Chinese court did not follow the UN's doctrine on the limitation of the rights stating:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>123</sup>

<sup>122</sup> Jiao Wu, *New Law to Abolish Laojiao System*, China Daily (Mar. 1, 2007), <[http://www.chinadaily.com.cn/china/2007-03/01/content\\_816358.htm](http://www.chinadaily.com.cn/china/2007-03/01/content_816358.htm)> (accessed Aug. 10, 2015).

<sup>123</sup> *General Comment No. 34: Article 19: Freedom of Opinion and Expression*, U.N. GAOR, Hum. Rts. Comm., 102<sup>nd</sup> Sess., ¶ 35, U.N. Doc. CCPR/C/GC/34 (2011), at <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> (accessed Aug. 9, 2015) (citing *Hak-Chul Shin v. Republic of Korea, Communication*

Without any consideration for the UN human rights treaties and interpretation of the Human Rights Committee, the Chinese Court, through the unconditional application of Art. 105 of the Chinese Criminal Code, determined in haste that Liu's articles were published in foreign states' websites having revealed his intention to subvert the socialist regime, according to which his activities constituted the crime of 'inciting to subvert the state regime.' The Chief Judge in this case should not be the only person blamed, given the circumstance that he and law are both instruments controlled by the party's will. Article 105 of China's Criminal Code itself seems too vague to draw any possible boundary between freedom of speech and inciting the subversion of the socialist state regime, nor was peaceful and rational political speech given special status for not convicting. These inherent deficiencies already constitute a violation of UN human rights treaties. However, China's ruling elites are not planning to do any legislative reform in this field, as confirmed by China's spokesperson from the Diplomatic Department when she stressed that the judgment of the *Liu* case was a matter of 'internal affairs' and warned western states 'not to interfere with Chinese judicial sovereignty,' without referring to UN human rights treaties.

The *Shuanggui* system is another example of something that will not be abolished by the CCP in the near future though it has violated the ICCPR and the contemporary Chinese legal system. *Shuanggui* detention is an internal disciplinary process, conducted by the CCP's Disciplinary Inspection Committee, having powers to start the investigation of the suspects, who are often relatively high up CCP figures accused of violating the CCP's discipline or the Criminal Law.<sup>124</sup> Suspects are usually confined to comfortable quarters but deprived of personal liberties, of rights of access to information and the rights to correspondence. Suspects' family members might not be informed by the Disciplinary Inspection Committee, neither can their family members employ lawyers to engage in the investigation because party discipline rejects any external interference in the highly secret investigation. Therefore, *Shuanggui* detention actually violates Art. 9(1) ICCPR which requires that the deprivation of personal liberty should be in accordance with the procedure established by law given the fact that no legislation has ever intended to limit the CCP's power. A few bold professors advised the CCP to regulate the *Shuanggui* system through a legislative approach for making the System itself accountable and transparent, in conformity with standards set in Chinese legislation and UN human rights treaties.<sup>125</sup> The ruling elites seem unwilling

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No. 926/2000, U.N. GAOR, Hum. Rts. Comm., 80<sup>th</sup> Sess., U.N. Doc. CCPR/C/80/D/926/2000 (2004), at <<http://www1.umn.edu/humanrts/undocs/html/926-2000.html>> (accessed Aug. 10, 2015)).

<sup>124</sup> Jerome A. Cohen, *Human Rights and the Rule of Law in China: Prepared Testimony before the Congressional-Executive Commission on China*, Council on Foreign Relations (Sep. 20, 2006), <<http://www.cfr.org/china/human-rights-rule-law-china/p11521>> (accessed Aug. 10, 2015).

