

Constitutional Review without Constitutionalism? The Prospects and Limitations of a Constitutional Review Mechanism in China

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Abstract

In 2017, Chinese President Xi Jinping announced that China intends to “advance constitutionality review”, and a subsequent 2018 Constitutional Amendment established the National People’s Congress (NPC) Constitution and Law Committee for the purpose of conducting constitutionality review. Along with the official studies currently being carried out, scholarly proposals have also flourished. Together, they depict – though imprecisely – the institutional blueprint. However, far from promoting constitutionalist values, the system is merely instrumental in advancing the core interests of the party state. In addition, its inherent limitations also become apparent after revisiting constitutional review in pre-democratic Taiwan and when considered in light of the current “filing and review” system under the NPC. By developing a typology of constitutional cases, the present paper assesses the chances that the mechanism will function effectively in various case scenarios. It is concluded that constitutionality review is an encouraging, albeit severely limited, indicator of progress in the Chinese party state.

1. Introduction

It is common knowledge that the Chinese Constitution is unenforceable despite being “the highest law of the land.”² The Supreme People’s Court (SPC) has repealed³ its famous *QI Yuling*⁴ decision, which applied the Constitution, whereas the National People’s Congress (NPC) and its Standing Committee have virtually never exercised their constitutional authority⁵ to oversee the implementation of the Constitution.⁶

By contrast, Chinese scholars have for many decades advocated the adoption of various models of constitutional review.⁷ Although the current English literature has supplied valuable understandings from different perspectives,⁸ much of it must now be studied anew

锦光)/WANG Conghu (王丛虎), On the Practice of Constitutional Interpretation in China (论我国宪法解释的实践), in: *Studies in Law and Business* (法商研究), 2009, No. 2, pp. 3–7; ZHOU Wei (周伟), Empirical Study on Constitutional Interpretation Cases (宪法解释案例实证问题研究), in: *China Legal Science* (中国法学), 2002, No. 2, pp. 72–80.

⁷ See generally CAI Dingjian, Constitutional Supervision and Interpretation in the People’s Republic of China, in: *Journal of Chinese Law*, Vol. 9 (1995), pp. 238–43; MO listed the major difficulties scholars had encountered in theorizing constitutional review, MO Jihong, The Constitutional Law of the People’s Republic of China and Its Development, in: *Columbia Journal of Asian Law*, Vol. 23 (2009), pp. 147–58; FU and ZHAI concisely portrayed the current state of constitutional scholarship in China, FU Hualing/ZHAI Xiaobo, What makes the Chinese Constitution socialist?, in: *International Journal of Constitutional Law*, Vol. 16 (2018) pp. 655–59. For the various propositions, see, e. g., BAO Wanchao (包万超), To Establish a Parallel Review Mechanism of a Constitutional Committee and a Chamber on Constitutional Review inside the Supreme Court: An Alternative Idea to Improve China’s Constitutional Review System (设立宪法委员会和最高法院违宪审查庭并行的复合审查制——完善我国违宪审查制度的另一种思路), in: *Legal Science* (法学), 1998, No. 4, pp. 12–16; FEI Shancheng (费善诚), On the Mode Selection of China’s Constitutional Review System (试论我国违宪审查制度的模式选择), in: *Tribune of Political Science and Law* (政法论坛) 1992, No. 2 pp. 2 et seq.; JI Weidong (季卫东), Constitutional Review and the Strengthening of Judicial Power (合宪性审查与司法权的强化), in: *Social Sciences in China* (中国社会科学), 2002, No. 2, pp. 4 et seq.; CAI Dingjian (蔡定剑), Application of the Constitution as Private Law in China (中国宪法实施的私法化之路), in: *Social Sciences in China* (中国社会科学), 2004, No. 2, pp. 56 et seq.; TONG Zhiwei (童之伟), The Application of the Constitution Should Follow the Path Prescribed by the Constitution Itself (宪法适用应依循宪法本身规定的路径), in: *China Legal Science* (中国法学), 2008, No. 6, pp. 22 et seq.

⁸ CAI Dingjian, The Development of Constitutionalism in the Transition of Chinese Society, in: *Columbia Journal of Asian Law*, Vol. 19

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² 中华人民共和国宪法 (Constitution of the People’s Republic of China), 4 December 1982, <http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm> (visited on 9 November 2021); English translation in: <<http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>> (visited on 9 November 2021), Preface.

³ See 最高人民法院关于废止 2007 年底以前发布的有关司法解释 (第七批) 的决定 (Decision of the Supreme People’s Court on Abolishing the Relevant Judicial Interpretation (Seventh Batch) Issued Before the End of 2007), 18 December 2008, <http://www.npc.gov.cn/zgrdw/npc/xinwen/fztd/sfjs/2008-12/27/content_1465018.htm> (visited on 9 November 2021).

⁴ See 最高人民法院关于以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复 (Reply of the Supreme People’s Court on Whether the Infringement of Citizens’ Constitutionally Protected Fundamental Right to Education by Infringing the Right to a Name Should Result in Civil Liability), 24 July 2001, <<http://gongbao.court.gov.cn/Details/635e70e2ab2f5969810116dbdff1f1.html>> (visited on 9 November 2021).

⁵ Constitution of the People’s Republic of China 1982, Arts 62 and 67.

⁶ Some scholars identified a few NPCSC decisions that are of constitutional significance, but they disagreed on whether they should count as constitutional interpretations. See HU Jinguang (胡

following the 19th National Congress of the Chinese Communist Party (CCP, “the Party”). In his report, Chinese President Xi Jinping pronounced that China will “strengthen oversight to ensure compliance with the Constitution” and, for the first time, “advance constitutionality review”.⁹ Official studies started soon after,¹⁰ with journal articles flourishing as well.

Paradoxically, however, “constitutionalism” has become a taboo topic since Xi came to power in 2012. Most revealing in this regard is a secret CCP communiqué denouncing “constitutional democracy” as a Western plot to “undermine the current leadership and the socialism with Chinese characteristics system of governance.”¹¹ ZHANG Xuezhong (张雪忠), a law professor in Shanghai, was even dismissed, allegedly for teaching constitutionalism.¹²

Against the backdrop of this paradox, this paper will try to envisage China’s future constitutional review mechanism, in particular its prospects and limitations. It will first summarize the official blueprint and scholarly proposals and, after a careful examination, unveil the instrumentalist nature of the reform. It will then revisit constitutional review in pre-democratic Taiwan and scrutinize the efficacy of the current “filing and review” (备案审查) system under the National People’s Congress (NPC) to help assess constitutionality review. Further, by developing a typology of constitutional cases, it will evaluate the chances that a provision or mechanism is found unconstitutional in various case scenarios. Finally, the paper will conclude by summarizing the mechanism’s prospects and limitations in China.

(2005), pp. 1 et seq.; *Stéphanie Balme/Michael W Dowdle* (eds), *Building Constitutionalism in China*, New York 2009; *Thomas E Kellogg*, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, in: *International Journal of Constitutional Law*, Vol. 7 (2009), pp. 215 et seq.; *ZHANG Qianfan*, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, in: *International Journal of Constitutional Law*, Vol. 8 (2010), pp. 950 et seq.; *Keith Hand*, *Resolving Constitutional Disputes in Contemporary China*, in: *East Asia Law Review*, Vol. 7 (2012), pp. 51 et seq.; *LIN Yan*, *Constitutional Evolution Through Legislation: The Quiet Transformation of China’s Constitution*, in: *International Journal of Constitutional Law*, Vol. 13 (2015), pp. 61 et seq.; *LIN Yan/Tom Ginsburg*, *Constitutional Interpretation in Lawmaking: China’s Invisible Constitutional Enforcement Mechanism*, in: *The American Journal of Comparative Law*, Vol. 63 (2015), pp. 467 et seq.

⁹ *Xi Jinping*, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Aspects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era*, *Xinhua*, 18 October 2017, <http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf> (visited on 9 November 2021), p. 34.

¹⁰ *ZHU Ningning* (朱宁宁), *Upholding Constitutional Authority, How to Break the Ice of Constitutionality Review (维护宪法权威, 合宪性审查如何破局)*, in: *Legal Daily (法制日报)*, 16 January 2018, p. 9.

¹¹ Document 9: A ChinaFile Translation, *ChinaFile*, 8 November 2013, <<http://www.chinafile.com/document-9-chinafile-translation>> (visited on 9 November 2021).

¹² Andrew Jacobs, *Chinese Professor Who Advocated Free Speech Is Fired*, in: *The New York Times*, 11 December 2013, p. A10.

2. Official Commitments

Although Xi’s announcement was the first time the term “constitutionality review” was mentioned in official documents, Chinese leaders, including Xi himself, had emphasized the importance of constitutional supervision and expressed their willingness to strengthen it multiple times.¹³ His most recent announcement is just another such commitment. However, the employment of the term “constitutionality review” for the first time is noteworthy.

