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**THE 1982 CHINESE CONSTITUTION AND
THE RULE OF LAW**

Hungdah Chiu

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All contributions (in English only) and communications should be sent to

Professor Hungdah Chiu, University of Maryland School of Law,
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THE 1982 CHINESE CONSTITUTION AND THE RULE OF LAW

HUNGDAH CHIU

Professor of Law, University of Maryland School of Law

1. Introduction

One of the major reforms of the post-Mao leadership in the People's Republic of China (PRC) is to strengthen the socialist legal system in order to provide a more secure and stable environment for carrying out the PRC's four modernizations program. To achieve this goal, the PRC has taken a series of measures¹ to reform its legal system in an attempt to establish a limited degree of a "rule of law" in China. Among these measures, the PRC leaders and scholars have placed a special emphasis on the Constitution promulgated on 4 December 1982.² In presenting the draft of the Constitution to the Fifth Plenary Meeting of the Fifth National People's Congress on 26 November 1982, Peng Zhen, Vice-Chairman of the Committee on Constitutional Amendment stated:

Our state system and social system provide both legal and practical guarantees that our citizens enjoy extensive and genuine freedoms and rights. The draft has reinstated the provision in the 1954 Constitution that all citizens are equal before the law. China's laws are drawn up by the whole nation under the leadership of the working class and are the concentrated expression of the will and interests of the people. All citizens are equal before such laws, which apply to all citizens equally; no citizen is allowed to enjoy the privilege of being above the Constitution and the law. It is imperative to reinstate this provision, for it represents a basic principle that ensures the application of socialist democracy and legality.³

In concluding, Peng also emphasized that the Chinese Communist Party (CCP) is very serious about this Constitution and also understands the importance of a constitution to the political life of a state. He said:

In his report to the 12th National Congress of the Communist Party of China, Comrade Hu Yaobang solemnly declared: "In particular Party members should be educated and urged to take the lead in observing the Constitution and laws." The stipulation in the new Party Constitution that 'the Party must conduct its activities within the limits permitted by the Constitution and laws of the state' embodies a most important principle. It

is impermissible for any Party organization or member from the Central Committee down to the grass roots, to act in contravention of the Constitution and laws” The Chinese people and the Communist Party of China fully recognize that the authority of the Constitution concerns the political stability and the future of our country, and that it is absolutely impermissible to undermine the Constitution in any way.⁴

The preamble of the 1982 Constitution states that “[t]he people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation”. Article 5 specifically provides that “[a]ll state organs, the armed forces, all political parties and public organizations, all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be examined”.⁵

In the opinion of a prominent PRC scholar, “the new Constitution makes clear the important principle of ‘governing a country by law’ and fully confirm the ‘rule of law’; thus possesses the important significance of restoring order and returning to the right path in both theory and practice”.⁶ Other Chinese scholars, however, are not so optimistic since most of them only referred to “strengthening the legal system” or “governing the country by law”, and almost no one referred to a “rule of law”.⁷

This paper will analyze the Chinese Constitution and its related problems in order to discern whether a “strengthened” Chinese legal system with emphasis on “governing the country by law” would provide a limited “rule of law” for Chinese society. The paper will begin with an analysis of the Chinese constitutional experience prior to the promulgation of the 1982 Constitution.

2. Chinese Constitutional Development from 1949 to 1981

Before the promulgation of the present Constitution in 1982, the PRC lived under four constitutions. Furthermore, a draft constitution of 1970 was recalled before its promulgation. The following table provides a concise description of the fate of each constitution:

<i>Year of Constitution</i>	<i>Fate</i>
1) 1949 Common Program of the Chinese People’s Political Consultative Conference (Provisional Constitution) ⁸	Replaced by the 1954 Constitution

- 2) 1954 Constitution⁹

When the Great Proletarian Cultural Revolution broke out in 1966, this Constitution was disregarded. Legally it was replaced by the 1975 Constitution.
- 3) Draft 1970 Constitution¹⁰

This draft was allegedly put out by Lin Biao, then Defense Minister and Vice-Chairman of the Party. It was distributed nationwide for discussion but was recalled after the failure of the alleged Lin Biao coup against Mao in the fall of 1971.
- 4) 1975 Constitution¹¹

This was later called the “Gang of Four” Constitution and after the fall of the “Gang” in October 1976, it appeared to be ignored, so, in fact, it lasted less than 2 years (17 January 1975 to October 1976). It was replaced by the 1978 Constitution.
- 5) 1978 Constitution¹²

Adopted by the National People’s Congress on 5 March 1978. On 1 July 1979, Articles 34, 35, 36, 37, 38, 42, and 43 were amended.¹³ The present constitution replaced it on 4 December 1982. It thus lasted only 4 years and 9 months.

