

THE CONSTITUTIONAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA AND ITS DEVELOPMENT

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I. INTRODUCTION

The People's Republic of China (PRC) has seen the enactment of several constitutional documents. These are the Constitutions of 1954, 1975, 1978, and 1982. The 1954 Constitution confirmed the basic governmental system, including the structure of state organs and citizens' rights. The 1975 and 1978 Constitutions were influenced by the extreme leftist sentiments of the Cultural Revolution, which promoted a theory of continuing revolution under proletarian dictatorship, inconsistent with the basic principles of modern constitutionalism. The Constitution currently in effect was enacted in 1982. Through a series of amendments,¹ constitutionalist principles such as rule of law, democracy and protection of human rights have been incorporated, and the resulting Constitution is a relatively complete constitutional text.

The present Constitution, as the basic law of the contemporary PRC, has played a positive role in affirming the results of reform and opening, stimulating economic development, promoting the protection of human rights, and establishing the authority of the law. In particular, general personal freedom as a constitutional right has been emphasized in all its aspects, so that individuals, social organizations, and enterprises can more fully realize their roles in social reform and everyday life.

But there continue to be many problems enforcing the Constitution, both in theory and from the practical perspective. Overlapping or contradictory constitutional authority has given rise to conflicts between laws enacted by the National People's Congress (NPC) and its Standing Committee. Legal obstacles prevent courts from applying the Constitution in the adjudication of judicial controversies. There are also problems giving full effect to the constitutional affirmation of human rights, and clarifying the scope of legislative authority and the legal force of fundamental rights prescribed in the Constitution.

This article attempts a preliminary response to these questions. The first part traces the constitutional history of the PRC. The second part discusses the power structure of the Government as laid down by the Constitution and the problems inherent in that structure. The third part discusses problems in legislation. The fourth part discusses constitutional issues of human rights. The last part offers some conclusions and surveys the vast area that has not been addressed in this article but requires further scholarly debate.

¹ The 1982 Constitution has been amended four times, in 1988, 1993, 1999, and 2004.

II. THE HISTORICAL EVOLUTION OF CONSTITUTIONAL LAWS IN THE PRC

A. *The Common Program as the Provisional Constitution*

The victory in the Chinese People's War of Liberation in 1949 marked the end of an era. In January 1949, the Chinese Communist Party issued an announcement, to be used in peace talks with the Nationalist Party (KMT).² The second and third provisions of the announcement demanded the abolition of the constitution and laws made under the KMT regime. One month later, the Central Committee of the Chinese Communist Party issued its Directive on the Abolishment of the Code of Six Laws and the Establishment of Judicial Principles in Liberated Areas,³ expressly invalidating all laws and regulations made by the KMT government.

On September 29, 1949, two days before the founding of the PRC, the First Plenary Session of the Chinese People's Political Consultative Conference adopted its Common Program,⁴ which would serve as a temporary and transitional constitution.

The Common Program described the nature, tasks, and guiding principles of the newly-born country in the form of fundamental law. Its clear purpose was for the new People's Republic to "abolish all laws, regulations and judicial systems established by the counterrevolutionary KMT government, which oppress the people, to establish laws and regulations that protect the people, and to build the people's judicial system."⁵

From the founding of the PRC to 1954, the Common Program served as a constitution that provided the PRC's legal foundation. Under the Common Program, the Central People's Government took effective measures to restore the national economy, suppress counterrevolutionary forces, and safeguard the sovereignty of the country.⁶

² 中共中央毛泽东主席 - 关于时局的声明 [Chairman Mao of the Central Committee of the Chinese Communist Party—A Statement on the Present Situation] Jan. 14, 1979, available at http://www.ahgz.gov.cn/dangwei/m_wxuan/4_50.htm (last visited Nov. 4, 2009).

³ This Directive was drafted by Wang Ming, but was approved by Chairman Mao Zedong before promulgation. See 周国泉、郭德宏、王明传 [ZHOU GUOQUAN & GUO DEHONG, BIOGRAPHY OF WANG MING] 268 (安徽人民出版社 [Anhui People's Press] 2nd ed. 2003).

⁴ 中国人民政治协商会议共同纲领 [Chinese People's Political Consultative Conference Common Program], (promulgated by the Chinese People's Political Consultative Conference, Sept. 29, 1949) (P.R.C.) [hereinafter Common Program].

⁵ *Id.* art. 17.

⁶ These activities included the *san fan* (三反) (three oppositions) movement of 1951–1952 to oppose corruption, waste, and bureaucratism; the *wu fan* (五反) (five oppositions) movement to oppose bribery, tax evasion, theft of state assets, cheating on government contracts, and theft of state economic secrets; and the establishment of the China Academy of Sciences to serve the construction of industry, agriculture, and national defense. See Country-Data.com, <http://www.country-data.com/cgi-bin/query/r-2910.html> (last visited Oct. 29, 2009); Embassy of the People's Republic

B. *The Four Constitutions in the History of the PRC*

1. The Birth of the 1954 Constitution

In January 1953, the Committee for Drafting the Constitution of the PRC was established, with Mao Zedong as chairman. After a year's effort, and with over 150 million citizens participating,⁷ the first constitution of the PRC was adopted on September 20, 1954, at the First Plenary Session of the First National People's Congress.

This first Constitution includes four chapters and contains a total of 106 articles: the first chapter, "General Principles," describes the nature of the state,⁸ the political⁹ and economic systems,¹⁰ and the principles of relations between ethnic groups.¹¹ The second chapter, "The Structure of the State," provides for the structure and division of state power. The third chapter, "Fundamental Rights and Duties of Citizens," provides that "all citizens are equal before the law."¹² The fourth chapter addresses "National Symbols," including the national flag,¹³ national seal,¹⁴ and the national capital.¹⁵

The first Constitution of the PRC was deeply influenced by the constitution of the Soviet Union¹⁶ and was regarded as a socialist-style constitution. It explicitly affirms the system of People's Congresses as the fundamental political system of the PRC, and emphasizes the importance of socialist and democratic principles.¹⁷

of China in the Republic of Indonesia, China's Science and Technology Development Summary, <http://www.mfa.gov.cn/ce/ceindo/eng/whjy/kjll/t87396.htm> (last visited Oct. 29, 2009).

⁷ The draft of the 1954 Constitution was made public for the purposes of holding a two-month nationwide discussion. More than 150 million citizens participated, advancing over 1.16 million questions and suggested amendments and additions. See China's Government White Papers, A Historic Turning Point in the Progress of Human Rights in China, available at <http://www.china.org.cn/e-white/3/3.1.htm> (last visited Oct. 29, 2009).

⁸ 宪法 [Constitution] art. 1 (1954).

⁹ *Id.* art. 2.

¹⁰ *Id.* art. 4.

¹¹ *Id.* art. 3.

¹² *Id.* art. 85.

¹³ *Id.* art. 104.

¹⁴ *Id.* art. 105.

¹⁵ *Id.* art. 106.

¹⁶ During the drafting of the first constitution, Chairman Mao Zedong asked all high ranking leaders to study a list of reference books. The most important of these materials were the 1924 and 1936 Constitutions of the U.S.S.R. See 6 毛泽东文集 [COLLECTED WORKS OF MAO ZEDONG] 320–21 (人民出版社 [People's Press] 1999).

¹⁷ See 朱福惠、王建国, 苏联 1936 年宪法与我国 1954 年宪法之比较研究 - 政治引导型宪法的价值分析 [Zhu Fuhui & Wang Jianxue, *A Comparison Between the 1936 Soviet Union Constitution and the 1954 Chinese Constitution: A Values Analysis of the Political Guidance of*

2. The Constitutions of 1975 and 1978

The PRC entered a legal void in 1957 with the rise and total dominance of extreme leftist ideology. The principles espoused in the 1954 Constitution were neglected or repudiated. In 1966, with the beginning of the Cultural Revolution, all legal orders based on the 1954 Constitution were abolished.¹⁸

On January 17, 1975, a constitution grounded in the theory of class struggle, and reflecting the achievements of the Cultural Revolution, was adopted at the First Session of the Fourth National People's Congress. The 1975 Constitution includes only 30 articles, and dispenses with, among other things, the 1954 Constitution's affirmation that "all people are equal before the law." It emphasizes the importance of class struggle and authorizes Revolutionary Committees at every level to act as standing bodies of the People's Congresses.¹⁹

Even after the fall of the Gang of Four in 1976,²⁰ the same ideology remained an important influence on the Government. On March 5, 1978, another extreme leftist constitution was adopted at the First Plenary Session of the Fifth National People's Congress. The 1978 Constitution provides that doctrines such as the theory of continuous revolution under proletarian dictatorship should be preserved, although it also advocates the scientific modernization of the PRC.²¹ Socialist legal principles are not explicitly addressed.

Neither the 1975 nor the 1978 Constitutions played an effective role in the construction of the legal system of the PRC due to the political limits on their basic legal principles. Focusing primarily on the struggle of the proletariat, these constitutions did little to further the legal development of China.

Constitution Formation], in 1954 年宪法研究 [ANALYSIS OF THE 1954 CONSTITUTION] 59–72 (张庆福、韩大元 [Zhang Qingfu & Han Dayuan], eds., 中国人民公安大学出版社 [Chinese People's Public Security University Press] 2005).

¹⁸ Stories are frequently told of President Liu Shaoqi's purported attempts to escape persecution and resist the Cultural Revolution by invoking the PRC Constitution. See, e.g., 刘少奇手持《宪法》制止儿女参与抄家 [Liu Shaoqi Held the Constitution and Stopped His Children's Participation in Confiscations], 光明日报 [GUANG MING DAILY], Mar. 26, 1999, available at <http://www.gmw.cn/01gmrb/1999-03/26/GB/18007%5EGM11-220.htm> (last visited Oct. 29, 2009); “文革”期间刘少奇据理捍卫国家主席尊严使用的《中华人民共和国宪法》 [The Constitution that Liu Shaoqi Used to Defend Presidential Dignity during the Cultural Revolution], available at http://www.shaoqi.cn/new_list.asp?id=335 (last visited Oct. 29, 2009).

¹⁹ 宪法 [Constitution] art. 22 (1975).

²⁰ “Gang of Four” refers to the Chinese Communist Party leaders who held power during the Cultural Revolution from 1966 to 1976: Jiang Qing, Wang Hongwen, Zhang Chunqiao and Yao Wenyuan.

²¹ 宪法 [Constitution] pmbl. (1978).

3. The 1982 Constitution

Since 1978, the topic of reform has become central to political life in the PRC. The basic principle of socialist legal construction was put forward at the Third Plenary Session of the Eleventh Congress of the Chinese Communist Party.

A Constitutional Revision Committee was established at the Third Plenary Session of the Fifth National People's Congress on September 10, 1980, on the proposal of the Central Committee of the Chinese Communist Party. After two years' effort, with 400 million citizens (over 80% of the adult population) participating in discussion and legislative hearings, the 1982 Constitution was born on December 4, 1982, at the Fifth Plenary Session of the Fifth National People's Congress. Dubbed the PRC's best Constitution,²² it includes four chapters and 138 articles, providing for the basic system and tasks of government, and adopts many of the principles of the 1954 Constitution. It is considered the most comprehensive constitution since the founding of the PRC, and remains in force today with chapters addressing the following subjects:

Preamble

Chapter One—General Principles

Chapter Two—The Fundamental Rights and Duties of Citizens

Chapter Three—The Structure of the State

Section I The National People's Congress

Section II The President of the People's Republic of China

Section III The State Council

Section IV The Central Military Commission

Section V The Local People's Congresses and Local People's Governments at Various Levels

Section VI The Organs of Self-Government of National Autonomous Regions

Section VII The People's Courts and the People's Procuratorates

Chapter Four—The National Flag, the National Seal, and the Capital

The 1982 Constitution emphasizes the role of the construction of the legal system in the future modernization of the PRC. The preamble states:

This Constitution, in legal form, affirms the achievements of the struggles of the Chinese people of all nationalities and defines the

²² See 宪法学 [CONSTITUTIONAL LAW] 103 (吴家麟 [Wu Jialin] ed., 群众出版社 [Qunzhong Press] 2003).

basic system and basic tasks of the state; it is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.²³

C. The Amendments to the 1982 Constitution and Their Significance

The 1982 Constitution, has not only played a positive role in supporting the construction of a socialist legal system, but also adapted to the needs of economic and other reform. This has taken place through the process of constitutional revision.

1. The 1988 Amendments²⁴

The Seventh National People's Congress adopted amendments to the 1982 Constitution at its First Session on April 12, 1988.²⁵ The main purpose of these amendments was to legitimize the private economy and increase the productive use of land by legalizing its transfer.²⁶

2. The 1993 Amendments²⁷

In 1992, Deng Xiaoping published his famous "South China remarks," clarifying the Government's position with respect to the differ-

²³ 宪法 [Constitution] pmb. (1982).

²⁴ 中华人民共和国宪法修正案 (1988) [1988 Amendment to the Constitution of the People's Republic of China], (promulgated by the Nat'l People's Cong., and effective Apr. 12, 1988), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

²⁵ *Id.* arts. 1, 2. The full text of both articles is as follows:

Article 1. Article 11 of the Constitution shall include a new paragraph which reads: "The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy."

