CONSTITUTIONAL INTERPRETATION IN LAW-MAKING: CHINA’S INVISIBLE CONSTITUTIONAL ENFORCEMENT MECHANISM

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Abstract: It is conventional wisdom that China’s Constitution is unenforceable, and plays little role in China’s legal system, other than as a symbolic document. This view rests on the fact that the Supreme Court has no power to interpret the Constitution. The formal body with interpretive power, the Standing Committee of the National People’s Congress, has never issued an official interpretation. Despite this apparent lack of enforcement, we argue that China’s Constitution indeed plays an increasingly important role within the party-state. It does through not through the courts but through the legislative process, in which formal requirements of constitutional review have helped the legislature to resolve complex disputes about the relationship among different government organs, the economic system, and even rights claims. Understanding this hidden mechanism contributes to our knowledge of the internal constitutional workings of authoritarian systems, which differ from those of liberal democracies.

I. THE CONVENTIONAL CONCEPTION

Both in China and abroad, there is a widely-shared consensus claiming that no visible constitutional enforcement mechanism exists in the world’s biggest developing country. Obviously, this consensus has some factual basis. The People’s Supreme Court lacks the power to interpret the Chinese Constitution, and judicial attempts earlier in this century to create such a power through a kind of Marbury v. Madison were rebuffed.1 Instead there has been renewed emphasis, at least since the Supreme Court Presidency of Wang Shengjun, on the “mass line” and the idea that courts should pay attention to the demands of the people.2 Formal power to interpret the Constitution lies with the NPC Standing Committee (NPCSC) but it has never formally exercised that power. While it did force the State Council to abolish two unconstitutional regulations through the legislative review process, the NPCSC has hardly been vigorous.3 Moreover, scholars have not shown much faith that the NPCSC can

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effectively police its own legislative product for constitutionality, as self-monitoring is presumptively improbable.

Although this view of the two-fold weakness of judicial and NPCSC enforcement of the Chinese Constitution is very widely held, it inevitably overstates the situation by overlooking some less visible institutional practices that have existed for a long time and have served to uphold the authority of the Constitution. In this article, we will argue that an important aspect of constitutional enforcement mechanism in China has been largely invisible to scholars who are focused on more conventional mechanisms. In particular, we focus on the NPC Standing Committee’s constitutional interpretations that occur in the context of the law-making process. Through interpretations, the NPCSC not only restrains itself through constitutional principles, but resolves inter-branch disputes and upholds individual rights. Constitutional enforcement in China largely occurs ex ante, rather than ex post.

In the existing literature, Chinese scholars have identified several important interpretations issued by the NPCSC that are of constitutional significance, although they sometimes disagree as to precisely which of these interpretations are constitutional in character.\(^4\) Notwithstanding the existing disagreement, all the interpretations in this category share a common characteristic: they are final decisions of the NPCSC, whether a resolution or an interpretation.\(^5\) Since there are only a limited volume of interpretations of such a nature and the NPCSC has not officially rendered a constitutional interpretation, many have complained that the NPCSC, the sole constitutional interpreter, has failed to live up to the sacred trust vested in it.\(^6\) This widely-shared impression has relegated the Chinese Constitution to the status of a non-functional “sham” document.\(^7\)

If the existing literature presents the entire picture, China’s Constitution has no operative impact, and must be relegated to the status of a purely symbolic document at best. However, as we will show, this view is deficient on both theoretical and empirical grounds. Theoretically, the failure to observe ex post checks by either the NPCSC or the courts does not eliminate the possibility of ex ante, internal checks within the party-state that are less visible to outside observers. Empirically, we show that, contrary to the conventional impression, China’s top legislature has routinely engaged in interpreting the Constitution during the legislative process, and has already accumulated a rich body of constitutional norms. China’s Constitution works, but not in the same way as the American or other constitutions do: it is a device for internal enforcement within the Party-State, in which the


\(^5\) A resolution is a legislative decision addressing a specific issue, which need not be solved through a comprehensive statute. Although the PRC Law on Legislation does not treat resolution as a form of legislation, it normally is accepted by judges as a source of law that enjoys the same legal authority as a statute.

An interpretation is normally used to clarify the meaning of a given clause of a statute that is disputable. But the Standing Comm. Natl People’s Cong. has been reluctant to issue interpretations by itself. Rather, it relies more on the Supreme People’s Court to fulfill the interpretative role.

\(^6\) E.g., Han Dayuan (韩大元), “Shi Liu Da” Hou Xu Qiang Hua Xian Fa Jie Shi Zhi Du De Gong Neng (“十六大”后须强化宪法解释制度的功能) [Constitutional Interpretation Shall be Enhanced after the Sixteenth Congress of the China’s Communist Party], 1 Fa Xue (法学) [Legal Science] 18 (2003).

legislature rather than the courts play the central role.

