

THE MAKING AND STRUCTURE OF THE 1982
CONSTITUTION OF CHINA

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Abstract

This article aims to historically explore the political and ideological structure of the 1982 Constitution, both of which are multiple and can, therefore, be examined from various angles. This includes, first of all, the historical changes of the United Front and the Political Consultative Conference as well as the political implications and the isolation function of their non-politicization. Second, it includes the distinction between and the unification of the leadership principle and the representation principle. Lastly, it includes the introduction of a new design of constitutionalism with rule of law, private property rights and human rights at the core, which to some extent altered the societal and ideological basis of the original structure. Because of these components, the 1982 Constitution was able to respond to the complex societal changes in the last 30 years, the secret of which lies in the multiple complex structure created by this history.

I. INTRODUCTION

Whether in terms of the main text or in terms of the amendments, the 1982 Constitution is a reflection of the layering of history. Of course, every constitution can be considered as a product of history, since none of them can truly be considered a 'genesis'. However, what sets the Chinese Constitution apart from other constitutions is that it did not grow naturally and continuously in a coherent period of history. Instead, its historical layers comprise numerous breaks and contradictions which indicate that the 1982 Constitution is of a multi-faceted complex structure.

Three decades after the proclamation of the 1982 Constitution, in fact, it is possible to explore this constitution from a historical perspective. The radical shifts in Chinese societal and economic structure in the last thirty years were internally reflected by the 1982 Constitution through four amendments comprising 31 articles, thereby creating a new design for Chinese constitutionalism.¹ However, if the historical perspective is limited only to these thirty

¹ The author has already discussed how the four amendments to the 1982 Constitution created a new design for Chinese constitutionalism as well as the increasing complexness of the Constitution's internal structure accompanied therewith in a different article. Zhai Zhiyong (翟志勇), *Ba'er Xianfa de Sige Xiuzheng'an yu Xinde Xianzheng Sheji* (八二宪法的四个修正案与新的宪政设计) [*The Four Amendments to the 1982 Constitution and the New Design for Constitutionalism*], 3/4 ZHANLÜE YU GUANLI (战略与管理) [STRATEGY AND MANAGEMENT JOURNAL] 25, 25-27 (2012). Therefore, the explorations of this article will concentrate mainly on the 1982 Constitution, and only marginally mention the four amendments.

years, we will still not be able to comprehensively understand the essence and the multiple dimensions of the 1982 Constitution. Although the text of the 1982 Constitution was enacted after the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party and the passing of the “Resolution on Certain Questions in the History of Our Party Since the Founding of the People’s Republic of China”, both of which provided for its guiding ideology,² when viewed as a whole, the 1982 Constitution is retrospective in nature and a reiteration and reconstruction of the history of constitutionalism since 1949. The passing of the 1982 Constitution was preceded by more than two years of discussions (from September 1980 to December 1982),³ and the wording of each article and paragraph was chosen deliberately, with great care, and meticulously. Therefore, the articles and paragraphs of this constitution would be rather difficult to understand if they are isolated from their historical background and context. If one does not know the intentions of the constituents, should one deeply elaborate on the essence and the internal structure of the constitution? This is best explained with a simple example: “The State protects sites of scenic and historical interest, valuable cultural monuments and relics and other significant items of China’s historical and cultural heritage.”⁴ This article seems to be rather insignificant and it even appears that there would be no need for this to be included in the 1982 Constitution. However, a review of the drafting history shows that the constituents consciously included this article, in order to dissolve the awareness and actions of the large-scale destructions of historical relics during the Cultural Revolution, while at the same time to appease some religious circles.⁵ Therefore, the perspective of historical research has to be extended to the constitutions of 1978, 1975 and 1954 and even the Common Program of The Chinese People’s Political Consultative Conference (hereinafter *Common Program*).

The 1982 Constitution is often considered the continuation and development of the 1954 Constitution. Not only does its form generally follow the patterns of the 1954 Constitution (with the exception of two chapters, “The Structure of the State” and “The Fundamental Rights and Duties of Citizens” which were interchanged) but the general principles also originated from the 1954 Constitution. According to a statistic by Han Dayuan: “From

² Peng Zhen (彭真), Guanyu Zhonghua Renmin Gongheguo Xianfa Xiugai Caoan de Baogao (关于中华人民共和国宪法修改草案的报告) [Report on the Draft Constitution of the People’s Republic of China] (Nov. 26, 1982), http://www.npc.gov.cn/wxzl/gongbao/1982-11/26/content_1478478.htm.