Article 2. The fourth paragraph of Article 10 of the Constitution, which provides that "no organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means," shall be amended to: "No organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law."

²⁶ *Id.*

²⁷ 中华人民共和国宪法修正案 (1993) [1993 Amendment to the Constitution of the People's Republic of China], (promulgated by the Nat'l People's Cong., and effective Mar. 29, 1993), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) [hereinafter 1993 Amendments].

ences between socialism and capitalism. The socialist market economy was affirmed as the necessary economic form for socialist construction.²⁸ The First Plenary Session of the Fourteenth National Congress of the Chinese Communist Party adopted this doctrine. In order to adjust for the requirements of the new doctrine and to provide a constitutional basis for it, several amendments related to the socialist market economy were made to the 1982 Constitution on March 29, 1993. The “state-run enterprise” was replaced in the text of the Constitution by the “state-owned enterprise.”²⁹ The traditional “planned economy” of the 1954, 1975, and 1978 Constitutions was replaced by the “socialist market economy;”³⁰ and the “rural people’s communes and agricultural producers’ cooperatives” were replaced by the “responsibility system in rural areas, mainly the household contract responsibility system with remuneration linked to production.”³¹

3. The 1999 Amendments³²

On March 15, 1999, the 1982 Constitution was again amended at the Second Plenary Session of the Ninth National People’s Congress. The focus of these amendments was on enhancing the importance of the socialist legal principle of “rule of law,”³³ and on promoting the constitutional status of non-public ownership.³⁴ All of the 1999 amendments arose out of the demand for meaningful reform in the economy, politics, and social welfare.

4. The 2004 Amendments³⁵

The most recent amendments to the Constitution were adopted on March 14, 2004 by the Tenth National People’s Congress at its Second

²⁸ 邓小平, 邓小平南巡讲话 [Deng Xiaoping, *Deng Xiaoping’s Remarks in Southern China*], Jan. 18, 1992, available at <http://www.oklink.net/lszl/dangdai/dxp01.html> (last visited Oct. 29, 2009).

²⁹ 1993 Amendments, *supra* note 27, art. 5.

³⁰ *Id.* art. 7.

³¹ *Id.* art. 6.

³² 中华人民共和国宪法修正案 (1999) [1999 Amendment to the Constitution of the People’s Republic of China], (promulgated by the Nat’l People’s Cong., effective Mar. 15, 1999), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.).

³³ *Id.* art. 13 (“A new paragraph is added to Article 5 of the Constitution as the first paragraph, which reads, ‘The People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.’”).

³⁴ *Id.* art. 16.

³⁵ 中华人民共和国宪法修正案 (2004) [2004 Amendment to the Constitution of the People’s Republic of China], (promulgated by the Nat’l People’s Cong., and effective Mar. 14, 2004), STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.).

Plenary Session. The concept of human rights entered the constitutional text for the first time, in the form of a provision that "the State respects and protects human rights."³⁶ This constitutional milestone places the 1982 Constitution in conformity with the requirements for the protection of international human rights.

There have been a total of thirty-one amendments to the 1982 Constitution, which continues to face the new challenges of the twenty-first century. The 1982 Constitution, as the comprehensive fundamental law of the PRC, can lead the PRC into a new era of socialist rule of law.

5. Summary

The most important constitutional documents in the history of the PRC include the 1949 Common Program, a provisional constitution; the first Constitution of 1954; the Cultural Revolution-influenced Constitutions of 1975 and 1978; and the 1982 Constitution with its four sets of amendments.

These documents have established a set of political systems with Chinese characteristics,³⁷ the most important and fundamental of which is the political system of the People's Congresses. Unlike the traditional Western political regime based on constitutional "checks and balances" between different state powers, under the PRC system People's Congresses at different levels possess all state powers, including the power to create and supervise legislative, administrative and judicial bodies based on the premise of direct supervision by the people. One very important characteristic of the PRC Constitutions is their protection of the general freedoms enjoyed by individuals, social organizations, enterprises and institutions. The main theoretical and practical issues in current constitutional

³⁶ *Id.* art. 24 ("One paragraph shall be added to Article 33 of the Constitution as paragraph 3, that is 'The state respects and protects human rights.' And paragraph 3 shall be changed into paragraph 4 accordingly.").

³⁷ The attribute of having Chinese characteristics (具有中国特色) is often cited in reference to the socialist system existing in the PRC. 宪法 [Constitution] pmbl. (1982); 全国人民代表大会常务委员会关于加强法制教育维护安定团结的决定 [Decision of the Standing Committee of the National People's Congress on Intensifying Education in the Legal System and Safeguarding Stability and Unity], (promulgated by the Standing Comm. Nat'l People's Cong., and effective Jan. 22, 1987), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) § 9; 中华人民共和国教育法 [Education Law of the People's Republic of China], (promulgated by the Nat'l People's Cong., Mar. 18, 1995, effective Aug. 1, 1995), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) art. 3. The use of the term has evolved and it is customarily used to refer to laws and policies that have idiosyncrasies unique to the PRC. See Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 HONG KONG L. J. 200 (2001); Albert Park & Changqing Ren, *Microfinance with Chinese Characteristics*, 29 WORLD DEVELOPMENT 39 (2001); Lawrence S. Liu, *Chinese Characteristics Compared: A Legal and Policy Perspective of Corporate Finance and Governance in Taiwan and China*, 4 CORP. GOV. INT'L ISSUES 3 (2004).

law concern the Constitution's lack of legal force and the absence of a system of constitutional review that includes clear mechanisms of interpretation and enforcement.

III. ESTABLISHING CONSTITUTIONAL REVIEW IN THE PRC: SOME THEORETICAL ISSUES

Although there have been positive developments in the enforcement of the 1982 Constitution, the Constitution seems far removed from the lives of citizens. While for jurists the Constitution affirms legal principles, its significance for ordinary people remains unclear.

For ordinary citizens, the Constitution cannot be depended on to protect individual rights and interests, as people have no knowledge of how it might be so utilized. The Constitution is therefore generally regarded only as an electoral law and law of state organs. Only a few people study it or know how to utilize it for their own purposes. This impedes the development of constitutional theory and also causes some important theoretical issues of constitutional implementation to be ignored or handled only in a superficial fashion.

This not only hampers the development of mechanisms of constitutional implementation, but also limits the ability of the PRC Constitution to function as a fundamental law. Important issues of constitutional relations have gone unresolved, leading to a great deal of misunderstanding and confusion in practice concerning the basic constitutional system. Before a system of constitutional review can be established in the PRC, the following theoretical issues must be clarified and addressed.

A. The Relationship Between the Constitution and the NPC

One principle of modern constitutionalism is the supremacy of the constitution: the constitution is founded on the sovereignty of the people and therefore represents an authority higher than that of any state organ, organization or individual.³⁸

This requires that a constitution cannot simply be enacted or revised at the will of state organs. Otherwise, there is little to prevent state organs, which have power to enact or revise the constitution, from using this power to elevate their own authority over the constitution. Of course,

³⁸ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law . . . the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution.").

countries with parliamentary systems and unwritten constitutions do not follow this principle.³⁹ But under a system with a written constitution, constitutional supremacy must be established if the constitution is to have legal significance separate from laws adopted by the legislature.

A written constitution has been chosen by the PRC, and the Constitution should therefore have supreme legal force. The Constitution must be differentiated from laws adopted by the NPC and its Standing Committee, or it will cease to have independent legal significance. Accordingly, the legal authority of the Constitution should be above that of the NPC. This requires that the procedure for enacting and amending Constitutions not be under the control of the NPC, but follow a special constitutional procedure. Presently, however, the procedure for amending the Constitution is under the control of the NPC.

Article 64 of the 1982 Constitution provides that amendments to the Constitution can be proposed by the Standing Committee of the NPC, or by more than one-fifth of the deputies of the NPC, and can be adopted by a vote of two-thirds of all the deputies of the NPC.⁴⁰ In contrast, laws and resolutions are adopted by a majority vote of all the deputies of the NPC.⁴¹

An important constitutional issue thus arises: What is the essential difference, if any, between constitutional amendments adopted by two-thirds of the deputies of the NPC, and laws and resolutions adopted by a majority of the deputies of the NPC? The former belongs to the legislative process of creating a constitution; the latter belongs to the normal legislative process. In theory, the act of creating the constitution is a direct expression of the people's will, but the act of legislation implicates the people's will only indirectly. The lawmaking power of a state legislative body may be confirmed by the constitution, but cannot be created by the legislative body itself. This would make the Legislature the source of state power itself, thus contravening the principle of popular sovereignty on which the modern constitution relies.

In modern constitutionalism, the power to create a constitution and the power to make a law are two different conceptions. The power to create a constitution belongs to the people and is connected with their so-

³⁹ See, e.g., Lori Ringhand, *Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain*, 43 COLUM. J. TRANSNAT'L L. 865, 871-75 (reviewing the conceptions of parliamentary sovereignty and judicial review in the British system, and their role in the absence of a written constitution).

⁴⁰ 宪法 [Constitution] art. 64 (1982).

⁴¹ *Id.*

verignty.⁴² Legislative power belongs to the Legislature, and functions as one type of state power.

In the PRC, although the powers to revise the Constitution and to enact legislation both reside in the NPC, the nature of the two powers is different. The power of a two-thirds majority of the NPC to amend the constitution must have greater significance. Otherwise, the legal procedure for amending the Constitution makes no legal sense.

The difference in the nature of the Constitution and the law, then, has not been made clear under the 1982 Constitution. Placing the powers of constitutional and legislative amendment together in the NPC results in a concentration of power in the NPC, which then becomes the sole source of state power. The principle of constitutional supremacy cannot be said to exist under the present Constitution. Because the power to create the Constitution and the power to enact laws reside in the same body, it is impossible in practice for laws adopted by the NPC to contravene the Constitution. Unconstitutionality is a logical impossibility.⁴³ The Constitution then functions only as a general principle for legislation by the NPC, and loses its direct normative role as law.

One recent example illustrates this predicament. In 2000, the NPC enacted the Legislation Law,⁴⁴ which purports to govern the legislative process and provides that all laws, regulations and rules must conform to its requirements. But this is in contravention of the principle of constitutional supremacy, because the Constitution, as a fundamental law, has supreme legal force, and cannot be contravened by any law, regulation or rule, and the NPC must enact laws in accordance with the Constitution. Any law adopted by the NPC that is inconsistent with the Constitution must be declared unconstitutional and overturned. But under

⁴² The power to create a constitution is the power to enact fundamental law. In the modern history of constitutional development, the French scholar Emmanuel Joseph Sieyès (1748–1836) was the first to advance the concept of the power to create a constitution. The power to create a constitution, by nature, cannot be a kind of state power because in accordance with modern constitutional theory, there must logically be a power to create a constitution, which preexists state power. A constitution must exist for state powers to be created. Thus, in constitutional theory, it is impossible to regard the power to create a constitution as a state power. On the other hand, the power to create a constitution is simply one sort of power. The indispensable assumptions of constitutional theory are made in order to justify the constitution itself. See, e.g., 西耶斯, 论特权: 第三等级是什么? [EMMANUEL JOSEPH SIEYÈS, ON PRIVILEGE: WHAT IS THE THIRD ESTATE?], (冯棠 [Feng Tang], trans., 商务印书馆 [Shang Wu Printing House] 1990).

⁴³ Hong Shihong has argued that the relation between Constitution and law is of no significance because both can be controlled by the same state organ, the NPC. 洪世宏, 无所谓合不合宪法 [Hong Shihong, *There is no so-called constitutionality or unconstitutionality*], 中外法学 [CHINESE AND FOREIGN LEGAL SCIENCES], No. 5, 2000, at 596.

⁴⁴ 中华人民共和国立法法 [The Legislation Law of the People's Republic of China], (promulgated by the Nat'l People's Cong., Mar. 15, 2005, effective July 1, 2000), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

the Legislation Law, any law, regulation or rule that fails to observe the Legislation Law must be declared invalid. The legal authority of the Constitution over the NPC's legislative process can thus be evaded: the NPC, by conforming to the requirements of the Legislation Law, can give itself a legal basis for ignoring the requirements of the Constitution. When the Constitution will actually be able to exert its full legal force, continues to be a major question in the legal field.

B. The Relationship Between the NPC and Its Standing Committee

According to the 1982 Constitution, the Standing Committee of the NPC is not an independent state organ. It shares power with the NPC, but is under the control of the NPC. Thus, all of the powers exercised by the Standing Committee of the NPC originate from the NPC. Moreover, all powers that can be exercised by the Standing Committee of the NPC can under the Constitution also be exercised by the NPC directly.⁴⁵

Such an interpretation is consistent with the organizational relationship between the NPC and its Standing Committee. If the powers exercised by the Standing Committee could not be exercised by the NPC, the former would function as an independent body, giving rise to a "check and balance" of the latter's powers, in effect contradicting the organizational relationship defined in the Constitution.