This article contributes to several literatures. Mostly obviously, it contributes to the ongoing debate on the nature of the Chinese Constitution and its role in society.\(^8\) More broadly, a recent line of work in political science has tried to understand the internal working of authoritarian regimes.\(^9\) There is now a sub-literature on the specific advantages of constitutions for authoritarian regimes.\(^10\) Such regimes that adopt constitutions are more enduring than those that fail to, in part because constitutions help resolve general problems of governance.\(^11\) Learning more about how the Chinese Constitution works will contribute to this nascent literature. In this vein, we are able to draw on, and deploy, an older American literature on the “constitution outside the courts.”\(^12\) In established democracies, legislatures and executives regularly interpret the constitution in the course of their own activity.\(^13\) Focusing only on judicial enforcement risks understating the myriad channels through which constitutions affect behavior and constrain the state. This is particularly true in authoritarian contexts like China.

II. THE LEGISLATIVE PROCESS AND CONSTITUTIONAL INTERPRETATION

China’s National People’s Congress (NPC) is the largest legislative body in the world, with nearly 3000 members at this writing. It is the “highest organ of state power” in the Chinese system.\(^14\) Because of its large size, and consistent with practice in socialist countries, the NPC has a smaller Standing Committee of around 150 members that sits in between the sessions of the larger body. This body, which is also mentioned in the Constitution, plays the day-to-day legislative role in many cases.\(^15\) Both the NPC and the NPCSC have internal committees to divide the work.

Compared with western countries, China’s legislative procedure is relatively straightforward. Both organizations and NPC delegates have the right to propose bills to the


\(^14\) Xianfa (宪法) [Constitution] art. 57, § 3.1 (1982) (China).

\(^15\) Id.
NPC and its Standing Committee. In the legislature, a draft bill has to go through three reads before it becomes a law, although it may take longer or shorter before some bills are signed into law. First, the organization (usually a ministry of the State Council or a special committee of the NPC) that is in charge of drafting the bill must introduce the draft to the whole session of the NPCSC, describing the necessity of enacting the statute and the basic framework of the bill. Second, members of the NPCSC will then review the draft, during which the Law Committee will also report to the NPCSC on the revision of the draft and major issues thereof. Third, before the final vote, the Law Committee will report to the NPCSC on the result of its deliberation on the draft at a plenary meeting, and then the revised draft of the legislative bill be deliberated on at group meetings.

As a proposed bill goes through the aforementioned hurdles, both the bill drafter, the Law Committee, and the members of the NPC and the NPCSC can raise and (or) respond to any concern over a given legislative proposal. Sometimes, when a draft is published for public comments, individual citizens will also have a chance to challenge the legitimacy of the draft. In both cases, the basis of the challenge may include constitutional issues. Various questions of constitutional significance will be brought forward and need to be solved as the legislative deliberation proceeds: Why should the NPC or the NPCSC adopt a rule that potentially violates the Constitution? How to justify such a questionable legislative move? Shall the legislature stick to the existing constitutional principles and rules in light of a changing reality? How should a constitutional loophole be fixed? These kind of questions arise with some regularity.

Today’s legislative process is increasingly becoming more open, so debate over a specific clause can be both intensive and contentious. During the debate, it is inevitable that any constitutional concerns will be raised. When this occurs, the legislatures are both legally obliged and politically bound to issue a timely and sound response since they have the duty to uphold the Constitution. Sometimes, a constitutional challenge from an outsider is even likely to hamper the usually smooth operation of the legislative agenda and force the legislatures to reconsider their legislative actions and offer a persuasive explanation on the questionable draft.

III. MAJOR ISSUES ADDRESSED THROUGH CONSTITUTIONAL INTERPRETATIONS

General speaking, constitutional interpretations have been widely used to address three major categories of issues: redistributing governmental power, defining citizens’ rights, and adjusting the economic structure. These have been among the most important issues in contemporary China, and in each area, the constitutional language has provided important resources for proponents and opponents of particular policies.

A. Redistributing Governmental Power

The Constitution establishes a government in which the power center resides on the
people's congresses, which exercise the legislative power, fundamental decision-making powers, and the appointment authority. Both the executive and judicial branches are subordinate and subject to the legislative branch. In term of the central-local relationship, although it emphasizes the necessity of sustaining a reasonable balance, the Constitution creates a system that both embraces the supremacy of the central authority and vests the most important powers in Beijing. Besides these general frameworks, there are also very concrete rules guiding both vertical and horizontal relations among government organs. But many other issues have not been addressed in the most authoritative document or in statutes. Legislative interpretations have helped to fill the blank. In particular, when the economic development calls for the creation of new governmental organizations, the expansion of existing governmental organizations' powers, or the readjustment of governmental relations, it is vital to legitimatize these moves through interpretation. Below we mention several examples in which constitutional text was invoked in debates over creating new organizations.

A.1. Creating New Governmental Organizations

In 1984, since "cases emerging from the sea territory are relatively complicated and demand specialty and technique", the Supreme People's Court proposed to the NPCSC to "establish maritime courts in major port cities in coastal areas specializing in handling maritime disputes". The Court argued that these maritime courts are special courts that are a necessary part of the court system created by the Constitution, although the supreme law only mentions "military courts" and fails to articulate what "other" special courts are. The NPCSC acceded to the court's explanation and approved the creation of maritime courts.