In addition to having several constitutions in the last three decades, many provisions of a constitution were usually ignored even when that constitution was nominally in force. For instance, Article 90, paragraph 2 of the 1954 Constitution provided that “[c]itizens of the People’s Republic of China enjoy freedom of residence and freedom to change their residence”.¹⁵ But, in fact, not only did the PRC impose severe restrictions on a citizen’s freedom to change his/her residence, but also, since the early 1960s, the government began to send thousands of educated youth to rural areas for permanent settlement. These youths could not return to the cities without special permission. Article 89 of the 1954 Constitution provided: “Freedom of the person of citizens of the People’s Republic of China is inviolable. No citizen may be arrested except by decision of a people’s court or with the sanction of a people’s procuracy”.¹⁶ Nobody disputes that this article was totally ignored. There were numerous violations of the PRC Constitutions in the past and there was no “rule of law” under the previous constitutions. A PRC scholar summarized:

It is quite clear that if we can practice “rule of law” and if our country’s socialist legal system ... develops to achieve the goal of “having laws for people to follow, strictly observing these laws, severely enforcing these laws and seriously dealing with law breakers”, then the chaotic lawless situation which occurred during the ten years of turmoil [*i.e.*, 1966-1976 Cultural Revolutionary Period], the stamping on the solemn constitution like waste paper, the arbitrary dismissal of the Chairman of the state and his death resulting from insulting and persecution and other shocking atrocities, will never occur. Similarly, the phenomena of “power is greater than law”, “using power to suppress law”, “using [an official’s] words to substitute law”, “refusing to follow law”, despising and ignoring the function of legal system or law ... can also be avoided.¹⁷

Moreover, the fact that in the past thirty or so years, there has not been a single case to interpret constitutional provisions, despite the fact that the Standing Committee of the National People’s Congress was assigned the role of interpreting the Constitution under the 1954 and 1978 Constitutions, also serves to highlight the lacking degree of weight which the Chinese Communist Party places on the Constitution as a means of governing China. In this connection the 1949 Common Program and the 1975 Constitution are more honest. The former simply contains no provisions on interpreting constitution and laws and the latter only gives the NPC Standing Committee the right to interpret laws. Moreover, there appears to have been no case on the interpretation of law in the PRC by the NPC Standing Committee in the past, despite the fact that the latter was assigned that role by the 1954, 1975, and 1978 Constitutions.¹⁸

While the Chinese constitutions in the past have little relevance to the “rule of law”, one should not infer from this fact that the constitution is not politically significant. Generally, each Chinese constitution before 1982 has contained a preamble and four chapters. The preamble’s importance lies in the fact that it indicates how the Chinese Communist Party perceives recent developments in Chinese history and reveals policy trends, both domestic and foreign. For instance, the preamble of the 1954 Constitution refers to “resistance to American aggression” and “an indestructible friendship with the great Union of Soviet Socialist Republics”¹⁹ The abortive 1970 draft constitution mentions “the leadership of the Central Committee of the Communist Party of China, headed by Chairman Mao with Vice-Chairman Lin, second-in-command ...”.²⁰ The preamble of the 1975 Constitution makes reference to the “threat of subversion and aggression by imperialism and social-imperialism”.²¹ The 1978 Constitution states in the preamble that “the triumphant conclusion of the first Great Proletarian Cultural Revolution has ushered in a new period of development in China’s socialist revolution and socialist construction”,²² which is contrary to the present leadership’s position that the “Cultural Revolution” was “ten years of disaster”.

Chapter 1 of a PRC Constitution is entitled “General Principles”, which sets

forth the basic principles and nature of the PRC state, the political and economic system, policies, and others. The second chapter deals with the structure of the state organs. This chapter reflects the view of the CCP on how state organs should be organized at the time of the promulgation of the Constitution. If the CCP later changes its view on the organization of the state organs, this part of the Constitution cannot bar the CCP from doing so. During the Cultural Revolution Period, this part of the 1954 Constitution was almost totally ignored in practice. Thus, Chairman Liu Shaoqi was removed from his position as the Chairman of the PRC by the CCP without following any procedures as provided in Article 28 of the 1954 Constitution which requires the approval of the National People's Congress. Recently a scholar revealed the situation of his dismissal as follows:

On 5 August 1967, Jiang Qing and Kang Sheng planned personally to conduct a large-scale struggle meeting to criticize Liu Shaoqi in Zhongnanhai and sent two "Central Cultural Revolution Special Commissioners" with special status to supervise the struggle meeting. They vehemently criticized and humiliated [Liu]. After the struggling and criticizing [session], Liu was sent to his office under guard. Although he was extremely tired, he still used his trembling hands to take a copy of "The Constitution of the People's Republic of China" and spoke sternly and forcefully for the cause of justice in presenting his protest:

"Your [mistreatment of me] personally is not important. But I am the Chairman of the People's Republic of China and I want to safeguard the dignity of the Chairman of the state. Who dismissed me from my position as the Chairman of the state? [If you] want to try me you must go through the [National] People's Congress. Your behavior is insulting our country. Individually I am also a citizen, why not let me speak? The Constitution guarantees the inviolability of a citizen's personal right and a person who undermines the Constitution is to be severely punished by law!"²³

Liu's invocation of the Constitution was, of course, futile and he was continuously detained by the Cultural Revolutionary unit and harassed until his death in 1969.

Similarly, the Revolutionary Committees established during this period to replace the various levels of government can hardly be grounded on any provision in the 1954 Constitution. So far as the judiciary is concerned, the procuracy was in fact abolished in the late 1960s in total disregard of the Constitution.²⁴

The third chapter is entitled rights and duties of citizens, which, as stated earlier, were almost totally ignored in practice. The last chapter provides for a national flag, national emblem and capital.