<sup>125</sup> Keith Zhai, *Communist Party Seeks to Reform Its 'Shuanggui' Anti-Corruption Investigations*, South China Morning Post (Nov. 22, 2013), <<http://www.scmp.com/news/china/article/1361851/communist-party-seeks-reform-anti-corruption-investigations>> (accessed Aug. 10, 2015).

to adopt this sound suggestion which would legally limit the ruling CCP's power. According to Chinese Legislative Law, the NPC – the only national body – has non-transferable powers to make legislation concerning the deprivation or limitation of personal liberties, so *Shuanggui* detention is an extrajudicial investigation conducted by the ruling party's body. If the NPC was permitted by the CCP to regulate *Shuanggui* detention, it would appear that the activities of the specific ruling party were the object of regulation by national legislation. Not to mention that ruling elites hate to see their power limited by law, which might potentially result in the CCP losing more authority and resources in the future. *Shuanggui* detention itself acts as a deterrent, as suspects easily confess the facts in fear of prosecution and torture during this secret interrogation. It effectively assists the leaders of the CCP to combat corruption as well as eliminate political opponents.<sup>126</sup>

China's government tolerates the commencement, by its agencies and bodies, of legislative reform that is to some extent in conformity with UN human rights standards, on the precondition that they do not conflict with the party's core interests, even though said standards were for a long time deemed to be anti-Marxist. The presumption of innocence is the fundamentally unalienable principle of criminal proceedings enshrined in Art. 14(2) ICCPR that '[e]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.' However, Chinese Marxist legal scholars have long considered the presumption of innocence as a bourgeois theory. In the 1957 Anti-Rightist Campaign, the review published in an official newspaper accused 'rightist' elites of using 'presumption of innocence' and 'benefit to defendant' to help counter-revolutionaries and criminals escape criminal responsibilities. This principle was depicted as having caused widespread harm to the 'struggle against crime' that was the prime objective of the socialist legal system.<sup>127</sup> China's 1979 Criminal Procedure Code, similarly to the Soviet Union's, contained no specific provision on the presumption of innocence. Marxist scholars argued that this bourgeois theory could not be compatible with Chinese legal reality, which according to the socialist order of criminal procedure should be based on the principle of 'taking facts as the basis and the law as the yardstick.'<sup>128</sup> Though not regarded as compatible with Marxist-Leninist ideology, the principle causes no harm to the interests of the communist ruling elites. Thus, the presumption of innocence was partially incorporated into Art. 12 of China's new

<sup>126</sup> Andrew Jacobs, *Accused Chinese Party Members Face Harsh Discipline*, N.Y. Times (Jun. 14, 2012), <[http://www.nytimes.com/2012/06/15/world/asia/accused-chinese-party-members-face-harsh-discipline.html?\\_r=0](http://www.nytimes.com/2012/06/15/world/asia/accused-chinese-party-members-face-harsh-discipline.html?_r=0)> (accessed Aug. 10, 2015).

<sup>127</sup> Timothy A. Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. Crim. L. & Criminology 259, 275 (1982), available at <<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6296&context=jclc>> (accessed Aug. 10, 2015).

<sup>128</sup> H. Xiao, *The Principle of Presumption of Innocence Could Not Be Compatible with Our Criminal Proceeding Order*, 1980(4) Legal Studies 62–63.

Criminal Procedure Code promulgated in 1996, which provides that 'no one shall be guilty of a crime, unless proven guilty by a court of law.' The Procuratorate within the new criminal procedure order discharges the burden proof. The defendant cannot be presumed guilty if he or she fails to prove his or her own innocence, unless public officials are convicted of a crime such as holding a huge amount of property acquired with unidentified resource. If there is no probable cause to prosecute or insufficient evidence to convict after initial or additional discovery, the prosecutor must drop the charges. During the trial proceedings, the people's court must rule in favor of the defendant and set him / her free due to lack of evidence in a case where the evidence does not satisfy the 'beyond reasonable doubt' requirement.<sup>129</sup> Actually, the newly revised provision is the outcome of a compromise between reformists and socialists in the text of Art. 12 where the 'defendants' or 'suspects' were not completely granted the rights of presumption of innocence before proven guilty by the court but simply clarified a fact that only a court can prove the guilt of defendants or not,<sup>130</sup> from where the rights to presumption of innocence can be indirectly derived on one hand, while the principle of 'taking facts as the basis and law as the yardstick,' on the other hand, remain the basic principle in new criminal procedure order.