The creation of the NPC's special committees followed the same fashion of reasoning. In 1998, the Ninth National People's Congress decided to establish nine special committees. In doing so, the NPC believed that it was exercising the power vested in Article 70 of the Constitution, which authorizes the highest legislature to establish such committees, including six enumerated ones and "other special committees", as long as it is deemed "necessary".

Reporting to the NPCSC in 1986, Vice Premier Qiao Shi pointed out that creating the Ministry of Supervision not only reflected the objective need of the construction of the Socialist Modernization, but also was a legitimate move. As Qiao said, Section 8, Article 89

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21 Xianfa § 3 (1982) (China).
23 Id.
24 Xianfa art. 124, § 3.7 (1982) (China).
26 Xianfa art. 70, § 3.1 (1982) (China).
of the Constitution provides the State Council “direct and administer the work concerning civil affairs, public security, judicial administration, supervision and other related matters”. And many NPC delegates had proposed to establish the supervision department at all levels of government based on the constitutional mandate.\(^{28}\)

During the review of the Securities Regulation Law, the head of the NPC’s Finance and Economic Committee argued that the then existing regulatory agency's operation did not conform to the legal system. Since the Constitution only allows a ministerial-level institution (a ministry or commission) to promulgate regulations, which is a type of legislative power exercised by the executive branch, the agency lacked this an important authority.\(^{29}\) Therefore, the Committee strongly urged to have the new agency designated as a ministry.\(^{30}\) But for undisclosed reasons, the agency was not finally given ministerial status, which means it does not have legislative power.

In 1983, the Sixth National People's Congress decided to create the national security department and authorized it to take over the responsibility of investigating spying cases that had before been handled by the public security agency. The decision was likely to curtail personal liberty protected by the Constitution, which provides "no citizen may be arrested except with the approval or by decision of a people's procurate or by decision of a people's court, and arrests must be made by a public security organ."\(^{31}\) The underlining rational for such an authorization offered by the NPC was that the national security department in substance is public security agency.\(^{32}\)

**A.2. Expanding Jurisdiction of Existing Organizations**

In 1985, the NPCSC decided to authorize the State Council to adopt provisional regulations on economic reforms and "opening-up" issues that may be out of reach of the State Council's legislative jurisdiction. The legislature defended the authorization on the following two grounds. First, there were many new and complicated issues concerning the implementation of the reform and opening-up policy that were beyond the State Council's legislative power, and could not be addressed by the NPC or the NPCSC due to the lack of experiences and experiments. But waiting for years for new laws to be produced would hinder the reform. Hence, it was essential to have the State Council adopt experimental regulations. Second, Art. 89 of the Constitution, which says the State Council can exercise other powers authorized by the NPC and NPCSC, also supports such an authorization.\(^{33}\)

\(^{28}\) Id.


\(^{30}\) Id.

\(^{31}\) Xianfa art. 37, § 3.1 (1982) (China).


\(^{33}\) Guanyu “Shouquan Guowuyuan Zai Jingji Tizhi Gaige He Duiwai Kaifang Fangmian Keyi Zhiding Zanxing De Guiding Huoze Tiaoli De Debu (Cao’an)” De Shuoming (关于“授权国务院在经济体制改革和对外开放方面可以制定暂行的规定或者条例的决定（草案）”的说明) [The Explanation on the Draft of the Resolution Authorizing the State Council to Adopt Provisional Regulations on Economic Reforms and “Opening-up”] (Apr. 3, 1985), available at
On local level, the Constitution only gives provincial people's congresses (including their standing committees) and their counterparts in autonomous regions the legislative power. In 1986, the Organic Law of Local People’s Congresses and Local Governments further allows the people's congresses in major big cities (较大的市) to exercise what we might call a semi-legislative power, through which they could draft local regulations that would eventually be adopted by the legislatures in their provinces. In 1995, the NPC once again expanded major big cities’ legislative power. It allowed those cities to adopt their own local regulations conditional on the approval by provincial legislatures so long as the regulations do not violate higher laws. The NPC also urged provincial legislature to speed up the approving process when they review major big cities' regulations.\(^{34}\)

A.3. Readjusting Governmental Relations

In 1984, the Law on Regional National Autonomy obligates superior governments to help ethnic autonomous regions. Thus, the draft creates a series of duties for superior state organs to fulfill, such as taking into account of ethnic autonomous regions' characters and needs when drawing up economic and development plans; establishing special funds to help those regions; organizing and supporting cooperation between developed regions and ethnic autonomous regions; deploying teachers, doctors, scientific researchers and other talents to help develop the economy, education and culture in those areas. In doing so, the NPC offered extensive justification for this new policy, including invoking the constitution.