Arguably, the term “constitutional supervision” derives from Articles 62 and 67 of the 1982 Chinese Constitution, which can be further traced back to as early as the 1954 Constitution. These provisions have since been referred to as a “constitutional supervision mechanism”,¹⁴ a notion that also encompasses the different varieties of constitutional review systems abroad.¹⁵

Starting in the 1990s, the term “constitutional review” became mainstream because of foreign influence, in particular as a result of the impact of Japanese terminology. However, being literally written as “unconstitutional(ity) review” (违宪审查) in Japanese and Chinese, this creates the impression of a rigorous institution, while “constitutionality review” (合宪性审查) may sound milder and safer.¹⁶ Although the latter might connote a higher degree of deference and a presumption of constitutionality,¹⁷ the distinctions between the two terms are minor. As the term “constitutionality review” has been adopted officially, this little language trick appears to have succeeded in securing acceptance by the Party.

Xi’s commitment was followed by a series of rather quick advancements. A constitutional amendment was adopted in March 2018, which, inter alia, renamed the NPC’s Law Committee (法律委员会) as the Constitution and Law Committee (宪法和法律委员会). This Committee will be in charge of the implementation

¹³ See, e.g., *HU Jintao* (胡锦涛), *Speech at the Capital Conference Commemorating the 20th Anniversary of the Promulgation and Entry into Force of the Constitution of the People’s Republic of China (在首都各界纪念中华人民共和国宪法公布施行二十周年大会上的讲话)*, in: *People’s Daily (人民日报)*, 5 December 2002, p. 1; *CCP Central Committee Decision Concerning Some Key Questions Associated with Comprehensively Advancing Governance According to the Law (中共中央关于全面推进依法治国若干重大问题的决定)*, in: *People’s Daily (人民日报)*, 29 October 2014, p. 1. See also *XIE Libin/Haig Patapan*, *Contesting Legitimacy in China: The Politics of Law in Modern Chinese Jurisprudence*, in: *Hong Kong Law Journal*, Vol. 46 (2006), pp. 998–99.

¹⁴ See, e.g., *CAI Dingjian*, (supra note 7); *XU Chongde* (许崇德), *On Constitutional Supervision in China (论我国的宪法监督)*, in: *Legal Science (法学)*, 2009, No. 10, pp. 3–9.

¹⁵ *LIN Laifan* (林来梵), “Constitutional Review” in China: Characteristics and Actuality of Generating: From the Perspective of the Tactics for Change of Three Related Terms (中国的“违宪审查”: 特色及生成实态——从三个有关用语的变化策略来看), in: *Zhejiang Social Sciences (浙江社会科学)*, 2010, No. 5, pp. 35–36.

¹⁶ *Ibid*, p. 39.

¹⁷ *WANG Shucheng* (王书成), *The Presumption of Constitutionality and Recognizing the Concept of “Review of Constitutionality”*: From Methodological Perspective (合宪性推定与“合宪性审查”的概念认知——从方法论的视角), in: *Zhejiang Social Sciences (浙江社会科学)*, 2011, No. 1, pp. 51–59.

of the Constitution, constitutional interpretation, constitutionality review, and raising constitutional awareness, these obligations being in addition to its existing task of reviewing draft bills.¹⁸

The most concrete official blueprint to date was revealed by two newspaper articles after interviews with LIANG Ying, Director of the Office for Filing and Review of Regulations (法规备案审查室) under the Legislative Affairs Commission (法制工作委员会, LAC) of the Standing Committee of the National People's Congress (NPCSC).

LIANG confirmed that the establishment of a constitutionality review system now occupies a vital position in the Party's "law-based governance" (依法治国) program, and, not surprisingly, he made clear that it will be carried out within the framework of the People's Congress system. He also mentioned that the scope of review will cover laws and decisions of the NPCSC, perhaps also Party documents, hence full coverage encompassing all normative documents and possibly some acts as well. It is, however, still questionable how the review of "basic laws" (基本法律) enacted by the NPC is to be done, a topic he appears to have evaded.

Furthermore, he disclosed some major concrete mechanisms currently under internal study. These consist of: *ex ante* advisory opinions on constitutionality, which will allow organs which enact normative documents to seek advisory opinions from the NPCSC on whether the relevant draft is constitutional; a mandatory *ex ante* review of draft bills or decisions concerning legal issues; *ex post* review following recommendations from state organs, citizens, or social organizations. In addition, he also listed a mechanism that would provide "constitutional justifications for major political decisions" as one potential aspect of the review process. Finally, he also pointed out the need to establish supporting mechanisms, such as constitutional implementation reports and a constitutional interpretation mechanism.¹⁹ Many of these measures have also been reaffirmed by Shen Chunyao, vice-chairman of the Constitution and Law Committee.²⁰

¹⁸ CCP Central Committee Issues "Plan for Deepening the Reform of the Party and State Institutions" (中共中央印发《深化党和国家机构改革方案》) in: People's Daily (人民日报), 22 March 2018, p 1; Decision of the Standing Committee of the National People's Congress on the Responsibilities of the Constitution and Law Committee of the National People's Congress (全国人民代表大会常务委员会关于全国人民代表大会宪法和法律委员会职责问题的决定), in: Gazette of the Standing Committee of the National People's Congress of the People's Republic of China (中华人民共和国全国人民代表大会常务委员会公报), 2018, No. 4, pp. 502–03.

¹⁹ See ZHU Ningning (supra note 10); DING Xiaoxi (丁小溪), Advancing Constitutionality Review and Strengthening the Supervision of Constitutional Implementation: Director of the LAC Office for Filing and Review of Regulations of the NPCSC Liang Ying on Constitutional Implementation (推进合宪性审查 加强宪法实施监督——全国人大常委会法工委法规备案审查室主任梁鹰谈宪法实施), Xinhua, 16 May 2018, <http://www.xinhuanet.com/2018-05/16/c_1122843310.htm> (visited on 9 November 2021).

²⁰ SHEN Chunyao (沈春耀), Thoroughly Study and Implement the Spirit of the Important Exposition of General Secretary Xi Jinping on the Constitution, Comprehensively Strengthen Constitutional Implementation and Supervision (深入学习贯彻习近平总书记宪法重要论

These two interviews delineated, albeit very fuzzily, the basic framework of the constitutionality review system. For more details, it is helpful to examine the numerous scholarly proposals, as presented in the next section.

3. Scholarly Proposals

The announcement of constitutionality review was overwhelmingly welcomed and soon sparked a wave of academic discussions, resulting in dozens of journal articles alone. As political decisions have already been made, academia has shifted its focus to institutional design and concrete operational proposals. This section will try to provide an overview but will limit its survey to proposals – published subsequent to the announcement of the reform – that were authored by more prominent legal academics, as they are far more likely to reach high officials and ultimately be adopted, especially when there is consensus. For example, scholars have agreed that a constitutional committee should be established and most were in favour of one in the form of a Special Committee (专门委员会) of the NPC,²¹ which was later adopted by the 2018 Constitutional Amendment.

After scanning the scholarly proposals, one can quickly identify a broad consensus on many issues.

Scholars have agreed on the ways to initiate the review. First, the Constitution and Law Committee may review draft bills or legal decisions *ex officio* prior to the deliberations during NPC or NPCSC sessions, i. e., *ex ante*.²² Second, after their entry into force, i. e., *ex post*, the review is to be initiated per request by state organs, such as the State Council, Central Military Commission, or provincial state organs; it is also to be activated at the request of courts hearing a case, or upon application from parties thereto, provided that their constitutional rights have allegedly been violated, they have exhausted all legal remedies, and time limitations are observed.²³ In addition, a few scholars are also in

述精神全面加强宪法实施和监督), in: People's Daily (人民日报), 23 May 2018, p. 11.

²¹ See, e. g., HU Jinguang (胡锦涛), On the Systematization of Promoting Constitutionality Review (论推进合宪性审查工作的体系化), in: Science of Law (法律科学), 2018, No. 2, p. 34; SUN Yuhua (孙煜华) / TONG Zhiwei (童之伟), Make China's Constitutionality Review System Characteristic and Effective (让中国合宪性审查制形成特色并行有效), in: Science of Law (法律科学), 2018, No. 2, p. 50; HAN Dayuan (韩大元), Some Thoughts on Advancing Constitutionality Review (关于推进合宪性审查工作的几点思考), in: Science of Law (法律科学), 2018, No. 2, p. 63; QIN Qianhong (秦前红), The Significance, Principles and Advancement of Constitutional Review (合宪性审查的意义、原则及推进), in: Journal of Comparative Law (比较法研究), 2018, No. 2, p. 72.

²² See 立法法 (Legislation Law), 15 March 2015, <http://www.npc.gov.cn/zgrdw/npc/dbdhh/12_3/2015-03/18/content_1930713.htm> (visited on 9 November 2021); English translation in: <<https://www.chinalawtranslate.com/en/2015lawlaw/>> (visited on 9 November 2021), Arts 20 and 33.

