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Constitutional Supervision in China After the 2018 Amendment of the Constitution: Refining the Narrative of Constitutional Supremacy in a Socialist Legal System

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Socialist Legal System

*Keith J. Hand**

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I. INTRODUCTION

Since the drafting of the 1982 People’s Republic of China (“PRC”) Constitution (“PRC Constitution” or “Constitution”), the creation of a specialized constitutional supervision organ¹ has been a topic of discussion

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¹ Cai Dingjian, *Constitutional Supervision and Interpretation in the People’s*

in China's political-legal reform process. Following the turmoil of the Mao era, the 1982 Constitution was promulgated to reinforce the new leadership's commitment to stability and modernization.² Participants in the drafting process argued for a specialized organ to ensure the Constitution would not be ignored in practice. They proposed a range of models, including a constitutional court, procuratorial supervision of the Constitution, and a National People's Congress ("NPC") constitutional committee.³ Although provisions for an NPC constitutional committee appeared in drafts of the new Constitution as late as the spring of 1982, Deng Xiaoping ultimately rejected them.⁴ Despite Deng's early opposition, proposals for a constitutional committee continued to bubble up throughout the reform era.

In 2018, China's leaders took steps to address this unresolved reform issue. While China's 2018 constitutional amendments attracted widespread attention, foreign commentators focused on provisions eliminating term limits for the state president, creating a new state anti-corruption organ, and enhancing the constitutional status of the Communist Party of China (the "Party") and "Xi Jinping Thought."⁵ Another, largely overlooked, amendment reconstituted one of the NPC special committees as the "Constitution and Law Committee," and a subsequent National People's Congress Standing Committee ("NPCSC") decision tasked this Committee with expansive new constitutional functions.⁶ Chinese commentators characterized this reform as the realization of four decades of efforts to

Republic of China, 9 J. CHINESE L. 219, 227 (1995) (describing the widely held understanding that constitutional supervision includes review of the constitutionality of legislation and other state acts and the resolution of jurisdictional disputes among state organs).

² William C. Jones, *The Constitution of the People's Republic of China*, 63 WASH. U. L. Q. 707, 724-29 (1985).

³ Liu Songshan (刘松山), *1981 Nian: Taidong Er Weixing de Xianfa Weiyuanhui Sheji* (1981 年: 胎动而未形的宪法委员会设计)[1981: *Embryonic but Inchoate Designs for a Constitutional Committee*], ZHONGGUO XIANZHENG WANG (中国宪政网)[CHINA CONSTITUTIONALISM NET], Mar. 13, 2011, §§ II-III.

⁴ *Id.* § III.

⁵ Jerome Cohen, *Xi Jinping Amends China's Constitution*, LAWFARE BLOG, Mar. 7, 2018, <https://www.lawfareblog.com/xi-jinping-amends-chinas-constitution>; Feng Lin, *The 2018 Constitutional Amendments*, CHINA PERSPECTIVES, no. 1 (2019), at 11-21; Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VIRGINIA J. INT'L L. 306, 346-65 (2019).

⁶ It is difficult to find other foreign scholarly or media sources that reference the Committee. The NPC Observer website discusses the Constitution and Law Committee in several posts. NPC OBSERVER, <https://npcobserver.com/> (last visited Mar. 7, 2022).

strengthen constitutional supervision.⁷ In a related step, NPC entities began publishing annual reports on China's system for reviewing legislation and promulgated detailed new procedures for such reviews.

These developments raise a puzzling question in China's legal development. After deflecting calls for a constitutional committee for nearly four decades, why did China's leaders decide to create one at a moment when Xi Jinping is presiding over a significant tightening of the country's political-legal environment? This article argues that the recent reforms should be understood as components of a broad constitutional rationalization designed to refine the Party's narrative of constitutional supremacy, strengthen the legal system as an instrument to discipline the bureaucracy, and contain citizen constitutional argument. The reforms demonstrate the Party's confidence that it can reap the legitimacy and governance benefits of building new constitutional supervision infrastructure without incurring material risks that citizens might leverage such infrastructure to challenge Party authority.

Part II provides a brief overview of legislative, judicial, and popular initiatives to strengthen enforcement of the PRC Constitution prior to 2012. Part III introduces the policy and legislative history of the Constitution and Law Committee, discusses the Committee's constitutional status and operation, and surveys corresponding developments in China's system for reviewing legislation. Part IV explores leadership motivations for these reforms and provides an initial assessment of the likely impact of the reforms for rights enforcement and the implementation of central laws and policies. As Part IV explains, China's leaders created a constitutional committee and enhanced transparency in the filing and review system only after undertaking a multidimensional effort to shape China's ideological landscape on constitutional issues, marginalize constitutional rights activists, and strengthen the constitutional status of the Party. To build mechanisms for the interpretation and enforcement of the Constitution, China's leaders had to first weaken the Constitution as a potential platform for promoting fundamental rights.

⁷ See, e.g., Mo Jihong (莫纪宏), *Hexianxing Shencha Jizhi Jianshe de 40 Nian* (合宪性审查机制建设的40年) [*Forty Years of Constructing a Constitutionality Review Mechanism*], BEIJING LIANHE DAXUE XUEBAO (北京联合大学学报) [J. BEIJING UNION UNIV.], vol. 16, no. 3 (July 2018), at 22; Wang Yu (王宇); *Jiedu Quanguo Renda Xianfa He Falü Weiyuanhui Xianfa Jiandu: 38 Nian Hou Yinglai Xin Jumian* (解读全国人大宪法和法律委员会宪法监督: 38年后迎来新局面) [*Deciphering Constitutional Supervision of the National People's Congress Constitution and Law Committee: After 38 Years, Welcoming a New Phase*], NANFANG ZHOUMO (南方周末) [S. WEEKEND], Mar. 22, 2018, <http://www.infzm.com/contents/134359>.

II. A BRIEF OVERVIEW OF CHINA'S CONSTITUTIONAL SUPERVISION SYSTEM PRIOR TO 2012

When it promulgated the 1982 Constitution, China adopted the Soviet system of centralizing constitutional supervision in a supreme legislature. Specifically, it vested the NPC and NPCSC with general constitutional supervision authority, and it granted the NPCSC power to interpret the PRC Constitution and to annul lower-level legislation that is inconsistent with the Constitution.⁸ Although the NPC and NPCSC have implemented some constitutional provisions by promulgating legislation,⁹ they have not carried out their other duties to interpret the Constitution and police violations in a systematic manner.¹⁰ Deficiencies in constitutional rights enforcement have prompted scholars to question the Constitution's legal significance.¹¹ Corresponding efforts to strengthen constitutional supervision in China have followed three basic tracks: enhancing the NPC's constitutional supervision infrastructure; "judicializing" the Constitution; and using constitutional argument as a tool of social mobilization.

A. Efforts to Enhance the NPC's Constitutional Supervision Infrastructure

Since 1982, Chinese citizens have repeatedly revived proposals for a specialized constitutional committee under the NPC. Scholars and NPC officials raised proposals for such a committee on several occasions in the 1980s. They continued such efforts during the drafting of the 2000 Legislation Law and the 2006 People's Congress Standing Committee Supervision Law.¹² Proposals for a constitutional committee have taken different forms, from a committee with status equal to the NPCSC (to ensure

⁸ XIANFA art. 62, §§ 2, 4 (1982) (China); *id.* art. 67, §§ 1, 7.

⁹ Yan Lin and Tom Ginsburg, *Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism*, 63 AM. J. COMP. L. 467, 467 (2015).

¹⁰ Fan Jinxue (范进学), *Quanguo Renda Xianfa He Falü Weiyuanhui de Gongneng Yu Shiming* (全国人大宪法和法律委员会的功能与使命) [*The Function and Mission of the NPC Constitution and Law Committee*], HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [EAST CHINA U. POL. L. J.], no. 4 (2018), 16-17.

¹¹ See, e.g., Zhang Qianfan (张千帆), *Zhongguo Xianzheng de Lujing Yu Kunjing* (中国宪政的路径与困境) [*The Paths of Chinese Constitutionalism and Their Limits*], May 8, 2011, CHENYOUXI XUESHU WANG (陈有西学术网); Donald C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 93-121 (C. Stephen Hsu ed., 2003).

¹² Cai, *supra* note 1, at 241-43; Mo, *supra* note 7, at 16; Li Yahong, *The Law-making Law: A Solution to the Problems of the Chinese Legislative System?* 30 HONG KONG L. J. 120, 133-36 (2000); Lin Chufang (林楚方), *Jiandufa: Minzhu Zhengzhi Shengzhang Dian* (监督法: 民主政治生长点) [*Supervision Law: Growing Point for Democratic Politics*], NANFANG ZHOUMO (南方周末) [S. WEEKEND], Sept. 6, 2002.

constitutional review of national laws) to an NPC special committee with only advisory functions.¹³

While calls for an NPC constitutional committee went unfulfilled prior to the 2018 constitutional amendment, NPC organs did strengthen systems for the filing and review of legislation. “Filing and review” refers to a system pursuant to which legislation and judicial interpretations are recorded with supervisory organs and then reviewed for consistency with higher-level legislation including, in theory, the Constitution.¹⁴ Although the Constitution sets out a basic framework of review powers, the filing and review system developed more fully only after the NPC adopted the PRC Legislation Law in 2000. This statute included basic standards and procedures for filing and review. It also provided citizens with a concrete statutory right to raise proposals for the review of legislation.¹⁵

The Legislation Law spurred further institutional reforms. In 2004, the NPCSC’s work organ, the Legislative Affairs Commission (“LAC”), established a Filing and Review Office to manage review work. NPC organs issued several internal work procedures for reviewing legislation from 2000 to 2005. The State Council and local people’s congresses expanded their own filing and review systems in the 2000s and early 2010s. The NPCSC alone received more than 8,000 pieces of legislation for review from 2002 to 2011.¹⁶ After the 2003 Sun Zhigang incident¹⁷ focused public interest in the Legislation Law’s citizen proposal mechanism, citizens raised more than 900 proposals for the review of legislation from 2004 to 2011.¹⁸

In practice, the operation of the filing and review system has been problematic. Filing and review organs suffer from organizational and political capacity deficits, and, until recently, neither the NPCSC nor its subordinate offices issued public responses to citizen review proposals. As a work organ, the Filing and Review Office does not exercise any formal constitutional authority. It has carried out its functions primarily by coordinating efforts to identify conflicts in legislation and addressing the

¹³ Guobin Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?* 43 SUFFOLK U. L. REV. 625, 650-52 (2010).

¹⁴ Keith Hand, *Understanding China’s System for Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 139, 139-216 (2013).

¹⁵ Zhonghua Renmin Gongheguo Lifafa (中华人民共和国立法法) [People’s Republic of China Legislation Law], adopted Mar. 15, 2000, amended Mar. 15, 2015, art. 99, ZHONGGUO RENDA WANG [CHINA NPC NET].

¹⁶ Hand, *supra* note 14, at 176-79 and accompanying notes (relying on an extensive body of Chinese official sources to compile statistics for filed legislation).

¹⁷ *See infra* part II(3).

¹⁸ GUIFANXING WENJIAN BEI’AN SHENCHA ZHIDU: LILUN YU SHIWU (规范性文件备案审查制度：理论与实务) [THE THEORY AND PRACTICE OF REGULATORY DOCUMENT FILING AND REVIEW] 19 (2011).

most pressing conflicts through an inefficient, behind-the-scenes process of cajoling promulgating organs to self-correct.¹⁹ Although some inconsistent legislation was amended or repealed through this process, citizens criticized the system for its lack of transparency, and scholars debated whether it should be considered a nascent form of constitutional review.²⁰

B. “Judicialization” of the Constitution

The PRC Constitution does not vest the people’s courts with explicit constitutional supervision authority. Courts do not enjoy the power to interpret the Constitution or to annul legislation that conflicts with it. However, the question of whether courts may apply the Constitution as a source of law in deciding cases has generated significant debate. Some scholars cited Supreme People’s Court (“SPC”) replies from 1955 and 1986 to argue that courts could not directly apply constitutional provisions as a source of law.²¹ While courts occasionally made brief reference to the Constitution in their judgments, such cases were limited both in number and impact.²² Beginning in the 1990s, Chinese scholars began to challenge these jurisprudential assumptions and advocate for judicial application of the Constitution.²³ As Han Liu has shown, changes in the reception and dissemination of American constitutional theory in China contributed to this enhanced focus on judicial review.²⁴

Interest in judicialization of the Constitution intensified in 2001. In that year, the SPC authorized a higher people’s court to apply the constitutional right to education to resolve a civil dispute. The SPC’s *Qi*

¹⁹ Hand, *supra* note 14, at 202-11 (noting that this process is consistent with norms of consensus building and avoids damaging the face and authority of promulgating organs).

²⁰ See, e.g., Zhu, *supra* note 13; Wang Kai (王轶), *Bei’an Shencha: Zhongguo de Weixian Shencha?* (备案审查: 中国的违宪审查?) [*Filing and Review: China’s Constitutional Review?*], in XIANFA QUANLI YU XIANZHENG (宪法权利与宪政) [CONSTITUTIONAL RIGHTS AND CONSTITUTIONALISM], 267-313 (Fu Hualing (傅华伶) & Zhu Guobin (朱国斌) eds., 2012).

²¹ Guobin Zhu, *Weak Courts, Weak Rights: Assessing the Realisation of Constitutional Rights in the PRC Courts*, 43 HONG KONG L. J. 713, 721-24 (2013).

²² Tong Zhiwei (童之伟), *Xianfa Shiyong Ying Yixun Xianfa Benshen Guiding de Lujing* (宪法适用应依循宪法本身规定的路径) [*Application of the Constitution Should Follow the Path of the Constitution’s Own Provisions*], ZHONGGUO FAXUE (中国法学) [CHINA LEGAL STUD.], no. 6 (2008), at 28–29.

²³ Thomas Kellogg, *The Constitution in the Courtroom: Constitutional Development and Civil Litigation in China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 340, 347-354 (Margaret Y.K. Woo and Mary E. Gallagher eds., 2011).