³ Xu Chongde (许崇德), Zhonghua Renmin Gongheguo Xianfashi (中华人民共和国宪法史) [The Constitutional History of the People’s Republic of China] 558-59 (2003).

⁴ XIANFA art. 22 (1982) (China).

⁵ Xu, *supra* note 3, at 783.

the 138 articles of the 1982 Constitution, a combined 98 articles draw upon identical or similar parts from the 1954 Constitution, constituting 87.6 %.”⁶ This statement, however, needs to be treated with caution, since the same concepts in the 1982 Constitution and the 1954 Constitution do not necessarily hold the same meaning. Peng Zhen, for instance, said: “With respect to the people’s democratic dictatorship as stated in the current draft constitution, it should not be interpreted as a simple restoration of the wording and content of the 1954 Constitution [...]”⁷ Therefore, the 1982 Constitution and the 1954 Constitution are only similar in appearance, but different in essence. Thus, while pointing out the similarities between the constitutions of 1982 and 1954, one needs to bear in mind the disparities between the two, since it is precisely these disparities that illustrate the distinctive character of the 1982 Constitution. In addition to these disparities, the Common Program and the Constitutions of 1975 and 1978’s positive and negative influences on the 1982 Constitution also need to be taken into consideration.⁸

The following simple examples will illustrate this point. Whereas none of the constitutions of 1954, 1975 and 1978 provided for regulations on the Political Consultative Conference, the 1982 Constitution positioned the Political Consultative Conference within the constitution, which is due to the eminent role the Political Consultative Conference played during the establishment of the state. Furthermore, when article 24 of the 1982 Constitution stresses the “love of the motherland, of the people, of labor, of science and of socialism,”⁹ which originated from the passage “love of the motherland, of the people, of labor, of science and taking good care of public property” from article 42 of the Common Program.¹⁰ As

⁶ Han Dayuan (韩大元), 1954 Nian Xianfa yu Zhongguo Xianzheng (1954年宪法与中国宪政) [The 1954 Constitution and China’s Constitutionalism] 402 (2008).

⁷ Peng, *supra* note 2.

⁸ Gao Quanxi advocates a “Great Return Discussion”, suggesting that, in terms of its spirit, the 1982 Constitution returns back as far as the “Provisional Constitution of the Republic of China” of 1912. However, this “Great Return Discussion” mainly focuses on the four amendments to the 1982 Constitution. According to Gao Quanxi: “The four amendments do not ‘return’ to the 1954 Constitution, but more so to the much farther ‘Provisional Constitution of the Republic of China’ of 1912 and to the republican nerve in the wider nervous system of history.” The discussions of this article, however, are limited to the constitutions of the new China, trying to point out the distinctive character of the 1982 Constitution by viewing it through the 1954 Constitution and the subsequent constitutions. See Gao Quanxi & Tian Feilong (高全喜·田飞龙), *Ba’er Xianfa yu Xiandai Zhongguo Xianzheng de Yanjin* (八二宪法与现代中国宪政的演进) [*The 1982 Constitution and the Evolution of Contemporary China’s Constitutionalism*], 131 *ERSHIYI SHIJI* (二十一世纪) [TWENTY-FIRST CENTURY BIMONTHLY] 15, 15-27 (2012).

⁹ XIANFA art. 24 (1982) (China).

¹⁰ Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (中国人民政治协商会议共同纲领) [Common Program of The Chinese People’s Political Consultative Conference] (adopted by the First Plenary Session of the Chinese People’s Political Consultative Conference, Sept. 29, 1949) art. 42 (Chinalawinfo).

another example, the Common Program and the 1954 Constitution both defined the new China as a people's democratic state,¹¹ whereas the 1982 Constitution defined the state as a socialist state with a people's democratic dictatorship.¹² The Common Program and the 1954 Constitution did not touch upon class struggles, while the 1982 Constitution states that, "The exploiting classes as such have been abolished in our country. However, class struggle will continue to exist within certain bounds for a long time to come."¹³ The Common Program and the 1954 Constitution did not mention the dictatorship of the proletariat. The 1982 Constitution, on the other hand, although rephrasing the dictatorship of the proletariat in its article 1 to the people's democratic dictatorship, nonetheless declares in its preamble that, "the people's democratic dictatorship [...] is in essence the dictatorship of the proletariat".¹⁴ These references are actually remnants of the elements of the Cultural Revolution from the constitutions of 1975 and 1978. In fact, many of the 1982 Constitution's new sections were added as a result of the lessons of the Cultural Revolution. An example can be found in article 38, which states: "The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false accusation or false incrimination directed against citizens by any means is prohibited."¹⁵ This section is mainly addressing the large-scale denunciations that were utilized during the Cultural Revolution. As opposed to this, many provisions were not regulated in the constitution, even though they were also based on a reflection of the Cultural Revolution, such as the freedom of movement or the freedom to strike.¹⁶