²³ See HU Jinguang (胡锦涛), Idea of Initiating Constitutional Review Procedural Subject Qualification (论启动合宪性审查程序主体资格的理念), in: Journal of CAG (国家行政学院学报), 2017, No. 6, pp. 36–37; HU Jinguang (胡锦涛), On the "Filtering" Mechanism of Constitutionality Review (论合宪性审查的“过滤”机制), in: China Law Review (中国法律评论), 2018, No. 1, pp. 73–75; HU

favour of empowering NPC deputies, members of the NPCSC, and NPC congress delegations to initiate the procedure²⁴ or of retaining the right of ordinary citizens to petition for initiation as a supervisory tool.²⁵

The mainstream view also holds that constitutionality review and legality review in the form of filing and review should be two separate systems.²⁶ When faced with a concrete case, laws and regulations are first to be presumed constitutional and applied. Then, if their legality and/or constitutionality are disputed, legality review should be conducted first. According to a draft working regulation of the NPCSC, where a conclusion cannot be reached, constitutionality review should follow.²⁷ Additionally, parties may resort to constitutionality review only after exhausting all legal remedies and only if it may affect the result of the case.²⁸ This view was shared among most People's Congress officials attending a conference.²⁹ Similarly, NPC Official Liang Ying also viewed filing and review as a "precondition of constitutionality review."³⁰

Jinguang (supra note 21), pp. 32–34. See also LIN Laifan (林来梵), Constitutional-Political Reflections on Constitutionality Review (合宪性审查的宪法政策论思考), in: *Science of Law (法律科学)*, 2018, No. 2, p. 42; SUN Yuhua/TONG Zhiwei (supra note 21), p. 52; HAN Dayuan (supra note 21), p. 65; QIN Qianhong (supra note 21), p. 74; WANG Wei (王蔚), Coordination Between the Objective Legal Order and Subjective Interests: Perfecting China's Constitutionality Review Mechanism (客观法秩序与主观利益之协调——我国合宪性审查机制之完善), in: *China Law Review (中国法律评论)*, 2018, No. 1, pp. 139–41; JIAO Hongchang (焦洪昌)/YU Wei (俞伟), China Should Establish a Constitutionality Review System for Draft Bills (我国应该建立法律草案合宪性审查制度), in: *Changbai Journal (长白学刊)*, 2018, No. 1, p. 81; TIAN Wei (田伟), The Procedural Types of Constitutionality Review of Norms by the Constitution and Law Committee (宪法和法律委员会规范合宪性审查的程序类型), in: *ECUPL Journal (华东政法大学学报)* 2018, No. 4, p. 29; YU Wenhao (于文豪), Unfolding the Constitutionality Review Responsibilities of the Constitution and Law Committee (宪法和法律委员会合宪性审查职责的展开), in: *China Legal Science (中国法学)*, 2018, No. 6, p. 56.

²⁴ SUN Yuhua/TONG Zhiwei (supra note 21), p. 52.

²⁵ JIAO Hongchang (焦洪昌)/JIANG Su (江溯), On the Dual Nature of the Citizen's Right to Make Suggestions for Constitutional Review in China: Analyses Based on Article 41 of the Constitution' (论我国公民合宪性审查建议权的双重属性——以《宪法》第41条为分析基础), in: *Journal of Political Science and Law (政法论丛)*, 2018, No. 3, p. 21.

²⁶ See, e.g., HAN Dayuan (韩大元), From the Law Committee to the Constitution and Law Committee: An Institutional and Functional Transformation (从法律委员会到宪法和法律委员会: 体制与功能的转型), in: *ECUPL Journal (华东政法大学学报)*, 2018, No. 4, p. 11; HU Jinguang (胡锦涛), On the Significance of the Establishment of the "Constitutional and Legal Committee" (论设立“宪法和法律委员会”的意义), in: *Journal of Political Science and Law (政法论丛)*, 2018, No. 3, p. 7; HU Jinguang (胡锦涛), On the Relationship Between "Filing and Review" and Constitutionality Review (论法规备案审查与合宪性审查的关系), in: *ECUPL Journal (华东政法大学学报)*, 2018, No. 4, pp. 27–28; YU Wenhao (supra note 23), pp. 55–56.

²⁷ ZHU Ningning (朱宁宁), Focusing on Key Issues of Filing and the Review of Normative Documents (聚焦规范性文件备案审查关键问题), in: *Legal Daily (法制日报)*, 16 October 2018, p. 10.

²⁸ HU Jinguang, (supra notes 23), pp. 75–77; (supra note 21), p. 32; (supra note 26), p. 7; (supra note 26), pp. 27–28.

²⁹ ZHU Ningning (朱宁宁), Make Every Effort to Build the Theoretical Framework of Filing and Review under Socialism with Chinese Characteristics (全力构建中国特色社会主义备案审查理论体系), in: *Legal Daily (法制日报)*, 16 October 2018, p. 10.

³⁰ LIANG Ying (梁鹰), Principles and Methods for Advancing Constitutionality Review (推进合宪性审查的原则和方式), in: *Study Times (学习时报)*, 24 December 2018, p. 3.

Under the U.S. and German models, with which Chinese scholars are most familiar, the question of constitutionality arises mostly in the context of concrete cases. Although some scholars point out the need for "unconstitutional as applied" review, whereby an otherwise constitutional legal norm is interpreted or applied in an unconstitutional manner under the individual circumstances,³¹ others are convinced that the examination should only be conducted *in abstracto* because, as legislators, the NPC or NPCSC should not intervene in individual cases.³² This means that even where a constitutionality issue arises out of a concrete legal dispute, its facts will still be essentially irrelevant to the review, leaving the final step of subsumption to courts hearing the case. Similarly, TIAN Wei has argued that *ex post* review by virtue of a court's reference would be more effective, whereas abstract *ex ante* review and constitutional complaints are less practical in China.³³ Further, most scholars are of the opinion that political questions should be exempt from review.³⁴

Scholars also share the consensus that the legal effect of constitutionality review conducted by the Constitution and Law Committee is merely advisory. Due to its position as an NPC Special Committee, the Committee's decisions can only be regarded as recommendations to the NPC or NPCSC, who retain the sole constitutional authority to make final binding decisions.³⁵ Further, QIN Qianhong has maintained that substantive issues concerning leaders in official capacity or "basic laws" must be reserved to the NPC itself.³⁶

If one combines the consensus among scholars with the official blueprint disclosed so far, the future shape of the institution has largely been drawn. Indeed, official commitment and the institutional design appear serious and sincere, and it is becoming concrete. On the other hand, constitutionalism has been denounced by the CCP and became a political taboo. The next chapter will try to explain this seemingly paradoxical situation.

4. Party Leadership rather than Constitutionalism

In spring 2013, following the prior censorship of a *Southern Weekly* New Year's greeting calling for realization of the "dream of constitutionalism in China,"³⁷ a highly ideological and politicized debate on con-

³¹ See DU Qiangqiang (杜强强), On the Constitutionality Review of "Unconstitutionality as Applied": An Analysis Based on Different Types of Unconstitutionality (试论对适用违宪的合宪性审查——基于不同违宪类型的分析), in: *Changbai Journal (长白学刊)*, 2018, No. 1, pp. 87–91.

³² HU Jinguang (supra note 21), p. 34.

³³ TIAN Wei (supra note 23).

³⁴ See, e.g., HU Jinguang, On the 'Filtering' Mechanism (supra note 23), p. 74; QIN Qianhong (supra note 21), pp. 70–71.

³⁵ SUN Yuhua/TONG Zhiwei (supra note 21), p. 56; HAN Dayuan (supra note 21), p. 63.

³⁶ QIN Qianhong (supra note 21), p. 76.

³⁷ See David Bandurski, A New Year's greeting gets the axe in China, China Media Project, 3 January 2013, <<http://chinamediaproject.org/2013/01/03/a-new-years-greeting-gets-the-axe-in-china/>> (visited on 9 November 2021); David Bandurski, Why Southern Weekly said 'No', China Media Project, 11 January 2013,

stitutionalism broke out. Proponents argued that the promotion of constitutionalism is compatible with the party state's ideology; leftist scholars, conversely, criticized the advocacy of constitutionalism as an attempt to introduce Western liberal democracy in China and overthrow party leadership.³⁸

The Party soon identified constitutionalism as a threat. A secret CCP communiqué denounced “constitutional democracy” – understood as “the separation of powers, the multi-party system, general elections, independent judiciaries, nationalized armies, etc” – as a Western plot to “oppose party leadership and implementation of its Constitution and laws” and “undermine the current leadership and the socialism with Chinese characteristics system of governance.”³⁹

Finally, the constitutionalists were cracked down on following Xi's secret speech decrying them as hostile forces propagating universal values, against whom the Party must “unsheathe the sword”.⁴⁰ Law professor ZHANG Xuezhong was even dismissed, allegedly for his writings that championed the protections guaranteed by the Constitution and for teaching constitutionalism in class.⁴¹

Thus, it is no exaggeration to assert that the term “constitutionalism” became a political taboo subsequent to the defeat of the constitutionalists,⁴² to the extent that any publication involving even the slightest mention of it would not be tolerated.⁴³ In 2015, the editorship of a magazine supported by reform-minded party elders, once an important base of constitutionalists, was taken over as well.⁴⁴

Consequently, constitutionality review à la CCP will not be based on classical liberal constitutionalism.⁴⁵ Instead, its cornerstone will be the CCP's leadership, this being a consistent stance of the Party⁴⁶ that was also

made explicit in Xi's address at the CCP 19th National Congress. Constitutionality review is part of the effort to “advance law-based governance”, while party leadership is the “fundamental guarantee” for law-based governance.⁴⁷

Naturally, this also extends to the NPC: “every task of the NPC must serve to strengthen and improve party leadership, consolidate the Party's status as the ruling party, and ensure that the party leads effectively.”⁴⁸ Constitutionality review will be no exception.