²⁴ Han Liu, *Regime Centered and Court-Centered Understandings: The Reception of American Constitutional Law in Contemporary China*, 68 AMER. J. COMP. L. 95 (2020), § II.

Yuling reply focused scholarly attention on judicial application of the Constitution as a breakthrough for constitutional supervision in China.²⁵ SPC Vice President Huang Songyou, the author of the *Qi Yuling* reply, encouraged such discourse by referencing *Marbury v. Madison* in an article discussing the significance of the reply.²⁶ Reformist lawyers brought new constitutional cases in an effort to expand the precedent, and Chinese courts cited the Constitution as a legal basis for their judgments in some civil and administrative cases.²⁷ These developments sparked further debate about the appropriateness and feasibility of judicial application of the Constitution in China's system.²⁸

The Party-state took steps to quash this nascent judicialization movement. Party-state leaders viewed judicialization of the Constitution as a "latent threat," and internal notices directed courts not to take the *Qi Yuling* reply as precedent.²⁹ Then, in 2008, the SPC formally repealed the reply, and subsequent SPC directives reinforced the understanding that courts should not cite the Constitution as a source of law.³⁰ As recent scholarship demonstrates, some courts have pushed the boundaries of these restrictions in practice. For example, Daniel Sprick has documented numerous post-2008 cases in which Chinese courts cited constitutional provisions, not as an explicit legal basis for their judgments, but as a gloss in their reasoning.³¹ Courts also find ways to implement constitutional norms indirectly through the application of national statutes and review of administrative actions.³² However, given the Party-state's reaction to the

²⁵ Mo, *supra* note 7, at 17.

²⁶ Huang Songyou (黄松有), *Xianfa Sifahua Jiqi Yiyi—Cong Zuigao Renmin Fayuan Jintian de Yige «Pifu» Tanqi* (宪法司法化及其意义—从最高人民法院今天的一个《批复》谈起) [*Judicialization of the Constitution and its Significance: A Discussion Beginning with Today's SPC "Reply"*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT DAILY], Aug. 13, 2001.

²⁷ Mo, *supra* note 7, at 18; Kellogg, *supra* note 23, at 367-76; Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. EAST ASIA L. R. 51, 70-72 (2011) (discussing one court's application of the Constitution to annul an administrative decision).

²⁸ Zhu, *supra* note 21, at 717-722.

²⁹ Zhang, *supra* note 11, § 3.

³⁰ Daniel Sprick, *Judicialization of the Chinese Constitution Revisited: Empirical Evidence from Court Data*, 19 CHINA REVIEW 41, 44-45 (2019).

³¹ *Id.* at 41-67.

³² See, e.g., Wen-Chen Chang & David S. Law, *Constitutional Dissonance in China*, in COMPARATIVE CONSTITUTIONAL THEORY 476, 500-02 (Gary Jacobsohn & Miguel Schor eds., 2018) (arguing that the absence of judicial review does not preclude courts from applying constitutional norms in other ways); see also He Haibo, *The Dawn of the Due Process Principle in China*, 22 J. ASIAN L. 57, 95-108 (2008) (discussing the judicial development of due process norms in the adjudication of administrative cases).

movement to judicialize the Constitution and subsequent efforts to contain constitutional activism,³³ there is little prospect that courts will emerge as a robust constitutional supervision institution.³⁴

C. Popular Constitutionalism

Chinese citizens have raised constitutional arguments to generate bottom-up pressure on the Party-state to implement the Constitution. This advocacy takes a range of forms.³⁵ Legal scholars have published compilations of constitutional cases, books, media commentaries, and open letters to discuss the constitutional dimensions of current events and strengthen public awareness of the Constitution. Citizens engaged in social protest sometimes reference the Constitution. “Rights defense” lawyers focus on specific cases or issues that generate public attention and controversy, leverage the Internet and media to frame the issues in constitutional terms, and then deploy constitutional arguments to press for reform. The use of legal mechanisms, such as filing court cases or raising proposals for review of legislation, is sometimes part of these efforts. But rights lawyers do not necessarily expect a legal outcome. Instead, their goal is to use constitutional argument to shape public opinion and, over the long term, to cultivate new interpretations of the Constitution in the public consciousness.

The “Sun Zhigang incident” was a watershed in the development of popular constitutionalism in China. In 2003, after the death of a young man in custody, three Chinese scholars filed a historic constitutional challenge to a regulation that empowered state authorities to detain and repatriate some internal migrants. As public pressure mounted, the State Council repealed the regulation. In the wake of the Sun Zhigang incident, legal activists refined rights defense and public interest litigation strategies. In discussing such strategies, Xu Zhiyong, one of the scholar petitioners in the Sun Zhigang incident, noted the importance of “raising the big flag of the Constitution” and offering citizen interpretations of the Constitution to enforce rights.³⁶

³³ See *infra* Part IV.

³⁴ Mo, *supra* note 7, at 18 (explaining that mainstream scholars have abandoned judicial review as a path for constitutional review breakthroughs); Fu Hualing and Zhai Xiaobo, *What Makes the Chinese Constitution Socialist?*, 16 INT’L J. CONST. L. 655, 657 (2018) (concluding that after repeal of the *Qi Yuling* reply, prospects for judicial enforcement of constitutional rights vanished quietly).

³⁵ For detailed discussions of social mobilization strategies and related events, see Zhang, *supra* note 11 and Hand, *supra* note 27.

³⁶ Xu Zhiyong (许志永), *Ba Xianfa Biancheng Changshi—Zai Fada Xianfa Weiquan Yu Xianfa Jieshi Yantaohui Shang de Fayan* (把宪法变成常识—在法大宪法维权与宪法解释研讨会上的发言) [*Transform the Constitution into a Common Understanding—Comments at the China University of Politics and Law Rights Defense and Constitutional Interpretation Workshop*], XU ZHIYONG BLOG, June 27, 2008, (on file

Subsequent application of rights defense strategies helped to catalyze modest reform successes. For example, after a woman named Tang Fuzhen self-immolated to protest the demolition of her home in 2009, legal scholars challenged the constitutionality and legality of China's urban expropriation regulations. After a lengthy drafting process, the State Council adopted new regulations on urban expropriations in 2011.³⁷ As discussed in Section IV, senior Party leaders viewed the rights defense movement as a threat, and they have taken steps to marginalize rights defense lawyers and narrow space for citizen constitutional argument in the public sphere.

III. REFORMS TO THE CONSTITUTIONAL SUPERVISION SYSTEM UNDER XI JINPING

A. *The Policy and Legislative History of the Constitution and Law Committee*

As Xi Jinping took the reins of Party-state power, he elevated the Party's rhetorical commitment to the Constitution in several respects. In widely publicized speeches in 2012 and 2013, Xi emphasized that "ruling the country according to law is first ruling the country according to the Constitution" and stressed the importance of strengthening mechanisms to supervise implementation of the Constitution.³⁸ While these early statements did not depart significantly from those of past leaders, the 18th Party Central Committee subsequently incorporated Xi's rhetoric into several key documents. In a communiqué issued after its third meeting (or plenum) in 2013, the Central Committee declared that China "will further improve supervision mechanisms and procedures for the implementation of the Constitution and raise the comprehensive implementation of the Constitution to a new level."³⁹ In its historic Fourth Plenum decision on

with author).

³⁷ Hand, *supra* note 27, at 121-23.

³⁸ Xi Jinping (习近平), Zai Shoudu Gejie Jinian Xianxing Xianfa Gongbu Shixing 30 Zhounian Dahuishang de Jianghua (在首都各界纪念现行宪法公布施行 30 周年大会上的讲话) [Xi Jinping: Speech at the Conference in the Capital to Commemorate the 30th Anniversary of the Implementation of the Current Constitution], XINHUA WANG (新华网) [XINHUA NET], Dec. 4, 2012, http://www.xinhuanet.com/politics/2012-12/04/c_113907206.htm; Xi Jinping Qiangdiao: Yifa Zhiguo Yifa Zhizheng Yifa Xingzheng Gongtong Tuijin (习近平强调: 依法治国依法执政依法行政共同推进) [Xi Jinping Emphasizes: Promote Ruling the Country According to Law, Governing According to Law, and Administration According to Law Together], ZHONGGUO ZHENGFU WANG (中国政府网) [CHINESE GOV'T NET], Feb. 24, 2013, http://www.gov.cn/ldhd/2013-02/24/content_2338937.htm.

³⁹ Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding (中共中央关于全面深化改革若干重大问题的决定) [CCP Central Committee Decision on Several Major Questions in Comprehensively Deepening Reform],

legal reform the following year, the Central Committee included a more specific call to “perfect the constitutional supervision system of the National People’s Congress and its Standing Committee,” “complete procedures and mechanisms for constitutional interpretation,” “strengthen the filing and review system,” and “cancel and correct normative documents that violate the Constitution or the law.”⁴⁰

Initial reforms following the Fourth Plenum suggested that Chinese leaders were prepared to take only modest steps to effectuate the constitutional directives in the Plenum decision. Although prominent jurists such as former SPC President Xiao Yang continued to advocate for a constitutional committee, the NPC passed up an opportunity to implement this reform when it amended the Legislation Law in 2015.⁴¹ While the Legislation Law amendments promoted transparency in the review process and strengthened the legal foundation for filing and review, the NPC did not include provisions for a specialized constitutional supervision organ.⁴²

However, subsequent Party texts signaled that more substantial institutional reforms were under consideration. In his lengthy report to the 19th Party Congress, Xi Jinping stressed the need to improve “the Chinese socialist system of laws, at the heart of which is the Constitution” and specifically called for “strengthening constitutional implementation and supervision, moving forward with constitutional review work, and safeguarding the authority of the Constitution.”⁴³ This was the first time the

Nov. 12, 2013, § 30, ZHONGGUO GONGCHANDANG XINWEN WANG (中国共产党新闻网) [CHINESE COMMUNIST PARTY NEWS NET], <http://cpc.people.com.cn/n/2013/1115/c64094-23559163.html>.

⁴⁰ Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding (中共中央关于全面推进依法治国若干重大问题的决定) [CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward], § 2(i), (Oct. 23, 2014) [hereinafter Fourth Plenum Decision], <http://politics.people.com.cn/n/2014/1029/c1001-25926893.html>.

⁴¹ *Zuigao Fayuan Yuan Yuanzhang Jianyi Zai Quanguo Renda Zengshe Xianfa Weiyuanhui* (最高法院原院长建议在全国人大增设宪法委员会) [Former SPC President Recommends Adding a Constitutional Committee in the NPC], BEIJING QINGNIAN BAO (北京青年报) [BEIJING YOUTH DAILY], Nov. 8, 2014.

⁴² *Quanguo Renmin Daibiao Dahui Guanyu Xiugai “Zhonghua Renmin Gongheguo Lifafa” de Jueding* (全国人民代表大会关于修改“中华人民共和国立法法”的决定) [Decision of the NPC on Amending the Legislation Law of the PRC], adopted March. 15, 2015, LAWINFOCHINA, <http://lawinfochina.com>.

⁴³ Xi Jinping, Gen. Sec’y of Chinese Communist Party, Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era, delivered to the 19th National Congress of the CCP, Oct. 18, 2017, § VI(4).

term “constitutional review” (合宪审查) appeared in such a Party report.⁴⁴

In January 2018, the Party Central Committee proposed amendments to the Constitution, which the NPCSC immediately approved for consideration by the full NPC. Interestingly, the Party’s amendment proposal did not make any reference to a Constitution and Law Committee.⁴⁵ However, in a lengthy “Plan to Deepen Reform of Party and State Institutions” issued the following month, the Central Committee called for the name of the NPC Law Committee to be changed to the “Constitution and Law Committee.” The Plan also specified that the duties of the Committee should be expanded to include not only “undertaking the unified deliberation of draft laws” (a principal function of the existing Law Committee), but also “promoting implementation of the Constitution, developing constitutional interpretation, advancing constitutional review, strengthening constitutional supervision, and coordinating publicity of the Constitution.”⁴⁶

The NPC and NPCSC subsequently implemented this Party proposal. In early March 2018, the NPC amended Article 70 of the Constitution to change the name of the “Law Committee” to the “Constitution and Law Committee.”⁴⁷ Then, in June 2018, the NPCSC issued a decision establishing the new constitutional duties of the Committee as set out in the Party Central Committee’s institutional reform plan. It also confirmed that the Committee would carry out the duties of the former Law Committee referenced in other legislation.⁴⁸ Over the next few

⁴⁴ Lu Yijie (卢义杰), Liu Shixin (刘世昕) & Yang Jie (杨杰), ‘*Falü Weiyuanhui’ Ni Gengming Wei ‘Xianfa He Falü Weiyuanhui’ Yiweizhe Shenme?* (法律委员会拟更名为“宪法和法律委员会”意味着什么?) [*What Does the Draft Name Change of the Law Committee to the Constitution and Law Committee Mean?*], ZHONG QING ZAIXIAN (中青在线) [CHINA YOUTH ONLINE], Mar. 8, 2018, http://zqb.cyol.com/html/2018-03/08/nw.D110000zqnb_20180308_3-03.htm.

⁴⁵ Zhongguo Gongchandang Zhongyang Weiyuanhui Guanyu Xiugai Xianfa Bufen Neirong de Jianyi (中国共产党中央委员会关于修改宪法部分内容的建议) [Proposal of the CCP Central Committee for Amendment of Part of the Constitution], issued Jan. 26, 2018, XINHUA WANG (新华网) [XINHUA NET], Feb. 25, 2018, http://www.xinhuanet.com/politics/2018-02/25/c_1122451187.htm.

⁴⁶ Zhonggong Zhongyang Yinfā “Shenhua Dang He Guojia Jigou Gaige Fang’an” (中共中央印发《深化党和国家机构改革方案》) [CCP Central Committee Publishes a “Plan for Reform of Party and State Organs”], issued Feb. 28, 2018, § 23, XINHUA WANG (新华网) [XINHUA NET], Mar. 21, 2018, http://www.xinhuanet.com/politics/2018-03/21/c_1122570517.htm.