The 1982 Constitution needs to be set in a historical context and compared with its preceding constitutions. Only then can a comprehensive understanding be achieved. However, the historical perspective alone might not be sufficient, since the history itself can only provide us with useful material. Rather, this material needs to

¹¹ *Id.* art. 1; XIANFA art.1 (1954) (China).

¹² XIANFA art. 1 (1982) (China).

¹³ *Id.* preamble.

¹⁴ *Id.* preamble.

¹⁵ *Id.* art. 38.

¹⁶ During the drafting process of the 1982 Constitution, there were great debates on whether the freedom of movement or the freedom of strike should be regulated in the constitution, particularly regarding the freedom of strike. Supporters even went so far as to cite the words of Lenin, in order to advocate their favored draft: "Lenin said: 'The recourse to strike struggles, in a state in which political power belongs to the proletariat, can be explained and justified only by the bureaucratic deformations of the proletarian state.'" However, the 1982 Constitution eventually deleted the freedom of strike, one explanation for which can be found in the structure of a socialist state, where "the people cannot themselves strike their own work". Another explanation suggests, "The deletion of the freedom to strike was a reaction to the incidents in Poland". I, however, assume that the most direct reason for the deletion were the deep memories of the "strike riots" that took place during the period of the cultural revolution. For the above quoted texts, see Xu, *supra* note 3, at 736, 791-94.

be dealt with in a philosophical way and the 1982 Constitution needs to be interpreted from the political and ideological structure in place, both of which developed from history.¹⁷

Historically, the 1982 Constitution needs to be placed in the context of the history of Chinese constitutionalism that begins with the Common Program and dealt with accordingly. However, Chinese constitution has undergone four re-enactments, and there were numerous contradictions and breaks among different constitutions. At the core of the 1982 Constitution is, therefore, the question of how these contradictions and breaks can be brought into a balance to tell the whole story, and the key for this balance lies in the multiple complex structures of the constitution.

Most of Chinese constitutional scholars focus on the studies on normative constitution and methodology of constitutional dogmatics,¹⁸ which almost have nothing to do with Chinese constitutionalist history and practice. But recently, some constitutional scholars, such as Gao Quanxi, Chen Duanhong, Jiang Shigong, have begun to discuss the political dimension of Chinese constitution,¹⁹ especially the relationship between Chinese communist party and the Chinese people, and the relationship between the constitution of CCP and the constitution of PRC. This article will further explore the political and ideological structure of 1982 Constitution. What makes it different is that it will inquire into this question from historical perspective, concentrating on the process of making and growth of 1982 Constitution.

In sum, this article aims to explore the political and ideological structure of the 1982 Constitution from historical angle. This includes, first of all, the historical changes of the United Front and the Political Consultative Conference as well as the political implications and the isolation function of their non-politicization. Second, it includes the distinction between and the unification of the leadership principle and the representation principle, where the key for unification is the absorption of the representation principle by the

¹⁷ For an explanation of the constitution from a historical and structural perspective, inspirations can be found in Laurence H. Tribe's treatise on the invisible constitution of America. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 69 (2011).

¹⁸ See, e.g., Lin Laifan (林来梵), *Cong Xianfa Guifan dao Guifan Xianfa* (从宪法规范到规范宪法) [From Constitutional Norm to Normative Constitution] (2001); Zhang Xiang (张翔), *Xianfa Shiyixue* (宪法释义学) [Constitutional Dogmatik] (2013); Bai Bin (白斌), *Xianfa Jiaoyixue* (宪法教义学) [Constitutional Dogmatik] (2014).