According to NPC official LIANG Ying, the objectives of constitutionality review are to “ensure strict obedience to the central authorities, guarantee the correct and effective implementation of the Constitution and laws, uphold the authority and sanctity of the Constitution and laws, maintain the unity of the legal system, and safeguard the lawful rights and interests of the people.”⁴⁹ As WANG Wei has noticed, the focus here is clearly on the unity of laws rather than the protection of rights,⁵⁰ while “obedience” has an even higher place.

LI Fei, chairman of the NPC Constitution and Law Committee, made it more explicit by pledging that “to strengthen the implementation and supervision of the constitution is [...] to adhere to the party's overall leadership and firmly safeguard the Party's central authority and unified leadership with Comrade Xi Jinping being the core.”⁵¹

Thus, the firm rejection of constitutionalism and the simultaneous adoption of constitutionality review are not contradictory: whereas constitutionalism was denounced due to its incompatibility with China's political regime, especially with party leadership, constitutionality review is being introduced exactly as an instrument for strengthening the leadership. “The CCP's leadership is the most essential attribute of socialism with Chinese characteristics”, reads Article 36 of the Constitutional Amendment passed in 2018. Now that party leadership has been enshrined in the Constitution, any attempts to “undermine, oppose, or deny the leadership of the Party are fundamentally unconstitutional and must be repelled and pursued legally.”⁵² The adoption of constitutionality review, once dubious in the eyes of Party leaders,⁵³ indicates that the Party now sees the mechanism as being in its own interest.

<<http://chinamediaproject.org/2013/01/11/why-southern-weekly-said-no/>> (visited on 9 November 2021).

³⁸ Rogier Creemers, China's Constitutionalism Debate: Content, Context and Implications, in: *The China Journal*, Vol. 74 (2015), pp. 94–102; Thomas E. Kellogg, Arguing Chinese Constitutionalism, *The 2013 Constitutional Debate and the “Urgency” of Political Reform*, in: *University of Pennsylvania Asian Law Review*, Vol. 11 (2016), p. 376; Lance L. P. Gore, The Political Limits to Judicial Reform in China, in: *The Chinese Journal of Comparative Law*, 2014, No. 2, pp. 216–18.

³⁹ See Document 9 (supra note 11).

⁴⁰ Creemers (supra note 38) p. 105. See Xi Jinping's 19 August Speech Revealed? (Translation), *China Copyright and Media*, 22 December 2014, <<https://chinacopyrightandmedia.wordpress.com/2013/11/12/xi-jinpings-19-august-speech-revealed-translation/>> (visited on 9 November 2021).

⁴¹ Jacobs (supra note 12).

⁴² See Baogang He, Socialist Constitutionalism in Contemporary China, in: Michael A. Wilkinson/Michael W. Dowdle (eds.), *Constitutionalism beyond Liberalism*, Cambridge 2017, p. 181.

⁴³ TONG Zhiwei (童之偉), *Constitutional Reform in Contemporary China (中國憲制之維新)*, Hong Kong 2016, p. 106.

⁴⁴ WEN Shan (文山), Interview with Du Daozheng: We Cannot Repeat the Mistake of the Southern Weekly (专访杜导正: 不能重蹈《南方周末》的覆辙), DW, 21 July 2016, <<http://p.dw.com/p/1JTDW>> (visited on 9 November 2021).

⁴⁵ See SHEN Chunyao (supra note 20).

⁴⁶ See Jianfu Chen, The Transformation of Chinese Law: Mark II, in: *Hong Kong Law Journal*, Vol. 45 (2015), pp. 919–25.

⁴⁷ XI Jinping (supra note 9), p. 32.

⁴⁸ WU Bangguo (吴邦国), Work Report of the Standing Committee of the National People's Congress (全国人民代表大会常务委员会工作报告), in: *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China (中华人民共和国全国人民代表大会常务委员会公报)*, 2009, No. 3, p. 334.

⁴⁹ ZHU Ningning (supra note 10).

⁵⁰ WANG Wei (supra note 23), pp. 135–37.

⁵¹ LI Fei (李飞), Strive to Raise Constitutional Implementation and Supervision to a New Level (努力把宪法实施和监督工作提高到新的水平), in: *Qiushi (求是)*, 2018, No. 11, p. 38.

⁵² *Ibid.*

⁵³ LIU Songshan, Keith J. Hand (trans.), 1981: Embryonic but Inchoate Designs for a Constitutional Committee, in: *UCLA Pacific Basin Law Journal*, Vol. 33 (2016), pp. 96–107.

And rightly so. Scholars have identified changes in Chinese social sentiment exhibiting a more legalistic attitude towards political legitimacy.⁵⁴ Constitutionality review can be seen as the Party's most recent effort to increasingly emphasize legality and legal legitimation in response.⁵⁵ In so doing, it may also temper criticisms that it is not observing the Constitution, and it may eliminate legitimacy deficits by signalling a progressing reform process.⁵⁶

Additionally, the emphasis on 'strict obedience to the central authorities'⁵⁷ would also lower transaction costs and alleviate principle-agent problems in administration.⁵⁸ In other words, it would better coordinate the internal institutions⁵⁹ and reinforce Xi's efforts to discipline the bureaucracy, thus reducing barriers to economic growth, implementation of central policies, and unnecessary disputes that weaken stability.⁶⁰ Moreover, encouraging people to report local wrongdoings to the central authorities would, in turn, enhance the central government's capacity to supervise local actors and enforce its decisions.⁶¹

Therefore, it is possible to establish a constitutional review system while firmly rejecting the core values of constitutionalism. Although this does not *per se* preclude a proper constitutional review mechanism, it would be impeded by inherent limitations.

According to Party orthodoxy, legislation is the unity of the propositions of the Party and the will of the people. It is hardly imaginable that the NPC, being led by the Party, could review the latter's propositions thoroughly.⁶² Consequently, constitutionality review will be far less involved in the political process.⁶³ Moreover, since Party regulations and decisions play a significant role in everyday politics,⁶⁴ the mechanism could only be truly effective if Party documents were subject to the same scrutiny.

It also raises further questions regarding how the Party should "lead" constitutionality review. The CCP Constitution stipulates that "[t]he Party exercises over-

all leadership over all areas of endeavour in every part of the country".⁶⁵ Of course, party leadership is also to be "exercised at every point in the process and over every dimension of law-based governance",⁶⁶ including constitutionality review, for which a CCP Central Committee for Comprehensive Law-based Governance has been established.⁶⁷ How this leadership is exercised will determine the latitude the NPC Constitution and Law Committee is afforded, which will, in turn, have a significant impact on the efficacy of constitutionality review. QIN Qianhong proposed a twofold approach: the CCP Committee is to decide on the admissibility – and exceptionally also approve the result – of politically sensitive cases; however, for the vast majority of cases, it should respect the rules and procedures and refrain from interference.⁶⁸ In addition, the Party even has its own review mechanisms vis-à-vis party rules, at least on paper,⁶⁹ so coordination and co-operation will be necessary whenever they overlap,⁷⁰ a delicate intermediary task for the Leading Party Members' Group (党组) of the NPC.⁷¹ Nonetheless, this is not simple and straightforward, and only time will tell.

5. Constitutional Review under Authoritarian Rule: The Case of Taiwan

Taiwan's experience with constitutional review before democratization may shed light on Mainland China because of their common historical, political, and cultural heritage. The Qing Dynasty had ruled Taiwan for hundreds of years until its cession to Japan in 1895. Soon after Taiwan's return to China in 1945, the *Kuomintang* government retreated to Taiwan following its defeat in the civil war. Citing the so-called "communist rebellion", Chiang Kai-shek and his son Chiang Ching-kuo exerted authoritarian rule until 1987, when martial law was finally lifted and political freedoms granted. Both the CCP and *Kuomintang* are Leninist parties and claim to be the successor of Sun Yat-sen, the founding father of the Republic of China.

Under the 1946 Republic of China Constitution, the *Judicial Yuan* had the authority to interpret the Constitution and unify the interpretation of laws and orders. The President had the power to nominate and, with

⁵⁴ See LEI Ya-Wen, *The Contentious Public Sphere: Law, Media, and Authoritarian Rule in China*, Princeton 2018.