⁴⁷ Zhonghua Renmin Gongheguo Xiuzhengan (中华人民共和国宪法修正案) [Amendment to the PRC Constitution], adopted Mar. 11, 2018, art. 44, XINHUA WANG (新华网) [XINHUA NET], http://www.xinhuanet.com/politics/2018lh/2018-03/11/c_1122521235.htm.

⁴⁸ Guanyu Quanguo Renmin Daibiao Dahui Xianfa He Falü Weiyuanhui Zhize

years, the NPC harmonized such legislation by incorporating the Committee's new constitutional functions.⁴⁹

B. The Status and Operation of the Constitution and Law Committee

The Constitution and Law Committee has formal constitutional status, but it exercises only advisory powers. Article 70 of the Constitution, as revised, establishes the Constitution and Law Committee as one of ten NPC special committees. Special committees assist the NPC and NPCSC by proposing or reviewing draft legislation and by assisting in the post-promulgation review of lower-level legislation.⁵⁰ The NPCSC's June 2018 decision confirmed that the Constitution and Law Committee would undertake new functions related to constitutional review and interpretation. However, the Committee remains subject to the supervision of the NPCSC when the NPC is not in session, and it has no independent power to issue binding constitutional decisions or interpretations. Instead, it is an advisory organ that assists the NPC and NPCSC in carrying out their constitutional functions.⁵¹

As an NPC special committee, the Constitutional and Law Committee is made up entirely of NPC deputies. It is chaired by Li Fei, former head of the NPCSC Hong Kong Basic Law Committee and former Vice Chair of the Law Committee. Most of the Committee's eighteen members hold concurrent positions in other institutions. Current Committee members include an SPC Vice President, two legal scholars, three deputies with concurrent positions in the NPCSC Legislative Affairs Commission ("LAC"), the head of the All China Lawyers Association, three People's

Wenti de Jueding (关于全国人民代表大会宪法和法律委员会职责问题的决定) [Decision on the Duties of the NPC Constitution and Law Committee], adopted June 6, 2018, XINHUA WANG (新华网) [XINHUA NET], http://www.xinhuanet.com/politics/2018-06/22/c_129899141.htm.

⁴⁹ See, e.g., amendments to the NPC Organic Law incorporating the Committee changes. Quanguo Renmin Daibiao Dahui Guanyu Xiugai Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Zuzhifa de Jueding (全国人民代表大会关于修改中华人民共和国全国人民代表大会组织法) [National People's Congress Decision to Amend the "PRC National People's Congress Organic Law"], adopted March 11, 2021, art. 33, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], <http://www.npc.gov.cn/npc/c30834/202103/2d8d19c686234f42addcd2a0592bf809.shtml>.

⁵⁰ Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. OF ASIAN L. 1, 48-52 (1997); PRC Legislation Law, *supra* note 15, arts. 99-101.

⁵¹ XIANFA art. 70, §§ 2, 4 (1982) (China); Yu Wenhao (于文豪), *Xianfa He Falü Weiyuanhui Hexianxing Shencha Zhize De Zhankai* (宪法和法律委员会合宪性审查职责的展开) [*The Development of the Constitution and Law Committee's Constitutionality Review Duties*], ZHONGGUO FAXUE (中国法学) [CHINA LEGAL STUDIES], no. 6 (2018), § 2(2).

Liberation Army representatives, and two State Council legal specialists.⁵² The NPC Organic Law authorizes the Committee to appoint legal experts to advise it, although it is not clear the Committee has done so.⁵³

The LAC, a professional work organ of the NPCSC, provides staff support for the Committee. The LAC maintains 11 specialized offices and a staff of about 200 professionals. It performs a range of legislative research, drafting, and review work for the NPC and its special committees.⁵⁴ It also responds to inquiries from other state organs on concrete issues of law.⁵⁵ In late 2018, the LAC established a new “Constitution Office” to support the Committee’s work and research issues related to the Committee’s new functions.⁵⁶

⁵² *Xianfa He Falü Weiyuanhui* (宪法和法律委员会) [*Constitution and Law Committee*], ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], http://www.npc.gov.cn/npc/c34375/xffl_2.shtml; Wang, *supra* note 7. One of the legal scholars appointed to the Committee at its inception, Renmin University Vice Dean Yu Zhigang, was later indicted on bribery charges and removed as an NPC delegate and Committee member. *Weiyuanhui Lishi* (委员会历史) [*Committee History*], ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], <http://www.npc.gov.cn/npc/c34456/202010/36e079db23b84378b41eccc4de257c59.shtml>; *Yu Zhigang Bei Daibu* (于志刚被逮捕) [*Yu Zhigang Arrested*], XINLANG CAIJING (新浪财经) [SINA FINANCE] (July 15, 2021) <https://finance.sina.com.cn/wm/2021-07-15/doc-ikqciyzk5577879.shtml>.

⁵³ Han Dayuan (韩大元), *Cong Falü Weiyuanhui Dao Xianfa He Falü Weiyuanhui: Tizhi Yu Gongneng de Zhuanxi* (从法律委员会到宪法和法律委员会: 体制与功能的转型) [*From the Law Committee to the Constitution and Law Committee: Transformation of System and Functions*], HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [E. CHINA U. POL. & L. J.], no. 4 (2018), at 10.

⁵⁴ *Quanguo Renda Changweihui Fazhi Gongzuo Weiyuanhui Jianjie* (全国人大常委会法制工作委员会简介) [*Brief Introduction to the Legislative Affairs Commission of the NPCSC*], ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], Sept. 27, 2021, <http://www.npc.gov.cn/npc/fgw001/202009/37a38fef089e499bb63b9d58ceda9ba4.shtml#> For size of the LAC staff, see Hand, *supra* note 14, 171 n.118 and accompanying text.

⁵⁵ *Brief Introduction to the Legislative Affairs Commission of the NPCSC*, *supra* note 54, § III(5); PRC Legislation Law, *supra* note 15, art. 47. While LAC responses to legal inquiries are not formally binding, other state organs treat them as authoritative in practice. Wang Guisong (王贵松), *Fayuan Dui Falü Chongtu Wenti de Yingdui: Xianzhuang Yu Qianzhan* (法院对法律冲突问题的应对: 现状与前瞻) [*Court Responses to the Problem of Legislative Conflicts: The Present Situation and a Look Forward*], FASHANG YANJIU (法商研究) [L. & BUS. STUD.], no. 2, 2010, § 2(1); Dowdle, *supra* note 50, at 84–85.

⁵⁶ Liu Man (刘嫚) & Cheng Shuwen (程姝雯), *Zheng Yanjiu Jianli Jianquan Hexianxing Shencha Jizhi He Chengxu* (正研究建立健全合宪性审查机制和程序) [*Correctly Researching the Establishment and Perfection of Constitutionality Review Mechanisms and Procedures*], NANFANG DUSHIBAO (南方都市报) [S. METR. DAILY], (Feb. 28, 2019), available at SOHU.COM, https://www.sohu.com/a/295339501_161795.

Official statements issued subsequent to the creation of the Constitution and Law Committee set out a detailed agenda for pushing these institutional reforms forward. In a 2020 publication, Xi Jinping noted shortcomings in existing constitutional supervision mechanisms and identified full implementation of the Constitution as the “primary task and basic work of building rule of law.”⁵⁷ Shortly thereafter, in its Plan on Building a Rule of Law in China (2020-2025), the Party Central Committee devoted an entire section to constitutional law.⁵⁸ Released in January 2021, the Plan set out one of the most detailed lists of constitutional implementation tasks that the Central Committee has published to date. It directs the NPC and NPCSC to ensure compliance of its own laws and regulations with the Constitution; clarify the principles, substance, and procedures for constitutional review; establish systems for pre-promulgation review and consultation on the constitutionality of lower-level legislation and state measures; emphasize conflicts with the Constitution in filing and review work; establish procedures and mechanisms for constitutional interpretation; respond to concerns about constitutional issues; and report on their progress.⁵⁹ The prominence and specificity of these statements signal the Party’s commitment to advance concrete reforms.

To date, however, the Constitution and Law Committee has focused primarily on the pre-promulgation deliberation of draft laws, decisions, and other delegate motions. For example, immediately after the NPC adopted the 2018 constitutional amendments and while the NPC was still in session, the new Committee deliberated on the draft Supervision Law.⁶⁰ Chinese scholars had questioned the constitutionality of earlier drafts of this law, and the 2018 constitutional amendments addressed these concerns by creating a

⁵⁷ Jiang Bixin (江必新) & Jiang Qinghua (蒋清华), *Xi Jinping Fazhi Sixiang Zhi Xianfa Lilun Yanjiu Lungang* (习近平法治思想之宪法理论研究论纲) [*Research Outline on Constitutional Theory in Xi Jinping Thought on Rule of Law*], ZHONGGUO ZHENGFA DAUE XUEBAO (中国政法大学学报) [J. CHINA U. POL. SCI. & L.], Sept. 25, 2021, § II(2).

⁵⁸ Zhonggong Zhongyang Yinfa “Fazhi Zhongguo Jianshe Guihua (2020-2025)” (中共中央印发《法治中国建设规划(2020—2025年)》) [Party Central Publishes the Plan on Building a Rule of Law Government (2020-2025)], ZHONGHUA RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (中华人民共和国中央人民政府) [PRC CENTRAL PEOPLE’S GOVT.], Jan 1, 2021, § II.

⁵⁹ *Id.* § I(5).

⁶⁰ Di Shisanjie Quanguo Renmin Daibiao Dahui Xianfa He Falü Weiyuanhui Guanyu “Zhonghua Renmin Gongheguo Jianchafa (Cao’an Xiugaigao)” Xiugai Yijian de Baogao (第十三届全国人民代表大会宪法和法律委员会关于《中华人民共和国监察法(草案 修改稿)》修改意见的报告) [Report on the Opinion of the 13th NPC Constitution and Law Committee on the Revised Version of the Draft PRC Supervision Law], Mar. 17, 2018, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET].

new state organ – the State Supervision Commission.⁶¹ The Committee enhanced the constitutional legitimacy of this statute by declaring unanimous support for the law, noting the 2018 amendments, and making several modest suggestions for revision.⁶²

Other published accounts discuss the Committee’s analysis of constitutional questions in its review of draft legislation. For example, in October 2018, the Committee issued a report on a draft revision of the People’s Court Organic Law that confirmed the NPCSC’s constitutional authority to promulgate revisions to this “basic law.”⁶³ In another example, the Committee assessed the question of whether the draft Foreign Investment Law’s reference to “foreign natural persons, enterprises, or other organizations” was consistent with Article 18 of the Constitution.⁶⁴ In a third example in 2021, the Committee reviewed the NPC’s draft decision on elections in the Hong Kong Special Administrative Region (“Hong Kong SAR”) and declared that the decision was consistent the Constitution and Hong Kong’s Basic Law.⁶⁵ Prior to 2018, the Law Committee deliberated on some constitutional questions related to draft legislation, and such statements are not entirely new.⁶⁶ But it is clear that strengthening pre-promulgation review of the constitutionality of legislation will be a core Committee function moving forward.⁶⁷

⁶¹ Lin, *supra* note 5, at 15.

⁶² Report on the Opinion of the 13th NPC Constitution and Law Committee on the Revised Version of the Draft PRC Supervision Law, *supra* note 60.

⁶³ Quanguo Renmin Daibiao Dahui Xianfa He Falü Weiyuanhui Guanyu “Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa (Xiuding Cao’an)” Shenyi Jiegou de Baogao (全国人民代表大会宪法和法律委员会关于《中华人民共和国人民法院组织法（修订草案）》审议结果的报告)[NPC Constitution and Law Committee, Report on the Results of Deliberation on the Amendment Draft of the PRC People’s Court Organic Law], Oct. 26, 2018, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], <http://www.npc.gov.cn/npc/c12435/201810/d45e0523a17449debc248c93d1a0f4d3.shtml>.

⁶⁴ Liu & Cheng, *supra* note 56.

⁶⁵ Quanguo Renda Xianfa He Falü Weiyuanhui Shenyi Shegang Jueding Cao’an Deng, Renwei Jueding Cao’an Biyao, Kexing (全国人大宪法和法律委员会审议涉港决定草案等认为决定草案必要、可行) [NPC Constitution and Law Committee Deliberates on Draft Decision on Hong Kong, Considers the Draft Decision to Be Necessary and Practical], ZHONGGUO XINWEN WANG (中国新闻网) [CHINA NEWS NET], Mar. 9, 2021, <https://www.chinanews.com.cn/gn/2021/03-09/9428021.shtml>. The decision was controversial because it tightened central control over Hong Kong elections and excluded “unpatriotic” opposition candidates from Hong Kong’s legislature. Sarah Zheng, *China’s NPC Approves Sweeping Changes to Hong Kong Election System*, SOUTH CHINA MORNING POST, Mar. 11, 2021.

⁶⁶ Lin and Ginsburg, *supra* note 9, at 472-87 (documenting numerous examples of the Law Committee discussing constitutional issues during the legislation process).

⁶⁷ Han, *supra* note 53, at 12. As the Vice Chair of the Committee candidly acknowledged in late 2021, “Presently, the major work of the Committee has been the

Although the Committee has been active in reviewing draft legislation, as of the submission of this article, progress on implementing the Committee's new constitutional functions has been limited. References to new "Constitutional and Law Committee Work Rules" are one indication of the status of implementation efforts. On its official webpage, the Committee lists the duties set out in Article 2 of the Work Rules. The ten specific duties listed correspond to those of the old NPC Law Committee.⁶⁸ An entry following this detailed list then adds a general reference to the Committee's new constitutional functions and states that "the rules of procedure for the Constitution and Law Committee to perform duties related to the work of the Constitution shall be stipulated at another time."⁶⁹ Similarly, annual reviews of the Committee's operations in *The People's Congress of China* provide numerous details on the Committee's deliberation of draft laws and other motions. However, the reviews discuss the Committee's new constitutional functions only in very general and forward-looking terms.⁷⁰

Domestic scholarly discourse suggests that the Committee's constitutional procedures and functions are the subject of ongoing debate. For example, the scope of the Committee's role in the post-promulgation review of legislation, the Committee's procedures for interfacing with filing

unified deliberation of draft laws and paying careful attention to issues of constitutionality in this process." Zhu Ningning (朱宁宁), *Jiaqiang He Gaijin Xin Shidai Renda Lifa Gongzuo* (加强和改进新时代人大立法工作) [*Strengthen and Improve People's Congress Legislative Work for the New Era*], FAZHI RIBAO (法制日报) [LEGAL DAILY], Nov. 9, 2021 (interview with Constitution and Law Committee Vice Chair Zhou Guangquan).