"At present, the economic and cultural development in ethnic autonomous regions is generally lagging behind. Such de facto inequality is inherited from history. In order to gradually eliminate inherited inequality between different ethnic groups, we shall wholeheartedly help ethnic minorities develop their economy and culture. This is a long-term, fundamental mission...... In order to achieve this goal, the Constitution provides that, 'The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities.'\(^{35}\)

15 years later, when revising the law, the NPCSC was facing the issue of whether the superior government still bears the same responsibility when an autonomous region becomes a normal administrative unit, be it a county or a city, due to demographic changes. In answering this question, the Law committee stressed that, if regions such as this still need support from the top, they may still enjoy preferable treatments with approval from the State Council, the central government. But the Committee insisted on not codifying this stance into the law. Rather, it said the issue should be addressed in practice.\(^{36}\) In this way, it avoided an

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\(^{36}\) Quanguo Renda Falv Weiyuanhui Guanyu <Zhonghua Renmin Gongheguo Minzu Quyu Zizhi Fa Xiuzheng’an (Cao’an) > Shenyi Jieguo De Baogao (全国人大法律委员会关于《中华人民共和国民族区域自治法修正案（草案）》审议结果的报告) [The Law Comm. Nat’l People’s Cong. Report on the
overly rigid approach, but encouraged flexible implementation of constitutional objectives.

The relationship between township governments and rural community boards is another complex area of intergovernmental relations that has proved difficult to define. Article 3 of the Organic Law of Villagers’ Committees provided, the township government guides, supports and helps the villagers’ committees to carry out their missions, but it can't intervene into the affairs that fall within the autonomous sphere of the latter. And the villagers' committees must assist the township government's works.

But there were two opposing opinions towards the draft. One group argued that "guide" and "help" are not enough to define the relationship between the towns and villagers' committees. In order to better fulfill the missions assigned by superior governments, the villagers' committees shall be required to accept the leadership of the township government. The other group contended that the villagers' committees are mass organizations of self-management at the grass roots level. If the towns can lead the villagers' committees and assign a big amount of administrative work to the committees, then the latter will readily become a level of government. This might also cause the town governments to replace the committees in making decisions, including appointing committee members, which violates the character of self-government.

The Law Committee believed that the relation between the towns and the villagers' committees by the draft conformed to the Constitution in sustaining the latter as mass organizations of self-management at the grass roots level, requiring the towns' guidance, support and help as well as mandating the committees' assistance. "Assist" is a legal duty. During the ten-year-long enforcement of the provisional law, such a legal framework had not prevented the towns from carrying out their missions. Therefore, the Committee suggested keeping the drafted clauses intact. It eventually explained:

"Some members argue that designating the government's role towards residents' committees as 'advisory' is not compatible with reality. Thus, they suggest that the residents' committees be led by the government. The Law Committee believes that since Article 111 of the Constitution defines both the residents' committees and the villagers' committees as 'mass organizations of self-management at the grass roots level' and the relation between the township government and the villagers' committees has been designated as 'advisory' after rounds of deliberation during revising the Organic Law of the Villagers' Committees, we had better follow that direction."


37 Xianfa (1982) (China) divides the whole country into four levels of governments, including the central government, provincial ones, counties and towns. Villages under towns are designated as self-governing entities that enjoy autonomy from the government. See Xianfa art. 111, § 3.5 (1982) (China).


B. Redefining Individual Rights

Like many constitutions in the world, the Chinese Constitution offers various types of rights to its citizens. Political rights, personal liberty, right to equal protection, and welfare rights, have all been declared in the highest law.\(^40\) In the meantime, the Constitution also articulates several duties that citizens must fulfill, such as the duty to pay taxes, the duty to become educated, and the duty to defend national security.\(^41\) But various questions remain unanswered. What do these pronouncements mean to individuals? How equal shall a law be? Will all the pronounced rights have the same weight or they can be re-prioritized by the legislature? Do unenumerated rights enjoy the same protection as those enumerated ones? To what extend shall the legislature take into account of the changing reality in developing the already established rights or creating new rights? Some of these questions have been addressed in the legislative process of the NPC and its Standing Committee.

Freedom of the press is one of the fundamental rights guaranteed by the Constitution,\(^42\) but Chinese government has kept very tight control over the press, which includes a system of prior review to ensure ideological uniformity at the price of curtailing freedom of expression. For decades, the enactment of Press Law has been thought to be a top priority for the NPCSC.\(^43\) But after the Tiananmen Square Incident, the law-making process slowed down and was almost terminated in 1995.\(^44\) In 1990, the NPCSC was faced with the question whether it should adopt the Press Law before adopting the Copyright Law. The Education, Technology, Culture and Public Health Committee believed that whether a work is legal or not should be defined and judged under the Press Law, so that statute should be promulgated as soon as possible in order to implement the Copyright Law. This opinion was endorsed by the Law Committee.\(^45\) But two months later, the tune was changed and the necessity of adopting a press law was repudiated. The reason given by the legislature was that "Copyright law is a civil code with the mission of protecting intellectual property, while the press law is administrative law concerning the regulation of publication of books and magazines. Although they are related, they have different functions and jurisdictions."\(^46\)

\(^{40}\) Xianfa § 2 (1982) (China).

\(^{41}\) Id.

\(^{42}\) Xianfa art. 35, § 2 (1982) (China).