It should be noted that the 1982 Constitution can be read to give the Standing Committee of the NPC some independent governmental powers. For instance, under Article 67 the Standing Committee has power to interpret the Constitution and laws, but it is not clear whether the NPC enjoys the same power. When we analyze the legitimacy of such a provision, we must conclude that the NPC has the same power of legal and constitutional interpretation as its Standing Committee. Otherwise, the Standing Committee would function as an independent state organ. This would result in a paradox, as the Standing Committee is merely the standing body of the NPC. The hierarchical relationship between the two bodies is part of the definition of their legislative power, which implies that the legislative power exercised by the Standing Committee of the NPC is less broad than that of the NPC. It is therefore not meaningful for the Constitution to divide legislative power between the NPC and the Standing Committee. Division of the legislative power can occur in a regime of separation of powers. Once the legislative power has been divided, all subjects exercising that power are then equal under the Constitution. But the organizational relationship between the NPC and its

⁴⁵ 宪法 [Constitution] arts. 58, 62 (1982).

Standing Committee would then lose its meaning as a restraint on the NPC and its Standing Committee. There is a conflict between the respective powers of the NPC and its Standing Committee, as defined in the Constitution, and the organizational relationship between them. This structural obstacle hinders clarification of the legal relation between the NPC and its Standing Committee. The key problem is that the division of powers between the NPC and its Standing Committee makes for ineffective implementation of the Constitution.

Another instance where this tension arises is in the conflict between the Criminal Procedure Law enacted by the NPC in 1996⁴⁶ and the Law on Lawyers enacted by the Standing Committee in 2007.⁴⁷ Lawyers have no right under the Criminal Procedure Law to meet freely with clients. But under the Law on Lawyers, they have the right to meet freely with clients without prior approval from judicial agencies. After the enactment of the Law on Lawyers in 2007, many professional lawyers attempted to exercise their rights to meet with their clients, but were barred from doing so by judicial agencies citing contrary provisions in the Criminal Procedural Law, which is awaiting revision.⁴⁸

A final example of this tension is in the resolution of conflicts between basic laws⁴⁹ and non-basic laws. According to Article 67 of the present Constitution, the Standing Committee of the NPC has power to interpret basic laws enacted by the NPC in the event of a conflict between a basic law enacted by the NPC and a non-basic law enacted by its Standing Committee. The Standing Committee thus makes the final determination as to which law has effect over the other. In practice, however, most state organs and their staff consider the NPC to have the ultimate power to resolve conflicts between basic and non-basic laws. This is an obvious doctrinal and practical problem concerning the relationship between the NPC and its Standing Committee. There is neither an obvious effective solution nor a high level of public awareness

⁴⁶ 中华人民共和国刑事诉讼法 [The Criminal Procedure Law of the People's Republic of China], (promulgated by the Nat'l People's Cong., Mar. 17, 1996, effective July 1, 1997), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

⁴⁷ See 中华人民共和国律师法 [Law of the People's Republic of China on Lawyers], (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) art. 33.

⁴⁸ See, e.g., 李梦娟, 新律师法难融“会见难”坚冰 [Li Mengjuan, *Difficult for New Lawyers' Law to Melt "Meeting Difficulty" Freeze*], 民主与法制时报 [DEMOCRACY & LAW], June 16, 2008, available at <http://news.mzyfz.com/times/a/20080616/104737.shtml> (last visited Oct. 29, 2009).

⁴⁹ Basic laws include criminal, civil and property laws, and organizational laws; that is, laws about state organs including the NPC, State Council, Local Governments, Court, Procuratorate, Election, Nationalities Regional Autonomy, and Special Administrative Regions. 张千帆 [Zhang Qianfan], A Presentation on the 1982 Constitution 8 (Sept. 20, 2007) (unpublished presentation, on file with author).

of the problem.

C. The Relationship Between the Authorized Legislation of the State Council and Its Official Legislation

According to the political system established in the Constitution, the State Council is constituted by the NPC through the selection of the prime minister based on the nomination of the State President, and is subject to supervision by the NPC and its Standing Committee.⁵⁰ The relationship between the NPC and the State Council is entirely hierarchical. This implies that all powers exercised by the State Council derive from the authority of the NPC. If the State Council can exercise certain independent state powers conferred directly by the Constitution, it need only obey the Constitution and is not accountable to the NPC, as long as it legitimately exercises its independent powers as stipulated in the Constitution. This result is in conflict with the organizational relation that subordinates the State Council to the NPC. This contradiction demonstrates an evident flaw in the division of legislative power.

Article 89 of the present Constitution gives the State Council the power to adopt administrative measures, enact administrative rules and regulations, and issue decisions and orders in accordance with the Constitution and the laws. This clause undoubtedly requires the State Council to adopt administrative rules and regulations in accordance with the Constitution and the laws. The phrase “in accordance with the laws,” can easily be interpreted to mean that administrative rules and regulations adopted by the State Council should be based on laws enacted by the NPC and its Standing Committee. Under such a regime, laws adopted by the NPC and its Standing Committee define the legal preconditions for the rules and regulations enacted by the State Council.⁵¹ But the statement, “in accordance with the Constitution,” seems to imply that the State Council’s power to enact administrative rules and regulations stems directly from the Constitution. This would mean that the legal force of the administrative rules and regulations adopted by the State Council might potentially include two aspects.

First, these rules and regulations would be based directly on, and subject only to, the Constitution, and therefore not subordinate to laws enacted by the NPC and its Standing Committee. Second, these rules and regulations would be based on the laws, and would avoid conflicts with those laws. The first of these possibilities—administrative rulemaking

⁵⁰ 宪法 [Constitution] art. 92 (1982).

⁵¹ See *id.* art. 89.

and regulation outside of the complete control of the NPC and its Standing Committee—is in conflict with the constitutional mechanism by which the State Council is supervised by the NPC and its Standing Committee.

If the NPC and its Standing Committee have complete supervisory power over the legislative power exercised by the State Council, the Constitution cannot offer any protection to the State Council as the authority directly underlying its administrative rules and regulations. Therefore, if cited as the legal basis for certain forms of legal rulemaking, the Constitution can easily cause contradictions in the legislative system. It is therefore worth noting that Article 89 of the present Constitution represents a hidden danger to the legislative system. That is, the State Council could in theory enact administrative rules and measures and issue decisions and orders in accordance with the Constitution, disregarding laws enacted by the NPC and its Standing Committee.

It has long been a controversial question whether administrative legislation in the PRC is official legislation or authorized legislation. The dispute can be traced back to the unclear legislative basis for administrative rules and regulations issued under Article 89 of the 1982 Constitution. Apart from considerations of the nature of the system of People's Congresses, the power to enact administrative rules and regulations should be based in the law, not in the Constitution. If the State Council's power to enact administrative rules and regulations derives directly from the Constitution, those rules and regulations can challenge the authority of laws made by the NPC and its Standing Committee, with no clear way to resolve the resulting conflicts.

The statement "in accordance with the Constitution" in Article 89 therefore cannot mean to identify the Constitution as a source of legal authority. It can only refer to the requirement that all administrative rules and regulations comply with the Constitution. It is necessary to be careful with the phrase "in accordance with the Constitution" when identifying sources of legislative authority.

Another potential problem concerns special legislative authorizations of the State Council by the NPC and its Standing Committee. Because legislative power ultimately resides in the NPC and its Standing Committee, it is they who must define the scope and nature of these authorizations. But the authorization decisions themselves discuss neither the reasons behind these grants of special authority, nor their legal status or significance. In practice, this legislative defect results in a great deal of independent legislation by the State Council. This seriously affects the organizational relationship between the State Council and the NPC and its Standing Committee.

For example, the duty of the citizen to pay taxes is defined by the present Constitution,⁵² and should in theory be embodied in laws enacted by the NPC and its Standing Committee, on the theory that tax obligations should be imposed by representative agencies based on the people's agreement. Nevertheless, most tax-paying obligations are imposed by administrative regulations adopted by the State Council, not by the NPC and its Standing Committee.⁵³ Another important example is the field of administrative compulsory enforcement, which has been formulated entirely through administrative regulations rather than laws.⁵⁴ Many important individual rights have been improperly limited by State Council administrative regulations.⁵⁵

D. The Power of the Central Military Commission to Enact Military Regulations Is Not Based in the Constitution

Under the present Constitution, the Central Military Commission (CMC) of the PRC directs the national armed forces,⁵⁶ but there is no constitutional provision on whether the CMC has the power to enact military regulations. In practice however, the CMC enacts military regulations. As a result, the military legislative system, as it currently exists in practice, does not conform to the Constitution.

The National Defense Law of 1995 provides that the CMC has power to enact military regulations.⁵⁷ This power is confirmed in the Legislation

⁵² *Id.* art. 56.

⁵³ See, e.g., 中华人民共和国增值税暂行条例 [Provisional Regulations of the People's Republic of China on Value-added Tax], (promulgated by the State Council, Dec. 13, 1993, effective Jan. 1994), available at <http://www.js-n-tax.gov.cn/Page1/StatuteDetail.aspx?StatuteID=2439>; 中华人民共和国消费税暂行条例 (2008 修订) [Interim Regulation of the People's Republic of China on Consumption Tax (2008)], (promulgated by the State Council, Nov. 10, 2008, effective Jan. 1, 2009), available at http://www.gov.cn/zwggk/2008-11/14/content_1149528.htm; 中华人民共和国营业税暂行条例 (2008 修订) [Interim Regulation of the People's Republic of China on Business Tax (2008)], (promulgated by the State Council, Nov. 10, 2008, effective Jan. 1, 2009), available at http://www.gov.cn/zwggk/2008-11/14/content_1149510.htm.

⁵⁴ See, e.g., 中华人民共和国海事行政强制实施程序暂行规定 [Provisional Regulations for Compulsory Execution Procedures in Maritime Administration], (promulgated by the Maritime Safety Administration, Oct. 27, 2004, effective Dec. 1, 2004), available at <http://www.tsghgl.gov.cn/Article.asp?NewsID=639> (last visited Oct. 29, 2009).

⁵⁵ The Standing Committee of the NPC has discussed a Draft Law on Administrative Compulsory Enforcement. Formal passage of this law is expected at the end of 2009. See 行政强制法草案向社会公开征集意见 (全文) [Draft Law on Administrative Compulsory Enforcement Made Public for Commentary (Full Text)], available at http://news.xinhuanet.com/legal/2009-08/28/content_11959680.htm (last visited Oct. 29, 2009).

⁵⁶ 宪法 [Constitution] art. 93 (1982).

⁵⁷ 中华人民共和国国防法 [Law of the People's Republic of China on National Defense], (promulgated by the Nat'l People's Cong., and effective Mar. 14, 1997), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) art. 13 (5).

Law adopted in March 2000.⁵⁸ But it has been very difficult to identify the nature of these military regulations. Because there is no constitutional provision concerning the CMC's power to enact military regulations, the legal force of CMC military regulations is not equal to that of other legal forms based explicitly in the Constitution. In accordance with the National Defense Law and Legislation Law, both adopted by the NPC, the CMC's power to enact military regulations can be construed as based on NPC authorization.⁵⁹ If this inference stands, the NPC may have the power to monitor military regulations made by the CMC for their conformity with the law. But under the National Defense Law and Legislation Law, military regulations appear to be comparatively independent. Their legal status appears to be on the same level as administrative rules and regulations issued by the State Council. In order to fit this regulatory power into the present constitutional and legislative system, the nature of the state power exercised by the CMC must be identified in the Constitution.

The Constitution needs, first, to clarify the nature of the military power exercised by the CMC and, second, to make clear that the CMC has power to enact military regulations. Such a stipulation can easily be justified as necessary in maintaining the uniformity of the legislative system. It is, however, easily seen that CMC military regulations are difficult to place within the uniform system of legal norms established by the 1982 Constitution and that the relationship between administrative and military regulations is very difficult to clarify.

In practice, administrative regulations made by the State Council and military regulations adopted by the CMC have a similar level of legal force even though there is no explicit official interpretation of their relationship. For instance, land in the possession of the military cannot be the subject of administrative regulations, but is addressed solely by military regulations, with the result that disputes concerning the status of this land and its use for military or civilian purposes cannot be resolved by ordinary civilian courts. The law has yet to cover the entire field of land rights. This very knotty issue confronts all efforts to normalize the use of land.

⁵⁸ Legislation Law art. 93.

⁵⁹ Under the present Constitution, the NPC has power to elect the Chair of the CMC and to choose all other members of the CMC from among nominees selected by the Chair (Article 62), and to remove the Chair and other members of the CMC from office (Article 63(3)). The Standing Committee of the NPC has power to supervise the work of the CMC (Article 67(6)). The Chairman of the Central Military Commission is responsible to the NPC and its Standing Committee (Article 94).

E. The Relationship Between Supervision and Separation of Powers

According to the system of People's Congress under the 1982 Constitution, the NPC and local People's Congresses at various levels are the organs through which the people exercise state power.⁶⁰ All administrative, judicial and procuratorial organs of the state are created by the People's Congresses, to which they are responsible and by which they are supervised.⁶¹ Thus, People's Congresses at all levels, as organs exercising state power, are not equal in legal position to their corresponding administrative, judicial and procuratorial organs. The relationship between them is hierarchical in nature. But this principle has not been fully observed by the Constitution, because within the same governmental level, the administrative, judicial and procuratorial organs of the state have power to check the People's Congresses in the practice of law enforcement.