⁶⁸ *Weiyuanhui Zhize (Quanguo Renmin Daibiao Dahui Xianfa Yu Falü Weiyuanhui Gongzuo Guize Di Er Tiao)* (委员会职责 (全国人民代表大会宪法和法律委员会工作规则第二条)) [*Committee Responsibilities (Constitution and Law Committee Work Rules Article 2)*], Oct. 19, 2020, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], <http://www.npc.gov.cn/npc/c34457/202010/6cd46be8404e41e587e77273ba9be272.shtml> (noting that to date, the full text of the Constitution and Law Committee Work Rules referenced in this post has not been publicly released).

⁶⁹ *Id.*

⁷⁰ See Li Fei (李飞), *Wei Tuijin Guojia Zhili Tixi He Zhili Nengli Xiandaihua Tigong Youli Fazhi Baozhang* (为推进国家治理体系和治理能力现代化提供有力法治保障) [*Provide a Strong Rule of Law Guarantee to Advance the Modernization of the State Governance System and Governance Capacity*], ZHONGGUO RENDA (中国人大) [THE PEOPLE'S CONGRESS OF CHINA], May 5, 2020, 13-16; Zhang Weiwei (张维炜) & Li Qianwen (李倩文), *Dili Fenjin Yong Dandang—Quanguo Renda Xianfa He Falü Weiyuanhui 2020 Nian Gongzuo Huimou* (砥砺前行勇担当——全国人大宪法和法律委员会 2020 年工作回眸) [*Retrospective on the Work of the Constitution and Law Committee in 2020*], ZHONGGUO RENDA (中国人大) [THE PEOPLE'S CONGRESS OF CHINA], Mar. 5, 2021, 15-18.

and review organs, and the Committee's status with respect to those organs are unclear. Scholarly commentary suggests a possible division of labor, with questions on the constitutionality of legislation being certified to the Committee, while the existing LAC Filing and Review Office focuses on reviewing the "legality" of legislation.⁷¹ Review of the constitutionality of legislation may require interpretation of the Constitution's abstract provisions, so the Committee must also develop standards and procedures for coordinating constitutional interpretations.⁷² A team of scholars led by Han Dayuan completed an expert draft of a "Constitutional Interpretation Procedure Law" in 2015.⁷³ While this draft may provide a foundation for developing constitutional interpretation practices, procedural and jurisdictional questions need to be addressed to account for the new Committee's role in interpretation.⁷⁴

Indeed, when it comes to specifics on how the Committee will implement its new constitutional functions, Chinese scholars continue to raise many questions. At a Chinese Law Society meeting on the Constitution and Law Committee in 2020, leading constitutional law scholars identified numerous unresolved issues.⁷⁵ Similarly, in a long scholarly exposition,

⁷¹ Hu Jinguang (胡锦涛), *Lun Woguo Hexianxing Shencha Jizhizhong Butong Zhuti de Zhineng Dingwei* (论我国合宪性审查机制中不同主体的职能定位) [*On the Status and Function of Different Entities in the My Country's Constitutionality Review System*], FAXUE JIA (法学家) [THE JURIST], no. 5, 2020, at 80-81.

⁷² Zhu Ningning (朱宁宁), *Zhongguo Fazhi Buru Hexianxing Shencha Shidai* (中国法治步入合宪性审查时代) [*China's Rule of Law Steps into an Age of Constitutionality Review*], FAZHI RIBAO (法制日报) [LEGAL DAILY], Feb. 26, 2019, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], FEB. 26, 2019, <http://www.npc.gov.cn/npc/c723/201902/afbb32fd3303446aa865725500b7807e.shtml>.

⁷³ Fan, *supra* note 10, at 21. For the expert draft, see Han Dayuan (韩大元), *Zhonghua Renmin Gongheguo Xianfa Jieshi Chengxufa (Zhuanjia Jianyi Gao) Ji Qi Shuoming* (《中华人民共和国宪法解释程序法(专家建议稿)》及其说明) [*PRC Constitutional Interpretation Procedure Law (Expert Draft for Proposal) and its Explanation*], Nov. 21, 2015, ZHONGGUO XIANZHENG WANG (中国宪政网) [CHINA CONSTITUTIONALISM NET], <http://www.calaw.cn/article/default.asp?id=10166>.

⁷⁴ Han Dayuan (韩大元), *Xi Jinping Fazhi Sixiang Zhong Youguan Xianfa Jieshi Zhidu de Lunshu* (习近平法治思想中有关宪法解释制度的论述) [*Discussion Related to Constitutional Interpretation Systems in Xi Jinping Rule of Law Thought*], FAXUE LUNTAN (法学论坛) [LEGAL FORUM], no. 3, 2021, at 5 (citing concrete issues such as the division of labor between the NPCSC "interpreting the Constitution" and the Constitution and Law Committee "developing constitutional interpretation"; the entities that can raise constitutional interpretation proposals; the procedural relationship between active and passive interpretation; and the role of the SPC).

⁷⁵ *Zhongguo Faxuehui Xianfaxue Yanjiuhui Renda Zhidu Yanjiu Zhuanye Weiyuanhui 2020 Nian Nianhui Chenggong Juban* (中国法学会宪法学研究会人大制度研究专业委员会 2020 年年会成功举办) [*The Chinese Law Society Constitutional Research Association's Special Committee on People's Congress System Research 2020*

Constitution and Law Committee member Jiang Bixin and co-author Jiang Qinghua discuss Xi Jinping's constitutional theory in intricate detail, but they emphasize a need to "clarify" specific provisions on the duties and procedures of the Committee and raise concrete issues related to constitutional supervision that still must be resolved.⁷⁶

The operation of the LAC reinforces perceptions that the Committee's constitutional functions are a work in progress and suggests that jurisdictional tensions on constitutional issues may be emerging. Domestic publications have focused primarily on the Constitution Office's support for Committee deliberations on draft legislation, rather than on concrete efforts to develop the Committee's expanded constitutional functions.⁷⁷ While the Legislation Law provides that the LAC's function is to research draft legislation and compile comments on such drafts, in practice an overwhelmed Committee has delegated some of the work of assessing draft legislation to the Constitution Office.⁷⁸ Perhaps more importantly, the LAC still does most of the work to review legislation after

Annual Meeting Conducted Successfully], HUAZHONG KEJI DAXUE FAXUEYUAN (华中科技大学法学院) [HUAZHONG U. OF SC. & TECH. L. SCH.], Nov. 6, 2020. <http://law.hust.edu.cn/info/1051/3184.htm>.

⁷⁶ Jiang & Jiang Q., *supra* note 57, § 3(3).

⁷⁷ See, e.g., Wang Yijun (王亦君) & Liu Shixin (刘世昕), *Zuigao Guojia Quanli Jiguan "Xin Chengyuan" Lüxin Yinian Jiao Dajuan* (最高国家权力机关“新成员”履新一年交答卷) [*The "New Member" of the Highest Organ of State Power Transmits its Record after Assuming its Post for a Year*], ZHONGGUO QINGNIANBAO (中国青年报) [CHINA YOUTH DAILY], Mar. 14, 2019, ZHONGGUO QINGNIAN ZAI XIAN (中国青年在线) [CHINA YOUTH ONLINE], http://zqb.cyol.com/html/2019-03/14/nw.D110000zgqnb_20190314_1-04.htm (explaining that the Constitution Office coordinated with the Committee as it deliberated on draft laws and draft amendments to laws, including the People's Court Organic Law, the People's Procuratorate Organic Law, the Martyrs Protection Law, the Criminal Procedure Law, and the Foreign Investment Law); *Quanguo Renda Changweihui Fagongwei Deng Juban Xianfa Lishi Wenxian Ziliao-zhan* (全国人大常委会法工委等举办宪法历史文献资料展) [NPCSC LAC Holds Document Exhibition on Constitutional History], ZHONGGUO XINWEN WANG (中国新闻网) [CHINA NEWS NET], Dec. 4, 2020, <https://www.chinanews.com.cn/gn/2020/12-04/9354445.shtml>.

⁷⁸ PRC Legislation Law, *supra* note 15, arts. 38, 39; Changhao Wei & Taige Hu, *The NPCSC Legislative Affairs Commission and its Invisible Legislators*, NPC OBSERVER, (June 21, 2021), <https://npcobserver.com/2018/06/25/scholarship-highlight-the-npsc-legislative-affairs-commission-and-its-invisible-legislators/> (noting that with limited personnel and staff support, the Constitution and Law Committee has delegated to the Constitution Office work such as filtering comments on draft legislation and suggesting amendments on the basis of those comments).

it has been promulgated.⁷⁹ And, LAC staff continue to opine publicly on constitutional questions related to legislation.⁸⁰

Public LAC commentary on constitutional questions could diminish the authority of the Constitution and Law Committee. Legal scholar Hu Jinguang argues that in the wake of the 2018 constitutional amendments and related institutional reforms, the LAC should refrain from constitutional review work.⁸¹ However, procedures on filing and review promulgated in 2019 left this jurisdictional issue unsettled, providing only generally that when constitutional issues arise in the review of legislation, the “Constitution and Law Committee and the LAC shall actively conduct constitutional review” and “raise written review and research opinions.”⁸² These dynamics have prompted some Chinese scholars to question whether the new Committee has the capacity to perform its constitutional functions and to express concern that the Committee has already been marginalized.⁸³

⁷⁹ *Chinese Law Society Constitutional Research Association’s Special Committee on People’s Congress System Research 2020 Annual Meeting Conducted Successfully*, *supra* note 75 (Comments of Shanghai Jiaotong University Law School Professor Fan Jinxue).

⁸⁰ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Fazhi Gongzuo Weiyuanhui Guanyu 2020 Nian Bei’an Shencha Gongzuo Qingkuang de Baogao (全国人民代表大会常务委员会法制工作委员会关于 2020 年备案审查工作情况的报告) [NPCSC Legislative Affairs Commission, Report on the Situation of Filing and Review Work in 2020], Jan. 20, 2021, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], [hereinafter 2020 Filing and Review Work Report], § IV(1). In August 2021, the *Legal Daily* published a detailed explanation of the constitutionality of an NPCSC decision that authorized the Shanghai People’s Congress to adopt regulations for its Pudong New District. *Quanguo Renda Fagongwei Xianfashi Jiedu “Pudong Xinqu Fagui”* (全国人大法工委宪法室解读“浦东新区法规”) [NPC LAC Constitution Office Deciphers “Pudong New District Regulation”], SHANGHAI RENDA WANG (上海人大网) [SHANGHAI PEOPLE’S CONGRESS NET], Aug. 6, 2021, FAZHI WANG (法治网) [LEGAL DAILY ONLINE] http://m.legaldaily.com.cn/rdlf/content/2021-08/06/content_8574328.htm.

⁸¹ Hu, *supra* note 71, at 80 (arguing the scope of the LAC’s work on constitutional issues should change after the 2018 constitutional amendments and related reforms).

⁸² Fagui, Sifa Jieshi Bei’an Shencha Gongzuo Banfa (法规, 司法解释备案审查工作办法) [Work Measures on Filing and Review of Regulations and Judicial Interpretations], adopted by the 44th Chairman’s Meeting of the 13th NPCSC, Dec. 16, 2019, art. 20, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET] [hereinafter 2019 Work Measures on Filing and Review], http://www.njrd.gov.cn/gfxwjbaso_0/flfgzd_66723/202103/t20210302_2835520.html.

⁸³ Wang Kai observes that because most Committee members hold concurrent posts, the Committee does not meet frequently and has not realized the roles initially envisioned for it. *Zhiming Xianfa Xuezheng Wang Kai Jiaoshou Zhujiang Hexianxing Shencha de Zhongguo Shijian* (知名宪法学者王锴教授主讲“合宪性审查的中国实践”) [*Famous Constitutional Law Scholar Professor Wang Kai Lectures on China’s Practice of Constitutionality Review*], NANKAI DAXUE FAXUEYUAN WANGZHAN (南开大学法学院网站) [NANKAI U. L. SCH. WEBSITE], Nov. 23, 2020. Fan Jinxue goes further and

C. New Transparency and Capacity in the Filing and Review System

In addition to the creation of the Constitution and Law Committee, there have been several notable developments related to constitutional supervision at lower levels of the NPC system. NPC officials characterize the system for filing and review of legislation as a “focal point” for perfecting constitutional supervision and a “foundation for promoting constitutional review work.”⁸⁴ Since 2017, the NPCSC and the LAC have taken steps to address transparency deficits in the system, standardize the filing and review process, and encourage citizens to participate in the process of identifying legislation that conflicts with the Constitution and law.⁸⁵

The LAC opened a new, more transparent stage in its filing and review work when it began publishing annual reports on the system in 2017. The work reports provide insights into the objectives, scale, and complexity of filing and review efforts. The initial 2017 report included comprehensive statistics on legislation filed with the NPCSC for review from 2013 to 2017 (4,778 pieces of legislation), the number of citizen proposals for review of legislation over the same period (1,527 citizen proposals), and the number of problematic regulations and judicial interpretations repealed (200 since 2004). It also identified correcting Supreme People’s Court and Supreme People’s Procuratorate (SPP) judicial interpretations as a focus of recent work.⁸⁶ Subsequent reports have updated these statistics on an annual basis, described special areas of focus for filing and review work each year, and documented efforts to provide feedback to citizens on their proposals for the review of legislation.⁸⁷

asserts that the Committee has already been marginalized. *Special Committee on People’s Congress System Research 2020 Annual Meeting Conducted Successfully*, *supra* note 75; *see also* Wei & Hu, *supra* note 78, (noting organizational capacity problems).