All PRC constitutions provide procedure for amending constitutional provisions by the National People's Congress but, except for the 1978 Constitution, no amendment was ever made. The CCP leaders at different stages normally

choose to discard the whole constitution and enact a new one, instead of amending the existing one. There are two reasons for this. First, there is the preamble problem; amending the preamble is an interesting question on which there is no precedent in other countries' constitutional practice. Second, CCP leaders had divergent views on the contents and length of a constitution at different stages. The 1954 Constitution had 106 articles with somewhat detailed provisions. Lin Biao and the so-called "Gang of Four", in response to Mao's preference for simplicity, wanted a simple and shorter constitution. Thus, both the 1970 abortive draft Constitution and the 1975 Constitution have only 30 articles. The 1978 Constitution, adopted after the fall of the "Gang of Four", had 60 articles – a compromise between the 1954 Constitution and the 1975 Constitution. Under such circumstances, it appeared that it was difficult to resort to amendment to resolve the constitutional issue.

The amendment procedure was used only twice after 1978, once in 1979, and once in 1980. However, the post-Mao leadership under Deng Xiaoping apparently felt that it was not possible to resort to this procedure to convert the 1978 Constitution to serve their policy. Therefore, in 1980, it decided to enact a new Constitution. The situation is described by a Chinese scholar as follows:

The 1978 Constitution properly restored part of the provisions of the 1954 Constitution and was more progressive than the 1975 Constitution. However, it was still based on the 1975 Constitution and reflected many "leftist" viewpoints such as affirming the accomplishment of the "Great Cultural Revolution", the so-called "basic line for the entire historical period of socialism" and the so-called principle of "continuing the revolution under the dictatorship of the proletariat".²⁵

3. The 1982 Constitution: Provisions on the Rights and Duties of Citizens

On paper, the 1982 Constitution pays more attention to the right and duties of citizens. From an organizational aspect, the chapter on the fundamental rights and duties of citizens is placed in Chapter 2, immediately following Chapter 1 on general principles. In previous constitutions, it was always placed in Chapter 3, after Chapter 2 on the structure of the state. This chapter on the "fundamental rights and duties of citizens" contains 24 articles (Articles 33 to 56), *i.e.* about 17% of the total 138 articles of the 1982 Constitution.²⁶ Although the 1978 Constitution devoted comparatively more space (16 articles) to the rights and duties of citizens, the 1982 Constitution provides more detailed regulation on this subject, because the Constitution of 1978 numbered only 60 articles.

Generally speaking, except for the missing stipulation on freedom of residence, the Constitution restores or expands the provisions on individual rights and freedoms in the 1954 Constitution.²⁷ The most notable one is equality before the law for all citizens of the People's Republic of China (Article 33). In religious freedom, the Constitution drops the right to prop-

agate atheism as contained in the 1978 Constitution. It says that “the state protects normal religious activities” but adds that no religious affairs may be “subject to any foreign domination” (Article 36). The Constitution guarantees the “freedoms and privacy of correspondence” and at the same time permits public security or procuratorial organs to censor correspondence in accordance with procedures prescribed by law to “meet the needs of state security or of investigation into criminal offenses” (Article 40).²⁸

Among the major new additions of the Constitution is the provision that the “personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, false charge or frame-up directed, or slander, against citizens by any means is prohibited” (Article 38). There is also an added statement on the freedom of the person: “Unlawful deprivation or restriction of citizens’ freedom of the person by detention or other means is prohibited, and unlawful search of the person of citizens is prohibited” (Article 37). The Constitution specifically stresses that the rights of citizens are inseparable from their duties (Article 33). Chinese people not only have the right but also the obligation to work (Article 42) and to receive education (Article 46). Added to the list of citizens’ duties are safeguarding state secrets (Article 54) and refraining from infringement “upon the interests of the state, of society and of the collective or upon the lawful freedoms and rights of other citizens” when exercising freedoms and rights (Article 51). These vaguely phrased provisions can be invoked by the PRC authorities to restrict the freedoms of the citizen provided in the Constitution. However, the new Constitution does not make the support of the leadership of the CCP a specific duty for Chinese citizens as this was done in Article 56 of the 1978 Constitution. Nevertheless, this may only indicate a subtle shift of emphasis in the drafting skill of the Constitution as the Preamble of this Constitution affirms the adherence to the “four basic principles” — namely, keeping to the socialist road, upholding the dictatorship of the proletariat, and insisting on Party leadership and Marxism-Leninism-Mao Zedong Thought, including the leadership of the CCP.²⁹ The Constitution also eliminates the provision for the freedom to strike, which, along with the “four big rights”, was incorporated into Article 45 of the 1978 Constitution as a result of the Maoist influence.³⁰

The Constitution provides in Article 41 the right of citizens to criticize and to file complaints with state organs and establishes the principle of state compensation for infringing upon civil rights of citizens. Although this right was provided in Article 97 of the 1954 Constitution, the present Constitution is more specific on this point.³¹ Article 41 provides:

Citizens of the People’s Republic of China have the right to criticize and make suggestions to any state organ and state functionary. Citizens have the right to make, to relevant state organs, formal complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary. However, no one may make false accusations or frame-ups through fabricating or distorting facts.

The state organs concerned must handle formal complaints, charges,

and exposures made by citizens by making a thorough investigation of the facts in a responsible manner. Nobody may suppress such formal complaints, charges, and exposures, or retaliate against citizens who make them.

Citizens who have suffered losses through infringement of their rights by state organs or state functionaries have the right to compensation in accordance with the provisions of the law.³²

On the other hand, the present article puts a restriction on the filing of a complaint by prohibiting so-called "fabrication or distortion of facts for the purpose of libel or frame-up". Since Article 138, paragraph 1, of the PRC Criminal Law imposes criminal sanctions on fabricating facts or bringing a false charge, this provision may discourage citizens from filing their complaints.³³

On the state compensation question, the PRC has not yet enacted a State Compensation Law, so the right exists in fact only on paper now.