⁵⁵ For evidence of this increasing emphasis, see ZHANG Taisu / Tom Ginsburg, *China's Turn Toward Law*, in: *Virginia Journal of International Law*, Vol. 59 (2019).

⁵⁶ Keith J. Hand, *An Assessment of Socialist Constitutional Supervision Models and Prospects for a Constitutional Supervision Committee in China: The Constitution as Commander?*, In: John Garrick / Yan Chang Bennett (eds.), *China's Socialist Rule of Law Reforms Under Xi Jinping*, London and New York 2016, p. 35.

⁵⁷ ZHU Ningning (supra note 10).

⁵⁸ ZHANG Taisu / Tom Ginsburg (supra note 55), p. 48.

⁵⁹ LIN Chien-Chih, *Constitutions and Courts in Chinese Authoritarian Regimes: China and Pre-Democratic Taiwan in Comparison*, in: *International Journal of Constitutional Law*, 2016, Vol. 14, p. 370.

⁶⁰ Keith J. Hand (supra note 56), p. 35.

⁶¹ ZHANG Taisu / Tom Ginsburg (supra note 55), p. 49.

⁶² SUN Yuhua and TONG Zhiwei (supra note 21), pp. 53–54.

⁶³ LI Shaowen (李少文), *The Jurisprudential Basis, System Model and Chinese Plan of Constitutional Review (合宪性审查的法理基础、制度模式与中国路径)*, in: *Journal of Comparative Law (比较法研究)*, 2018, No. 2, p. 89.

⁶⁴ See WANG Shucheng, *Emergence of a Dual Constitution in Transitional China*, in: *Hong Kong Law Journal*, Vol. 45 (2015), pp. 836 et seq.

⁶⁵ Constitution of the Communist Party of China, Xinhua, 24 October 2017, <http://www.xinhuanet.com/english/download/Constitution_of_the_Communist_Party_of_China.pdf> (visited on 9 November 2021), 10.

⁶⁶ XI Jinping (supra note 9), p. 19.

⁶⁷ CPC Releases Plan on Deepening Reform of Party and State Institutions, Xinhua, 21 March 2018, <http://www.xinhuanet.com/english/2018-03/21/c_137055471.htm> (visited on 9 November 2021).

⁶⁸ QIN Qianhong (supra note 21), p. 73.

⁶⁹ See Regulations on the Drafting of Party Rules (中国共产党党内法规制定条例), in: *People's Daily (人民日报)*, 28 May 2013, p. 6; Regulations on Filing and Review of Intra-CCP Rules (中国共产党党内法规和规范性文件备案规定), in: *People's Daily (人民日报)*, 28 May 2013, p. 6.

⁷⁰ FAN Jinxue (范进学), *On the Characteristics and Style of China's Constitutional Review System (论中国合宪性审查制度的特色与风格)*, in: *Journal of Political Science and Law (政法论丛)*, 2018, No. 3, p. 17.

⁷¹ See SUN Yuhua / TONG Zhiwei (supra note 21), pp. 55–56.

the consent of the *Control Yuan*, appoint the Grand Justices of the *Judicial Yuan*.⁷² In 1947, a Council of 17 Grand Justices was established and given responsibility for the interpretation of the Constitution.⁷³ Quite naturally, though, they were overwhelmingly *Kuomintang* members.⁷⁴

The first Council (1948–1957) was initially somewhat active⁷⁵ and did not confine itself to the interpretation of specific constitutional provisions.⁷⁶ In Interpretation No. 76 – after the National Assembly, the *Legislative Yuan*, and the *Control Yuan* all claimed to be “legislative” bodies – it was asked to decide which constitutional body was equivalent to western congresses or parliaments and qualified to send delegates to an international inter-parliamentary conference. Confronted with the dilemma, the Council endeavoured to mediate by holding that they were all equivalent to western congresses or parliaments. Still, this interpretation met with the extreme displeasure of the *Legislative Yuan*, which within a year enacted a Council Law that was widely believed to have been “punishment”.⁷⁷

The law restricted the subjects of interpretation to “matters specifically provided for in the constitutional text”, thus curtailing the review power of the Council. It also raised the threshold for rendering a constitutional interpretation to three-fourths of those present, with a quorum of three-fourths of the Grand Justices.⁷⁸

From then on, the Council could only become increasingly deferential, and statistics reveal its utmost impotency. In the first four terms combined (1948–1985), the Council issued only a few dozen constitutional interpretations, out of which even fewer legal provisions were declared unconstitutional: the first three Councils (1948–1976) issued only one such interpretation, which was ignored brazenly and only implemented two decades later.⁷⁹

The statistics also indicate a clear trend whereby the Grand Justices of the second and third terms (1958–1976) were less active compared to their respective

predecessors, both in the number and significance of the interpretations delivered. Only the fourth Council (1976–1985) exhibited increased activism, likely a reaction to the flourishing democratic movements and the changing social atmosphere witnessed during its term.⁸⁰

Therefore, many commentators rightly pointed out that in the authoritarian era the Council can be regarded as a mere instrument of the *Kuomintang* regime that only provided constitutional justifications for that regime. This was evidenced by the fact that it had never accepted a single case challenging the rather dubious constitutionality of the Temporary Provisions legalizing authoritarian rule,⁸¹ which suspended the two-term presidential limitation and enabled the president to govern through decree powers without legislative approval.⁸² Most prominently, the Council upheld the suspension of elections to the National Assembly during times of “national emergency”, which effectively allowed representatives elected on the mainland in 1948 to serve until National Assembly elections were finally held in 1991.⁸³

Nonetheless, the Council attempted, albeit unsuccessfully, to empower itself. As illustrated above, the first Council, to a certain extent more active, suffered from a backlash narrowing its jurisdiction following Interpretation No. 76. In Interpretation No. 86, the second Council sought to expand judicial control over court administration but was rebuffed by the failure of political authorities to comply. In the meantime, this also demonstrated that institutions have particular goals that conflict with each other and tend to expand their own power, no less under the Leninist *Kuomintang* regime, where all political actors were controlled by one party that was unified, disciplined, and hierarchically organized;⁸⁴ however, any such efforts of self-empowerment will likely face resistance, sometimes even discipline, from other institutional actors.

The case of authoritarian Taiwan offers several lessons for contemporary Mainland China. First, when put together, the overall impotency of the *Judicial Yuan* under authoritarian rule and its U-turn towards judicial activism at the dawn of democratization exemplify well the decisive effect of the political environment instead of institutional design. Whatever the institutional design, the practical effect of the Mainland’s constitutionality review must be assessed in light of the political realities of the party state. In particular, the *Judicial Yuan*’s proactive promotion of civil rights since the inception of the fifth Council (1985–) is unlikely on the

⁷² 中華民國憲法 (Constitution of the Republic of China), 1 January 1947, <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=A0000001>> (visited on 9 November 2021); English translation in: <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000001>> (visited on 9 November 2021), Arts 78–79.

⁷³ See 司法院組織法 (*Judicial Yuan Organization Act*), 23 December 1947, <<https://lis.ly.gov.tw/lglawc/lawsingle?000726E4ABB40000000000000000A00000000200FFFFFD00^04501036122300^000000000000>> (visited on 9 November 2021), Arts 3–4.

⁷⁴ Lawrence Shao-Liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, in: *The American Journal of Comparative Law*, Vol. 39 (1991), p. 518.

⁷⁵ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge 2003, p. 124.

⁷⁶ Lawrence Shao-Liang Liu (supra note 74), p. 524.

⁷⁷ Ibid, p 525; Tom Ginsburg (supra note 75), pp. 130–131.

⁷⁸ See 司法院大法官會議法 (Law Governing the Council of Grand Justices of the *Judicial Yuan*), 21 July 1958, <<https://law.judicial.gov.tw/FLAW/hisdata.aspx?lsid=FL000849&ldate=19580721&lsr=001>> (visited on 9 November 2021), Arts 3–4 and 13.

⁷⁹ Lawrence Shao-Liang Liu (supra note 74), p. 527; Tom Ginsburg (supra note 75), pp. 133–34.

⁸⁰ See Tom Ginsburg (supra note 75), p. 125.

⁸¹ Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, in: *Journal of Comparative Law*, 2008, No. 3, p. 83.

⁸² See 動員戡亂時期臨時條款 (Temporary Provisions Effective During the Period of Communist Rebellion), 18 April 1948, <[https://lis.ly.gov.tw/lglawc/lawsingle?000B55F9AB2F00000000000000000000A000000002000000^04102037041800^000000000000](https://lis.ly.gov.tw/lglawc/lawsingle?000B55F9AB2F0000000000000000000A000000002000000^04102037041800^000000000000)> (visited on 9 November 2021).

⁸³ Lawrence Shao-Liang Liu (supra note 74), p. 524–25.

⁸⁴ Tom Ginsburg (supra note 75), p. 132.