⁸⁴ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Fazhi Gongzuo Weiyuanhui Guanyu Shi’er Jie Quanguo Renda Yilai Ji 2017 Nian Bei’an Shenchongzuo Qingkuang de Baogao (全国人民代表大会常务委员会法制工作委员会关于十二届全国人大以来暨2017年备案审查工作情况的报告) [NPCSC Legislative Affairs Commission, Report on the Situation of Filing and Review Work in since the 12th NPC and in 2017], Dec. 24, 2017, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET] [hereinafter 2017 Filing and Review Work Report], §§ 1, 4 http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-12/27/content_2035723.htm.

⁸⁵ For an excellent overview of recent developments in the filing and review system, see Changhao Wei, *Reining in Rogue Legislation*, *MADE IN CHINA J.*, vol. 6, no. 2 (Sept. 2021), 48-55.

⁸⁶ 2017 Filing and Review Work Report, *supra* note 84, § 1.

⁸⁷ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Fazhi Gongzuo Weiyuanhui Guanyu 2018 Nian Bei’an Shenchongzuo Qingkuang de Baogao (全国人民代表大会常务委员会法制工作委员会关于2018年备案审查工作情况的报告) [NPCSC Legislative Affairs Commission, Report on the Situation of Filing and Review

The work reports also provide brief descriptions of citizen review proposals, specific legislation the LAC has reviewed, and related outcomes. Many of the citizen proposals described in the reports appear to be politically anodyne. Examples include challenges to rules and regulations on famous trademark registration, joint spousal responsibility for debts following divorce, road and traffic management, fees for parking violations, grassland restoration fees, and the illegal practice of medicine. The work reports typically provide a brief description of the issue, indicate that the Filing and Review Office consulted with the promulgating organ, and note progress in conforming the challenged provisions to higher-level legislation.

Several reports feature descriptions of LAC work on potentially sensitive issues. For example, one citizen review proposal argued that an SPP interpretation effectively reduced the Criminal Procedure Law's evidentiary standard for formal arrest by authorizing procuratorates to approve the "conditional arrest" of suspects in major cases on the basis of incomplete evidence.⁸⁸ The report states that LAC officials conferred with the SPP and that procuratorates are no longer implementing this provision.⁸⁹

In another example, the 2018 and 2019 work reports describe proposals for the review of State Council legislation on "custody and education," a controversial system of administrative detention for prostitutes and their clients. After referencing the formal abolition of China's re-education through labor system in 2013, the 2018 report describes LAC efforts to build consensus on the custody and education issue and its recommendation that the relevant regulations be repealed.⁹⁰ The 2019 report documents steps to repeal the system.⁹¹ When the NPCSC

Work in 2018], ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET] [hereinafter 2018 Filing and Review Work Report], § 1, <http://www.npc.gov.cn/npc/c12491/201812/afbfcb16af1d455b86dfb0cb4175ba2a.shtml>; 2020 Filing and Review Work Report, *supra* note 80, § 4(1).

⁸⁸ Wang Mengyao (王梦遥), *11 Nian Lai, Beishou Zhengyi Zuigaojian Yaoqiu Tingyong 'Futiaojian Daibu' Guiding*, (11年来备受争议 最高检要求停用“附条件逮捕”规定) [*After 11 Years of Controversy, the SPP Suspends Application of Provisions on "Conditional Arrest"*], XINJING BAO (新京报) [BEIJING NEWS], July 7, 2017, ZHONGGUO XINWEN WANG (中国新闻网) [CHINA NEWS NET], <https://www.chinanews.com.cn/gn/2017/07-15/8278411.shtml>.

⁸⁹ 2017 Filing and Review Work Report, *supra* note 84, § II(2).

⁹⁰ 2018 Filing and Review Work Report, *supra* note 87, § II(2).

⁹¹ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Fazhi Gongzuo Weiyuanhui Guanyu 2019 Nian Bei'an Shencha Gongzuo Qingkuang de Baogao (全国人民代表大会常务委员会法制工作委员会关于 2019 年备案审查工作情况的报告) [NPCSC Legislative Affairs Commission, Report on the Situation of Filing and Review Work in 2019], Dec. 25, 2019, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET] [hereinafter 2019 Filing and Review Work Report], § II(3), <http://www.npc.gov.cn/npc/c30834/201912/24cac1938ec44552b285f0708f78c944.shtml>.

formally repealed the custody and education system a year later, it did not cite a constitutional rationale for doing so.⁹² Nevertheless, the willingness of the LAC to publicize its recommendation, and to comment on a review proposal with constitutional implications, marked a break from past practice.⁹³

In a further sign of this shift, the 2020 work report contains a special section describing the LAC's work to "reliably resolve constitutional issues." It cites several concrete examples. In one, the LAC concluded that a fee imposed on air passengers for China's civil aviation development fund is constitutional (but lacks a lawful basis after the amendment of the Budget Law in 2014).⁹⁴

The LAC has also addressed several longstanding issues related to equal protection and discrimination in China. In its 2020 work report, the LAC publicized a suggestion that the SPC amend a controversial 2003 judicial interpretation that has the effect of creating different compensation standards for urban and rural residents in personal injury cases.⁹⁵ Since the mid-2000s, Chinese citizens have repeatedly challenged the constitutionality of this interpretation, arguing that it violates the equal protection clause (Article 33) of the Constitution.⁹⁶ Although the LAC did not address these constitutional arguments directly, it concluded that in the wake of social and governance changes in China, the different standards should be abolished.⁹⁷

In its 2021 Work Report, the LAC also addressed a conflict in

⁹² Quanguo Renda Changweihui Tongguo Feizhi Youguan Shourong Jiaoyu Falü Guiding He Zhidu de Jueding (全国人大常委会通过废止有关收容教育法律规定和制度的决定) [NPCSC Decision to Abolish the Custody and Education Regulations and System], Dec. 28, 2019, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], <http://www.npc.gov.cn/npc/c30834/201912/0aaecba8d5c84ba4a9e4484ee8dc12fb.shtml>.

⁹³ Wei, *supra* note 85, at 49 (observing that constitutional arguments raised to challenge the custody and education system in 2018 were very similar to the arguments Chinese scholars advanced to challenge the custody and repatriation system in 2003, but that NPC entities were careful to not to publicly comment on the constitutionality of custody and repatriation in 2003).

⁹⁴ 2020 Filing and Review Work Report, *supra* note 80, § 4.

⁹⁵ *Id.*

⁹⁶ For a discussion of early challenges, see Keith J. Hand, *Citizens Engage the Constitution: The Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China*, in BUILDING CONSTITUTIONALISM IN CHINA 238-39 (Stephanie Balme & Michael W. Dowdle eds., 2009).

⁹⁷ For a thoughtful discussion of the LAC's statement in the context of recent reform dynamics, see Dongyu Sun, "Same Life, Different Values:" *An Example of How Judicial Interpretations are Reviewed in China*, Apr. 16, 2021 (Susan Finder & Changhao Wei eds.) SUPREME PEOPLE'S COURT MONITOR <https://supremepeoplescourtmonitor.com/2021/04/16/same-life-different-values-an-example-of-how-judicial-interpretations-are-reviewed-in-china/>.

national law and administrative regulations on the issue of whether a pre-marital health examination certificate is required to register a marriage. As early as 2005, Chinese citizens sent proposals to the NPCSC requesting review of legislative conflicts on pre-marital health exams.⁹⁸ This has long been an issue of concern, in part because Hepatitis B virus carriers in China experience discrimination in marriage, employment, education, and other endeavors.⁹⁹ The LAC finally addressed the conflict in 2021. It concluded that while China's new Civil Code establishes a legal duty to notify partners of major infections prior to marriage, and partners may annul a marriage for breach of this disclosure duty, the Code does not prohibit marriage when a party suffers from such infections. The LAC recommended the revision of conflicting laws and regulations "in accordance with the spirit of the Civil Code."¹⁰⁰

The work reports also illustrate ways in which the filing and review process may operate to narrow or redefine rights. In 2020, the LAC found that several local regulations governing the use of local languages in ethnic minority schools violate Article 19 of the Constitution, which requires the state to promote Mandarin nationwide.¹⁰¹ The LAC revisited this issue in 2021, stating conclusively that all regions, including ethnic minority areas, must fully implement "national language education" and correct conflicting local regulations.¹⁰² This finding reinforces the central government's assimilation campaigns in autonomous regions such as Xinjiang and

⁹⁸ Congressional-Executive Commission on China, Citizens Petition NPC Standing Committee Review of Conflicting Legal Provisions on Marriage Registration, Aug. 31, 2005. Citizens filed a similar review proposal in 2021. *Wo Yuan Shisheng Tichu de Bei'an Shencha Jianyi Huode Quanguo Renda Changweihui Fagongwei Zhongshi Bing Ruxuan 2021 Niandu Quanguo Shida Xianfa Shili* (我院师生提出的备案审查建议获全国人大常委会法工委重视并入选 2021 年度全国十大宪法事例) [*Filing and Review Proposal of Our Law School's Teachers and Students Receives the Close Attention of the NPC Legislative Affairs Commission and Is Selected as One of the Ten Major Constitutional Precedents of 2021*], WANG JIAN FAXUEYUAN [KENNETH WANG LAW SCHOOL WEBSITE], Jan. 5, 2022, <http://law.suda.edu.cn/58/34/c1054a481332/page.htm>.

⁹⁹ *Voices Against Discrimination: Chinese Citizens Challenge Discriminatory Regulations and Practices*, CHINA L. & GOV. REV. (June 2004) (on file with author).

¹⁰⁰ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Fazhi Gongzuo Weiyuanhui Guanyu 2021 Nian Bei'an Shencha Gongzuo Qingkuang De Baogao (全国人民代表大会常务委员会法制工作委员会关于 2021 年备案审查工作情况的报告) [NPCSC Legislative Affairs Commission, Report on the Situation of Filing and Review Work in 2021], Dec. 21, 2021, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET] [hereinafter 2021 Filing and Review Work Report], <http://www.npc.gov.cn/npc/c30834/202112/2606f90a45b1406e9e57ff45b42ceb1c.shtml>.

¹⁰¹ 2020 Filing and Review Work Report, *supra* note 80, § 4. See Wei, *supra* note 85, at 52-53 for a discussion of these constitutional findings.

¹⁰² 2021 Filing and Review Work Report, *supra* note 100, § 2.

Tibet.¹⁰³ The 2021 work report also identifies the filing and review of local laws in Hong Kong and Macau, and maintenance of the “constitutional order” and “rule of law” in special administrative regions, as a focus for 2022. Such references raise the possibility that the filing and review process could be used to support the central government’s ongoing efforts to tighten control over Hong Kong.¹⁰⁴

To strengthen the filing and review system, the NPCSC Chairman’s Meeting publicly promulgated new filing and review procedures in late 2019. The Work Measures on Filing and Review of Regulations and Judicial Interpretations (“Work Measures”) are expansive in scope, with 57 articles setting out general principles for filing and review work and specifying the scope and procedures for filing and review, the entities responsible for filing and review, and standards for the review of legislation.¹⁰⁵ The Work Measures provide for the electronic filing of new legislation;¹⁰⁶ require reviewing organs to provide feedback both to state organs and citizens on the disposition of the review proposals;¹⁰⁷ and mandate that the LAC publish annual reports to the NPCSC on filing and review work.¹⁰⁸ Contemporaneous with the release of the Work Measures, the NPCSC established a new online platform that citizens could use to submit and track proposals for the review of legislation.¹⁰⁹ The LAC has also established an expert committee to provide advice on filing and review issues.¹¹⁰ Such steps are consistent with broader efforts in the political-legal system to enhance technological resources and tap citizen expertise.¹¹¹

¹⁰³ Peh Hong Lim, *China Steps Up Assimilation of Ethnic Minorities by Banning Languages in Schools*, VOICE OF AMERICA (Oct. 24, 2021), <https://www.voanews.com/a/china-steps-up-assimilation-of-ethnic-minorities-by-banning-languages-in-schools-/6281558.html>.

¹⁰⁴ For recent developments in Hong Kong, see Michael C. Davis, *Hong Kong: How Beijing Perfected Repression*, 33 J. OF DEMOCRACY 100, 100 (2022).

¹⁰⁵ See generally 2019 Work Measures on Filing and Review, *supra* note 82 (reporting that the Work Measures left some issues, such as the division of labor between the Constitution and Law Committee and the LAC, to be sorted out in day-to-day practice); *Id.*, arts. 20, 21, 33, 40 (assigning review functions to both special committees and the LAC). Indeed, Article 33 provides that if special committees and the LAC determine that it is necessary to conduct a joint review, they may hold a “joint review meeting” and, if they reach different conclusions, should report the results to the NPCSC Chairman’s Meeting. *Id.* art. 33.

¹⁰⁶ *Id.* arts. 6, 12.

¹⁰⁷ *Id.* arts. 48-51.

¹⁰⁸ *Id.* arts. 52-53.

¹⁰⁹ Wei, *supra* note 85, at 51.

¹¹⁰ 2021 Filing and Review Work Report, *supra* note 100, § 4.

¹¹¹ Susan Finder, *Supreme People’s Court’s New Vision for the Chinese Courts*, SUPREME PEOPLE’S COURT MONITOR (May 4, 2020),

Official statistics suggest that the work reports and institutional reforms have re-invigorated public interest in the filing and review system. Following publication of its inaugural work report in December 2017, the LAC reported receiving a staggering 4,578 citizen letters and review proposals in 2018 (almost three times the total for the prior six years combined) and noted that filing and review organs sent responses to some citizens.¹¹² Citizens have continued to engage the system, with the LAC reporting receipt of 5,146 review proposals in 2020 and 6,339 review proposals in 2021 (including 5,065 review proposals filed through the LAC's new online platform).¹¹³ Prior to 2017, filing and review organs conducted their work in an opaque manner out of concern that publicity could trigger a flood of sensitive citizen review proposals.¹¹⁴ New transparency in the filing and review system and the robust citizen response signal a shift in this official calculus.