Besides the provisions contained in Chapter 2 of the Constitution, there are other provisions which are closely related to the implementation of citizens' rights and duties under the Constitution. Chapter 1, Article 5 of the Constitution establishes the principle of supremacy of the Constitution in the PRC by providing:

The state upholds the uniformity and dignity of the socialist legal system.

No laws or administrative or local rules and regulations may contravene the Constitution.

All state organs, the armed forces, all political parties and public organizations, all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be examined.

No organization or individual shall enjoy privileges that violate the Constitution and the law.³⁴

There is no comparable article in any previous PRC constitution. Therefore, the inclusion of this article in the 1982 Constitution clearly demonstrates that the present leadership is more serious than any previous one in enhancing the status of the Constitution in the PRC.³⁵

Moreover, the 1982 Constitution restores the provisions of the 1954 Constitution on judicial and procuratorial independence in Articles 126 and 131 of Chapter 3. Article 126 provides:

The people's courts exercise, in accordance with the provisions of the law, judicial authority independently and are not subject to interference by administrative organs, public organizations, and individuals.³⁶

Article 131 is identical, but for the replacement of "people's courts" and "judicial" by "people's procuracies" and "procuratorial" respectively.³⁷

The above stated constitutional provisions, if substantially implemented, would certainly provide a degree of a "rule of law" in the PRC. However, no matter how optimistic one may be, there still remains a sharp discrepancy between the law and reality. There are several reasons to explain this situation. First, constitutional provisions are drafted in general terms and they must be implemented through legislation or administrative decrees. For instance, as stated earlier, the state compensation for infringing upon the civic rights, provided in Article 41, paragraph 3 of the Constitution, cannot be enjoyed by citizens because there is no such legislation now. Given time, however, all necessary legislation can theoretically be enacted and this should not be considered a serious problem in the foreseeable future. The more serious problem is whether the PRC's legislative and administrative organs can enact law or promulgate administrative decrees to curtail citizens' rights and increase citizens' duties under the constitutions. The following discussion provides a few examples to illustrate this point.

1) While Article 33, paragraph 2, of the Constitution guarantees the "equality before the law" for "all citizens", the PRC's election law discriminates against rural area citizens in electing delegates to the National People's Congress. According to PRC election laws, city residents can elect one delegate for every 130,000 persons, while rural residents can elect one delegate for every 1,040,000 persons.³⁸ Since 80% of the Chinese live in rural areas, the election law discriminates against the great majority of the Chinese people.

2) Article 35 guarantees the citizens "freedom of speech, of the press, of assembly, of association, of procession and of demonstration". In fact, aside from extreme and exceptional cases, anyone who tries to exercise such freedoms will be punished, and most end up in jails or labor camps.³⁹

3) Article 37, paragraph 2 requires the arrest of a citizen to be approved by "decision of a people's procuracy" or "a people's court". However, on various vaguely defined grounds such as "without proper employment", "refusal to accept work assignment or transfer", a public security organ can arrest a person and send him or her to "reeducation through labor" for up to four years in a labor camp. This measure is based on a 1957 Decision of the State Council on Reeducation through Labor⁴⁰ and subsequent "Supplementary Regulations on Reeducation through Labor" adopted by the Standing Committee of the NPC in 1979.⁴¹

4) The Criminal Law enacted by the NPC in 1979 allows the use of analogy in Article 79 which undermines the basic spirit of "rule of law" which the Constitution intends to establish.⁴²

5) Article 49, paragraph 2, provides that "both husband and wife have the duty to practice family planning",⁴³ but the State Council arbitrarily established the principle of a single child for each family and conducted a campaign of forced abortion for women intending to have a second child. Severe sanctions in the form of fines, expulsion from work and others were imposed on violators.⁴⁴

The above stated few examples demonstrate that the basic problem of the right of Chinese citizens under the Constitution is that there appears to have been no effective mechanism in the Constitution to prevent the legislative and administrative organs to curtail such rights and to increase their duties in disregard of the constitutional provisions. This will be explained in the next section.

4. The Hierarchy of the Constitution, Laws (Statutes), and Administrative Orders/Decrees (Rules) in the PRC and the Questions of Interpretation and Enforcement of the Constitution

Theoretically, the Constitution of the PRC is the supreme legal instrument, and according to Article 5, paragraph 2, "no laws or administrative or local rules and regulations may contravene the Constitution".⁴⁵ So-called "basic statutes" (laws) rank second in the hierarchy of legal order, and they can only be enacted and amended by the National People's Congress (Article 62, paragraph 3). Next in binding force are statutes enacted by the Standing Committee of the National People's Congress (Article 67, paragraph 2).

The State Council can, however, exercise the power "to adopt administrative measures, enact administrative rules and issue decisions and orders in accordance with the Constitution and statute" (Article 89, paragraph 1). According to a prominent Chinese legal official, the enactment of administrative rules by the State Council does not need prior approval by the NPC or its Standing Committee, nor does it require the State Council to file with these organs for record.⁴⁶ In other words, all administrative rules enacted by the State Council are presumed to be consistent with the Constitution and statutes. Although under Article 67, paragraph 7, of the Constitution, the Standing Committee of the NPC can exercise the power "to annul those administrative rules and regulations, decisions or orders of the State Council which contravene the Constitution and the law",⁴⁷ so far no such case has ever arisen.⁴⁸ Moreover, there is no procedure for an individual to challenge the legality of administrative rules issued by the State Council.