Meanwhile, the process of the incorporation of rights to the prohibition of self-incrimination, which is a fundamental right embodied in Art. 14 ICCPR, could also mean the outcome of the incorporation of the UN human rights standard relied on the extent of the compromise between the reformists and conservatives and on the assumption of the party's permission. The new Amendment of the Chinese Criminal Procedure Code has literally imported the rights into Art. 50, which provides: 'The People's court, the People's Procuratorate, and public securities . . . are prohibited to force the defendants' or suspects' self-incrimination.' Due to the presumption that the rights to the prohibition of self-incrimination sharply increase the difficulties for authorities in ascertaining the facts of crimes, the new rule on the prohibition of self-incrimination is no stronger than a fragile vase easily shattered by the suspects' obligation, as provided in Art. 118, stating that criminal suspects must answer the investigator's questions relevant to the criminal investigation truthfully during the interrogation of said suspects. Thus, the criminal obligation of suspects must be offset by the new rights borrowed from UN human rights treaties.

Communist regimes usually stress the development of social and economic rights to defend its human rights records and show great achievements under the leadership of the Communist Party. Under the guideline of socialist ideology, the Chinese government proposes that rights to subsistence and rights to development are two

<sup>129</sup> Jinwen Xia, *New Development in 2001 Chinese Criminal Procedure Law*, 7 Ann. Surv. Int'l & Comp. L. 1, 2 (2001), available at <<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1056&context=annlsurvey>> (accessed Aug. 10, 2015).

<sup>130</sup> R. Chen, *Reflection and Reconstruction of Theoretical Foundation of Evidence Law*, The Papers Book of Evidence Law 360, 369 (2005).



supreme collective rights in China's rights hierarchy in that economic development presumably guarantees the realization of the rights in all categories. This strategy could not only satisfy people's need but also consolidate the legitimacy of the party's ruling. In view of the fact that economic rights are unenforceable by the courts but, rather, realizable through the economic growth and fair distribution of resources, China could not possibly be accused of the violation of economic and social rights, but rather be widely praised for its effort to eradicate poverty, build infrastructure and public services as well as promote the employment rate as the largest developing country. In the recent State Report to the UN CESCR, China's delegate stated that the Chinese government attributed great importance to the concluding observation presented by the Committee and, in the course of formulating and implementing the Eleventh Five-Year Plan for National Economy and Social Developments (2006–10), had given full consideration to the requirements of the Covenant and to the reasonable recommendations of the Committee, making every effort to transform them into policy measures that suit the national scenario.<sup>131</sup> The Chinese government continuously guarantees social and economic rights through the perfecting of the legal system, making national policy and formulating specific Human Rights Action Plans, having attained the remarkable achievements. Although the ICESCR came into effect in China, the Chinese government confessed that not all ICESCR articles have been realized in their entirety, and the enjoyment of certain rights still cannot meet the ICESCR's requirement.<sup>132</sup>

The attainment of great achievements does not imply that China's government has already perfectly eliminated discriminatory social institutions. For instance, the *Hukou* System is the administration of Chinese household registration, inspired by the Soviet's *propiska* (passing port) system, with the purpose of limiting urban migration by the rural population, and which has formally differentiated residential groups and shaped state development priorities.<sup>133</sup> The System, with obvious discrimination, has caused great concern in the UN CESCR,<sup>134</sup> and is consistently subject to public

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<sup>131</sup> *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: China*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., ¶ 4, at 3, U.N. Doc. E/C.12/CHN/2 (2012), at <<http://www.refworld.org/publisher,CESCR,,CHN,52ca7ff64,0.html>> (accessed Aug. 10, 2015).