IV. ASSESSING CHINA'S CONSTITUTIONAL SUPERVISION REFORMS

The lack of attention outside of China to the Constitution and Law Committee suggests that foreign observers disregarded it as a superficial reform. But the creation of the Committee involves more than meets the eye. The NPCSC's decisions to expand the Committee's constitutional functions, establish the NPCSC LAC Constitution Office, and reform the filing and review system demonstrate that there is substance behind the name change. The reconstituted Committee has operated for only a short period interrupted by the COVID crisis, and it has yet to publish detailed procedures for implementing its new constitutional functions. Consequently, this assessment must acknowledge that the Committee and related reforms are a work in progress. December 2022 marks the 40th anniversary of the 1982 Constitution and may present an opportune moment for NPC entities to demonstrate further progress on constitutional supervision.

China's current political environment adds to the challenge of

<https://supremepeoplescourtmonitor.com/2020/05/04/supreme-peoples-courts-new-vision-for-the-chinese-courts/> (discussing ways in which the SPC's directives "New Era governance" emphasize Party leadership, judicial discipline, and online platforms).

¹¹² 2018 Filing and Review Work Report, *supra* note 87, § 1; 2020 Filing and Review Work Report, *supra* note 80, § 3.

¹¹³ 2020 Filing and Review Work Report, *supra* note 80, § 3; 2021 Filing and Review Work Report, *supra* note 100, § 2. The LAC reported receiving only 138 citizen review proposals in 2019, but it did not state a reason for the significantly smaller number. 2019 Filing and Review Work Report, *supra* note 91, § 2.

¹¹⁴ Hu Jinguang (胡锦涛), *Lun Sheli "Xianfa He Falü Weiyuanhui de Yiyi* (论设立“宪法和法律委员会”的意义) [*Discussing the Significance of the Constitution and Law Committee*], ZHENGFA LUNCONG (政法丛)[COMMENTARY ON POLITICS AND LAW], at 5, ZHONGGUO SHEHUI KEXUE WANG (中国社会科学网) [CHINA SOCIAL SCIENCE RESEARCH NET] (July 6, 2018), http://www.cssn.cn/fx/201807/t20180706_4497495.shtml.

assessing the Committee's likely impact. Domestic legal scholarship often provides a useful resource for assessing such reforms, but it is clear that the Party-state limited public discussion of the 2018 constitutional amendments.¹¹⁵ The suspension of Qinghua Professor Xu Zhangrun and the removal of Professor Zhang Qianfan's popular constitutional law textbook from bookstores in 2019 demonstrate the pressures constitutional law scholars face.¹¹⁶ While Chinese scholars have published numerous articles on the Constitution and Law Committee and related issues, the domestic Chinese literature must be read with appreciation for the sensitivity of the subject matter and the reality that scholars with critical views of China's constitutional system cannot publish freely.

*A. Limited Prospects for Enhanced Enforcement of
Constitutional Rights*

With these caveats in mind, it is doubtful the Constitution and Law Committee will have much significance for the enforcement of fundamental rights in China. China's leaders had a range of socialist models to draw on for a specialized constitutional supervision organ. Some, such as the Hungarian Constitutional Council and the Polish Constitutional Tribunal, exercised a mix of advisory and binding powers to review legislation.¹¹⁷ The record of authoritarian regimes elsewhere in the socialist world and East Asia suggests that even with more robust powers on paper, a constitutional committee would not be likely to apply fundamental rights expansively or otherwise challenge Party power.¹¹⁸ Nevertheless, in the Constitution and Law Committee, China's leaders chose the weakest of the socialist models – a committee of parliamentary deputies, subordinate to the supreme legislature, with only advisory functions. Furthermore, as discussed below, they did so only after taking steps to contain citizen

¹¹⁵ Lin, *supra* note 5, at 11-12; *China Censors in Overdrive over Possible Constitution Amendment*, INTERNATIONAL FEDERATION OF JOURNALISTS, Feb. 28, 2018, <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/china-censors-in-overdrive-over-possible-constitution-amendment.html>; Charlotte Gao, *The CCP's Proposed Term Limit Change Shocks China*, THE DIPLOMAT, Feb. 26, 2018, <https://thediplomat.com/2018/02/the-ccps-proposed-term-limit-change-shocks-china/>.

¹¹⁶ Xi Wang et al., *China Censors Law Textbook Over 'Western' Influences*, RADIO FREE ASIA, Feb. 4, 2019, <https://www.rfa.org/english/news/china/textbook-02042019114215.html>; Chris Buckley, *A Chinese Law Professor Criticized Xi. Now He's Been Suspended*, N.Y. TIMES, Mar. 26, 2019.

¹¹⁷ Klaus-Jurgen Kuss, *New Institutions in Socialist Constitutional Law: The Polish Constitutional Tribunal and the Hungarian Constitutional Council*, 12 REV. SOCIALIST L. 343, 353-66 (1986).

¹¹⁸ For the limited impact of constitutional supervision organs in Eastern Europe, see Mark F. Brzezinski, *The Emergence of Judicial Review in Eastern Europe: The Case of Poland*, 41 AM. J. COMP. L. 153-200 (1993). For constitutional courts under authoritarian governments in East Asia, see generally TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

constitutional argument. Romania created a similar committee in 1965, and its impact on rights enforcement was negligible.¹¹⁹ Perhaps with such limitations in mind, even generally supportive Chinese commentators displayed flashes of ambivalence toward the Committee, characterizing it as a “low cost” or “compromise” step, or acknowledging “a certain gap” between the new committee and “the independent constitutional committee that the scholarly world has continuously promoted.”¹²⁰

The experience of the Hong Kong Basic Law Committee (“BLC”) is instructive here. In 1990, the NPC issued a decision to establish the BLC when Hong Kong’s mini-constitution, the Basic Law, came into effect seven years later.¹²¹ The Basic Law provides that the NPCSC is obliged to consult the BLC on a range of matters, including interpretation and amendment of the Basic Law and decisions to invalidate Hong Kong ordinances that conflict with the Basic Law.¹²² As Eric Ip argues, the BLC had the potential to play a significant role in interpreting the Basic Law and arbitrating constitutional tensions between the central government and the Hong Kong Special Administrative Region. It could have been a model for a future constitutional supervision committee on the mainland.¹²³ Instead, although the BLC exercises only advisory functions and the central government controls its membership, the BLC suffers from significant transparency deficits, and its role and influence are limited in practice.¹²⁴ The central government has deployed a variety of legal tools, including NPCSC interpretations of the Basic Law and legislation such as the Hong Kong

¹¹⁹ Leszek Garlicki, *Constitutional Developments in Poland*, 32 ST. LOUIS U. L. J. 713, 716 (1988).

¹²⁰ Han, *supra* note 53, at 6; Wang, *supra* note 7.

¹²¹ Quanguo Renmin Daibiao Dahui Guanyu Pizhun Xianggang Tebie Xingzhengqu Jibenfa Qicao Weiyuanhui Guanyu Sheli Quanguo Renmin Daibiao Dahui Xianggang Tebie Xingzhengqu Jibenfa Weiyuanhui de Jianyi de Jueding (全国人民代表大会关于批准香港特别行政区基本法起草委员会关于设立全国人民代表大会常务委员会香港特别行政区基本法委员会的决定的决定) [Decision of the NPC Approving the Proposal by the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region on the Establishment of the Committee for the Basic Law of the Hong Kong Special Administrative Region under the NPCSC], issued Apr. 4, 1990, art. 2, ZHONGGUO RENDA WANG (中国人大网) [CHINA NPC NET], <https://www.mfa.gov.cn/ce/cohk/chn/syzz/tyflsw/t54819.htm>.

¹²² Basic Law of the Hong Kong Special Administrative Region, adopted by the National People’s Congress of the People’s Republic of China, April 4, 1990, arts. 17(3), 18(3), 158(4), 159(3).

¹²³ See Eric C. Ip, *Prototype Constitutional Supervision in China: The Lessons of the Hong Kong Basic Law Committee*, 10 ASIAN J. COMP. L. 323-42 (2016).

¹²⁴ *Id.* at 339-41. See also Yash Ghai, *The Political Economy of Interpretation, in INTERPRETING HONG KONG’S BASIC LAW: THE STRUGGLE FOR COHERENCE*, 115-42 (Hualing Fu et. al, eds. 2007) (arguing that the Basic Law Committee has been “co-opted and subordinated to the Central Authorities”).

National Security Law, to tighten its grip on Hong Kong and narrow the scope of civil and political rights there.¹²⁵ The appointment of Li Fei, who served as Vice Director and then Director of the BLC over a ten-year period from 2008 to 2018, suggests that Chinese leaders could have a similar, marginal role in mind for the Constitution and Law Committee.

Assessing the Committee against the backdrop of other 2018 constitutional amendments brings the limited nature of the reform into sharper relief. One obstacle to a constitutional supervision committee with more expansive powers is that the creation of such a body would require a realignment of China's constitutional structure. It is notable that the NPC *did* undertake a constitutional restructuring of such magnitude in 2018 when it created a new state organ – the State Supervision Commission.¹²⁶ The fact that the NPC took such a step to constitutionalize and expand the powers of China's disciplinary apparatus, rather than to create a robust constitutional supervision mechanism, highlights the limited nature of the Constitution and Law Committee reform. The omission of the amendment creating the Constitution and Law Committee in the Party's 2018 constitutional amendment proposal is further evidence that it was a low priority. Some scholars, noting a lack of transparency and irregularities in the amendment approval process, have speculated that there may have been resistance to the amendments within the Party.¹²⁷ It is possible that the Committee was added as a late concession to generate support for the amendment package.

B. Efforts to Rationalize China's Constitutional System

If the Committee's impact in enforcing constitutional rights is likely to be limited, why proceed with the reform at all? Many of the 2018 amendments can be understood as components of a broad constitutional rationalization intended to eliminate gaps (perceived or actual) between the text of the Constitution and Party-state practice. For example, the 2015 Legislation Law amendment authorized cities with districts to promulgate local regulations.¹²⁸ However, the Constitution did not explicitly grant cities

¹²⁵ Ghai, *supra* note 124, at 127-28, 138 (observing that central authorities needed a “legal” and “reasonable” method to control Hong Kong and turned to NPCSC interpretation as one key method); Davis, *supra* note 104 (discussing the legal and political tools the central government has deployed to “replace the liberal constitutional order promised in the Basic Law with what is effectively a national security constitution”).

¹²⁶ Lin, *supra* note 5, at 11-12, 16.

¹²⁷ Zhang & Ginsburg, *supra* note 5, at 356.

¹²⁸ Quanguo Renmin Daibiao Dahui Guanyu Xiugai “Zhonghua Renmin Gongheguo Lifafa” de Jueding (全国人民代表大会关于修改《中华人民共和国立法法》的决定) [National People's Congress, Decision to Amend the PRC Legislation Law], adopted Mar. 15, 2015, arts. 31-36, ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DAIBIAO DAHUI (中华人民共和国全国人民代表大会) [NAT'L PEOPLE'S CONG.], http://www.gov.cn/zhengce/2015-03/18/content_2834713.htm.

such legislative authority. As noted in Section III(3), scholars had questioned the constitutionality of existing anti-corruption practices and early drafts of the PRC Supervision Law. The 2018 constitutional amendments provided a constitutional basis for these systems.¹²⁹ The amendment eliminating term limits for the state presidency provides a third example. The role of the state president is largely ceremonial. Even if Xi relinquished the state presidency, he could maintain a firm grip on China's political system as head of the Party and the Central Military Commission.¹³⁰ The amendment paves the way for Xi to retain all three of the top Party-state posts, thus mitigating the awkwardness of having another leader serve as ceremonial head of state in meetings with foreign leaders.

The Constitution and Law Committee can be viewed as part of this rationalization effort. The Party-state's commitment to "rule according to law" is a pillar of its governing legitimacy. Gaps between the leadership's reform rhetoric and the text of the Constitution, on the one hand, and Party-state practice, on the other, weaken the power of this legitimizing narrative. Chinese leaders regularly emphasize the Constitution as fundamental law and promote the narrative of a unified socialist legal system. Chinese citizens have pressed for a specialized constitutional supervision organ for decades, and the Party-state has made explicit commitments in this regard. Because the leadership's rhetorical commitments to the Constitution make such citizen demands difficult to ignore, the Constitution can become what some scholars have characterized as a regime "irritant."¹³¹ By creating the Constitution and Law Committee and demonstrating that the filing and review system is functioning, senior leaders can argue that they are fulfilling their commitments to strengthen constitutional supervision and reap corresponding legitimacy dividends.

The operation of the Constitution and Law Committee in turn bolsters the legitimacy of other state acts. The Committee's heavy emphasis on pre-promulgation review of draft legislation highlights this function. Committee review of legislative proposals may identify constitutional tensions that drafters did not recognize, allowing such tensions to be resolved prior to promulgation.¹³² Perhaps more importantly, when proposed legislation generates constitutional controversy, central leaders

¹²⁹ Amendment to the PRC Constitution, *supra* note 47, art. 47.

¹³⁰ Lin, *supra* note 5, at 14.

¹³¹ Chang & Law, *supra* note 32, at 510-11.