For example, Article 129 of the 1982 Constitution provides that the People's Procuratorates of the PRC are state organs in charge of legal supervision. According to general constitutional principles, legal supervisory organs must have sufficient authority to carry out their assigned functions. Because laws are enacted by the NPC and its Standing Committee, the NPC and its Standing Committee can in theory act as the legal supervisory bodies. It is in conformity with constitutional principles for laws made by one organ to be supervised by the same organ. But Article 129 of the Constitution assigns the function of legal supervision to the People's Procuratorate, raising the possibility of conflict between the Procuratorates and other organs of state power whenever the state Procuratorates exercise their legal supervisory functions. If the supervisory power of the Procuratorates can be guaranteed in practice, the Procuratorates must then necessarily limit the power of other state organs, resulting in a "check and balance" relationship between the Procuratorate and other organs of state power. This is in contradiction with the organizational relationship between the organs of state power and the Procuratorate.

The structure of the present constitutional order gives rise to certain problems because many important constitutional relations have not yet received sufficient attention or theoretical treatment. It is therefore very difficult to evaluate constitutional enforcement under the current system. The problem for constitutional implementation is obviously not "action not based on law," but "law without basis." This means certain provisions of the present Constitution cannot be enforced due to logical contradic-

⁶⁰ 宪法 [Constitution] art. 2 (1982).

⁶¹ *Id.* arts. 96, 128, 133.

tions within the Constitution. This is a significant defect in the design of the current system.

As a consequence, there occur in practice many forms of legal supervision: legal supervision is exercised by the People's Congresses, the Procuratorates, the courts, administrative supervisory agencies, special state organs, social organizations, the Chinese Communist Party, and others. The holders of ultimate supervisory power are not explicitly identified in the present Constitution, and there is a possibility for the relatively free interpretation of the constitutional text without practical checks.

F. Possible Solutions

Despite the existence of these contradictions in the current design of constitutional relations, there is, in theory, a straightforward solution: revision of the Constitution to remove all defects in the text and put all constitutional relations in order.

The specific issues discussed above might be addressed effectively through constitutional amendment. First, the procedure for constitutional amendment can be modified to include joint approval of proposed amendments by the NPC and the provincial level People's Congresses. Provincial level People's Congresses elect NPC representatives. Assuming that People's Congresses at the provincial level have a real say in decisions to amend the Constitution, such a mechanism would function as a "representative" system, allowing the NPC to be supervised in the amendment process.

Second, the conflict between the NPC and its Standing Committee can be resolved by the establishment of a legal supervisory system in which the NPC can, if necessary, overturn laws enacted by its Standing Committee.

Third, the question on the legal basis for State Council administrative regulations may be resolved by removing the phrase "in accordance with the Constitution" from Article 89 of the Constitution and specifying that NPC and its Standing Committee legislation is the sole source of legal authority for State Council administrative regulations.

Fourth, the ambiguity in the constitutional basis for CMC military regulations can be resolved by a constitutional amendment that defines the legislative power to enact military regulations and expressly delegates it to the CMC.

Fifth, the problem of legal supervision should be resolved by the establishment of a system of authorization: the People's Congresses at all levels might be given the power to delegate legal supervisory powers to

the People's Procuratorates in order to avoid institutional conflict in the field of legal supervision.

There has been vigorous debate on whether People's Congresses at all levels should have power to intervene in judicial cases, given their constitutional supervisory powers over the system of "one house and two courts" (referring to the People's Government, the People's Procuratorate and the People's Courts). Some scholars support intervention in judicial cases by the People's Congresses at all levels,⁶² while others are in firm opposition to this idea.⁶³

At the beginning of 2003, a resolution to intensify the supervision of judicial cases by the People's Congresses at all levels was drafted by the NPC Standing Committee, but did not enter the deliberative process and was ultimately not passed, due to the inability to clarify the ambiguous relationship between the People's Congress and the administrative, procuratorial and judicial agencies at the same governmental level.⁶⁴

Unclear constitutional relations have resulted in many practical problems. The aim of all of the aforementioned suggestions is therefore to establish clear constitutional relations so as to improve the implementation of the present Constitution and establish a unified principle of socialist legality. A clear and effective system of constitutional relations can help improve awareness of constitutional issues among the public and state organs.

IV. THE CONCEPTION OF HUMAN RIGHTS IN THE CHINESE CONSTITUTION

A. The Evolution of Human Rights Protections in the Chinese Constitution

This section discusses the historical evolution of the constitutional provisions on the protection of human rights, from the Common Program to the 2004 amendments to the 1982 Constitution.

⁶² See 陈红玲, 慎用个案监督 [Chen Hongling, *Prudently Utilize Supervision in Individual Judicial Cases*], 政治与法律 [POLITICAL SCIENCE AND LAW], NO. 2, 2000, at 5.

⁶³ See 黎国智、冯小琴, 人大对法院个案监督的反向思考 [Li Guozhi & Feng Xiaoqin, *Opposing Thoughts on the People's Congress' Power to Supervise Individual Judicial Cases*], 法学 [LEGAL SCIENCES], Volume 5, 2000, at 9.

⁶⁴ See 房保国, 人大个案监督的尺度 [Fang Baoguo, *The Scope of People's Congress Supervision of Individual Judicial Cases*], available at http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=25162 (last visited Oct. 29, 2009).

1. Human Rights Protection in the Common Program

On the eve of the founding of the PRC in 1949, the Common Program was adopted at the First Session of the First Chinese People's Political Consultative Conference.⁶⁵ This provisional constitution affirmed in spirit the principle of the protection of human rights.⁶⁶ But owing to the influence of revolutionary politics at that early stage, individual rights were not expressly provided for. The rights described in the Common Program can be divided into the following: people's rights, rights of the people's groups, rights of the minorities, and other rights enjoyed by certain special subjects. The individual is the subject not of rights but of the duties listed in Article 8 of the Common Program. These include the duties to protect the motherland, obey laws, observe labor discipline, cherish public property, perform military and public service, and pay taxes.⁶⁷ Other duties of the individual can be found in Article 42, on "loving the motherland, the people, labor, science and public property is a public moral virtue for citizens of the [PRC]."⁶⁸

Thus, although the concept of rights can be found in the Common Program, the individual is the subject not of rights but of duties. The Common Program played an important role as a revolutionary, politically expressive constitution, extending the protection of legal rights and human rights to the people, but not to the enemies of the people.⁶⁹

It is also worth noting that the Common Program does not recognize the concept of the citizen. On the contrary, such groups as counterrevolutionaries, feudal landlords, and bureaucratic capitalists should be deprived of political rights for a certain period of time, but can reform themselves through compulsory labor in accordance with Article 7 of the Common Program. Hence it can be said that the concept of human rights in modern sense was not established in the Common Program due to these historical factors.

⁶⁵ See Common Program, pmbl.

⁶⁶ See *id.* arts. 4 (the people of the People's Republic of China have the right to vote and be elected), 5 (the people of the People's Republic of China have freedom of thought, speech, press, assembly, association, communication, and religion, and the right to demonstrate).

⁶⁷ *Id.* art. 8.

⁶⁸ *Id.* art. 42.

⁶⁹ For instance, Articles 4 and 5 of the Common Program state that it is the people of the People's Republic of China who enjoy these rights, as opposed to all people. Compare *id.* art. 5 ("The people of the People's Republic of China have freedom of thought, speech, press, assembly, association, communication, personal integrity, transfer of abode, religion and the right to demonstration. . . ."), with U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime . . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .").

2. Human Rights Protection in the 1954 Constitution

As a provisional constitution, the Common Program played many important roles in the early years of the PRC, particularly in the construction of the legal system, including the activities of legislative, administrative and judicial institutions. After social order had been restored and the national economy began to develop, on January 12, 1953, the National People's Government established a commission responsible for drafting the new PRC Constitution, with Mao Zedong appointed Chairman.⁷⁰ After more than a year of effort, a draft of PRC's first constitution was passed at the First Session of the First National People's Congress on September 20, 1954.

Unlike the Common Program, the 1954 Constitution includes many progressive provisions concerning the protection of human rights. The following points merit particular attention.

The 1954 Constitution includes a special chapter on "the basic rights and duties of the citizen." Though the Common Program places some emphasis on the people's rights, it does not include a special chapter or address rights in a comprehensive way. The 1954 Constitution gathers the provisions on the rights of the citizen in a single chapter so that citizens can easily find them.⁷¹ This method of stipulating the rights of the citizen represents a step forward in the protection of human rights. The legal position of human rights, as opposed to state powers, was confirmed in the text of the 1954 Constitution, and became an important part of Chinese Constitutional law.

Many important freedoms and rights are affirmed in the 1954 Constitution, including the freedom to relocate,⁷² freedom of speech,⁷³ freedom of association,⁷⁴ freedom of religious belief,⁷⁵ and the freedom to conduct public demonstrations and protests.⁷⁶ Aside from the citizen, subjects such as laborers, capitalists, women, foreigners and minorities are given special constitutional rights. For example, Article 8 of the 1954 Constitution provides that the state should protect the peasant's land and other rights.⁷⁷

⁷⁰ The National People's Government was established on Sept. 27, 1949, according to the Organic Law of the National People's Government, at the First Session of the Chinese People's Political Consultative Conference.

⁷¹ 宪法 [Constitution] ch. 3 (1954).

⁷² *Id.* art. 90.

⁷³ *Id.* art. 87.

⁷⁴ *Id.* art. 87.

⁷⁵ *Id.* art. 88.

⁷⁶ *Id.* art. 87.

⁷⁷ *Id.* art. 8 ("The state protects peasant ownership of land and other means of production according to law. The state guides and helps individual peasants to increase production and encourages them voluntarily to organize production' supply and marketing, and credit co-operatives.").

Article 10 describes the right of capitalists to the protection of capital by the state.⁷⁸ The third chapter on the rights of the citizen thus increases constitutional attention to human rights by including a set of rights for all citizens in addition to the constitutional rights of other specified subjects.

In defining the rights of the citizen, the 1954 Constitution relies on the concept of citizenship. This is in contrast to the Common Program, in which there is no concept of citizenship or of the individual as a holder of rights. The clarification of these concepts represents a significant progress in constitutional technique.

Of course, under the 1954 Constitution, groups such as counterrevolutionary elements, landlords and bureaucratic capitalists should be deprived of political rights.⁷⁹ Though the conception of the citizen is used in the constitutional text, the rights for the citizen are not universally applicable.

The identity of constitutional rights and constitutional duties is expressly stated in the text of the 1954 Constitution. Articles 100 to 103 provide that citizens of the PRC bear a duty to observe the Constitution and laws,⁸⁰ protect public property,⁸¹ pay taxes⁸² and serve in the military.⁸³ The rights of the citizen and the duties of the citizens are tightly connected in the formulation of the basic relationship between the state and the citizen.

In the 1954 Constitution, any protected right referred to in the text is connected with some kind of protective measure. For example, under Article 94, the right to receive education is supported by material and insti-

⁷⁸ *Id.* art. 10. Article 10 states: "The state protects the ownership by capitalists of the means of production and other capital according to law. The policy of the state towards capitalist industry and commerce is to use, restrict and transform them. The state makes use of the positive qualities of capitalist industry and commerce which are beneficial to national welfare and the people's livelihood, restricts their negative qualities which are not beneficial to national welfare and the people's livelihood, encourages and guides their transformation into various forms of state-capitalist economy, gradually replacing capitalist ownership with ownership by the whole people; and this it does by means of control exercised by administrative organs of state, the leadership given by state-owned economy, and supervision by the workers. The state forbids any kind of illegal activity by capitalists which endangers the public interest, disturbs the social-economic order, or undermines the economic plan of the state."

⁷⁹ *Id.* art. 19. Article 19 states: "The People's Republic of China safeguards the people's democratic system, suppresses of all acts of treason and counter-revolutionary activities, and punishes all the traitors and counterrevolutionaries. The State shall, in accordance with law and within a certain time period, withdraw the political rights of feudal landlords and bureaucratic capitalists, at the same time it provides them with a way to live, in order to enable them to reform through work and become citizens who earn their livelihood by their own labour."

⁸⁰ 宪法 [Constitution] art. 100 (1954).

⁸¹ *Id.* art. 101.

⁸² *Id.* art. 102.

⁸³ *Id.* art. 103.

tutional aid delivered by the state. Similar legal safeguards protected the right to labor,⁸⁴ the right to rest⁸⁵, and others.

The 1954 Constitution, then, achieved a great success in the protection of human rights, not only by expanding the content of constitutional rights, but also extending them to new subjects. It established a system of human rights protection focused on rights of the citizen. Unlike the Common Program, it promotes the institutional development human rights protection.

3. Human Rights Protection in the 1975 Constitution

Under the Constitution of 1954, the NPC and its Standing Committee promulgated a series of organic laws and other basic laws to address the needs of socialist construction. The People's Congresses were established according to the fundamental structure established in the 1954 Constitution,⁸⁶ and the people acted as masters of the state. Nevertheless, protection of human rights suffered beginning in 1957 with the state's anti-rightist movement, as many intellectuals lost their personal freedom. The Cultural Revolution began in 1966 in the name of "continuous revolution under proletarian dictatorship."⁸⁷ The basic political system established in the 1954 Constitution was destroyed and the Red Guards ignored the protected constitutional rights of the citizen.