Mainland, as the Party may perceive it as contravening its core interests.⁸⁵

On the other hand, the *Judicial Yuan's* failed attempt at self-empowerment also suggests the possibility that the NPC might seek to expand its power at some point in pursuit of its own institutional interests, notwithstanding the leadership of the Leninist CCP. The SPC's aggrandizement in recent years, including the prominent *QI Yuling* case, have already demonstrated that institutions in the Chinese party state are no exception.⁸⁶ However, such self-empowerment attempts are likely to face a backlash from other state organs and even discipline from the Party, just as Taiwan's case has illuminated, and perhaps to an even more severe degree.

Unlike the *Judicial Yuan*, the NPC Constitution and Law Committee, which is within the legislature, has no constitutional authority itself and hence less institutional independence. Moreover, the composition of the Committee indicates that it is overwhelmingly dominated by NPC and State Council officials, with only two legal academics and one practising lawyer out of the 19 committee members, none of whom are constitutional lawyers.⁸⁷ Altogether, these point to an institution lacking independence and professionalism, a body more susceptible to Party or governmental interference.

6. Efficacy of "Filing and Review"

In order to assess the prospects of constitutionality review, it may be helpful to scrutinize the efficacy of the current "filing and review" system conducted by the NPCSC, a "precondition"⁸⁸ closely related to constitutionality review.

Chapter 5 of the Legislation Law, promulgated in 2000 and amended in 2015, prescribes the filing of administrative regulations (行政法规), local regulations (地方性法规), autonomous regulations and separate regulations (自治条例和单行条例), governmental regulations (规章), and judicial interpretations. Except for governmental regulations, all the above are to be filed with the NPCSC within 30 days of promulgation. More importantly, the NPC is vested with the power to review them.⁸⁹

⁸⁵ See *Ibid.* For detailed analysis, see Chapter 7.

⁸⁶ See ZHANG *Taisu*, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, in: *Columbia Journal of Asian Law*, Vol. 25 (2012), p. 1. See also Björn *Ahl*, *Judicialization in Authoritarian Regimes: The Expansion of Powers of the Chinese Supreme People's Court*, in: *International Journal of Constitutional Law*, Vol. 17 (2019), p. 252.

⁸⁷ See Name List of Chairman, Vice Chairmen, and Members of the Constitution and Law Committee of the 13th National People's Congress (第十三届全国人民代表大会宪法和法律委员会主任委员、副主任委员、委员名单), NPC, 13 March 2018, <<http://www.npc.gov.cn/npc/c34456/202010/36e079db23b84378b41ecc4de257c59.shtml>> (visited on 9 November 2021).

⁸⁸ LIANG *Ying* (supra note 30).

⁸⁹ See Legislation Law 2015, Art 99; 各级人民代表大会常务委员会监督法 (Law on the Supervision of Standing Committees of People's Congresses at Various Levels), 27 August 2006, <http://www.npc.gov.cn/wxzl/gongbao/2006-09/26/content_5354987.htm> (visited on 9 November 2021); English trans-

However, figures speak of a mechanism that can hardly be considered effective. For example, among the 3,692 regulations filed during the NPCSC's eighth term (1992–1997), 2,045 were reviewed and 93 were found to contradict the Constitution.⁹⁰ After forwarding its opinions to local People's Congresses, the NPC received feedback in only eight instances, with merely one regulation ultimately being amended.⁹¹ Due to the impractical and heavy workload, the 2000 Legislation Law even abolished *ex officio* review. Although it was reintroduced in the 2015 amendment, the LAC was able to ensure that only State Council regulations and judicial interpretations were reviewed, leaving out thousands of other regulations. The reviews conducted up until 2017 identified five judicial interpretations as potentially in conflict with the Constitution, but only one was rectified. A constitutional contradiction previously discovered in a judicial interpretation took more than seven years to be rectified.⁹²

The passive review conducted either at the request of top state organs or upon the recommendation of other organisations or citizens has also been largely silent. In fact, as vice-director of the LAC, XU Anbiao (许安标) admitted in 2017, not a single document was ever repealed openly.⁹³ Rather, the whole process has been operating mainly behind the scenes: over 100 regulations and judicial interpretations were corrected since 2004 thanks to the mechanism.⁹⁴ No state organs have ever requested a review, whereas citizens have utilized it in varying degrees. During the NPC's 12th term (2012–2017), 1,527 recommendations were made, among which 1,206 were admissible, accounting for 79 per cent;⁹⁵ the corresponding numbers from 2018 were 1,229, 112, and 9.1 per cent, respectively.⁹⁶ However,

lation in: <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2008-01/02/content_1388018.htm> (visited on 9 November 2021), Art 32.

⁹⁰ LIU *Zheng* (刘政), *The First Review of Local Regulations in 1982 and My Thoughts on It (1982 年对地方性法规首次审查及由此想到的)*, *People's Daily Online*, 29 July 2004, <<https://web.archive.org/web/20110107064133/http://www.people.com.cn/GB/14576/28320/35193/35204/2674577.html>> (visited on 9 November 2021).

⁹¹ WEN *Ye* (文晔)/ZHANG *Yixuan* (张意轩), *Constitutional Review Is Still Far Away*, in: *Newsweek (新闻周刊)*, 2004, No. 23, pp. 29–31.

⁹² See SHEN *Chunyao* (沈春耀), Report of the Legislative Affairs Commission of the Standing Committee of the National People's Congress on the Situation of Filing and Review Since the 12th National People's Congress and in 2017 (全国人大常委会常务委员会法制工作委员会关于十二届全国人大以来暨 2017 年备案审查工作情况的报告), in: *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China (中华人民共和国全国人民代表大会常务委员会公报)*, 2018, No. 1, p. 127.

⁹³ LAC of the NPCSC Answers Questions About Draft General Provisions of Civil Law and Legislative Work of the NPC (全国人大常委会法工委就民法总则草案与人大立法工作答问), NPC, 9 March 2017, <https://web.archive.org/web/20190626010843/http://www.npc.gov.cn/npc/zhibo/zzzb33/node_27357.htm> (visited on 9 November 2021).

⁹⁴ *Ibid.*

⁹⁵ See SHEN *Chunyao* (supra note 92), p. 126.

⁹⁶ See SHEN *Chunyao*, Report of the Legislative Affairs Commission of the Standing Committee of the National People's Congress on the Situation of Filing and Review in 2018 (全国人大常委会常务委员会法制工作委员会关于 2018 年备案审查工作情况的报告), in: *Gazette of the Standing Committee of the National People's Congress of the*

the percentage of cases in which the review ultimately identified a constitutionally problematic regulation or interpretation is unknown. To this day, the LAC has only published 20 such cases, among which 11 are recommendations.⁹⁷

It would be inappropriate to neglect the effects of filing and review completely, but asserting that its efficacy is minimal is hardly an underestimation. After all, laws are excluded from review; and even among the documents subject to review, only those of lower hierarchy were selected. For example, all 20 cases published so far concern local regulations and SPC judicial interpretations,⁹⁸ leaving out State Council regulations and normative documents issued by governments at all levels. Even for documents that are indeed subject to review, the LAC is often so weak that compliance with its opinions mainly depends on the good will of the enacting organs.

Further, openness, a crucial value of any system of constitutional adjudication, is almost non-existent throughout the whole process, and this characterization applies to procedure, admissibility, reasoning, results, and even the parties involved.⁹⁹ Petitioners will either receive no reply at all or, very rarely, a letter informing them of the final determination. In 2018, only 22 petitioners were lucky enough to receive such responses.¹⁰⁰ Although NPC officials are also aware of this deficiency,¹⁰¹ it will be a strenuous task to remedy it.

Furthermore, if one examines the 20 published cases closely, one will soon realize that they are rarely about constitutionality, but rather about the legality and sometimes even the rationality of a certain legal document.¹⁰² While constitutional questions seem to have been avoided intentionally,¹⁰³ the success of complaints often follows a political logic instead of a legal one.

Exemplary is the repeal of Article 24 of the Marriage Law Judicial Interpretation (II), which stipulated that “debts incurred by one spouse shall be paid off jointly, unless the other spouse can prove that the debtor and the creditor agreed that the debt was personal.” Consequently, thousands faced court judgments forcing them to pay off the debts their ex-spouses had accumulated secretly during their marriage. Having lost their appeals and also often petitions to the SPC, affected individuals formed an “Article 24 Victim Support Group”, seeking to have the interpretation an-

People’s Republic of China (中华人民共和国全国人民代表大会常务委
员会公报), 2019, No. 1, pp. 327–32.

⁹⁷ See SHEN Chunyao (supra note 92); SHEN Chunyao (supra note 96).

⁹⁸ Ibid.

⁹⁹ HU Jinguang (supra note 23), p. 66.

¹⁰⁰ See SHEN Chunyao (supra note 96).

¹⁰¹ See LU Yijie (卢义杰) et al., Filing and Review from Behind the Scenes to the Front of the Stage (备案审查制从幕后走到台前), in: China Youth Daily (中国青年报) 13 March 2018, p. 4.

¹⁰² See Wang Kai (王锴), The Distinction and Connection Between Constitutionality, Legality, and Rationality Reviews (合宪性、合法性、适当性审查的区别与联系), in: China Legal Science (中国法学), 2019, No. 1, pp. 5–24.