Under the State Council, the provincial and municipal people's congresses directly under the Central Government also have the power to adopt "local regulations, so long as these do not contravene the Constitution, the law, and administrative rules and regulations, and they shall report them to the Standing Committee of the National People's Congress for the record" (Article 100). The Standing Committee of the NPC, however, has the power to "annul" those regulations which it considers as contravening the Constitution, statutes, or the administrative rules and regulations (Article 67, paragraph 8).⁴⁹ Again, there is no procedure for an individual citizen to challenge the legality of local administrative rules adopted by provincial or municipal people's congresses.

The people's congresses of autonomous regions, prefectures and counties have greater legislative authorities. Article 116 of the Constitution provides:

People's congresses of national autonomous areas have the power to enact autonomy regulations and specific regulations in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned. The autonomy regulations and specific regulations of autonomous regions shall be submitted to the Standing Committee of the National People's Congress for approval before they go into effect. Those of autonomous prefectures and counties shall be submitted to the standing committees of the people's congresses of provinces or autonomous regions for approval before they go into effect, and they shall be reported to the Standing Committee of the National People's Congress for the record.⁵⁰

According to a prominent Chinese legal official, this article authorizes the autonomous regions, prefectures or counties to adopt rules on concrete matters even if they may be different from the Constitution or statutes.⁵¹ This appears to be a questionable view at first glance, because the Standing Committee of the NPC has only the power to enact and amend statutes with the exception of those which would be enacted by the NPC,⁵² thus it does not seem to have the power to approve local rules of autonomous regions which may be different from the Constitution or basic statutes.⁵³ However, under Article 67, paragraphs 2 and 4, the NPC Standing Committee has the power to interpret the Constitution and statutes. Thus, if it considers the local rules of autonomous regions as contrary to the Constitution or basic statutes, it should not approve those rules. Anything it approves should be considered as not in contravention of the Constitution or basic statutes. As in the case of administrative rules or regulations issued by the State Council, there is no procedure for an individual citizen to challenge the legality of the rules issued by the autonomous regions.

As stated at the beginning of this section, Article 5, paragraph 2 of the 1982 Constitution placed the Constitution at the pinnacle of the legal hierarchy in the PRC and thus theoretically the laws enacted by the NPC should not contravene the Constitution. However, in reality, the NPC can enact any laws it wishes in disregard of the spirit and letter of the Constitution. This is because the Constitution has given the power to interpret the Constitution to the NPC's Standing Committee (Article 67, paragraph 1). It is not to be expected that this subordinate organ would interpret a law enacted by its parent organ, *i.e.* the NPC, as "unconstitutional".

Moreover, despite the fact that the Constitution restricts the NPC Standing Committee's power only "to enact, when the National People's Congress is not in session, partial supplements and amendments to statutes enacted by the National People's Congress provided that they do not contravene the basic principles of these statutes" (Article 67, paragraph 3), in fact the Standing Committee can, with respect to the statutes enacted by the NPC, do as it

pleases because it has the power to interpret statutes (Article 67, paragraph 4). It is again not to be expected that the Standing Committee would interpret its supplement or amendment to a NPC statute as contravening the basic principles of that statute. This situation can best be explained by quoting several NPC Standing Committee's decisions to amend the Criminal Procedure Law, the Organic Law of the People's Court and the Criminal Law, adopted by the NPC itself.

On 1 July 1979, the NPC adopted a Criminal Procedure Law, to enter into force on 1 January 1980.⁵⁴ Article 144 provides that "[a] death sentence shall be approved by the Supreme People's Court".⁵⁵ On 10 June 1981, the NPC Standing Committee adopted a resolution granting from 1981 to 1983 the right to approve death sentences to the provincial-level higher courts in cases of murder, robbery, rape, bombing, arson, poison, breaching of dikes, or sabotage of communications and power facilities.⁵⁶ On 2 September 1983, the NPC Standing Committee adopted a resolution to amend Article 13 of the Organic Law of People's Courts, enacted by the NPC, to allow the Supreme People's Courts to delegate the authority to approve death sentences to the provincial-level higher people's courts in cases of murder, rape, robbery, use of explosives, and other serious offenses.⁵⁷ Another resolution of the NPC Standing Committee removes practically all guarantees of due process, provided in the Criminal Procedure Law enacted by the NPC, for persons accused of murder, rape, armed robbery, and other violent crimes. In the resolution, it removed Article 110 of the Criminal Procedure Law that requires a defendant to receive a copy of the indictment at least seven days before the trial in order to prepare his (or her) defense. It also limited the time limit for appeal to three days from the ten days stipulated in Article 131 of the Criminal Procedure Law.⁵⁸ In another resolution adopted again on the same day, the NPC Standing Committee revised the Criminal Law, enacted by the NPC, to increase sharply the number of capital offenses to cover virtually any serious crimes and order the courts to impose stiffer penalties, including execution, on people convicted of violent crimes.⁵⁹

All of the above amendments to the various basic laws enacted by the NPC were considered as not contravening the basic principles of those statutes. Under the amended Criminal Law and Criminal Procedure Law, a person charged with certain violent or serious crimes could be executed within about 8 days, including arrest, investigation, prosecution, sentencing, appeal, and execution.⁶⁰

What is more interesting here is that even before the amendments to the Criminal Law and the Criminal Procedure Law were adopted by the NPC Standing Committee, many persons charged with certain violent or serious offenses were already executed under the summary procedure and the subsequently amended Criminal Law.⁶¹ Neither the procurators nor the judges seemed to pay heed to the constitutional law issued raised here. Moreover, the NPC Standing Committee, which was assigned the task of "supervising the implementation of the Constitution" under Article 67, paragraph 1, also took

no action to challenge this unconstitutional action taken by the administrative organs, procuracies, and courts.⁶²

Article 64 of the 1982 Constitution provides that an amendment to the Constitution may be proposed by the NPC Standing Committee or by one-fifth of the deputies of the NPC and be adopted by a two-thirds' majority of the total number of deputies of the NPC.⁶³ In fact, as long as the present leadership and its followers are in power, most of the time there appears to be no need to resort to this amendment procedure because the Standing Committee of the NPC can do whatever it wants to interpret the Constitution.