In order to affirm the achievements of the Cultural Revolution, a new Constitution was passed at the First Session of the Fourth National People's Congress on January 17, 1975. Although the 1975 Constitution includes a separate chapter on the fundamental rights and duties of the citizen, there are few articles addressing these rights. Many important rights defined by the 1954 Constitution were removed, including equality before the law,⁸⁸ freedom of relocation,⁸⁹ the right to compensation,⁹⁰ and the right to cultural activity.⁹¹

It is worth noting that the 1975 Constitution does emphasize one particular type of right and duty: the fundamental right and duty of the citizen to support the Chinese Communist Party, support the socialist system,

⁸⁴ *Id.* art. 91.

⁸⁵ *Id.* art. 92.

⁸⁶ *Id.* arts. 55, 56.

⁸⁷ See, e.g., Lin Biao, Report of Apr. 1, 1969, available at <http://www.marxists.org/chinese/linbiao/marxist.org-chinese-linbiao-19690401.htm> (last visited Oct. 30, 2009) ("[W]e should deeply understand Chairman Mao's theory of continued revolution under the dictatorship of the proletariat.")

⁸⁸ 宪法 [Constitution] art. 85 (1954).

⁸⁹ *Id.* art. 90.

⁹⁰ *Id.* art. 97.

⁹¹ *Id.* art. 95.

and abide by the Constitution and the laws of the PRC.⁹² Some individual rights were added to the text of the 1975 Constitution, including freedom of correspondence⁹³ and the right to strike.⁹⁴ Thus, the 1975 Constitution did not simply systematically deny the significance of the protection of citizens' rights. Still, the level of human rights protection in the 1975 Constitution is inferior to that provided by the 1954 Constitution.

4. Human Rights Protection in the 1978 Constitution

After the end of the Cultural Revolution in 1976, the Chinese People, in particular the leading Party members, engaged in a wide-ranging reflection upon what they, at that time, regarded as a catastrophe. They had to correct the mistakes in what had just transpired. The year 1978 marked a watershed in Chinese history. The Third Session of the Eleventh Congress of the Chinese Communist Party was convened in December 1978. It ushered the PRC into a new era of reform and change. As a very important step in the PRC's political reform and change, on March 5, 1978, the First Session of the Fifth National People's Congress passed the 1978 Constitution, replacing the 1975 Constitution.

The spirit of the 1954 Constitution was restored, especially in the area of protection of human rights. In the text of the 1978 Constitution, the rights and duties of the citizen were gathered in a separate chapter.⁹⁵ Most of the provisions on protection of human rights in the 1954 Constitution that had been repealed in the 1975 Constitution were reinstated in the 1978 Constitution, including the defendant's right to legal defense.⁹⁶

Although the Cultural Revolution had ended, certain political policies such as "the theory of continuous revolution under proletarian dictatorship"⁹⁷ still had some impact on political life at the beginning of the reform era. An obvious example could be found in Article 45 of the 1978 Constitution, which provided for the *si da* (four big freedoms), which pertain to the special political rights to speak freely, to air one's views freely, to write big character posters, and to hold public demonstrations. In contrast to the 1975 Constitution, which considered the four big freedoms as part of the exercise of mass movements, the 1978 Constitution recognized the four big freedoms as political rights.

⁹² 宪法 [Constitution] art. 26 (1975).

⁹³ *Id.* art. 28.

⁹⁴ *Id.*

⁹⁵ 宪法 [Constitution] ch. 3 (1978).

⁹⁶ Another example of this is the right of citizens to sue state organs upon the latter's unlawful dereliction of duty. This right was present in Article 97 of the 1954 Constitution and Article 55 of the 1978 Constitution, but does not appear in the 1975 Constitution.

⁹⁷ See Lin, *supra* note 87.

A study of the human rights provisions of the 1978 Constitution shows that the framers of the Constitution wanted to draw lessons from the experiences of the Cultural Revolution. One important task in revising the 1975 Constitution was to restore the tradition of the 1954 Constitution and improve the protection of human rights.

5. Human Rights Protection in the 1982 Constitution

On December 4, 1982, the Fifth Session of the Fifth National People's Congress passed the present 1982 Constitution. Since its passing, the 1982 Constitution has been amended four times, in 1988, 1993, 1999 and 2004. Each of the amendments improved protection of human rights. To sum up the content and characteristics of human rights protections in the present Constitution, certain significant points can be identified.

First, the chapter concerning the rights and duties of the citizen (Chapter 2) is placed ahead of the chapter concerning the structure of the state and the provisions describing the relationship between the powers of the state organs and the rights of the citizen (Chapter 3). The 1954 Constitution was the first Constitution to provide a separate chapter listing the rights and duties of citizens, and this was followed in the 1978 and 1982 Constitution.

In drafting the present Constitution, the high ranking leaders and senior legal experts corrected the relationship between the powers of the state organs and the rights of the citizen in view of the experiences of other countries and the theory of modern constitutionalism.⁹⁸ This was a significant step in the protection of human rights. It suggests that in a modern society, state organs should exist for the purpose of protecting human rights. Rights have priority over power. This reflects the theoretical requirement of the people's sovereignty. The 1982 Constitution displays this advanced idea in the domain of protection of human rights. Constitutional rights become important tools for controlling and monitoring state power.⁹⁹

Second, the present Constitution establishes a relatively complete set of constitutional rights. Of these, the rights of the citizen refer to a wide and deep range of human rights. Under the present Constitution, the following rights, among others, are included in the chapter on the rights and duties of the citizen: equality before the law;¹⁰⁰ the right to vote and be

⁹⁸ Wu, *supra* note 22, at 363.

⁹⁹ *Id.*

¹⁰⁰ 宪法 [Constitution] art. 33 (1982).

voted for;¹⁰¹ freedom of speech, the press, assembly, association, procession, and demonstration;¹⁰² freedom of religious belief;¹⁰³ personal freedom;¹⁰⁴ personal dignity;¹⁰⁵ freedom from unlawful search of one's home;¹⁰⁶ freedom and privacy of correspondence;¹⁰⁷ the right to criticize and make suggestions to the state, to make complaints and charges against or to expose any state organ or functionary; the right to compensation in case of damage suffered due to the acts of state parties;¹⁰⁸ the right to material assistance from the state;¹⁰⁹ the right to receive education;¹¹⁰ and the freedom to engage in scientific research, literary and artistic creation, and other cultural pursuits.¹¹¹

Aside from the above-mentioned rights, other kinds of constitutional rights are enjoyed by the different subjects: the right of the laborer to work¹¹² and to rest;¹¹³ the right of workers and staff to a system of retirement;¹¹⁴ the right to gender equality;¹¹⁵ the right to the protection of marriage, family, and mother and child;¹¹⁶ the legitimate rights and interests of Chinese nationals residing abroad and those of returned overseas Chinese and of the family members of Chinese nationals residing abroad;¹¹⁷ the right to the grant of asylum to foreigners who request it for political reasons;¹¹⁸ and the right to a defense for the accused.¹¹⁹ Moreover, state enterprises, collective economic organizations, foreign enterprises and the other social organizations enjoy some constitutional rights.¹²⁰

Third, the present Constitution defines the meaning of citizenship. Before 1982, although the rights of the citizen emerged in the Constitutions of 1954, 1975 and 1978, the meaning of citizenship was not clear due to the lack of an exact definition of who is considered a citizen under the Constitution. Some groups were regarded as special persons, such as

¹⁰¹ *Id.* art. 34.

¹⁰² *Id.* art. 35.

¹⁰³ *Id.* art. 36.

¹⁰⁴ *Id.* art. 37.

¹⁰⁵ *Id.* art. 38.

¹⁰⁶ *Id.* art. 39.

¹⁰⁷ *Id.* art. 40.

¹⁰⁸ *Id.* art. 41.

¹⁰⁹ *Id.* art. 45.

¹¹⁰ *Id.* art. 46.

¹¹¹ *Id.* art. 47.

¹¹² *Id.* art. 42.

¹¹³ *Id.* art. 43.

¹¹⁴ *Id.* art. 44.

¹¹⁵ *Id.* art. 48.

¹¹⁶ *Id.* art. 49.

¹¹⁷ *Id.* art. 50.

¹¹⁸ *Id.* art. 32.

¹¹⁹ *Id.* art. 125.

¹²⁰ *Id.* arts. 18, 19, 21.

counterrevolutionaries, feudal landlords, bureaucratic capitalists and other persons deprived of political rights for a certain period. These persons could undergo reform through the process of compulsory labor but their citizenship was not definite. This has been changed under the present Constitution: Article 33 provides that all persons holding the PRC nationality are citizens. That is, the definition of citizenship in the present Constitution has been expanded to include all persons of PRC nationality.

Fourth, the present Constitution clarifies the relationship between the constitutional rights and constitutional duties of the citizen, and emphasizes the importance of the difference between rights and duties in the legal sense. According to Article 33, every citizen enjoys rights but must at the same time perform the duties prescribed by the Constitution and laws. Article 51 provides a principle of coordination among different interests, emphasizing that the exercise by citizens of their freedoms and rights may not infringe upon the interests of the state, society, or collective, or upon the lawful freedoms and rights of other citizens. This principle is in conformity with the spirit of modern constitutionalism and protection of human rights.

Lastly, the present Constitution improves the constitutional protection of certain constitutional rights. In the three previous constitutions, the right to material assistance from the state was enjoyed only by the laborers¹²¹ based on the socialist theory that there should be no gain without labor. In the present Constitution, the subject of the right to material assistance is simply the ordinary citizen.¹²² This reflects a change in the relationship between the state and the citizen and, in particular, the responsibility of the state for citizens in terms of social welfare.

In sum, the present Constitution provides more effective protection for human rights than the three previous constitutions. This is reflected in the increase in the number of rights enjoyed by the citizen and the expansion of the subjects that enjoy constitutional rights. Citizens were given twenty-three individual rights in the 1954 Constitution, seventeen in the 1975 Constitution, twenty in the 1978 Constitution, and twenty-nine in the 1982 Constitution.¹²³ As to the subjects entitled to the enjoyment of these rights, fifteen subjects enjoyed various rights under the 1954 Constitution, twelve in the 1975 Constitution, fifteen in the 1978 Constitution, and twenty-three in the 1982 Constitution.¹²⁴ In all respects, the 1982

¹²¹ 宪法 [Constitution] art. 93 (1954); 宪法 [Constitution] art. 27 (1975); 宪法 [Constitution] art. 50 (1978).

¹²² 宪法 [Constitution] art. 45 (1982).

¹²³ 国际人权公约与中国 [INTERNATIONAL CONVENTIONS ON HUMAN RIGHTS AND CHINA] 103 (莫纪宏 [Mo Jihong], ed., 世界知识出版社 [World Knowledge Publishing] 2005).

¹²⁴ *Id.*

Constitution improves the level of human rights protection over that provided by its predecessors.

B. The Significance of the Conception of Human Rights in the PRC Constitution Through the Constitutional Amendments of 2004

1. Human Rights and the Rights of the Citizen in the PRC Constitution

Before the 1990s, the concept of human rights was regarded in the PRC as a bourgeois and not a socialist concept until the 1990s. The prevalence of this view was due to the influence of theories of *class struggle*. In a socialist society, there exist two mutually opposed groups: the people and the enemies of the people.¹²⁵ The nature of the socialist regime is to use democracy to rule the people and dictatorship to rule over enemies of the people. The task of socialist law is to grant rights to the people and deprive enemies of the people of any rights. Thus, under socialist constitutional law, there are no universal rights applicable to everyone without distinction.¹²⁶ This is why there is a concept of citizens' rights, but not of human rights, in the texts of all four of the PRC constitutions. When the present Constitution was drafted, the prevailing ideology dominated even the field of human rights protection. It was very difficult for the NPC to incorporate the international concept of universal human rights into the constitutional text.¹²⁷

Starting at the beginning of the 1990s, the Chinese government began taking part in international dialogue on human rights, gradually learning of the current international movement toward human rights protection. Based on a careful examination of the concept and significance of human rights, human rights were accepted by the Chinese government and scholars. One of the greatest successes in human rights protection in the PRC has been the signing of two important international covenants: the International Covenant on Civil and Political Rights (ICCPR)¹²⁸ and International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²⁹

¹²⁵ 4 毛泽东著作选读 [MAO ZEDONG WORKS SELECTION] 1475 (人民出版社 [People's Press] 2nd ed. 1991).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 1057 [hereinafter ICCPR]. The PRC signed the ICCPR on Oct. 5, 1998 but has not yet ratified it.

¹²⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. This Covenant was signed by the PRC on Oct. 27, 1997 and ratified on Mar. 27, 2001.

At the same time, many issues relating to the protection of human rights have been discussed both in the academe and by the public.¹³⁰

The public began to appeal for the incorporation of the concept of human rights into the Constitution in order to increase the Government's responsibility for human rights and to improve constitutional protections.¹³¹ With support for human rights growing, the NPC passed the new amendments to the Constitution on March 14, 2004, incorporating the concept of human rights into the Constitution. The new text provides: "The state respects and protects human rights."¹³²

2. The Significance of the 2004 Constitutional Amendments to the Protection of Human Rights

It should be noted that the 2004 amendments play a very important role in human rights protection not only by clarifying the concept of human rights but also by extending the scope of protection. This can be observed in the following points.