In 1985, the draft of Exit and Entry Administration Law tried to impose an obligation of citizens traveling overseas to defend national security, as it provided, "Chinese citizens who enter or exit borders shall abide by the Constitution and laws, defend the security, dignity and interests of the motherland, shall not commit any activities that harm the security, dignity and interests of the motherland, and shall report to respective agencies of the Chinese government on any activities that harm national security and interests." During deliberation, some committee members argued that it was both constitutionally baseless and inappropriate to oblige citizens to report to the government on activities harming the national security and it should not be a part of the law. The NPCSC agreed and decided to only make the following pronouncement, so as to keep the law in line with the Constitution: "Citizens of the People's Republic of China, when traveling abroad, shall not commit any activities that harm the security, dignity and interests of the motherland."47

In 2010, 30 NPC deputies, led by Nan Cunhui (南存辉), a well-known entrepreneur, proposed to revise the Joint Venture Law to allow Chinese individuals, not just enterprises, to be able to establish a joint venture with foreign entities. They argued that, barring individuals from engaging in a joint venture represents not only a violation of the principle of equality under civil law, but an outdated practice. Hence, they believed that the timing was ripe to abolish such a bar. The Ministry of Commerce, however, contended that the constitution supports such a ban since it only allows foreign enterprises and individuals to engage in various forms of economic cooperation with "Chinese enterprises and other economic organizations."49 Therefore, the Ministry responded, the Joint Venture Law should not be amended in deputies' favor. The Finance and Economy Committee of the NPC later endorsed the Ministry's standing.48 In this way, the constitutional text was used to reject a claim for more individual rights.

On the other hand, a rights clause of the constitution was also used to create the administrative litigation system in the country. The People's Court Organic Law of 1979 limits the courts' adjudicatory function to civil and criminal cases only: obviously, lawmakers at that time did not permit the court to take administrative cases. The Constitution only broadly defines the people's courts as "state judicial organ" and fails to articulate what types of cases the courts can take.

After the Constitution took effect, the seed of the administrative litigation system was first planted by the NPCSC. In 1983, when drafting the Maritime Transportation Safety Law, the NPCSC successfully overcame the boycott from the Ministry of Transportation, which thought it was unnecessary to establish the administrative litigation system because governmental agencies would not violate any law. Peng Zhen (彭真), the most senior Vice

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48 Id.

49 Xianfa art. 18, § 1 (1982) (China).

Chairman and General Secretary of the NPCSC, while meeting with the heads of the ministry, pointed out that Article 41 of the Constitution, which includes the right to criticize and petition to the government, "is the Constitutional basis for administrative litigation." He also iterated that "we are now enforcing the Constitution." The Ministry eventually gave in and the NPCSC was able to write into the law a clause empowering private parties to bring suits against the maritime transportation department in people's courts. It is widely known that it was in 1989 when the NPC built up a comprehensive administrative litigation system. Reporting to the whole session of the NPC on the drafting of the law, Vice Chairman Wang Hanbin reiterated that the constitutional foundation of the law is Art. 41.

The NPCSC also has devoted much energy in illuminating the meaning of equality under different contexts. For example, there have been a series of interpretations concerning the voting rights gap. The first election law adopted in 1953 set the representation ratio between people’s congress delegates in rural areas and their urban counterparts as 4:1 at the county level, 5:1 at the provincial level, and 8:1 at the national level. When introducing the draft of the election law of 1953, Deng Xiaoping, then the Vice Premier, acknowledged that, “To some extent, the representation ratio is not a fully equal measure. But only it can reflect our reality and allow every ethnic group, every class has its representatives based on social status. With the development of politics, economy and culture, we must have a more perfect election system and hold more equal, even completely equal elections.” Unfortunately, the election

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51 It provides that, “Citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary; but fabrication or distortion of facts with the intention of libel or frame-up is prohibited. In case of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them. Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law.”

52 Zhao Lei, Xianzhi Gongquanli Lanyong Shi Sanshixinian Lifa De Da Sìxiàng - Zhuanzhuang Anli (限制公权力滥用是30年立法的大思想-专访全国人大法工委副主任张春生) [Restricting the Abuse of Public Power Has been the Major Thought behind 30 Years’ Legislative Experiences: Exclusive Interview with Former Deputy Director of the Legal Affairs Office of the Standing Comm. Nat’l People’s Cong., Zhang Chunsheng], Nanfang Zhoumo (南方周末) [Southern Weekly], Jul. 24, 2008, at A08.

53 Id.

54 Hishang Jiaotong Anquan Fa (海上交通安全法) [Maritime Transportation Safety Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 2, 1983, effective Jan. 1, 1984) (China) provides, “If a party does not accept the penalty of a fine or revocation of his work certificate imposed by the competent authorities, he may bring suit in a people’s court within 15 days after receiving notification of the penalty……”


law of 1979 allowed the status quo to stand. In 1982, the current constitution made the following announcement, “All citizens …… have the right to vote and stand for election, regardless of nationality, race, sex, occupation, family background, religious belief, education, property status, or length of residence, except persons deprived of political rights according to law.” However, electoral practice did not bring equality.

In 1994, the NPCSC decided to make a modest change by setting the ratio as 4:1 at all levels of people’s congresses. As the legislature pointed, “In the last four decades, especially the years following the launching of the opening-up policy, our politics, economy and culture has achieved great success and the rural-urban population ratio has also experienced substantial changes. Thus, it is imperative to narrow down the rural-urban representation ratio accordingly.”