5. Conclusions

On paper, the 1982 Constitution is far better than any of its predecessors in establishing a certain degree of "rule of law" in China. In actual fact, however, for the reasons stated below, one can hardly make any optimistic assessment in this respect. First, no sufficient mechanism has been built into the Constitution to assure that the legislative body will not enact laws which may contravene the basic spirit and letter of the Constitution. The function of interpreting and supervising the implementation of the Constitution is entrusted to the Standing Committee of the NPC – a legislative body. This arrangement is similar to constitutions of the Soviet Union and other communist countries, with the exception of Yugoslavia, none of these countries have taken their constitutions seriously. In this connection, a Chinese scholar has made a suggestion for improvement when the draft of the 1982 Constitution was put to nation-wide discussion:

We consider that, in accordance with our country's political system (the people's congress organized on the principle of democratic centralism), the role of supervising the implementation of the Constitution could best be assumed by a Constitutional Commission elected by the National People's Congress (the number of members should be between 9 to 17 and those to be elected should be persons of good moral standing and reputation and with the highest prestige). This is because the Standing Committee of the National People's Congress has, according to the draft, become the principal legislative organ. It would be more difficult for the Standing Committee to detect whether the laws or decrees passed by it are contrary to the Constitution and to correct them.⁶⁴

Secondly, how the Standing Committee of the NPC is to exercise its role of supervising the implementation of the Constitution is not clear. As pointed out by a Chinese scholar, referring to the experience of the 1954 Constitution: Although the 1954 Constitution provided that the Standing Committee of the National People's Congress has the authority "to annul decisions and orders of the State Council which contravene the Constitution, laws or

decrees” and “to revise or annul inappropriate decisions issued by the government authorities of provinces, autonomous regions, and municipalities directly under the central authority”,⁶⁵ there is, however, no implementing regulation to govern the manner in which the Standing Committee of the National People’s Congress is to exercise this authority, [including] the procedure to exercise it and which organ is to be assigned to handle these cases. It is very clear that the organ and the form of supervising the implementation of the Constitution in our country is very inadequate. This caused the provisions on supervising the implementation of the Constitution to become merely a formality and thus there is no important guarantee to implement the whole Constitution. This situation resulted in a phenomenon of paying little attention to the Constitution or disregarding the Constitution in our country’s political life.⁶⁶

At present, the PRC does not seem to respond to these problems of supervising the implementation of the Constitution as raised by this scholar.

Third, as stated earlier, there appears to be no procedure available to individual citizens to challenge unconstitutional legislation or illegal administrative rules issued by administrative organs.

Fourth, despite the promulgation of the new Constitution, the PRC still retains certain vaguely drafted earlier laws and practices which are contrary to the basic spirit of the “rule of law” The 1951 State Secret Law,⁶⁷ which included almost everything in the PRC not officially released to the public as “state secrets”, provides under Article 13 that anyone who leaks those “secrets” to a domestic or foreign enemy is subject to punishment as a counter-revolutionary. The system of reeducation through labor, which authorizes the police to send a person to a labor camp for up to four years without judicial review, was also retained. The Criminal Law still retains the principle of analogy, which has been abandoned long ago even by the Soviet Union and Eastern European countries.

Finally, the Chinese leaders have paid sparse attention to legal procedure to carry out their policies. They appear to consider that the end may justify the means. The anti-crime campaign is an example. In carrying out this campaign, the Chinese leaders paid almost no attention to proper procedures prescribed by law. They intended a quick fix and thus dispensed with legal procedure. If this attitude continues, even a limited degree of the “rule of law” would be difficult to take root in the PRC.

NOTES

1. For a summary of these measures, see Hungdah Chiu, *Chinese Law and Justice: Trends Over Three Decades*, in *University of Maryland School of Law Occasional Papers/Reprints Series in Contemporary Asian Studies* 1982 No.7 (52), 17-22 and Shao-Chuan Leng, with Hungdah Chiu, *Criminal Justice in Post-Mao China: Analysis and Documents*, Ithaca, NY 1985, Chapter 3.
2. English translation 9 *Rev.Soc.Law* No.2 1983, 183-208.
3. “Report on the Draft of the Revised Constitution of the People’s Republic of China”, 25 *Beijing Review* No.50 13 December 1982, 12-13.