First, there is an emphasis on the responsibility of the state to protect human rights. Two concrete duties are imposed on the state: to respect human rights and to protect human rights.¹³³ The first duty is negative and the latter is positive. These duties are consistent with the requirements stipulated in international human rights conventions.¹³⁴

Second, the amendments extended protection to private property rights, providing a firm systematic basis for the socialist market economy. Before the 2004 amendments, although the Constitution included provi-

¹³⁰ See 本刊评论员, 深入开展人权与法制的理论研究 [MO JIHONG, DEEPLY ENGAGING IN THEORETICAL RESEARCH ON HUMAN RIGHTS AND LEGALITY] (中国法学 [China Law Press] 1991).

¹³¹ 陈光中, 《公民权利和政治权利国际公约》批准与实施问题研究 [CHEN GUANGZHONG, RESEARCH ON ISSUES REGARDING RATIFICATION AND IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS] (中国法制出版社 [China Legality Press] 2002). In this book, Professor Chen proposed a mechanism for ratifying and implementing the ICCPR, causing great concerns among both the NPC and the public.

¹³² 宪法 [Constitution] art. 33 (1982).

¹³³ *Id.* Note that there are no constitutional provisions explicitly addressing the protection of human rights, apart from the general statement Article 33 that the state "respects human rights." However, there are allusions to the responsibility of state organs for guaranteeing fundamental rights under the 2004 amendments. For instance, Article 36 protects religious belief. The state's obligation to respect and protect the right to religious belief prohibits state organs, public organizations or individuals from compelling citizens to believe in, or not to believe in, any religion, and from discriminating against citizens who believe in, or do not believe in, any religion.

¹³⁴ See ICCPR, *supra* note 132, art. 2 (1) (providing that each State party to the ICCPR undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR).

sions regarding private property,¹³⁵ there was no specific confirmation of the right to private property. This is due partly to the prohibition on the development of private property and partly to the flaws in the traditional theory of human rights protection.¹³⁶ The nature of rights in the Constitution was therefore not quite clear. In response, the 2004 amendments set up a comprehensive and systematic basis for the protection of the right to private property.¹³⁷

Third, the concept of public emergency is brought into the constitutional text, replacing the system of martial law. Before the 2004 amendments, the Constitution defined a system of martial law, but this was not consistent with what was required in practice. For the sake of formulating the emergency power of the state and establishing a constitutional system by which the state could undertake urgent measures in times of public emergency, martial law was replaced by a system of public emergency.¹³⁸ This was also done in order to adapt domestic mechanisms to the requirements of Article 4 of the ICCPR concerning states of public emergency, including the implementation of measures constituting a derogation of state obligations under the ICCPR.

In summary the incorporation of human rights enriches the constitutional protection of the rights of citizens in the present Constitution. It offers a good chance for the Legislature to make laws and regulations to concretize the protection of human rights.

3. The Significance of Human Rights in the Present Constitution

The issue of protection of human rights is very contentious, and pressure from the public and from the international community is creating a strong impetus to develop the protection of human rights. Nowadays, issues on the protection of human rights receive much attention from the Government and the public. It should be emphasized that the concept of human rights under the present Constitution will be of far-reaching influence on the establishment of constitutionalism in the future.

The conception of human rights in the present Constitution is helpful in perfecting the structure of constitutional rights by treating human rights as the core of constitutional protections. The subjects of constitutional rights can be divided into classes – the public, citizens, laborers, social

¹³⁵ See 宪法 [Constitution] art. 9 (1978) (providing that the state protects the lawfully earned income, savings, housing and other consumer goods owned by citizens).

¹³⁶ See, e.g., *id.* art. 13 (discussing the right to inherit private property but not defining the right to private property).

¹³⁷ 宪法 [Constitution] art. 13 (1982).

¹³⁸ *Id.* arts. 67 § 20, art. 80, art. 89 § 16.

organizations and others. These subjects enjoy different constitutional rights based on the different responsibilities of the state towards them. Individual interests are protected at different levels according to different situations, provided this meets prevailing international standards.

The human rights provisions in the present Constitution offer a constitutional basis for the enactment of laws on the protection of human rights by the NPC and its Standing Committee. The important task at present for the Legislature of the PRC is the adoption of a Law on Protection of Human Rights. There are two alternative ways for the PRC to promote the protection of human rights. The first is to rearrange the structural order of the provisions in the Constitution such that the fundamental rights of the citizens and human rights are enjoyed by all persons living in the PRC. The second is to enact a special law concretizing constitutional provisions on the responsibility of the state in protecting human rights. The first of these measures touches many doctrinal and procedural issues regarding the nature and character of human rights and would be very difficult for the NPC to accept in the short term. The latter project may be more easily carried out by the NPC because a special law on the protection of human rights can create a new arrangement both in the substantive and procedural sense.

In 2007, the author convened a special group of experts to draft a PRC Law on the Protection of Human Rights (PHR Law). The draft law prepared by the experts (the Expert Draft) was published with a Study Report explaining the purpose of the PHR Law. This Report gives a point-by-point appraisal of the concrete provisions of the PHR Law, including the legislative purpose and legal basis of every provision, and relevant research data.

The Expert Draft is an important contribution to the study of this issue, which is still in its early stages. The accompanying study includes an analysis of the current system of human rights protection in the PRC. The Expert Draft was formulated on the basis of lengthy discussions on the Universal Declaration of Human Rights,¹³⁹ the ICCPR, the ICESCR and other international human rights conventions. The provisions of the Expert Draft therefore basically cover all institutional requirements for the protection of human rights and the most important fundamental rights. The provisions codify the fundamental rights system prescribed in the present Constitution as law. The Expert Draft also makes recommenda-

¹³⁹ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

tions for the performance by the PRC of its obligations as a state party to the international human rights conventions it has ratified.¹⁴⁰

According to the Expert Draft, there is a systematic structure of human rights consisting of human rights that are enjoyed by all natural persons, fundamental rights enjoyed by all citizens, and special rights enjoyed by special groups of citizens and other residents of the PRC. An elected People's Representative, for example, enjoys at least three kinds of constitutional rights: the basic human rights accorded to all arising from one's status as a natural person; the fundamental rights accorded to citizens; and the prerogatives enjoyed by the representative in enforcing his or her responsibilities. There appears to be a pyramid structure in the protection of human rights, with the most fundamental rights at the bottom, and the most specific rights, enjoyed by virtue of a person's status, at the top. The Government must take different responsibilities in protecting these different rights. The protection of rights enjoyed by all natural persons imposes the strictest burden because entitlement to these rights involves no consideration of race, nationality, gender, social background or education.

On October 27, 1997, the ICESCR was signed by the Government, and was ratified in 2001. On October 5, 1998, the Government signed the ICCPR, but it has yet to be ratified. As of August 2008, the Government has signed 25 international human rights conventions.¹⁴¹ Before ratifying

¹⁴⁰ 莫纪宏, 人权保障法与中国 [MO JIHONG, THE LAW OF PROTECTION OF HUMAN RIGHTS AND THE PEOPLE'S REPUBLIC OF CHINA] 368–90 (法律出版社 [Law Press] 2008) [hereinafter Mo, Protection of Human Rights].

¹⁴¹ As of August 2008, the PRC is signatory to the following human rights treaties and conventions: Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, signed by the PRC on July 20, 1949 and ratified on Apr. 18, 1983; Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, ratified by the PRC on Sept. 24, 1982; Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, ratified by the PRC on Sept. 24, 1982; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, ratified by the PRC on Dec. 29, 1981; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243, acceded to by the PRC on Apr. 18, 1983; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, signed by the PRC on Aug. 29, 1990 and ratified on Mar. 2, 1992; Convention concerning equal remuneration for men and women workers for work of equal value, May 28, 1953, 165 U.N.T.S. 305, ratified by the PRC on Dec. 28, 1990; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, signed by the PRC on Dec. 12, 1986 and ratified on Oct. 4, 1988; Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Aug. 12, 1949, 75 U.N.T.S. 32, signed by the PRC on Nov. 2, 1950; Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, Aug. 12, 1949, 75 U.N.T.S. 86, signed by the PRC on Nov. 2, 1950; Geneva Convention relative to the protection of civilian persons in time of war, Aug. 12, 1949, 75 U.N.T.S. 288, signed by the PRC on Nov. 2, 1950; Geneva Convention relative to the treatment of prisoners of war, Aug. 12, 1949, 75 U.N.T.S. 136, signed by the PRC on Nov. 2, 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol

the ICCPR, the Government must clarify the relationship between universal rights granted under international human rights conventions and rights granted under the PRC Constitution. That is, it must clarify the difference between the protection of human rights arising from the Constitution and the protection of human rights arising from ordinary laws. This will be hard work, and as seen from the proposals above, there is a need to probe such intricate issues more deeply.¹⁴²

C. Constitutional Litigation

The incorporation of human rights in the Constitution is likely to give rise to litigation of human rights in the courts, on the basis of constitutional provisions. Until now, however, citizens cannot sue based on the human rights provisions of the Constitution.

Nevertheless, ordinary civil, criminal and administrative cases can play an important role by indirectly vindicating constitutional rights. To be sure, these three actions offer substantial remedies to the victims of human rights violations. But this is not enough, particularly with respect to violations of political rights. Hence, as awareness of human rights increases due to the incorporation of human rights in the present Constitution, human rights litigation is becoming part of the judicial system. One of the more prominent examples is the litigation arising from cases concerning the removal from cities such as Beijing of temporary residents who do not have a permit from the Public Security Bureau (PSB). This

I), June 7, 1977, 1125 U.N.T.S. 3, ratified by the PRC on Sept. 14, 1983; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, ratified by the PRC on Sept. 14, 1983; Vocational Rehabilitation and Employment (Disabled Persons) Convention, June 20, 1983, 1401 U.N.T.S. 235, ratified by the PRC on Feb. 2, 1988; Right of Association (Agriculture) Convention, Nov. 12, 1921, 38 UNTS 153, ratified by the PRC on Apr. 27, 1934; International Covenant on Economic, Social and Cultural Rights, Dec. 16 1966, 993 U.N.T.S. 3, signed by the PRC on Oct. 27, 1997 and ratified on Mar. 27, 2001; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, May 25, 2000, 2171 U.N.T.S. 227, signed by the PRC on Sep. 6, 2000 and ratified on Dec. 3, 2002; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, 2133 U.N.T.S. 161, ratified by the PRC on Aug. 8, 2002; Convention Fixing the Minimum Age for the Admission of Children to Industrial Employment, July 11, 1984, 40 U.N.T.S. 218, ratified by the PRC on July 11, 1984; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, signed by the PRC on July 17, 1980 and ratified on Nov. 4, 1980; Convention concerning Employment Policy, July 9, 1964, 569 U.N.T.S. 65, ratified by the PRC on Dec. 17, 1997; Convention on Rights of the Child, May 25, 2002, 2173 U.N.T.S. 222, signed by the PRC on Aug. 29, 1990 and ratified on Jan. 31, 1992; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 46 I.L.M. 443, signed by the PRC on Mar. 30, 2007 and ratified on Aug. 1, 2008.

¹⁴² See Mo, Protection of Human Rights, *supra* note 140, at 368–90, for a discussion of how the PRC to perform its obligations under the ICCPR.

has been a contentious issue for the past ten years. Attorney Cheng Hai filed a suit against the PSB of Chang Ping District in Beijing alleging that the actions of the PSB contravene the PRC's Administrative Licensing Law.¹⁴³ While the suit was eventually dismissed by the court,¹⁴⁴ this is an example of a case in which plaintiffs seek the redress for human rights violations by direct appeal to the courts.

The incorporation of human rights into the present Constitution encourages discourse about human rights at the international level and improves prospects for the implementation of international human rights conventions in the PRC. As of August 2008, the PRC has signed twenty-five international human rights conventions. The incorporation of human rights in the present Constitution also provides a legal basis for the domestic implementation of rights protection mechanisms available in the international human rights conventions. Human rights discourse contributes to the elimination of communication barriers between the PRC and the rest of the world. The content of the rights in the Chinese Constitution can be interpreted according to international norms. It is possible to establish a bridge between PRC law and international human rights conventions.

Finally, the incorporation of human rights into the Constitution is of great significance both in theory and in practice, particularly in spreading correct ideas on protection of human rights. It is predicted that a better system for the protection of human rights will be established in the future, and that the issue of human rights will become a popular topic through the mass media.

V. JUDICIAL REVIEW, ITS IMPACT, AND ITS PROBLEMS

A. The Role of the People's Courts in the Implementation of Constitutional Law

None of the PRC's four Constitutions have included a provision on the responsibility of the people's courts in ensuring the implementation of the Constitution. Only the preamble to the 1982 Constitution refers to the question, providing that all state organs, political parties, public organizations, enterprises and institutions, the armed forces and people of all na-

¹⁴³ 中华人民共和国行政许可法 [Administrative License Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2003, effective July 1, 2004), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

¹⁴⁴ Luisetta Mudie & Chen Ping, Chinese Resist Urban Clean-up Drive, http://www.rfa.org/english/china/china_chengguan-20080227.html (last visited Oct. 30, 2009).

tionalities,¹⁴⁵ have the duty to uphold the dignity of the Constitution and ensure its implementation.¹⁴⁶ Moreover, to guarantee the implementation of the Constitution, it is specifically provided in Article 5 that all state organs, political parties, public organizations, enterprises, and undertakings must abide by the Constitution and the law.¹⁴⁷ Further, all acts that violate the Constitution must be investigated, and no organization or individual has the privilege of being beyond the Constitution.¹⁴⁸ On the basis of these provisions, the people's courts at all levels have the responsibility of guaranteeing the implementation of the Constitution, possibly even through the process of judicial review. But apart from the strict requirements and standards provided in the Constitution, it is not clear whether the people's courts have the power to review constitutional cases, and that the judgments of the people's courts have not substantially impacted the implementation of the Constitution.