But in 2004, when the NPCSC was asked to further close the rural-urban representation gap and to allow migrant workers to have equal voting rights in cities, it refused to move forward. When turning down the request, the NPCSC stated, “These issues are relatively complicated and further deliberation is needed. We had better leave them unchanged at this stage.” Six years later, the NPC eventually decided to eliminate the gap once and for all. In doing so, the top legislature mainly attributed the gradual manner of achieving full equality to the pace of urbanization. As it expounded, “In 1953, the urban population only accounted for 13.26% of the total population. The working class was predominantly residing in cities. In order to reflect the working class’s leading status in the nation’s political life and demonstrate the orientation of industrialization, the Election Law set up the rural-urban representation ratio……. Since 1995, the pace of industrialization and urbanization has accelerated; the economic and cultural development in rural areas has realized a great leap forward; the social structure has undergone a fundamental change. The urban population accounted for 46.6% of the total population in 2009, a dramatic increase from 29.04% in 1995. In the meantime, all levels of people’s congresses have held several rounds of elections and accumulated experiences; the construction of socialist democratic politics and legal system has achieved a great success; the class basis and constituency of the Communist Party has been constantly solidified and expanded. Therefore, the time is ripe to enforce an equal representation formula between urban and rural areas.”

The other case centers on the issue whether it is constitutional to offer protection to private property under a constitution that claims to defend the sacredness of public property.

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58 Xianfa art. 34, § 2 (1982) (China).
59 Id.
This issue turned out to be one of the high dramas concerning constitutional interpretation in 2005 when the NPCSC was deliberating on the Property Law. In August, Gong Xiantian (巩献田), a law professor from Peking University, wrote an open letter to Chairman of the NPCSC, Wu Bangguo, charging that the draft of the Property Law constituted a serious violation of the Constitution after the NPCSC published the draft for public comments. Prof. Gong claimed that although the Constitution announces “socialist public property is sacred and inviolable”, the draft paid no respect to such an important principle. He further accused that the draft only protected very few private business people, though it claimed to offer equal protection to every citizen. Mr. Gong lamented that, if passed, the law would “further accelerates the pace of privatization”, widen wealth disparities, and, exacerbate social tensions. Hence, he protested that, the NPC had no authority to enact it into law, if not amended, since the law was a by-product of a violation of the Constitution. The letter attracted extensive media attention and ignited a heated academic debate. It eventually forced the NPCSC to readjust its legislative agenda and unprecedentedly went through seven rounds of deliberation before the draft was passed.

In late October, 2005, Wu Bangguo, Chairman of the NPCSC, reiterated the principle of equal protection for different types of properties. He stressed that the law should better reflect the economic policy, especially the different status designated to different types of enterprises by the Constitution. And the legislature, he urged, should find ways to strengthen the protection of state-owned property and prevent the loss of state assets.

Before voting the seventh draft into a law, Wang Zhaoguo, the most senior Vice Chairman of the NPCSC, offered extensive defense on the constitutionality of the law. He first emphasized that equal protection of different types of property is not only one of the most important principles of the civil law, but an imperative principle enshrined in the Constitution. More importantly, providing equal protection to different types of property is also an indispensable component of the socialist market economy, which has been designated as a mission for the state. Chairman Wang hence expounded, "Fair competition, equal protection, and survival of the fittest is the basic law of the market economy. Under the conditions of the socialist market economy, market players originating from different ownership operate in a universal market and interact with each other. All market players are on an equal footing, enjoying the same rights, observing the same rules and bearing the same responsibilities. If the various market players are not given equal protection, use dispute resolution mechanisms and shoulder unequal liability, it is impossible to develop the socialist market economy, and to uphold and improve the basic socialist economic system."

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65 Id.
67 Id.
C. Debating State Ownership

Reflecting a common feature of communist constitutions, state ownership over natural resources has also been established in China as an indispensable part of the planned economy. Article 6 announces that, “The basis of the socialist economic system” is “socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.” Both Article 9 and Article 10 then specifically address the issue of who owns the natural resources. The former provides, “Mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the state, that is, by the whole people, with the exception of the forests, mountains, grassland, unreclaimed land and beaches that are owned by collectives in accordance with the law.” The latter particularly touches upon land ownership, establishing the state ownership for lands in urban areas while rural lands belonging to the collectives. It further prohibits any form of land transaction. All in all, the Constitution embraces a rigid framework in which state ownership is dominant.

This series of pronouncements, however, soon came into conflict with the on-going economic reform and opening-up policy, and modification became inevitable in some areas. In 1988, the ban on land transactions was lifted through a constitutional amendment in order to attract foreign investment and boost urbanization. In 1993, the NPC amended the Constitution to introduce a “socialist market economy.” In 2004, the declaration that “citizens' lawful private property is inviolable” was added into the Constitution. All these amendments reflect a more diverse and flexible orientation of the economic system.