4. *Ibid.*, 23.
5. "Constitution of the People's Republic of China", *supra* note 2, 186.
6. Yu Haocheng, "The New Constitution Establishes the Important Principle of Governing a Country by Law Under the Leadership of the Party", in China Law Association, ed., *Xianfa lunwenxuan* (Selected Essays on Constitutional Law), Beijing 1983, 121.
7. *E.g.* see Xiao Weiyun, "A Comparative Study of the New Constitution and the Three Previous Constitutions", Chen Shouyi and others, *Faxue lunwenji* (Collection of Legal Essays), Beijing 1984, 186-198. See also editorial, "Welcome the Coming New Year of Governing the Country by Law", *Zhongguo fazhi bao* (China's Legal System Newspaper), 31 December 1982, 1.
8. English translation in Michael Lindsay, ed., *The New Constitution of Communist China, Comparative Analysis*, Taipei 1976, 281-292.
9. English translation in *ibid.*, 293-311. For a review of this Constitution, see "Ten Years of the Chinese People's Constitution", *Bulletin of the International Commission of Jurists* September 1964 No.20, 22-33.
10. English translation in Lindsay, *The New Constitution*, *supra* note 8, 312-320.
11. English translation in *ibid.*, 328-336.
12. English translation in 21 *Beijing Review* No.11 17 March 1978, 5-14. For a comparative study of several Chinese Constitutions between 1949 and 1978, see Jerome Alan Cohen, "China's Changing Constitution", *The China Quarterly* December 1978 No.76, 794-841.
13. "Amendments to the Constitution", 22 *Beijing Review* No.28 13 July 1979, 10.
14. *Law Annual Report of China 1982/3*, Hong Kong 1982, 103.
15. Lindsay, *The New Constitution*, *supra* note 8, 310.
16. *Ibid.*
17. See *supra* note 6.
18. Article 31, paragraph 3 of the 1954 Constitution, Article 17 of the 1975 Constitution and Article 25, paragraph 3 of the 1978 Constitution.
19. Lindsay, *The New Constitution*, *supra* note 8, 294, 295.
20. *Ibid.*, 313.
21. *Ibid.*, 329.
22. 21 *Beijing Review* No.11 17 March 1978, 6.
23. Yu Haocheng, "On the Question of Guaranteeing the Implementation of the Constitution", in Zhang Youyu and others, *Xianfa lunwenji* (Collected Essays on the Constitution), Vol.2, Beijing 1982, 276.
24. See C.L. Sulzberger's report in *The New York Times*, 25 November 1973.
25. Dong Chengmei, "The Historical Development of Our Country's Constitution", in *Selected Essays on Constitutional Law*, *supra* note 6, 58.
26. The 1954 Constitution has 19 articles on rights and duties of citizens among its 106 articles, *i.e.* about 18% of the total number of articles.
27. This was provided in Article 90, paragraph 2 of the 1954 Constitution, but was omitted in the 1970 abortive draft Constitution and both the 1975 and 1978 Constitutions.
28. This makes one Western report of Chinese origin wonder whether people's mail will really be protected since no one is sure about either the existence of these legal procedures or the definition of "state security". Frank Ching, "Chinese Nation-wide Mull Their New Constitution", *Asian Wall Street Journal* 24 June 1982, 6. For reports about the PRC's practice of opening people's mail, see Fox Butterfield, *China: Alive in the Bitter Sea*, New York 1982, 323-324.
29. Cf. the following statement made by a prominent PRC legal official:
The four basic principles are the foundations of our country and are the guiding thought of the new Constitution. This is generally recognized ... The Constitution cannot contravene these principles. ... The first two of the four basic principles may and also must be written into articles of the text of the Constitu-

tion; however, the latter two principles of the four basic principles, *i.e.* insisting on party leadership and Marxism, Leninism and Mao Zedong Thought are [more] appropriate to be written in the preamble ... This is because insisting on Party leadership and Marxism, Leninism and Mao Zedong Thought cannot be genuinely achieved by relying on the coercive force of the law.

Zhang Youyu, "Making Further Progress in the Research and Implementation of the New Constitution", *Zhongguo faxue* (Law of China) 1984 No.1, 19. Zhang is Deputy Director of the Commission of Legislative Affairs of the Standing Committee of the National People's Congress.

30. According to a prominent Chinese legal official, the freedom to strike (first adopted by the 1975 Constitution) was a product of ultra-leftist ideas, unsuitable to the interest of socialist development or to China's concrete conditions. Zhang Youyu, "On the Revision of the Constitution of China", *Faxue yanjiu* (Studies in Law) 1982 no.3, 3-4.
31. Article 97, later part, of the 1954 Constitution provides that "[p]eople suffering loss by reason of infringement of their rights as citizens by persons working in state organs have the right to compensation" Lindsay, *The New Constitution*, *supra* note 8, 311. No comparable provision was included in the 1975 and 1978 Constitutions.
32. "The Constitution of the People's Republic of China", *supra* note 2, 191.
33. *Law Annual Report of China, 1982/3*, *supra* note 14, 275.
34. "The Constitution of the People's Republic of China", *supra* note 2, 186.
35. Article 100 of the 1954 Constitution only provides that "citizens ... must abide by the Constitution and the law ..." Lindsay, *The New Constitution*, *supra* note 8, 311.
36. "The Constitution of the People's Republic of China", *supra* note 2, 205.
37. *Ibid.*
38. See 1983 *Zhongguo baike nainjian* (1983 Yearbook of the Encyclopedia of China), Shanghai 1983, 226.
39. See Chapter on "Prisoners of conscience" in *China, Violations of Human Rights, Prisoners of Conscience and the Death Penalty in the People's Republic of China*, London 1984, 5-52. A prominent Chinese legal official also acknowledged that in China there are people who questioned the validity of this Article. He wrote:

Article 35 ... is a real guarantee for the rights and freedoms of the people and is broadly supported by the people. However, there are some people who allege: ["] This article in fact is not to be implemented and just [put out] for appearance's sake. If anyone in fact engages in processions or demonstrations, he (or she) shall be punished. They even make wild talk by saying that in bourgeois countries [people] feel more at ease. If I want to say anything I can say it. If I want to do anything, I can do it. For instance, in the United States, if one demonstrates in any place outside the White House, he (or she) will not be bothered.