¹⁹ See Gao Quanxi (高全喜), *Zhengzhi Xianfaxue Gangyao* (政治宪法学纲要) [Outline of Political Constitutional jurisprudence] (2014); Chen Duanhong (陈端洪), *Xianzhi yu Zhuquan* (宪制与主权) [Constitutionalism and Sovereignty] (2007); Chen Duanhong (陈端洪), *Zhixianquan yu Jibenfa* (制宪权与基本法) [Constituent Power and Fundamental Law] (2010); Jiang Shigong (强世功), *Zhongguo Xianfa zhong de Buchengwen Xianfa: Lijie Zhongguo Xianfa de Xinshijiao* (中国宪法中的不成文宪法:理解中国宪法的新视角) [*The Unwritten Constitution in China's Constitutional Law: the New Perspective on Understanding China's Constitutional Law*], 12 *KAIFANG SHIDAI* (开放时代) [OPEN TIMES] 10, 10-39 (2009).

leadership principle. Lastly, it includes the introduction of a new design of constitutionalism with rule of law, private property rights and human rights at the core, which to some extent altered the societal and ideological basis of the original structure. Because of this, the 1982 Constitution was able to respond to the complex societal changes in the last 30 years, the secret of which lies in the multiple complex structure created by this history.

II. THE UNITED FRONT: DEMOCRACY, REVOLUTION AND PATRIOTISM

In 1939, Mao Zedong stated in the introduction to the journal *The Communist*, “The experience of 18 years have taught us that the United Front, the armed struggles and the establishment of the party, are the Communist Party’s three key trump cards in the Chinese revolution to defeat the enemies, the three main trump cards.”²⁰ This statement is a summarization of the experience of past revolutions as much as it also provides guidance for the work that lies ahead. Among these three key trump cards, the United Front was placed in the most prominent position. Ten years later, it was exactly the United Front that played a crucial role in the emergence of the new China. On April 30, 1948 the Central Committee of the Communist Party of China issued an appeal towards all democratic parties, people’s organizations and people from all walks of life through its “May 1st - Labor Day Slogans.” It stated that on the basis of a consolidated and expanded United Front, “the democratic parties, the people’s organizations and the eminent persons of all societies should immediately call for the Political Consultative Conference to discuss and realize the convocation of a people’s congress and the establishment of a democratic coalition government!”²¹ In September 1949, the new Political Consultative Conference was convened and the Common Program of the Chinese People’s Political Consultative Conference passed by the Conference served as the basis for the founding of the state. With regard to the United Front and the Political Consultative Conference, the Common Program made the following references:

The Chinese People’s Democratic Dictatorship is the state power of the People’s Democratic United Front composed of the Chinese working class, the peasantry, the petty bourgeoisie, the national bourgeoisie and other patriotic democratic

²⁰ Mao Zedong (毛泽东), *Mao Zedong Xuanji* (毛泽东选集) [Selected Works of Mao Zedong] 606 (2nd ed. 1991).

²¹ *Kaiguo Shengdian: Zhonghua Renmin Gongheguo Dansheng Zhongyao Wenxian Ziliao Huibian* (开国盛典——中华人民共和国诞生重要文献资料汇编) [The Founding Ceremony: A Compilation of important Documents of the Emergence of the People’s Republic of China] 9 (Office of the National Committee of the Political Consultative Conference (政协全国委员会办公厅) eds., 2009).

elements, based on the alliance of workers and peasants and led by the working class. The Chinese People's Political Consultative Conference, composed of the representatives of the Communist Party of China, of all democratic parties and groups and people's organizations, of all regions, of the People's Liberation Army, of all national minorities, overseas Chinese and other patriotic democratic elements, is the organizational form of the Chinese people's democratic United Front. The Chinese People's Political Consultative Conference, representing the will of the people of the whole country, proclaims the establishment of the People's Republic of China and is organizing the people's own central government.²²

At a time when it was objectively not possible to convene a democratically elected people's congress, the People's Democratic United Front was fictionally the people, whilst the Political Consultative Conference, as the organizational form of the United Front, was acting as the constitutional convention. According to article 13 of the Common Program, "Pending the convocation of the National People's Congress elected by universal franchise, the Plenary Session of the Chinese People's Political Consultative Conference shall exercise the functions and powers of the National People's Congress", which goes to show that the Political Consultative Congress was also the highest organ of state power.²³ However, in the initial phase of the founding of a state this cannot possibly be otherwise. The new China, with "the new democracy, or the people's democracy" as its political basis, needed to deliver on their promise of the people becoming the masters.²⁴ It was clear, in turn, that the mandate the Political Consultative Conference received from the Chinese People's Democratic United Front could not be equated with a mandate received from the people.²⁵ Therefore, article 13 of the Common Program likewise stated:

²² Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (中国人民政治协商会议共同纲领) [Common Program of The Chinese People's Political Consultative Conference] (promulgated by the First Plenary Session of the Chinese People's Political Consultative Conference, Sept. 29, 1949), preamble (Chinalawinfo).