Of course, there are some relatively definite provisions concerning the function of judges in the PRC Judges Law, which states that judges must strictly observe¹⁴⁹ and earnestly execute¹⁵⁰ the Constitution and the law. Although there are no effective mechanisms enabling judges to exercise the power of constitutional review, judges must at least guarantee the implementation of the Constitution in the process of performing judicial functions.

It is worth noting that since the founding of the PRC, the problematic phenomenon of the Supreme People's Court trying to avoid issuing constitutional judgments has existed. One typical example is the judicial interpretation issued by the Supreme People's Court in 1955, stating that the Constitution cannot be cited as the legal basis for a finding that an act is illegal and subsequently for the sentencing of a convicted defendant.¹⁵¹

¹⁴⁵ The term *minzu* (民族) is translated as "nationalities." Used in this way, the term does not refer to persons who belong or owe allegiance to a particular nation arising from citizenship. Here, it refers to the different ethnic groups in the PRC, the largest of which are the Han, Zhuang, Manchu, Hui, and Miao.

¹⁴⁶ 宪法 [Constitution] pmbl. (1982).

¹⁴⁷ *Id.* art. 5.

¹⁴⁸ *Id.* art. 5.

¹⁴⁹ *Id.* art. 7.

¹⁵⁰ 中华人民共和国法官法 [Judges Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) art. 3.

¹⁵¹ 最高人民法院关于在刑事判决中不宜援引宪法作论罪科刑的依据的复函 [The Supreme People's Court's Reply concerning the Lack of Propriety of Citing the Constitution as the Basis of Judgment and Sentence in Criminal Cases] (July 30, 1955), available at <http://law.lawtime.cn/d560147565241.html> (last visited Oct. 21, 2009). This judicial interpretation was issued as a response to an inquiry from the High People's Court of the Xinjiang Uighur Autonomous Region.

The nature and content of this judicial interpretation have caused contentious debate among constitutional law scholars.

Some scholars believe that this judicial interpretation is the reason that the role of the people's courts in reviewing constitutional cases has remained limited.¹⁵² Others believe that this interpretation is in conformity with the principle of the People's Representative system, and that constitutional issues should be solved directly by the People's Congresses.¹⁵³

The other important judicial interpretation concerning the role of the courts in constitutional review is a response by the Supreme People's Court in 1986 to an inquiry from the High People's Court of Jiangsu Province.¹⁵⁴ In this judicial interpretation, the Supreme People's Court states that laws, administrative regulations, local regulations and autonomous regulations can be cited as legal grounds for judicial decisions—but no mention is made of the Constitution. Therefore, some scholars argue that according to this interpretation, the Constitution cannot be directly cited as grounds for a judicial decision by the courts.¹⁵⁵

Whether or not the people's courts have power to apply constitutional law in the adjudication of cases has not been settled in practice. However, discussion of the relationship between judicial review and democracy in the PRC has not been as contentious as in other countries where constitutional review plays an important role in maintaining the rule of law.

B. The Influence of the Qi Yuling Case on Constitutional Review in the PRC

A milestone in the field of constitutional review in the PRC was reached in 2001 when the Supreme People's Court issued a judicial interpretation¹⁵⁶ in connection with the *Qi Yuling* case (the *Qi Yuling* Judicial

¹⁵² 1 宪法在中国实施何以艰难 [1 WHY IS IT SO DIFFICULT TO ENFORCE THE CONSTITUTION?] (范进学 [Fan Jinxue] ed., 政法论坛 [Forum of Politics and Law] 2009).

¹⁵³ See *id.*

¹⁵⁴ 最高人民法院关于人民法院制作法律文书如何引用法律规范性文件的批复 [The Supreme People's Court's Reply Concerning How to Cite Laws and Regulations by People's Courts in Making Legal Documents], available at <http://china.findlaw.cn/fagui/cxf/23/25631.html> (last visited Oct. 21, 2009).

¹⁵⁵ See 王振民, 中国违宪审查制度 [WANG ZHENMIN, THE SYSTEM OF CONSTITUTIONAL REVIEW IN CHINA] 172 (中国政法大学出版社 [China University of Political Science and Law Press] 2004).

¹⁵⁶ 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 [Supreme People's Court, Official Reply on Whether the Civil Liabilities Shall Be Borne for the Infringement upon a Citizen's Basic Right of Receiving Education] (June 28, 2001), Sup. People's Ct. Gaz. (P.R.C.) No. 4, 2001, at 152, available at <http://www.51labour.com/lawcenter/lawshow-59482.html> (last visited Oct. 22, 2009).

Interpretation).¹⁵⁷ Here, the Supreme People's Court, for the first time, made a definitive judgment concerning the protection of citizens' constitutional rights. Some scholars compared the Qi Yuling Judicial Interpretation to *Marbury v. Madison*,¹⁵⁸ a seminal 1803 case on judicial review in the United States of America.¹⁵⁹

In this case, Qi Yuling passed the college entrance examinations and was admitted to the Jining Business School to major in Finance and Accounting. However, defendant Chen Xiaoqi falsified documents in order to gain admission to Jining Business School under the name of the plaintiff. Thus, Qi was not able to gain admission to Jining Business School or any other university. Later, when Qi discovered Chen's impersonation, she filed suit against Chen alleging violations of, among others, her right to receive an education.¹⁶⁰

In the Qi Yuling Judicial Interpretation, the Supreme People's Court stated that the Chen's acts constituted violations of Qi's constitutional right to receive education, as stipulated in Article 46 of the present Constitution, and that Chen was civilly liable for damages to Qi. Huang Songyou, Vice President of the Supreme People's Court, praised this interpretation as a positive step towards participation of the Judiciary in constitutional judgment.¹⁶¹ However, two different schools of thought have emerged regarding the significance of this judicial judgment, one supporting Huang's view, the other more skeptical towards the Supreme People's Court, with a view that subsequent judicial interpretations might contravene present constitutional mechanisms of legal interpretation.¹⁶²

¹⁵⁷ 齐玉苓诉陈晓琪等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纠纷案 [Qi Yuling v. Chen Xiaoqi] (Shandong High People's Ct., Aug. 23, 2001) LawInfoChina.com (last visited Oct. 20, 2009), available at <http://vip.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=cas&gid=33621382> (last visited Oct. 22, 2009).

¹⁵⁸ 5 U.S. (1 Cranch) 137 (1803).

¹⁵⁹ See 黄松有, 宪法司法化及其意义 [Huang Songyou, *Constitutional Jurisdiction and its Significance*], 人民法院报 [PEOPLE'S COURT DAILY], Aug. 13, 2001, available at <http://www.yadian.cc/paper/3623/> (last visited Oct. 21, 2009).

¹⁶⁰ 宪法 [Constitution] art. 46 (1982).

¹⁶¹ Huang, *supra* note 159.

¹⁶² Judge Song Chunyu writes that the general right to personality includes the right to receive an education, and that one could have legal basis for the protection of the right to receive an education by applying the Constitution directly. 宋春雨 [Song Chunyu] 齐玉苓案宪法适用的法理思考-受教育权的性质与公民基本权利保护的法律研究 [Jurisprudent Consideration on Qi Yuling Case: the Nature of Right to Receiving Education and Legal Research on Protection of Fundamental Rights of the Citizen] 人民法院报 [PEOPLE'S COURT DAILY], Aug. 13, 2001. On the other hand, Professors Xu Chongde and Zheng Xianjun write that fundamental rights of the citizen which are quite different from ordinary civil rights need be protected in special procedure of constitutional supervision but not in ordinary civil procedure. 许崇德, 郑贤君 [Xu Chongde & Zheng Xianjun] “宪法司法化”是宪法的理论误区 [On the Theoretical Misunderstanding of the Judicialization

According to Article 67, Section 1 of the present Constitution, the Standing Committee of the NPC has the power to interpret the Constitution, and the responsibility to supervise the implementation of the Constitution.¹⁶³ The majority view in the field of constitutional law is that the power to interpret and protect the Constitution should be exercised exclusively by the NPC and its Standing Committee. That is, constitutional judgments should be made by the representative agency, which reflects the people's will. The Supreme People's Court, which is not a representative organ, must be constrained in its acts because it lacks a democratic basis of its power.¹⁶⁴

It is very interesting to see how the relationship between judicial review and its democratic basis was proposed and discussed in relation to the Qi Yuling Judicial Interpretation. This was the first time the PRC had paid attention to the importance of the review of constitutional problems by the Judiciary, as well as the nature of constitutional interpretation. Heated debate has gone on ever since.

It should be noted, however, that on December 18, 2008, the Supreme People's Court issued an announcement reversing the Qi Yuling Judicial Interpretation. This new judicial interpretation, the "Decision on the Revocation of Certain Judicial Interpretations Issued before the End of 2007,"¹⁶⁵ revoked 27 judicial interpretations and opinions. The Qi Yuling Judicial Opinion was among those revoked, the only reason cited being that "application ceased." From then on, the debate in the academic field surrounding the Qi Yuling case ceased.¹⁶⁶

of Constitution] 法学家 [JURISTS], Vol. 6, 2001. The above-mentioned articles represented two schools of academic research on Qi Yuling Case.

¹⁶³ 宪法 [Constitution] art. 67 (1982).

¹⁶⁴ See 胡锦涛光、韩大元, 中国宪法发展研究报告 (1982–2002) [HU JINGUANG & HAN DAYUAN, RESEARCH REPORT ON CHINA CONSTITUTIONAL LAW (1982–2002)] 924–25 (法律出版社 [Law Press] 2004).

¹⁶⁵ 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 [The Decision of the Supreme People's Court on Abolishing the Relevant Judicial Interpretations (the Seventh Batch) Promulgated before the End of 2007], available at http://www.court.gov.cn/sfjs/show.php?file_id=132344&key=%B7%A8%CA%CD (last visited Oct. 30, 2009). This Decision was adopted December 8, 2008, and went into force December 24, 2008.

¹⁶⁶ However, a few academic journals continued to publish articles discussing certain theoretical issues relating to the Decision and the Qi Yuling case. See 法律科学 [SCIENCE OF LAW], vol. 2–3 (2009).

C. Supervision of the "One House and Two Courts" and the Relationship Between the Representative Agency and Other State Organs

Since the enactment of the Constitution in 1954, the PRC has been a socialist country and the basic political system has been the system of People's Congresses. The basic relationship between the People's Congresses at various levels and the corresponding state organs is clear. The state organs are created by their corresponding People's Congresses, and must be subordinate to the order and the supervision of the People's Congresses.¹⁶⁷ Under the present Constitution, the NPC and its Standing Committee have the power to supervise the implementation of the Constitution.¹⁶⁸ This can be explained from the standpoint of the theory of popular representation.¹⁶⁹ Further, although there is an explicit provision in the present Constitution concerning the source of the power to make constitutional law, it can be deduced from Article 2 of the Constitution that this power rests with the people, since Article 2 states that all power in the PRC belongs to the people.¹⁷⁰ As for the operating mechanism of the People's Representative system, the basic principle of the Constitution is that:

The state organs of the People's Republic of China apply the principle of democratic centralism. The National People's Congress and the local People's Congresses at different levels are instituted through democratic election. They are responsible to the people and subject to their supervision.

All administrative, judicial and procuratorial organs of the state are created by the People's Congresses to which they are responsible and under whose supervision they operate.¹⁷¹

Thus it is easy to see that the relationship between the People's Congresses at the various levels and their corresponding state organs does not create a system of checks and balances, but rather a system of NPC supervision.

As to the power to supervise the implementation and interpretation of the Constitution, People's Courts at different levels have no power to undertake review of constitutional questions. There exists some degree of

¹⁶⁷ 宪法 [Constitution] art. 3 (1982).

¹⁶⁸ See 宪法 [Constitution] arts. 62, 67 (1982).

¹⁶⁹ Hu & Han, *supra* note 164, at 924-25.

¹⁷⁰ 宪法 [Constitution] art. 2 (1982).

¹⁷¹ *Id.* art. 3.

contradiction in the legal grounds for explaining the legitimacy of review of constitutional problems by courts and its basis in democracy, both in the academic sphere and in practice. More attention should be paid to the fact that parliamentary democracy is developing very swiftly without any proper limitation. There is currently a debate concerning the function of the People's Congresses at different levels, particularly at the local levels, in supervising cases in which a final judgment has been made by the People's Courts. In some localities, the People's Representatives form a group responsible for supervising judicial decisions to guard against corruption among judges.