<sup>132</sup> *Id.* at 11.

<sup>133</sup> Tiejun Cheng & Mark Selden, *The Origins and Social Consequence of China's Hukou System*, 1994(139) *The China Quarterly* 644. doi:10.1017/S0305741000043083

<sup>134</sup> UN Committee on Economic, Social and Cultural Rights in the recent concluding observation (*Concluding Observations on the Second Periodic Report of China, Including Hong Kong, China, and Macao, China*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., U.N. Doc. E/C12/CHN/CO/2 (2014), at <<http://www.refworld.org/docid/53c77e524.html>> (accessed Aug. 10, 2015)) to China's State Report called upon China again to strengthen its effort to abolish its *Hukou* System and to ensure that all rural-to-urban migrants are able to enjoy work opportunities, as well as social security, housing, health, and education benefits, enjoyed by the residents in urban areas. The Committee also urged China to take all necessary effective family-support measures to avoid the separation of children from family environment and to ensure that children could, particularly those from the rural areas, be raised by their parents.

denouncement by Chinese scholars,<sup>135</sup> as well as by representatives in the NPC,<sup>136</sup> in the sense that a residence with a rural registration would, by law, get greatly unequal treatment to residences with an urban registration, in terms of the enjoyment of social and economic rights as well as civil and political rights. A case adjudicated by a court in Beijing in 2006 aroused people's worries in that the principle of individuals' lives having equal value had been directly undermined by the *Hukou* System. Two men were killed in a car accident. The judges determined that the successors of the deceased from an urban residence be awarded compensation of as much as 400,000 RMB, while the relatives of the rural victim would be compensated only 160,000 RMB according to a specific SPC's Interpretation, having clarified that the criterion, used to explain the different compensation values for death in a car accident, was the rural or urban status of the accident victims.<sup>137</sup> These institutional inequalities range broadly from college entrance rates<sup>138</sup> to coverage of social medical insurance.<sup>139</sup> Dating back to the 1950<sup>s</sup>, food rationing in the mid-1950<sup>s</sup>, the planned economy era, had an important corollary with the *Hukou* System, in its effort to control migration and assure the supply of food to priority sectors, specifically to the growing ranks of the working class, cities and the military.<sup>140</sup> Rationing policy sharply differentiated between urban and rural residences. The subsistence of urban residences was guaranteed by the State, whereas rural residences were responsible for feeding themselves. The systematic discrimination between rural and urban citizens was established then. In order to bridge the gaps between rural and urban areas, the Chinese government has consistently promoted various reforms to accelerate orderly urbanization and made efforts to achieve full basic public service coverage for persons living in the cities and towns. In November 2013, the Chinese Central government once again clearly proposed, for purposes of population management,

<sup>135</sup> Lijiang Zhu, *The Hukou System of the People's Republic of China: A Critical Appraisal under International Standards of Internal Movement and Residence*, 2 *Chinese Journal of International Law* 519 (2003), available at <<http://chinesejil.oxfordjournals.org/content/2/2/519.full.pdf>> (accessed Aug. 10, 2015). Zhu criticized the negative impact of *Hukou* System into the freedom of internal movement under the legal framework of the ICCPR and into the actual inequalities in social life.

<sup>136</sup> *Chongqing's National Representative Proposes to Abolish the Different Types of Hukou between Rural and Urban*, <<http://news.sohu.com/20090304/n262594828.shtml>> (accessed Aug. 10, 2015).

<sup>137</sup> *Difference in Hukou Type Means Difference in Lives Value*, <<http://news.sohu.com/20060415/n242818192.shtml>> (accessed Aug. 10, 2015).