¹⁰³ LIN Laifan (supra note 23), pp. 38–39.

nulled and their cases reversed.¹⁰⁴ They lobbied NPC representatives and sent out thousands of letters to various government bodies, including nearly 1,000 petitions to the NPC calling for review in accordance with the Legislation Law.¹⁰⁵ Combined with motions by NPC representatives and appeals from legal professionals, their efforts pushed the NPC into coordinating with the SPC, ultimately leading the latter to replace the interpretation with one that shifts the burden of proof to the creditors.¹⁰⁶ Nonetheless, it was only after the judicial interpretation had triggered widespread discontent that the NPC went into action. As opposed to the constitutionality of Article 24, it is reasonable to believe that the deciding factors were the sheer number of petition letters, the close attention paid within and beyond the legal profession, and, most importantly, the political implications these efforts potentially had for the preservation of stability. Still, even in this rare case of success, the repeal took effect only subsequently, thus unable to provide a remedy to the petitioners retrospectively.

The list of problems can continue,¹⁰⁷ but LIN Laifan has summarized four major ones concisely: the reviewing body, LAC, ranks low; the review is inefficient; motivation is low; the decisions are unauthoritative.¹⁰⁸

Scholars have elaborated on the reasons for these problems. The lack of resources is certainly a major reason. With thousands of documents to review every year, the Office for Filing and Review of Regulations has only some 20 staff members.¹⁰⁹ Besides this, the LAC only conducts *ex officio* review *in abstracto*, which makes spotting potential violations more difficult. As argued by WANG Wei, this is because the mechanism is oriented towards the proper allocation of power according to a unified system of law rather than the remedying of citizens’ rights.¹¹⁰ Last but not least, adding to the absence of the LAC’s constitutional authority, the non-confrontational culture within the Chinese society, in particular the bureaucratic state organs,¹¹¹ prompted the LAC to save face for others, as happened in the SUN Zhigang incident, where the

¹⁰⁴ Han Jie, Marriage Law Explanation Stipulates Thousands of Chinese Divorcees to Pay Exes’ Debts, CGTN, 5 June 2017, <https://news.cgtn.com/news/3d416a4e3245444e/share_p.html> (visited on 9 November 2021).

¹⁰⁵ XING Bingyin (邢丙银), Behind the Amendment to Article 24 of the Marriage Law Judicial Interpretation II: Nearly a Thousand Letters Petitioning the LAC for Review (婚姻法司法解释二第 24 条修正背后: 近千封信建议法工委审查), The Paper, 22 January 2018, <<http://www.thepaper.cn/baidu.jsp?contid=1961044>> (visited on 9 November 2021).

¹⁰⁶ WANG Xiuzhong (王秀中), The “Relay” Behind the Amendment to Marriage Law Judicial Interpretation (婚姻法司法解释修改背后的“接力”), in: Southern Metropolis Daily (南方都市报), 1 February 2018, p. 13.

¹⁰⁷ See, e.g., Recording & Review: A Reintroduction, NPC Observer, 30 September 2021, <<https://npcobserver.com/2020/08/18/recording-review-a-reintroduction/>> (visited on 9 November 2021).

¹⁰⁸ LIN Laifan (supra note 23), p. 41.

¹⁰⁹ CUI Li (崔丽), LAC of the NPCSC Establishes Office for Filing and Review of Regulations (全国人大常委会法工委设立法规审查备案室), in: China Youth Daily (中国青年报), 20 June 2004.

¹¹⁰ WANG Wei (supra note 23), pp. 135–37.

¹¹¹ LIN Laifan (supra note 23), p. 44.

State Council repealed the document in question by itself.¹¹²

Almost all these deficiencies will probably be present in constitutionality review as well, as filing and review and constitutionality review will be inter-connected,¹¹³ and the Constitution and Law Committee also lacks the required institutional capacity.

Primarily, as an NPC Special Committee, the Constitution and Law Committee lacks constitutional review authority, so its power is limited to merely advising the NPC or NPCSC. It will also likely face a shortage of personnel. With only 19 committee members mostly working part-time,¹¹⁴ it will have to delegate to the LAC, only to add to the LAC's already heavy workload. Further, pursuant to Article 5(4) of the Constitution, violators of the constitution will be held responsible. Consequently, unconstitutionality carries more gravity than illegality, which will likely make constitutionality review even less confrontational than filing and review so as to avoid the serious implications. The Constitution and Law Committee can be expected to exhibit a high degree of cautiousness and deference to other institutional actors, just as with filing and review.¹¹⁵ These aspects, altogether, cast serious doubt on the prospects for constitutionality review.

7. Prospects in Different Case Scenarios

Based on the above observations, this chapter will attempt to develop a typology of constitutional case scenarios and strive to evaluate the chances of success by dividing potential cases into various categories according to different standards.

As already discussed, constitutionality review is being introduced mainly to ensure "obedience to the central authorities"¹¹⁶ or, in other words, to strengthen party leadership.¹¹⁷ Additionally, from a political perspective, it may also contribute to governmental legitimacy and effective implementation of central policies; coordination between the internal institutions may also see improvements,¹¹⁸ thus lifting barriers to economic growth.¹¹⁹ The prospects for constitutionality review will be contingent upon the extent to which it serves to fulfil these objectives.

First, *ex ante* review will have a better chance in China, where a political culture that avoids confrontation is prevalent. This is particularly true for *ex ante* advisory opinions, whereby the requesting organs will already be showing their respect for the Constitution and a good will to conform thereto by seeking an advisory

opinion in the first place. Further, since the NPC and its Standing Committee have long been reviewing draft bills during their legislative process,¹²⁰ they will be competent to conduct constitutionality review based on practical experience already obtained. Nonetheless, besides the reality that the Constitution is not the most important factor in the deliberation process, the Law Committee has also demonstrated its intentional avoidance of constitutional questions, not to mention that the majority of legal documents, such as regulations and judicial interpretations, are immune from this procedure.¹²¹ These are also likely limitations of *ex ante* constitutionality review.

Second, the Constitution and Law Committee is also expected to provide constitutional justifications for major political decisions.¹²² In such cases, the Committee's decisions will, in effect, be predetermined as soon as a request has been made, since constitutional justifications as such are merely instrumental in clearing the way for those political decisions. One similar precedent is the NPCSC's decision endorsing an arrangement to place an immigration and customs checkpoint inside a high-speed rail station in Hong Kong, allowing the laws of Mainland China to be enforced in part of the station and in running carriages.¹²³ The decision was issued to "provide further constitutional basis" for the arrangement¹²⁴ at a time when many Hong Kong citizens were worried that it could open a Pandora's Box as to Beijing exercising its jurisdiction over Hong Kong.¹²⁵ While such approvals are no doubt highly welcomed by other actors of the party state, they count as anything but constitutional review since the NPC is only supposed to endorse political decisions already made, whatever the legal conclusions.

¹²⁰ LIN Yan/Tom Ginsburg (supra note 8); XING Binwen (邢斌文), Constitutional Review in Deliberations on Draft Laws (论法律草案审议过程中的合宪性控制), in: Tsinghua University Law Journal (清华法学), Vol. 11 (2017), No. 1, pp. 167–88.

¹²¹ XING Binwen, *ibid.*, pp. 186–87.

¹²² ZHU Ningning (supra note 10).

¹²³ See Decision of the Standing Committee of the National People's Congress on Approving the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (全国人民代表大会常务委员会关于批准《内地与香港特别行政区关于在广深港高铁西九龙站设立口岸实施“一地两检”的合作安排》的决定), in: Gazette of the Standing Committee of the National People's Congress of the People's Republic of China (中华人民共和国全国人民代表大会常务委员会公报), 2018, No. 1, p. 46.

¹²⁴ Zhang Xiaoming (张晓明), Explanations on the Draft Decision of the Standing Committee of the National People's Congress on Approving the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (关于对《关于批准〈内地与香港特别行政区关于在广深港高铁西九龙站设立口岸实施“一地两检”的合作安排〉的决定(草案)》的说明), in: Gazette of the Standing Committee of the National People's Congress of the People's Republic of China (中华人民共和国全国人民代表大会常务委员会公报), 2018, No. 1, p. 54.

¹²⁵ LIAN Yi-Zheng, China's Trojan Train Into Hong Kong, in: The New York Times, 27 November 2017, <<https://cn.nytimes.com/opinion/20171127/china-train-hong-kong/dual/>> (visited on 9 November 2021).

¹¹² Verna Yu, Striking a Blow for Freedom, South China Morning Post, 14 May 2013, <<http://www.scmp.com/news/china/article/1236973/blow-freedom-campaign-memory-sun-zhigang-10-years>> (visited on 9 November 2021).

¹¹³ ZHU Ningning (supra note 29).

¹¹⁴ See Name List (supra note 87).

¹¹⁵ LIN Laifan (supra note 23), p. 39.

¹¹⁶ ZHU Ningning (supra note 10).