For example, in 1997, the Standing Committee of the People's Congress of Yunnan Province adopted a Regulation on Emphasizing the Supervision of Judicial Cases by the Standing Committees of the People's Congresses at All Levels in the Administrative District of Yunnan Province in order to Normalize the Supervision of Judicial Case.¹⁷² However, the legal force of judicial decisions has remained unclear because of the unclear relationship between the People's Congress and their corresponding People's Courts.

D. Summary

It is easy to start a discussion about the nature of judicial review of constitutional issues and the relationship between the court and the legislature in countries such as Japan, where the principle of checks and balances is regarded as dividing the state's powers amongst different state organs.

In Japan, since the establishment of the 1946 Constitution, the role of the courts in reviewing constitutional issues has been discussed in the academe. When a judge, who is not elected by the voters, passes judgment on a decision of elected representatives, for example, whether the judge should constrain her exercise of judicial power is an issue that is discussed within the academe.¹⁷³

In the PRC, because there are no institutional mechanisms to support constitutional review by courts, questions on constitutional adjudication by courts and the role of judges in reviewing the constitutionality of laws

¹⁷² 云南省各级人民代表大会常务委员会对司法案件实施监督的规定 [Regulation Emphasizing the Supervision of Judicial Cases by the Standing Committees of the People's Congresses at all level in the Administrative District of Yunnan Province] (Dec. 3, 1997), available at http://yunnan.pprd.org.cn/zcfg/dffg/200910/t20091016_68579.htm.

¹⁷³ See 户波江二, 司法权与违宪审查制论的 50 年 [Tonami Enitsu, *50 Years of Jurisdiction and the System of Constitutional Review*], 宪法论丛 [DISCOURSES ON CONSTITUTIONAL LAW], No. 1, 1998, at 32.

and decisions adopted by representative agencies have not been discussed thus far. In the author's view, there are several legal channels that can be utilized by the People's Courts at different levels, and the Supreme People's Court in particular, to guarantee the implementation of the Constitution. Among these, the most effective is the establishment of a system of constitutional application that is distinguishable from constitutional interpretation. At present, the main institutional obstacle constraining judicial constitutional review is the exclusive grant of that power to the Standing Committee of the NPC.¹⁷⁴

In the author's view, if the courts acquire the power to apply constitutional provisions in order to issue judgments that interpret the Constitution, their role of the in guaranteeing the implementation of the Constitution will change completely.¹⁷⁵ Of course, under the mechanisms governing constitutional interpretation, when there is any vagueness in constitutional provisions that arises in the course of their application to a case, the People's Courts must submit the question to the Standing Committee of the NPC for interpretation. This implies that the Constitution can be cited as a legal principle, in connection with other legal grounds, in order to emphasize the legal force of ordinary laws and regulations.

It is worth noting that several cases at the local level have involved the application of constitutional provisions. These include the case of *Du Rong v. Shen Yafu and Mou Chunlin*,¹⁷⁶ in the Intermediate People's Court of Shanghai, the case of *Zhang Lianqi and Zhang Guoli v. Zhang Xuezheng*,¹⁷⁷ in the District Court of Tanggu District of Tianjin, and the

¹⁷⁴ 宪法 [Constitution] art. 67 (1982).

¹⁷⁵ Article 90 of Legislation Law provides that "when the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate and the standing committees of the People's Congresses of the provinces, autonomous regions and municipalities directly under the Central Government consider that administrative regulations, local regulations, autonomous regulations or separate regulations contradict the Constitution or laws, they may submit written requests for examination to the Standing Committee of the National People's Congress, and the working offices of the Standing Committee shall refer the requests to the relevant special committees for examination and suggestions. When State organs other than the ones mentioned in the preceding paragraph, public organizations, enterprises and institutions or citizens consider that administrative regulations, local regulations, autonomous regulations or separate regulations contradict the Constitution or laws, they may submit to the Standing Committee of the National People's Congress written suggestions for examination, and the working offices of the Standing Committee shall study the suggestions and shall, when necessary, refer them to the relevant special committees for examination and suggestions." Legislation Law art. 90.

¹⁷⁶ In this case, the judge cited Article 51 of the present Constitution as legal grounds to support the view that every person bears a legal duty to respect the others' reputation and refrain from defamation. See 杜融诉沈涯夫、牟春霖诽谤案 [Du Rong v. Shen Yafu and Mou Chunlin] (Shanghai Interm. People's Ct., Apr. 11, 1998) LawInfoChina.com (last visited Oct. 20, 2009), available at http://lw.3edu.net/rsal/lw_75594.html (last visited Oct. 22, 2009).

¹⁷⁷ In this case, the court argued that personal dignity should be respected and protected under Article 38 of the Constitution. See 王发英诉刘真及《女子文学》等四家杂志侵害名誉权纠纷案

case of *Wang Faying v. Liu Zhen and Four Magazines Including Women's Literature*,¹⁷⁸ the High People's Court of Hebei province. In these cases, the courts directly cited constitutional provisions to support their decisions without engaging in constitutional interpretation. Such positive judicial behavior can enhance the importance of judges in the field of constitutional implementation, while deferring to the authority of the NPC and its Standing Committee. Therefore, a tension exists between constitutional review by courts and representative democracy. On the one hand, judges should respect the authority of representative bodies when exercising judicial review. On the other hand, judges should play a positive role in guaranteeing the implementation of the Constitution. As an institutional mechanism for preventing representative democracy from devolving into autocracy, the court should have a definitive constitutional position in preserving the authority of the Constitution.

VI. CONCLUSION AND OUTLOOK

This article traces the history of constitutional development since the founding of the PRC and introduces the basic political system defined by the present Constitution. In the author's view, the constitutional documents adopted since 1949 have played a very important role in affirming the legitimacy of the PRC and the fundamental rights of its citizens. The constitutional text has been revised over time in accordance with the requirements of reform and opening. Nevertheless, there are many theoretical and practical issues to resolve with regard to the impact and role of the Constitution. These include the resolution of contradictory constitutional relations, the establishment of effective mechanisms to protect human rights and fundamental rights, the improvement of constitutional implementation, and the fashioning of effective institutions of constitutional interpretation and application. It should be pointed out that the power of courts to apply the Constitution and the legal procedure for constitutional review of laws, regulations and rules, are issues that have remained at the center of intense academic debate.

[Wang Faying v. Liu Zhen and Four Magazines Including Women's Literature] (Hebei High People's Ct., Jun. 5, 1989) LawInfoChina.com (last visited Oct. 20, 2009), available at <http://www.smjy.com.cn/dzts/5/MSF/JDAL/1039.htm> (last visited Oct. 22, 2009).

¹⁷⁸ In this case, the court argued that personal dignity should be respected and protected under Article 38 of the Constitution. See 王发英诉刘真及《女子文学》等四家杂志侵害名誉权纠纷案 [Wang Faying v. Liu Zhen and Four Magazines Including Women's Literature] (Hebei High People's Ct., Jun. 5, 1989) LawInfoChina.com (last visited Oct. 20, 2009), available at <http://www.smjy.com.cn/dzts/5/MSF/JDAL/1039.htm> (last visited Oct. 22, 2009).

In addition, other emerging issues in PRC constitutional law have begun to engage the Government. The first is the intensification of constitutional supervision.¹⁷⁹

Articles 62 and 67 of the present Constitution provide that the NPC and its Standing Committee have the power and obligation to supervise implementation of the Constitution. It is reiterated in Article 99 that local People's Congresses at various levels ensure the observance and implementation of the Constitution, the law, and administrative rules and regulations in their respective administrative areas. However, there is no agency specially charged with supervising the observance and implementation of the Constitution under the NPC or its Standing Committee, apart from the explicit stipulations concerning the powers of the NPC and its Standing Committee.¹⁸⁰

The laws enacted by the NPC and its Standing Committee have not referred to such a supervisory mechanism. Compliance with the Constitution is seldom used as a standard for reviewing laws and regulations. Constitutional rights do not have primacy vis-à-vis the ordinary rights stipulated in laws enacted by the NPC and its Standing Committee. The Constitution has not become the standard for judging the behavior of state organs or citizens. Therefore, in order to improve the legal status of the Constitution, it is imperative that the NPC and its Standing Committee set up agencies that will undertake the concrete tasks of supervising constitutional implementation. At present, the most important thing for institutional construction is to implement the relevant provisions in the Legislation Law concerning constitutional review.¹⁸¹

The second is internal consistency in the constitutional design. Under the Constitution, there exist several basic constitutional relationships which contradict one another: the relationship between the NPC and the Constitution,¹⁸² the relationship between the NPC and its Standing Committee,¹⁸³ the relationship between legislative powers and legislative or-

¹⁷⁹ See 宪法 [Constitution] pmbl. (1982) (the Constitution "is the fundamental law of the state and has supreme legal authority." "[A]ll political parties and public organizations and all enterprises and institutions in the country . . . have the duty to uphold the dignity of the Constitution and ensure its implementation."), art. 5 ("No organization or individual is privileged to be beyond the Constitution or the law.").

¹⁸⁰ The general method of supervision for the NPC and its Standing Committee is focused on the following three aspects: (1) hearing reports from the State Council, Supreme People's Court, Supreme People's Procuratorate, and other state organs, (2) investigating the implementation of laws for conformity with the Constitution, and (3) investigating the implementation of administrative and local regulations for conformity with the constitution, law and other regulations. 宪法 [Constitution] arts. 62, 67 (1982).

¹⁸¹ See Legislation Law art. 90.

¹⁸² 宪法 [Constitution] art. 64 (1982). See *supra* Part III A.

¹⁸³ See 宪法 [Constitution] art. 57 (1982). See Part III. B.

gans, and the relationship between authorized legislation and functionary legislation.¹⁸⁴ Such contradictions affect the role of the Constitution in protecting the principle of rule of law.

Third is the reaffirmation of the rule of law and the role of the Constitution in society. According to the Constitution, there exist four kinds of autonomy: autonomy in nationality autonomous regions,¹⁸⁵ the residents' autonomy in urban areas at the grassroots level,¹⁸⁶ the villagers' autonomy in rural areas at the grassroots level,¹⁸⁷ and the autonomy enjoyed by special administrative regions.¹⁸⁸ However, the original theoretical source of autonomy is not apparent. The power and form of this autonomy and the status of "rule of law" are ambiguous.

In the past ten years, many well-known slogans used by the Chinese Communist Party have been incorporated into the Constitution. Among these are "ruling the state according to law"¹⁸⁹ and "[t]he state respects and protects human rights."¹⁹⁰ These principles and policies have penetrated the constitutional text. On September 15, 2004, President Hu Jintao pointed out in a speech celebrating the fiftieth anniversary of the NPC that the essence of "ruling the state according to law" was to rule the state according to the Constitution, and that the core of the exercise of state power based on the law was to enforce state power in accordance with the Constitution.¹⁹¹ It is to be expected that modern constitutionalism will

¹⁸⁴ See Part III. C.

¹⁸⁵ See 中华人民共和国民族区域自治法 (2001 年) [Law of the People's Republic of China on Regional National Autonomy (2001)], (promulgated by the Nat'l People's Cong., and effective Feb. 28, 2001) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.). The Law on Regional National Autonomy was originally promulgated by the NPC on May 31, 1984, and went into effect on Oct. 1, 1984.

¹⁸⁶ See 中华人民共和国城市居民委员会组织法 [Organic Law of the Urban Residents Committee (P.R.C.)], (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Jan. 1, 1990) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

¹⁸⁷ See 中华人民共和国村民委员会组织法 [Organic Law of the Villagers Committees (P.R.C.)] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 4, 1998, effective Nov. 4, 1998) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

¹⁸⁸ See 中华人民共和国香港特别行政区基本法 [The Basic Law of the Hong Kong Special Administrative Region (P.R.C.)], (promulgated by the Nat'l People's Cong., Apr. 4, 1990, effective July 1, 1997) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.); 中华人民共和国澳门特别行政区基本法 [The Basic Law of the Macao Special Administrative Region (P.R.C.)] (promulgated by the Nat'l People's Cong., Mar. 31, 1993, effective Dec. 20, 1999) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

¹⁸⁹ See 宪法 [Constitution] art. 2 (1982).

¹⁹⁰ *Id.* art. 33.

¹⁹¹ See 胡锦涛在纪念全国人大成立 50 周年大会上的讲话 [Speech Delivered by President Hu Jintao at the Ceremony of 50th Anniversary of the Nat'l People's Cong.] Sept. 15, 2004, available at http://news.xinhuanet.com/newscenter/2004-09/15/content_1987151_3.htm (last visited Oct. 20, 2009).

have a decisive impact on the future development of the legal system as well, as the constitutional structure of the PRC itself.

The Constitution, as the basic law of the PRC, has played a positive role in affirming the results of reform and opening, stimulating economic development, promoting human rights protection, and establishing the authority of the law. There have been many problems enforcing the Constitution both in theory and in practice. In the theoretical arena, certain key constitutional relations must be explicitly established in a way that avoids institutional conflict. In practice, legal obstacles have prevented courts from applying the Constitution in adjudicating cases, separate from the premise that constitutional interpretation is not the province of the courts. In visualizing the future of constitutional development in the PRC, then, the main task of state organs is to implement the Constitution: to interpret and apply the Constitution so as to establish formal mechanisms for constitutional review within the parameters of the Chinese system.