<sup>138</sup> A statistic surveyed by Peking University that only 14.2% freshmen come from rural areas in 2013. The rate of freshmen from rural areas keeps decreasing in the recent seven years in Chinese top universities because the advantaged finance and staff resource are gradually centralizing in metropolitan or capital of provinces. Consequently, the gap between the resource directly leads to different opportunities young generation can enjoy. See <[http://edu.china.com.cn/henan/2013-10/16/content\\_30308642.htm](http://edu.china.com.cn/henan/2013-10/16/content_30308642.htm)> (accessed Aug. 10, 2015).

<sup>139</sup> X. Zhang, *Education and Health Inequality in China*, 2(2) *China Economic Quarterly* (2003).

<sup>140</sup> Lynn T. White, *Careers in Shanghai: The Social Guidance of Personal Energies in a Developing Chinese City 1949-66*, at 162 (University of California Press 1978).

the full release from restrictions of settlement in towns and small cities and the orderly authorization of settlement in medium-sized cities. However, the Chinese government is not likely to abolish the System in the near future given that it has effectively blocked people originating from the rural areas, who endure inadequate living standards, flooding into metropolitan areas rapidly, which might bring high crime rates, resource constraints, inconvenient access to social facilities and traffic. Unlike the negative state obligations in the fulfillment of liberal and political rights, the Chinese government must prudently distribute the available resources to the rural migrants, and scientifically estimate the impact of migration on resource in order to adjust its *Hukou* policy gradually, rather than abolish it immediately as required by the UN CESCR.

#### 4. Conclusion

Before the foundation of the People's Republic of China in 1949, China's Constitution drafters were often inspired by Japanese or western state models. Inspiration obtained from the western liberal constitutional model was eliminated at the time when the communist elites won the civil war in 1949. China's ruling elites came to regard Stalin's Soviet Constitution as the most prestigious model on which to build China's socialist economic and political regime as they shared the same Marxist-Leninist ideology. Though few scholars have noticed the similarity between the 1977 Brezhnev Constitution and China's current 1982 Constitution, some clues could convince us that China's drafters borrowed some new constitutional theories that occurred in the 1977 Soviet Constitution texts. Even when China was diplomatically allied with the US against the Soviet Union from the 1970<sup>s</sup> to the 1980<sup>s</sup>, borrowing was possible, and reasonable, due not only to the shared ideology, but also because Brezhnev and Deng Xiaoping pursued the common purpose of eliminating the worship of Mao or Stalin written in the Constitution, as well as changing the socialist state into a normalized country embedded in socialist legality.

However, present China's Constitution, based on the Soviet model, which stresses the dictatorship of the proletariat, exposes many deficiencies when adapting to a common globalized market, considering that the judiciary has very limited competence to adjudicate litigation. All the member states are obligatorily required, within the WTO framework, to establish a qualified review mechanism of administrative acts related to WTO affairs. This requirement has failed to be implemented well within in the Chinese legal system due to the fact that courts only act as the 'mouth of the law' within China's legal system, moulded in accordance with Soviet constitutional theory. This means that courts are not given more extensive competence to review administrative regulations or abstract administrative act, whilst judicial independence might potentially be interfered with by the local administrative leaders considering that local courts are financed by local administrative bodies who are usually involved