With the economic doctrine of the state-directed economy waning, the NPCSC, in later years, also constantly confronted the issue of how to define state ownership under different circumstances. What does “the state” mean? Who can represent the State to exercise ownership, appropriate and exploit natural resources? Is it the Central Government, local governments, the collectives, or even individuals? And who owns resources that have not been enumerated in the Constitution? The meaning of state ownership varies across different contexts, and the practical questions have come to the fore.

As mentioned above, the Constitution has only expressly established the state ownership of “mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches.” Although it also claims that “other natural resources” generally belong to the State, the identification of these “other natural resources” has not yet been clarified. The question of how to assign the ownership of unenumerated resources must be resolved on a case-by-case basis. So far, the NPCSC has given strikingly different answers in two statutes. On one occasion, the legislature firmly announced that, “As a special type of natural resource, uninhabited islands pertain to state-owned natural resources mandated by the Constitution”, because “they are not forests, mountains, grassland, unreclaimed land and beaches that can be owned by collectives in accordance with the law ……” In the other statutory context, it refused to accept that wild plants and animals are exclusively state-owned. To the contrary,

68 Xianfa art. 10, § 1 (1982) (China) provides that “[n]o organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways”.

69 Xianfa 1988 amendment states that “[t]he right to the use of land may be transferred according to law”.

70 Xianfa 1993 amendment, art. 7.

71 Xianfa 2004 amendment, art. 6.

72 Xianfa art. 9, § 1 (1982) (China).

since these species are indispensable parts of forests and grasslands, collectives can also own them when mandated by law.  

The second common issue is to what extent that collective ownership and individual use is permitted. The answer differs slightly depending on the nature of resources, but the legislature generally adheres to the constitutional mandates. In 1985, the NPCSC was confronting the question of whether state-owned grasslands that have long been used by collectives could be designated as collectively-owned property upon the approval from both the provincial People’s Congress and the NPCSC. Some argued that grasslands are generally state-owned and thus any provision for ownership transition would be a clear violation of the Constitution. Eventually, the NPCSC had to bow to the constitutional principle. It then declared that grassland is primarily owned by the state, although it can also be owned by collectives as mandated by law. And state-owned grasslands can be assigned to collectives or individuals for long term use.

In 2002, when revising the Water Law, the NPCSC was faced with a different issue. The legislature, urged by the Environment and Resources Protection Committee, ministries and localities, initially decided to endow rural collectives with the ownership of water ponds and reservoirs, despite the fact that the Constitution exclusively reserves water for state ownership. This move was resisted by the Law Committee, which argued that it would amount to a clear violation of the Constitution, and that collectives and their members should only be entitled to use the water. Therefore, the Law Committee proposed to waive the permit and fees for collectives and their members, which are general requirements for using state-owned water resources.

The third issue is who represents the State, the Central Government or local governments or other state organs? In all cases, the NPCSC has consistently ruled that only the Central Government can represent the State. In other words, “state-owned” almost means “centrally-owned”, although the language may vary in different contexts. In 1996, the Law Committee affirmed that the notion that the local government where mineral resources reside owns them is a completely misconception. Mineral resources belong to the State and only the Central Government can represent the State. Meanwhile, under pressure from local...
governments, the NPCSC also dropped the wording that those resources “do not belong to any local governments or departments.”

Similarly, the Ministry of Homeland and Resources stressed that the power to take a land only resides in the State Council, which is the Central Government. Such an arrangement was fully endorsed by the NPCSC in its statute. The legislature also declared that the State Council represents the State to exercise the ownership of uninhabitable islands.

Finally, when enacting the Property Law, the NPCSC clarified that it is the State Council, not the NPC, that represents the State. It said, “According to the Constitution, the NPC is the highest organ of state power and the State Council is the executive branch of it. The NPC represents the People of the nation to exercise the state power, which is carried out by making decisions on fundamental issues of national importance. It is the State Council that enforces those decisions. Therefore, it is the executive branch, rather than the legislative branch, that exercises the state ownership……The NPC, through legislation, authorizes the State Council to exercise the state ownership……and the latter shall be responsible to and be supervised by the former.”

IV. HYBRID ROLES AND MULTIPLE MEANS

As these many examples illustrate, the NPC and its Standing Committee have been fairly active in illuminating constitutional meanings in China. Far from the image of the Constitution as a pure “sham”, the text has been a vital resource for opponents and proponents of particular policies, and has provided a genuine constraint preventing certain initiatives from going forward. During this process, the NPC and NPCSC have played at least three different roles under different circumstances. At the very basic level, the legislature has been a loyal follower or enforcer of the founding document. In this context, its foremost mission is to adhere to the rules and principles that have been clearly announced in the constitution. When turning down the plan to escalate the township governments’ control over villages, for example, the legislature firmly defended the autonomy that the Constitution provided to community boards. In this regard, the two bodies have fulfilled their duty as the legislature to uphold the authority and dignity of the Constitution. All in all, they do take the Constitution very seriously.