Zhang Youyu, "Making Progress in the Implementation of New Constitution", *supra* note 29, 27. Zhang considered the above view either maliciously slanderous or ignorant and referred to many Western restrictions on the exercise of rights and freedoms, but he did not give any examples of the rights and freedoms in fact exercised by Chinese people. *Ibid.*, 27-30. See also *Country Reports on Human Rights Practice for 1984*, Washington, DC 1985, 737-739.

For some non-political purposes, the PRC occasionally tolerates people demonstrating before a government organ. On 5, 6, 7 July 1982, some people demonstrated before Pier 41 of Wuhan Port to prevent the loading of coals which caused severe pollution in the nearby residential areas. No sanction was imposed on the demonstrators. See *Zhongguo fazhi bao* (China's Legal System Newspaper), No.135 (25 February 1983), 1. Another case of demonstration against pollution occurred on 4 August 1973, but two leaders of the demonstrators were sentenced to imprison-

ment for three to seven years respectively on the charge of engaging in counter-revolutionary destruction. The case was reversed in 1979. See Sun Xiangmin, "Is This a Counterrevolutionary Destruction Incident?" *Huagang* (Environment), October 1984, 24-25.

40. English translation in Jerome Alan Cohen, *The Criminal Process in the People's Republic of China*, Cambridge, Mass. 1968, 249-250.
41. English translation in Leng and Chiu, *Criminal Justice in Post-Mao China*, *supra* note 1, Document 11.
42. *Law Annual Report of China 1982/3*, *supra* note 33, 272.
43. *The Constitution of the People's Republic of China*, *supra* note 2, 38.
44. See Michael Weisskopf, "China's Birth Control Policy Drive", *The Washington Post*, 8 January 1985, A1, A11.
45. "The Constitution of the People's Republic of China", *supra* note 2, 186.
46. Zhang Youyu, "Making Progress in the Implementation of New Constitution": *supra* note 29, 11.
47. "The Constitution of the People's Republic of China", *supra* note 2, 195.
48. Article 31, paragraph 6 of the 1954 Constitution contains a similar provision. Lindsay, *The New Constitution*, *supra* note 8, 300. No comparable provision was included in the 1975 and the 1978 Constitutions.
49. "The Constitution of the People's Republic of China", *supra* note 2, 201.
50. *Ibid.*, 195.
51. Zhang Youyu, "Making Progress in the Implementation of the New Constitution", *supra* note 29, 12.
52. Article 67, paragraph 2, of the Constitution. "The Constitution of the People's Republic of China", *supra* note 2, 195.
53. See *supra* note 51 and accompanying text.
54. *Law Annual Report of China, 1982/3*, *supra* note 14, 285-298.
55. *Ibid.*, 296.
56. *Foreign Broadcast Information Service (FBIS), Daily Report: China*, 11 June 1981, K4.
57. *Renmin Ribao* (People's Daily), 3 September 1983, 3.
58. *Ibid.*
59. *Ibid.*
60. See the case reported in *China, Violations of Human Rights*, *supra* note 39, 69.
61. On 23 June 1981, the Nanjing Municipal Intermediate People's Court convened a 10,000-people mass rally where a murderer named Luo received the death penalty and was immediately executed. It took only eight days for the whole legal process from the arrest of Luo to his execution, including police investigation, prosecution, trial, sentencing, and his appeal to the Provincial High Court. *Renmin Ribao* (People's Daily), 25 June 1981, 4. Former residents of China have also revealed that this practice of summary justice is not infrequent during an anti-crime campaign.
62. Cf. the following report by a Western reporter:

Police insist that all criminals who have been punished were sentenced after trial and careful investigations – in line with China's new emphasis on rule by law.

But diplomats with reliable Chinese sources report that many executions outside major cities have been decreed by administrative – not judicial – order. Even when trials were held, they often were expedited without indictments or adequate time for defenses or appeals, sources said.

Police, who have been exhorted to "resolutely attack the enemy to protect the people", have sometimes been sloppy in their investigations, blurring key criminal distinctions in the haste to make arrests, diplomats said.

A Peking actor who had engaged in extramarital affairs was executed as a mass rapist late last year, sources said. Chinese who knew him said his worst offense was seducing young women.

Chinese courts offer few protections in a system in which the defendant is presumed guilty. Normally, the best defense is confessing in the hope of getting a lighter sentence. The job of defense lawyers – in the few cases in which they are used – is to strengthen the plea for leniency.

Michael Weisskopf, "China Says Crime Cut: Execution Up", *The Washington Post*, 21 January 1984, A20.

63. "The Constitution of the People's Republic of China", *supra* note 2, 195.

64. Yu Haocheng, "On the Question of Guaranteeing the Implementation of the Constitution", *supra* note 23, 281.

65. Lindsay, *The New Constitution*, *supra* note 8, 300.

66. Zhang Chen and Tie Song, "On the Implementation of the Constitution", in *Collected Essays on Constitution*, *supra* note 23, 297.

67. Republished in *Renmin Ribao*, 11 April 1980, 1, 3. English translation in *FBIS, PRC*, 14 April 1980, L7-L11.