in local commercial protectionism to bar the entry of products originating abroad or from other regions. The deficiency of judicial review in China is only one example that demonstrates the negative influence of the Soviet constitutional model on China's integration into modern global constitutionalism. The problem of building an effective constitutional review mechanism compatible with China's constitutional order still haunts Chinese legal experts and human rights advocates. Neither the US common law model nor the German continental model would be easily imported considering that SPC negated the US model in 2007 with the implicit reason that it was not compatible with the Chinese constitutional order, while the latter model would not be compatible with the doctrine of dictatorship of proletariat where only the NPC, as the supreme state organ, has the power to interpret the Constitution and review the constitutionality of a statute promulgated by the administrative or local organs. The highly political model invented by France and the Soviet Union, in my view, could, more or less, provide us inspiration. The French model is based on the balance of diverse political forces where the Constitutional Council acts as the forum to reconcile different political opinions in order to reach a consensus. The process of reviewing constitutionality before the promulgation of the legal act might be borrowed by China as a strategic measure to guarantee the stability of Chinese legal order. The Soviet CCS did not last very long. However, it provided us with a constitutional review model compatible with the Marxist-Leninist state on the condition that this specific committee was established under the Soviet Congress of Deputies. China's constitutional review mechanism could mix the features of the these two models combined with the engagement of the NPCC, which is a political consultative organization containing representatives of eight Chinese democratic parties as well as religious leaders and intellectuals without political party identities. The NPCC could propose the candidate list of the envisioned Constitutional Court composed by experts in law and political science, and then the final members would be elected from the said candidate list by the NPC representatives. The new envisioned Constitutional Court will be a specific organ, under the framework of the NPCSC, that will independently and publicly review the constitutionality of final legislative drafts before sending them to the NPC or NPCSC for approval, like the French Constitutional Council does, and have the competence to review administrative regulations or local decrees in discursive measures, before or after the promulgation of these statutes, like the former Soviet CCS did.

China's present constitutional order also blocked Chinese courts that effectively applied UN universal standards of human rights in their case determination. UN international human rights treaties have some limited but potential influence on China's human rights legislation as well as human rights protection. China has acceded to five out of nine core UN international human rights Conventions and signed the ICCPR, but none of them could be directly applied by domestic courts because the Chinese legal system insists that individuals are not the eligible subjects

of international law. In this situation, UN human rights standards, if pursuing to be observed by Chinese, have to be transferred into the Chinese legal system through the legislative approach. The NPC often prefers to adopt a new law or approve some amendments rather than transfer them directly through *ad hoc* human rights acts. Though very few materials prove that UN human rights treaties are treated as the authoritative source during the preparation of drafts, some evidence can convince us that, to some extent, drafters took due notice of these UN documents. Some Instructive Reports on the drafts have announced, explicitly or implicitly, that UN human rights treaties are some of the fundamental guidelines of China's human rights legislation or legislative reforms. Some drafters who work in the panel of experts, the Legislative Affairs Committee or the Law Commission have a lot of learning and teaching experience in international human rights law. As a result, it is possible for them to turn their attention to UN standards during the drafting process. However, besides all well-known hindrances arising from the interests of the ruling party, for China's legislative reform to be in conformity with UN human rights standards, it will have to go through strong resistance imposed by leftists, most of whom are conservatives advocating the Soviet model. In these circumstances, the extent of legislative reform depends on the compromise and struggle between the reformists and conservatives.

UN human rights committees seem more critical of China's human rights records than Western States governments engaging in bilateral human rights dialogue with China but paying more attention to their economic benefits. The issues of the treatment of political dissidents, detainees subjected to torture, and discriminatory institutions are the committees' greatest concerns. China's UN delegates have to reply to questions, posed by various UN human rights committees, on behalf of the Chinese government. During the process of interrogation, Chinese delegates have to show their respect to these UN authorities to demonstrate what a civilized state should do on the international floor, and they sometimes have to confess the deficiency of human rights protection or admit the government has abused its power after the submission of convincing evidence regarding human rights violations presented by the NGOs' Shadow Reports. However, the ruling party and the Chinese government will not make any concession of their core interests, implying that the ruling elites would consolidate their power or maintain the communist regime's safety and social stability with measures that are not in conformity with the minimum standards of UN human rights. *Shuanggui* detention as an effective extrajudicial disciplinary instrument against corruption could not be constrained by law though actually it violates the ICCPR and Chinese Legislative Law, while the notorious *Hukou* System, acting as a valve to prevent rural migration from flooding into urban areas will not be abolished in the near future since it has a preventive effect on the maintenance of public security and relief of resource-constraints.

## Acknowledgments

I will give my special thanks to Ms. Alexandra Barros for her effort on revise and polish my paper. And I will give my high regards to my supervisor Paolo Carrozza for his inspired advices and comments on my paper.

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