¹³² Legal scholars argue that assessing legislative conflicts prior to promulgation is preferable, as it avoids the tensions and complexity of the post-promulgation review process. Liu Songshan (刘松山), *Difang Renda Ji Qi Changweihui Baozheng Xianfa Shishi de Diwei He Zuoyong* (地方人大及其常委会保证宪法实施的地位和作用) [*The Status and Functions of Local People's Congresses and their Standing Committees in Ensuring Implementation of the Constitution*], FAXUE LUNTAN (法学论坛) [LEGAL FORUM], no. 3, 2009, at 89.

can quell such debates by noting that China's new constitutional committee has reviewed the legislation and resolved the issue. The Committee's endorsement of the constitutionality of the PRC Supervision Law and the NPC's 2021 decision on Hong Kong's electoral system are examples of this dynamic.¹³³ *Even if* the Committee's review and declarations of support are largely a formality, the operation of this specialized constitutional organ reinforces the narrative of constitutional supremacy.¹³⁴

Consistent with this narrative, China's leaders may depart from the practice of experimenting with some reforms that technically violate the Constitution. This practice has prompted scholarly debate about the propriety of so-called "benign violations" of the Constitution.¹³⁵ In a recent media discussion of Xi Jinping Thought on Rule of Law, one constitutional law scholar notes the phenomenon and argues that future reforms will be carried out strictly in accordance with the Constitution.¹³⁶ In an example of this shift, discussion of an NPCSC decision authorizing the Shanghai municipality to issue legislation for its Pudong district emphasized the constitutionality of the decision and contrasted it with the NPC's authorization of China's Special Economic Zones in the 1980s.¹³⁷ If maintaining the *form* of compliance with the Constitution is a core component of Xi's legal theory, even benign violations in the service of reform are problematic. To the extent existing constitutional provisions are unclear, constitutional interpretation, another key component of the

¹³³ The Committee can be expected to confer constitutional legitimacy on any proposal of importance to Party. As Committee Chair Li Fei emphasized in 2020, the Committee must incorporate Party leadership into all aspects of its legislative work, including the unified deliberation of draft laws. Li, *supra* note 70, at 13-14.

¹³⁴ Thomas Kellogg, *The Rule of Law in Asia: The Case of China*, in HANDBOOK ON THE RULE OF LAW 490-508 (Christopher May & Adam Winchester eds., 2018) (arguing that state authorities have used the Constitution during the legislative process to justify action, but noting that observers have not uncovered examples of the NPC or NPCSC deciding against legislative action important to the leadership because such action was unconstitutional).

¹³⁵ See, e.g., Hao Tiechuan (郝铁川), *Lun Liangxing Weixian* (论良性违宪) [*On Benign Violations of the Constitution*], FAXUE YANJIU (法学研究) [LEGAL STUD.], no. 4, 1996, at 89-91; Tong Zhiwei (童之伟), "Liangxing Weixian" Buyi Kending ("良性违宪" 不宜肯定) [*It Is Not Appropriate to Affirm "Benign Constitutional Violations"*], FAXUE YANJIU (法学研究) [LEGAL STUD.], no. 6, 1996, at 19-22. The transfer of land use rights in the 1980s is one example. Clarke, *supra* note 11, at 105-08.

¹³⁶ Zhu Zheng, *Understanding Xi Jinping Thought on Rule of Law*, CHINA GLOBAL TELEVISION NETWORK, Nov. 21, 2021, <https://news.cgtn.com/news/2020-11-19/Understanding-Xi-Jinping-thought-on-the-rule-of-law-VxugROqvV6/index.html> (discussing November 2020 Party conference at which Xi Jinping set out his thought on "rule of law" and emphasizing the need for future reforms to adhere to the constitutional text).

¹³⁷ NPC LAC Constitution Office Deciphers "Pudong New District Regulation", *supra* note 80 (observing that the authorization of SEZs lacked a clear constitutional basis).

Committee's functions, can bridge the gap and address changing social conditions in a manner consistent with leadership objectives.¹³⁸

The reforms also advance efforts to rationalize the legal system by strengthening the implementation of central law and policy. Under Xi's leadership, the Party has renewed its commitment to legal reform in part to reinforce the legal system as an instrument to centralize authority and discipline China's vast bureaucracy.¹³⁹ The principal functions of filing and review are to ensure that central directives are implemented and to reinforce the unity, stability, and authority of the socialist legal system.¹⁴⁰ The 2019 Work Measures on Filing and Review emphasize that legislation is reviewed to ensure consistency with the Constitution and national law and with the orders and policies of the Party Central Committee.¹⁴¹ As a work organ, the LAC's Filing and Review Office cannot force other state organs to correct problematic legislation. While recent scholarship suggests that the LAC has become more assertive on these issues,¹⁴² the Constitution and Law Committee has greater institutional prestige to deploy in coordinating efforts to resolve legislative conflicts. As such, the Committee arguably reinforces the filing and review system as an instrument of bureaucratic discipline.¹⁴³

Filing and review reforms demonstrate that the Party-state is mobilizing Chinese citizens to advance this governance objective. The central government depends on citizen proposals to help it identify and prioritize conflicts in China's complex legislative system. As one LAC publication observed, "Experience proves that it is difficult to discover

¹³⁸ Han, *supra* note 74, at 4. See also Sophia Woodman, *Legislative Interpretation by China's National People's Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law* 229, 236-38 in INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE (Hualing Fu et al. eds. 2007) (discussing the functions of legislative interpretation in socialist legal systems).

¹³⁹ Jacques DeLisle, *The Rule of Law with Xi-Era Characteristics: Law for Economic Reform, Anticorruption, and Illiberal Politics*, 20 ASIA POLICY 23, 23-29 (July 2015); Zhang & Ginsburg, *supra* note 5, at 369-71.

¹⁴⁰ 2017 Filing and Review Work Report, *supra* note 84, § 1.

¹⁴¹ 2019 Work Measures on Filing and Review, *supra* note 82, art. 2 (providing that the NPCSC conducts filing and review work to guarantee the orders and prohibitions of the Party Central Committee, safeguard the implementation of the Constitution and law, and protect the legitimate rights and interests of citizens); *id.* art. 37 (providing that when regulations or judicial interpretations are found to be inconsistent with the major decisions of the Party Central Committee, review opinions should be submitted).

¹⁴² Wei, *supra* note 85, at 51-52.

¹⁴³ Hu, *supra* note 71, at 80 (noting that the LAC lacks independent status and arguing that the Constitution and Law Committee, due to its representative status, the mechanism by which it was created, and its character as a special committee, is in a stronger position to assist the NPCSC with constitutionality review and to coordinate with other state organs).

problems through active review. Only by mustering the enthusiasm of the masses . . . can we discover unlawful normative documents and address them in a timely manner.”¹⁴⁴ However, the failure of NPC organs to publish findings or issue responses to citizen review proposals had shaken public confidence in the system.¹⁴⁵ By increasing the transparency of filing and review work, the Party-state encourages Chinese citizens to identify legislative conflicts. Such efforts to enlist citizens in monitoring state actors at lower levels are consistent with other recent reforms, such as amendments to expand the scope and impact of the PRC Administrative Litigation Law.¹⁴⁶ Public engagement with citizens on review proposals also burnishes the Party-state’s narrative that it practices “people’s democracy.”¹⁴⁷ To the extent citizen review proposals do not conflict with core Party-state interests, they may help build momentum for modest reforms that enhance rights on the margins of the political-legal system. In some respects, the concrete developments in the filing and review system discussed here may challenge scholarly assertions that the Constitution is a “false blueprint” or matters to the Party *because* it is not a useful mechanism for resolving governance problems.¹⁴⁸

C. Conditioning China’s Political-Legal Landscape to Manage Constitutional Reform Risks

Writing in 2016, I did not expect the potential legitimacy and governance benefits of creating a specialized constitutional supervision organ to prompt China’s leaders to take even the modest step of creating a constitutional committee with advisory functions. A constellation of countervailing factors, including the problem of reversing Deng Xiaoping’s

¹⁴⁴ THEORY AND PRACTICE OF REGULATORY DOCUMENT FILING AND REVIEW, *supra* note 18, at 130.

¹⁴⁵ *Id.* at 132-134.

¹⁴⁶ For recent amendments to the Administrative Litigation Law, see He Haibo, *How Much Progress Can Legislation Bring? The 2014 Amendments of the Administrative Litigation Law of the PRC*, 13 U. PA. ASIAN L. REV. 137-190 (2018). As Wang Jing has argued, the revised law strengthened norms and standards for judicial review of “regulatory documents” that conflict with higher legislation. Wang Jing, *Judicial Review of Regulatory Documents in China*, 16 U. PA. ASIAN L. REV. 328, 355-58 (2021).

¹⁴⁷ 2021 Filing and Review Work Report, *supra* note 102, § 2 (explaining that earnestly receiving, studying, and handling citizen review suggestions and giving timely feedback manifests “the practice of people’s democracy”).

¹⁴⁸ Kellogg, *supra* note 134, at 497, 499-502, 508 (arguing that the Constitution is a “false blueprint” and concluding that Xi Jinping has departed from an “authoritarian legality paradigm”); Ling Li & Wenchang Zhou, *Governing the “Constitutional Vacuum” – Federalism, Rule of Law, and Politburo Politics in China*, 4 CHINA L. & SOC’Y. REV. 1-40 (2019) (“the constitution appeals to the Chinese Communist Party . . . because it does not provide solutions to fundamental issues of governance”; resulting constitutional vacuum allows the Party to exert control through alternative mechanisms).

rejection of a specialized constitutional committee, the association of such committees with failed communist regimes, the Party-state's need for flexibility in addressing complex constitutional questions, and concerns that Chinese citizens might leverage a constitutional committee to advance sensitive constitutional arguments, seemed to tip the balance in favor of conservatism on this institutional reform question.¹⁴⁹

Why did Chinese leaders assess the apparent costs and benefits differently? As Taisu Zhang and Tom Ginsburg argue in a recent article, the 2018 amendments suggest that the Constitution may have greater significance in China than many observers assumed.¹⁵⁰ In their account, the growing political importance of the Constitution is the product of mutually reinforcing factors, including the Party-state's heavy investment in socialist legality as a source of governing legitimacy and a tool of central control, and corresponding societal pressure on the Party-state to live up to its commitments.¹⁵¹ As discussed above, the creation of the Constitution and Law Committee could be evidence of such dynamics. The legitimacy dividends and governance benefits of this reform may simply have had greater weight in the leadership's calculus than I expected.

At the same time, the Party-state has taken numerous steps to manage risks related to reform of the constitutional supervision system. While Xi has restored and modestly expanded on the constitutional and legal reforms of the 1990s, he has worked to contain some of the consequences of earlier stages of reform, including the emergence of the rights defense movement and citizen constitutional argument. As the rights defense movement gained momentum in the mid-2000s, senior leaders identified it as a threat, warning that China must “[e]ffectively guard against enemy forces,” including those who use “the pretense of rights defense to engage in sabotage.”¹⁵² The strategies and objectives of some rights lawyers also evolved, from a focus on advocacy in individual cases to civic organizing and constitutional discourse that challenged China's

¹⁴⁹ Keith Hand, *An Assessment of Socialist Constitutional Supervision Models and Prospects for a Constitutional Supervision Committee in China*, in CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 30-44 (John Garrick & Yan Chang Bennett eds. 2016).

¹⁵⁰ Zhang & Ginsburg, *supra* note 5, at 351-52, 356-58.

¹⁵¹ *Id.* § IV.

¹⁵² Luo Gan (罗干), *Shenru Kaizhan Shehuizhuyi Fazhi Linian Jiaoyu, Qieshi Jiaqiang Zhengfa Duiwu Sixiang Zhengzhi Jianshe* (深入开展社会主义法治理念教育 切实加强政法队伍思想政治建设) [*Deeply Carry Out Education on Socialist Rule of Law Concepts, Strengthen the Ideological and Political Construction of the Political-Legal Team*], QIUSHI (求是) [SEEKING TRUTH], Apr. 11, 2006, ZHONGGUO GAIGE XINXIKU (中国改革信息库) [CHINA REFORM DATABASE], <http://www.reformdata.org/2006/0615/19714.shtml>.

political-legal system more overtly.¹⁵³ The Party-state has taken three interrelated steps to manage these tensions and cripple liberal interpretations of the Constitution. Although these efforts commenced prior to 2012, Xi Jinping has strengthened all of them.

First, it has marginalized activist lawyers, liberal scholars, and other individuals who have raised constitutional arguments. State harassment of rights activists increased in the mid-2000s.¹⁵⁴ Under Xi Jinping, repression of rights defense lawyers reached a new crescendo in the summer of 2015, when authorities detained hundreds of lawyers and their affiliates in a nationwide round-up.¹⁵⁵ The scale of the “709 crackdown,” and the Party-state’s zeal to publicize detentions, marked an intensification of efforts to marginalize rights lawyers.¹⁵⁶ In the wake of the crackdown, the Party-state has continued to harass, disbar, and prosecute some lawyers, co-opted others, and launched new regulatory initiatives to keep the legal profession in check.¹⁵⁷ For example, a 2016 Ministry of Justice directive instructs law firms to prevent lawyers from using online campaigns or open letters to “create public opinion pressure” or to “publish or disseminate speech that denies the fundamental political system firmly established in the Constitution.”¹⁵⁸ A 2021 All China Lawyers Association directive goes further and prohibits lawyers from engaging in commentary that “triggers social conflict,” “incites dissatisfaction with the Party and state,” or “violates the Party’s line, directives, and policies, denies the leadership of the Party, or denies socialist rule of law with Chinese characteristics.”¹⁵⁹ Efforts to marginalize individuals also have targeted constitutional law

¹⁵³ Eva Pils, *From the Independent Lawyer Groups to Civic Opposition: The Case of China’s New Citizen Movement*, 19 *ASIAN-PAC. L. & POL. J.* 110, 129-33 (2017).

¹⁵⁴ See generally Human Rights Watch, *Walking on Thin Ice: Control, Intimidation, and Harassment of Lawyers in China* (2008), <https://www.hrw.org/reports/2008/china0408/>.

¹⁵⁵ Alex Palmer, *‘Flee at Once’: China’s Besieged Human Rights Lawyers*, N.Y. TIMES, July 25, 2017, <https://www.nytimes.com/2017/07/25/magazine/the-lonely-crusade-of-chinas-human-rights-lawyers.html>; Fu Hualing and Han Zhu, *After the July 9 (709) Crackdown: The Future of Human Rights Lawyering*, 41 *FORDHAM J. INT’L L.* 1135, 1135-53 (2018).