¹¹⁷ LI Fei (supra note 51).

¹¹⁸ LIN Laifan (supra note 59), p. 370.

¹¹⁹ Keith J. Hand (supra note 56), p. 35.

Ex post review needs to be analysed with reference to the way in which it is initiated. Given that no state organs have ever made a review request pursuant to the Legislation Law, they will also be unlikely to request constitutionality review. State organs can amend their own documents should any doubt arise; if documents of other organs are concerned, they can opt for informal communication to avoid any embarrassment. Even in the unlikely event of a review request, the NPC would still experience inherent difficulties conducting an effective and thorough review due to the lack of a concrete legal context. By contrast, cases referred by courts would be relatively more promising, thanks to both the clear identification of legal issues in concrete cases and the participation of professional judges.¹²⁶ If the channel for citizen petitions remains available, the NPC will likely be flooded by the sheer amount of petitions unless a functional filtering mechanism is established.¹²⁷ In other words, the prospects for citizen petitions depend, to a large extent, on the design of a filtering mechanism.

There are many other factors that also impact the prospects for a certain case. An important one is the level of the norms or institutions concerned. As has already been demonstrated by the filing and review mechanism, the higher a provision is situated in the hierarchy of norms, the less likely it is to be reviewed. Most notably, theoretical obstacles will impede the review of laws, in particular “basic laws” enacted by the NPC. Since the Constitution and Law Committee is a Special Committee within the NPC under the direction of the NPCSC,¹²⁸ any rectification of unconstitutional laws will require the good will of the NPC or its Standing Committee, effectively confining constitutionality review to little more than an internal control mechanism. Moreover, not only does the rectification of an unconstitutional “basic law” fall solely on the NPC itself,¹²⁹ its political implications are also formidable. In the eyes of a former high official and authoritative scholar, such a formal step would indicate a fundamental problem with the state.¹³⁰ Therefore, the best the Constitution and Law Committee could do would be to covertly advise the NPC or its Standing Committee to amend the relevant provisions.

In addition, the prospects for a case will also vary significantly depending on which articles of the Constitution and what constitutional rights have allegedly been violated and, in particular, their political sensitivity. FU and Peerenboom distinguished two types of political cases: (pure) political cases challenging the authority of the ruling regime directly, and politically sensitive cases affecting socio-political stability,

economic growth, China’s international reputation, or broad public interest.¹³¹ While it is difficult to rate each and every provision or right, the political sensitivity of some rights has been indicated clearly in the official Chinese position in reply to the Working Group on the Universal Periodic Review of the Human Rights Council in 2013. China acknowledged its restrictions on the freedom of speech, assembly, association, and religious belief, but it insisted that they are perfectly legal and legitimate.¹³² Therefore, even if the restrictions on these rights could be challenged through constitutionality review, the chances of success would be minimal, if any. The same also applies to socio-economic cases, such as those involving land taking, education, or class action. Moreover, it is unimaginable that any challenge at all could be raised against national security cases involving terrorism, secession, or an alleged endangerment of the state and state secrets.¹³³

Cases where social discontent is triggered and political stability is at stake will be dealt with more cautiously. As with the process of filing and review explained above, if a case receives widespread public attention, the authorities may be motivated to rectify the wrongdoing for fear of popular unrest threatening stability. This, however, is subject to a weighing of interests. For example, in a case where a university graduate died in mysterious circumstances during allegedly illegal police custody, the prosecution decided not to indict the police officers who had “misused force, delayed medical care, concocted facts, concealed the truth, and obstructed the investigations”, despite public anger at the death and subsequent cover-up attempts made by the police.¹³⁴ Compared to popular discontent, the risk of losing the loyalty of the police, who are indispensable for the maintenance of stability, vastly predominates.

To sum up, in the absence of fundamental political reforms, the function of constitutionality review is likely to remain “partial”¹³⁵ and limited in the foreseeable future.¹³⁶ Whereas rights on the “margins of political life” might enjoy some enhancement, challenges to core interests of the party state will definitely not be tolerated.¹³⁷ What is more, in times of threats – whether real

¹³¹ FU Yulin/Randall Peerenboom, A New Analytic Framework for Understanding and Promoting Judicial Independence in China, in: Randall Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Cambridge: 2009, p. 96.

¹³² See Human Rights Council, Report of the Working Group on the Universal Periodic Review: China Addendum, A/HRC/25/5/Add.1, 27 February 2014.

¹³³ See FU Yulin/Randall Peerenboom (supra note 131), p. 96.

¹³⁴ Chris Buckley/Adam Wu, No Trial for Beijing Officers Over Death of Environmentalist in Police Custody, in: *The New York Times*, 24 December 2016, p. A6.

¹³⁵ See WANG Yuhua, *Tying the Autocrat’s Hands: The Rise of The Rule of Law in China*, Cambridge 2014, p. 3.

¹³⁶ See Albert H. Y. Chen, China’s Long March towards Rule of Law or China’s Turn against Law? in: *The Chinese Journal of Comparative Law*, 2016, No. 4, p. 35.

¹³⁷ Tom Ginsburg/Tamir Moustafa, Introduction: The Functions of Courts in Authoritarian Politics, in: *Tamir Moustafa/Tom Ginsburg* (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge 2008, p. 258; Xin He, *The Party’s Leadership as a Living*

¹²⁶ TIAN Wei (supra note 23), pp. 33–35.

¹²⁷ See ZHANG Xiang (张翔), *Constitutional Interpretation* (宪法释义学), Beijing 2013, pp. 67 et seq.; HU Jinguang (supra note 23), pp. 36–37, 73–75, 32–34; LIN Laifan (supra note 23), p. 44; HAN Dayuan (supra note 21), pp. 63–64; TIAN Wei (supra note 23), pp. 37–38.

¹²⁸ Constitution of the People’s Republic of China 1982, Art 70.

¹²⁹ SUN Yuhua/TONG Zhiwei (supra note 21), p. 52.

¹³⁰ See ZHANG Youyu (张友渔), *Treatises on Constitutionalism* (宪政论丛), Beijing 1986, p. 292.

or perceived – to such core interests, even this already limited effect may vanish quickly.¹³⁸

8. Conclusion

The CCP has formally denounced constitutionalism as Western and bourgeois. Instead of adhering to constitutionalist values, its introduction of constitutionality review is merely instrumental in the strengthening of party leadership. In addition to assisting the Party in refuting criticisms and eliminating legitimacy concerns, constitutionality review would also help to reinforce the central authority, ensure policy implementation, and improve internal coordination.

Although this instrumentalism does not exclude the possibility of a functional constitutional review system, it will be hampered by serious limitations. A fundamental limitation is party orthodoxy that sees legislation as expressing the will of the Party and the people under its leadership. Moreover, if key Party instruments are to be left out, the review could shrink to superficiality. Further, as the constitutional framework will remain unchanged, the NPC Constitution and Law Committee's deficit in formal constitutional authority is yet another severe limitation. The lessons learned from authoritarian Taiwan and the NPC's filing and review mechanism further presage the weakness of constitutionality review. In the meantime, the NPC Constitution and Law Committee must also endure a heavy workload with very few personnel available. All these factors cast doubt on the prospects for constitutionality review.

Constitution in China, in: *Alberto Simpser/Tom Ginsburg* (eds.), *Constitutions in Authoritarian Regimes*, Cambridge 2013.

¹³⁸ *FU Hualing*, *Wielding the Sword: President Xi's New Anti-corruption Campaign*, in: *Susan Rose-Ackerman/Paul Lagunes* (eds.), *Greed, Corruption, and the Modern State: Essays in Political Economy*, Cheltenham and Northampton 2015, p. 309.

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Constitutional Review without Constitutionalism? The Prospects and Limitations of a Constitutional Review Mechanism in China

Der chinesische Präsident Xi Jinping verkündete im Jahre 2017, China werde „die Verfassungsmäßigkeitsprüfung vorantreiben“, und die Verfassungsänderung des Jahres 2018 etablierte das Komitee des NVK für Verfassung und Recht mit der Zuständigkeit für die Prüfung der Verfassungsmäßigkeit. Während offizielle Studien hierzu unternommen werden, wurden auch bereits zahlreiche wissenschaftliche Vorschläge vorgebracht. Beide stellen, wenn auch vage, den möglichen institutionellen Rahmen des Systems dar. Allerdings ist das System weit davon entfernt, verfassungsmäßige Werte voranzutreiben, und dient hingegen vor allem den Kerninteressen des Parteistaats. Seine inhärenten Beschränkungen werden zudem im Vergleich mit dem vordemokratischen Taiwan und dem aktuellen „filing and review system“ des NVK offenbar. Mittels einer Typologie verfassungsrechtlicher Fälle werden die Chancen, dass dieses System effektiv funktioniert, vertieft analysiert. Der Artikel kommt zu dem Ergebnis, dass die Verfassungsmäßigkeitsprüfung, trotz ihrer Beschränkungen, einen Fortschritt im chinesischen Parteistaat darstellt.