The legislatures, however, do not always act in a passive way. In fact, they can become quite resilient towards the constitutional order. When an existing constitutional rule has proved to be outdated in practice or there is an urgent need to bring constitutional changes, the NPC and NPCSC have been willing and able to produce norms of constitutional significance. For instance, the Property Law eliminates the discriminatory treatment offered by the Constitution between public and private property and establishes equal status for the two types of property. In this regard, the legislature has been a creator of new constitutional norms and order. Such a role can be easily recognized when it creates new governmental entities or expands the jurisdiction of existing organizations. Of course, the legislature’s role as a norm-creator is by no means unlimited. In practice, the legislature has shown that it is well aware of fundamental principles in the constitution and tries not to undermine these

80 Id.


83 Guanyu <Zhonghua Renmin Gongheguo Wuquan Fa (Cao’an)> De Shuoming, supra note 66.
pillars.

The legislature also acts as an arbiter especially when the jurisdictional boundary between governmental organizations has to be redrawn or when constitutional rights have to be redistributed. When jurisdictional and rights conflicts emerge, both the NPC and the NPCSC must carefully conduct a calculation of different approaches, and work out a sound solution through interpretation. Examples include empowering courts to check the executive branch through administrative litigation; the realization of equal voting rights between rural and urban China; and the granting of equal protection to state-owned property and its private counterpart. In each case, the NPC has structured relations among different interests in China’s system, playing a role of arbiter.

Like constitutional tribunals in other jurisdictions, both the NPC and its Standing Committee have also been quite skillful and resilient in applying different interpretative approaches in different arenas. Generally speaking, at least four methods have been adopted in constitutional interpretations:

1. **Using a constitutional clause to legitimate a new legislative arrangement.** When creating a new institution or establishing a new system, the legislature often has to justify such an institutional innovation by citing a specific constitutional clause(s) as a source of authority. Invoking Article 41 as the foundation of establishing the administrative litigation system is a suitable example of this sort.

2. **Broadly construing a constitutional principle to allow statutory innovations.** When there is no identifiable delegation clause to rely on to support an institutional innovation, the legislatures will try to borrow a constitutional principle to accommodate such a move. In 1990, the NPCSC wrote into the Copyright Act a clause that allows individuals to translate Mandarin works into ethnic minority languages without prior approval from the original author and without paying the author, while translating works from minority languages into Mandarin still follows the Berne Convention which mandates both approval from and payment to the original author. The legislature defended the discriminatory arrangement by invoking the constitutional principle that requires the government to help ethnic minority regions accelerate their cultural development.\(^\text{84}\)

3. **Invoking a constitutional principle to reject a controversial legislative proposal.** If a legislative proposals too controversial and risks undermining the status quo, the NPCSC will often iterate a constitutional principle to fence off the potential threat and enhance institutional stability. In 2006, when enacting the Supervision Law, the NPCSC overruled a proposal that people’s congresses’ standing committee at all levels have the right to supervise individual cases decided by courts in order to improve judicial accountability. The legislature believed that such a design would fundamentally intrude into judicial independence that has been guaranteed by the Constitution.\(^\text{85}\)

4. **Intentionally being vague to avoid any constitutional disputes.** Like other political entities, the NPCSC is sophisticated enough not to provide a definitive answer if that will induce unnecessary disputes, particularly when it lacks sufficient political capital to resist any political pressure or retaliation. For instance, under the protest from local governments and ministries, the NPCSC eventually eliminated a clause stating “mineral resources do not belong to the localities or ministries”.\(^\text{86}\)

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84 Guanyu <Zhonghua Renmin Gongheguo Zhuzuoquan Fa (Cao’an Xiugai Gao)> Xiugai Yijian De Huibao, *supra* note 46.


86 Quanguo Renda Falv Weiyuanhui Guanyu <Zhonghua Renmin Gongheguo Kuangchan Ziyuan Fa
V. CONCLUSION

Both the NPC and its Standing Committee have not only shown their respect for the Constitution, but also used constitutional interpretations to address important issues facing them. Through interpretations, constitutional norms have not only been applied and enforced, but also evolved to meet new challenges.

Some interpretations have also rebutted the widely-shared doubt about the ability of legislatures to constrain themselves. As the legislature becomes more plural in membership, constitutional concerns will be raised more frequently during the legislative process. In light of the fact that legislation has been a major venue for constitutional evolution, the self-checking function is becoming more and more important and necessary.

This rich body of interpretations should be treated as an indispensable part of China’s constitutional norms. Without them, no one can fully comprehend China’s Constitution. While there has been some attention to popular constitutionalism in the recent active debates on the nature of the Chinese Constitution, these have not always recognized the importance of the legislature as a site of constitutional interpretation.\(^87\)

The implications of this analysis are hardly restricted to China. Many of these examples demonstrate new insight into the role of constitutions in authoritarian regimes, in which constitutional argument can produce genuine constraint, and can guide choices by providing resources to one or the other side in a policy debate. Scholars of American constitutional history have long recognized that the U.S. Congress plays a central and distinct role in constitutional interpretation. Our basic claim is that China is less different than one might think, and that we should not restrict our search for constitutional impact in China to the courts.\(^88\) Indeed, by taking a wider view of constitutional discourse, we might find that the Chinese Constitution matters very much indeed, and will continue to grow in importance, even in an era in which constitutionalism is not a politically correct term there.

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