¹⁵⁶ Pils, *supra* note 153, at 144-45.

¹⁵⁷ Fu and Han, *supra* note 155.

¹⁵⁸ Ministry of Justice, *Lüshi Shiwusuo Guanli Banfa* (律师事务所管理办法) [Measures on Law Firm Administration], issued Nov. 1, 2016, art. 50.

¹⁵⁹ Zhonghua Quanguo Lüshi Xiehui Guanyu Jinzhi Weigui Chaozuo Anjian de Guiding (Shixing) (中华全国律师协会关于禁止违规炒作案件的规则 (试行)) [All China Lawyers Association, Provisions (Trial Implementation) on Prohibiting Unlawful Hying of Cases], issued Sept. 10, 2021, *ACLA CHINA*, arts. 2, 4, 8, <http://www.acla.org.cn/article/page/detailById/32079>.

scholars, as the suspension and dismissal of Teng Biao, Zhang Xuezhong, Xu Zhangrun, and other scholars illustrate.¹⁶⁰

The recent indictment of rights lawyer and former law lecturer Xu Zhiyong provides a vivid example of the Party-state's determination to suppress influential constitutional activists. Xu rose to prominence in 2003 as one of three scholars who filed a proposal with the NPCSC challenging China's custody and repatriation system.¹⁶¹ Although feted in the state press for his 2003 effort, Xu later ran afoul of authorities as he pursued more overt political advocacy. To promote constitutionalism and citizen engagement, Xu co-founded the Open Constitution Initiative ("OCI") and, after OCI was shut down, the New Citizen Rights Movement.¹⁶² After serving a four-year sentence for the crime of "gathering crowds to disrupt public order," Xu continued his advocacy, triggering a new detention and more serious charges of inciting subversion of state power in August 2021. The criminal indictment against Xu lists a range of "offenses" related to his activism, including "slander[ing] our [China's] political system," advocating "constitutionalist transition," promoting "color revolution," and founding an "illegal organization."¹⁶³ Even Xu's defense lawyer has been marginalized. In November 2021, the Beijing Justice Bureau revoked Liang Xiaojun's license to practice law for, among other reasons, "smearing the foundational systems and basic principles set out in the Constitution and law."¹⁶⁴

In a second, closely related effort, the Party-state has undertaken a sustained campaign to condition China's ideological landscape by tightening controls over constitutional discourse and advancing Party-centric constitutional narratives. The Party's Central Document No. 9,

¹⁶⁰ Feng Chongyi, *China's Socialist Rule of Law: A Critical Appraisal of the Relationship Between the Communist Party and Comprehensive Law Reform*, in CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 54 (John Garrick & Yan Chang Bennett eds. 2016); Buckley, *supra* note 116. Xu's suspension triggered discussions of sanctions on other scholars. *What Does the Punishment of a Prominent Scholar Mean for Intellectual Freedom in China*, CHINAFILE, March 28, 2019, <https://www.chinafile.com/conversation/what-does-punishment-of-prominent-scholar-mean-intellectual-freedom-china>.

¹⁶¹ For an overview of Xu Zhiyong's legal and political advocacy through 2015, see generally Pils, *supra* note 153, §§ II, IV.

¹⁶² *Id.* at 129-34.

¹⁶³ *Citizens Movement Advocates Xu Zhiyong and Ding Jiayi Indicted for Subversion on Scant, Slanderous 'Evidence'*, CHINA CHANGE, Sep. 25, 2021, <https://chinachange.org/2021/09/25/civil-rights-activists-xu-zhiyong-and-ding-jiayi-indicted-for-subversion-on-scant-slanderous-evidence>.

¹⁶⁴ *New Wave of Persecution Against Chinese Human Rights Lawyers Must Sound the Alarm*, CHINA HUMAN RIGHTS DEFENDERS, Dec. 6, 2021, <https://www.nchr.org/2021/12/new-wave-of-persecution-against-chinese-human-rights-lawyers-must-sound-the-alarm/>.

issued in 2013, cited “intense struggles” in the “ideological situation” and discussed seven ideological threats. First on this list of threats, which included promoting civil society, press freedom, and universal values, was “promoting Western constitutional democracy”:

In commemorating the thirtieth anniversary of the enactment of the [Chinese] Constitution, [some people] hold up the banners of “defending the constitution” and “rule of law.” They attack the Party’s leaders for placing themselves above the constitution, saying China “has a constitution but no constitutional government.” . . . The point of publicly proclaiming Western constitutional democracy’s key points is to oppose the Party’s leadership and implementation of its constitution and laws.¹⁶⁵

To “strengthen management of the ideological battlefield,” the Party-state has significantly tightened controls over constitutional discourse in educational institutions and the media, launched a media campaign criticizing “constitutionalism,” and removed some constitutional law textbooks from bookstores.¹⁶⁶ The Central Committee’s Fourth Plenum Decision and Plan for Building a Rule of Law China (2020-2025) focused on Party leadership as the core of China’s constitutional system and emphasized that reforms are subject to this fundamental principle.¹⁶⁷ In this formulation, “implementing the Constitution and law” and preserving Party supremacy are two sides of the same coin. As Ling Li and Wenzhang Zhou observe, the intention is to “legalize the Party-state structural link, thus turning its semi-concealed *de facto* union with the state into a *de jure* marriage.”¹⁶⁸ By promoting this conception of the constitutional order more explicitly, the Party responds to and crowds out competing constitutional visions.

The leadership’s determination to dominate constitutional discourse was on full display in the run-up to the 2018 constitutional amendment. As numerous sources noted, authorities limited public consultation and

¹⁶⁵ *Document 9: A ChinaFile Translation*, CHINAFILE, Nov. 8, 2013, <https://www.chinafile.com/document-9-chinafile-translation>.

¹⁶⁶ Rogier Creemers, *China’s Constitutionalism Debate: Content, Context, and Implications*, 74 THE CHINA JOURNAL 91, 94-106 (July 2015); Feng, *supra* note 160, at 49, 51-56; Xi Wang et al., *supra* note 116.

¹⁶⁷ Fourth Plenum Decision, *supra* note 40, §§ I, II; Party Central Publishes the Plan on Building a Rule of Law China 2020-2025, *supra* note 58 (emphasizing, as the first and main principle, “persisting in the centralized and unified leadership of the Party and firmly grasping the leadership of the Party as the most fundamental guarantee of socialist rule of law”); Jiang and Jiang Q., *supra* note 57, §§ I(1), 2(2) (confirming that anyone who denies Party leadership under any pretext is violating the Constitution).

¹⁶⁸ Li & Zhou, *supra* note 148, at 21.

discussion of the amendment package and censored unfavorable views.¹⁶⁹ Moreover, even as it injected new transparency into the filing and review system, the LAC included brief descriptions of only selected citizen review proposals. By presenting a few carefully curated cases, rather than publishing a comprehensive database of all citizen review proposals, the NPCSC and its work organs can deflect attention from the most sensitive constitutional rights arguments.¹⁷⁰

Finally, the Party-state has taken steps to weaken the legal basis for liberal constitutional arguments. The 2018 amendment to Article 1 of the Constitution added the phrase, “The defining feature of socialism with Chinese characteristics is the leadership of the Communist Party of China,” thereby enshrining the principle of Party leadership in the main body of the Constitution. Before the amendment, references to Party leadership appeared only in the Preamble. Chinese scholars are divided over the legal effect of the Preamble, and some conclude that it is not binding.¹⁷¹ This gave citizens a sliver of textual space to argue that the Constitution should limit Party power.¹⁷² The amendment of Article 1 sidelines such debates. The Party’s grip on China’s political-legal system is not seriously in question, and, prior to 2018, Chinese courts occasionally swatted down rights arguments by citing constitutional provisions conditioning the exercise of rights on duties to the state, society, and public order.¹⁷³ In this context, the fact that the Party attached importance to amending Article 1 demonstrates its determination to eliminate any remaining legal space that citizens might leverage to advance rights claims or otherwise challenge its supremacy.

As Xi Jinping has refined this “Thought on Rule of Law” in the years following the 2018 constitutional amendments, he has woven together several of the threads discussed here. In a March 2021 article in *Qiu Shi*, Xi identified adherence to the Constitution as one of eleven key components of his thought and then expounded on the essential characteristics of constitutional governance:

¹⁶⁹ Lin, *supra* note 5, at 11-12; Gao, *supra* note 115.

¹⁷⁰ Citizens have published numerous review proposals containing such sensitive content. Hand, *supra* note 27, at 93.

¹⁷¹ Zhang Qianfan (张千帆), *Xianfa Xuyan Ji Qi Xiaoli Zhengyi* (宪法序言及其效力争议) [*The Dispute Over the Effect of the Preamble to the Constitution*], GUANCHAZHE (观察者) [OBSERVER], June 17, 2013, https://www.guancha.cn/ZhangQianFan/2013_06_17_151869.shtml.

¹⁷² Fu & Zhai, *supra* note 34, at 657 (noting that because Party leadership is not mentioned in the “enactive” provisions of the Constitution, some scholars minimized its significance).

¹⁷³ *Translation and Commentary: Verdict in Guo Quan Subversion Case Shows Conflict Between Free Expression and State Security*, DUI HUA HUMAN RIGHTS J., Oct. 22, 2009, <https://www.duihuahrjournal.org/2009/10/translation-commentary-verdict-in-guo.html>.

The Fourth Plenum of the 18th Central Committee of the Communist Party of China unequivocally stated that to persist in ruling the country according to law, we must first persist in ruling the country according to the Constitution, and to persist in governing according to law, we must first persist in governing according to the Constitution. When we speak of ruling the country according to the Constitution and governing according to the Constitution, there is an essential difference with so-called “constitutionalism” in the West, and we can’t confuse the two. Persisting in ruling the country according to the Constitution and governing according to the Constitution includes persisting, without wavering, in the leadership status of the Communist Party of China stipulated in the Constitution and persisting, without wavering, in the state system of the people’s democratic dictatorship and governing form of the people’s congress system stipulated in the Constitution.

Upholding the unity of state rule by law is a serious political issue. Our country is a unitary state, and upholding the unity of state rule by law is extremely important. The Legislation Law was amended in 2015 and gave cities with districts local legislative powers. Local legislative work has made positive progress, and the overall situation is good. But in some locales, there are still issues with provisions that contravene higher law, legislative “leakage,” etc., with very negative impacts. We must strengthen implementation and supervision of the Constitution, promote the work of constitutionality review, and firmly correct and annul all regulations and normative documents that violate the Constitution and law.¹⁷⁴

As a result of the 2018 amendments, Xi can cite to the stipulations of the Constitution to wrap the principle of Party leadership in a veil of constitutionality and dismiss Western constitutional theories that have inspired reformist constitutional arguments. Having set out this core element of his constitutional theory, Xi can then focus on constitutional supervision as the solution to a practical governance problem – resolving legislative conflicts and unifying China’s legal system. His article signals

¹⁷⁴ Xi Jinping (习近平), *Jianding Buyi Zou Zhongguo Tese Shehui Zhuyi Fazhi Daolu Wei Quanmian Jianshe Shehuizhuyi Xiandaihua Guojia Tigong Youli Fazhi Baozhang* (坚定不移走中国特色社会主义法治道路为全面建设社会主义现代化国家提供有力法治保障) [*Resolutely Persist in Taking the Road of Socialist Rule of Law with Chinese Characteristics, Provide a Strong Rule of Law Guarantee for Comprehensively Building a Modern Socialist*], QISHI WANG (求是网) [SEEKING TRUTH NET], no. 5, Feb. 28, 2021, § 4, ¶¶ 2-3, http://www.qstheory.cn/dukan/qs/2021-02/28/c_1127146541.htm.

that further institutional developments are likely to concentrate on the filing and review system and corresponding efforts to clean up conflicting local legislation, a conclusion supported by contemporaneous statements in the NPC system.¹⁷⁵

Perhaps then, it is appropriate to characterize the creation of the Constitution and Law Committee and corresponding reforms to the filing and review system as efforts to refine the *narrative* of socialist constitutional supremacy. While the creation of the Committee involves more than simply a name change, China's leaders chose one of the weakest socialist constitutional supervision models, and they did so only after enhancing the constitutional status of the Party and undertaking a campaign to marginalize competing constitutional visions. When the recent reforms are viewed in this context, they demonstrate the Party's confidence that it dominates China to such a degree that it can reap the legitimacy and governance benefits of answering four decades of calls for specialized constitutional supervision infrastructure without incurring material risks of unintended consequences. The Constitution may be important in Xi's China, but as an instrument of central control, not as a tool for rights enforcement. As one scholar remarked in assessing the impact of Poland's constitutional tribunal prior to 1989, the reform presents "the illusion of constitutional legality without challenging [the system's] most fundamental assumptions."¹⁷⁶

¹⁷⁵ Commentary by NPCSC leaders places heavy emphasis on the filing and review of legislation as a focal point for people's congress constitutional supervision. See, e.g., Yang Zhenwu (杨振武), *Laolao Bawo "Sige Jiguan" Dingwei Yaoqiu Quanmian Jiaqiang Xin Shidai Renda Gongzuo He Jianshe* (牢牢把握“四个机关”定位要求全面加强新时代人大工作和建设) [*Firmly Grasp the Positional Demands of the "Four Organs" and Comprehensively Strengthen People's Congress Work and Construction in the New Era*], QIUSHI WANG (求是网) [SEEKING TRUTH NET], No. 22, Nov. 16, 2021, § 4, ¶¶ 2, 4. Similarly, the LAC's 2021 Filing and Review Work Report closely tracks Xi's language in identifying priority issues. 2021 Filing and Review Work Report, *supra* note 102, §§ 5, 6, http://www.qstheory.cn/dukan/qs/2021-11/16/c_1128064618.htm (strengthening guidance of local people's congresses, carrying out research on "legislative leakage," and carefully handling constitutionality related issues among key issues of focus in 2021 and 2022).

¹⁷⁶ Brzezinski, *supra* note 118, at 175.