²³ *Id.* art. 13.

²⁴ *Id.* preamble.

²⁵ Stalin, while suggesting that China should pass a constitution as soon as possible, pointed out the same problem: "Stalin assumed that if you do not pass a constitution and hold elections, your enemies will hold two statements against you, as propaganda towards the masses of the workers and the peasants: Firstly, your government was not elected by the people and secondly, your state does not have a constitution. Because the Political Consultative Conference is not a product of elections by the people, the people will be able to say that your state was established at gun-point and is self-proclaimed." See Liu Shaoqi (刘少奇), *Guanyu yu Sidalin Huitan Qingkuang gei Maozedong he Zhongyang de Dianbao* (关于与斯大林会谈情况给毛泽东和中央的电报) [*A Telegram on Talks with Stalin for Mao Zedong and the Central Committee of the Communist Party of China*] in JianguoYilai Liu Shaoqi Wengao (建

[...] after the convocation of the National People's Congress elected by universal franchise, the Chinese People's Political Consultative Conference may submit proposals on fundamental policies relating to national construction work and on other important measures to the National People's Congress or to the Central People's Government.²⁶

Ultimately, the sovereign power is to be returned to the people.

Therefore, it was beyond all questions that after the convocation of the first session of the National People's Congress, the National People's Congress would replace the Political Consultative Conference, pass a constitution, and act as the highest organ of state power. However, the question of how the People's Democratic United Front and the Political Consultative Conference should be dealt with after their replacement became an issue that needed to be addressed. The ultimate decisions of the 1954 Constitution were that first, the "People's Democratic United Front" would be retained in the preamble of the constitution as a historical heritage and a mechanism for "mobilization and unification", while at the same time a circumlocution such as "the leadership of the working classes" was abandoned, which clearly emphasized the authority of the Party over the United Front.²⁷ Secondly, the Political Consultative Conference was formally dismissed from the constitution, which Liu Shaoqi explained was because:

The Chinese Political Consultative conference is the organizational form of the Chinese People's Democratic United Front. It was the substitute for the National People's Congress, a mandate that will not have to be exercised in the future, but the organization of the United Front will continue to play a key role in the political life of China. Since it is the organization of the United Front, the political parties and other groups participating in the United Front will issue their own regulations with regards to this organization through consultation.²⁸

国以来刘少奇文稿) [Liu Shaoqi's Manuscripts Since the Founding of the State] 537 (Party Literature Research Centre eds., Vol. 4, 2005).

²⁶ Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (中国人民政治协商会议共同纲领) [Common Program of The Chinese People's Political Consultative Conference] (promulgated by the First Plenary Session of the Chinese People's Political Consultative Conference, Sept. 29, 1949) art. 13 (Chinalawinfo).

²⁷ *Id.* preamble.

²⁸ Liu Shaoqi (刘少奇), Guanyu Zhonghua Renmin Gongheguo Xianfa Caoan de Baogao (关于中华人民共和国宪法草案的报告) [Report on the Draft Constitution of the People's Republic of China] (Sept. 15, 1954), http://www.gov.cn/test/2008-03/06/content_910667.htm.

In fact, this means that after the Political Consultative Conference has completed its phasic historical mission acting as the constitutional convention and the highest organ of state power, its “armament” would be completely removed, and it would become a mere internal organizational form of the United Front without having any constitutional meaning anymore.

As the 1975 Constitution was promulgated, the United Front was further weakened from “democratic United Front” to “revolutionary United Front”.²⁹ With the “revolutionary” replacing the “democratic”, the influence of the United Front was not only further strangled, but it was also completely isolated in the revolutionaries, making their failure become naturally inevitable. With the 1978 Constitution and the lessons learned from the Cultural Revolution, the emphasis on the United Front was renewed which led to the following regulation in the preamble to the constitution:

[...] we should consolidate and expand the revolutionary United Front which is led by the working class and based on the worker-peasant alliance, and which unites the large numbers of intellectuals and other working people, patriotic democratic parties, patriotic personages, our compatriots in Taiwan, Hong Kong and Macao, and our countrymen residing abroad.³⁰

Although the United Front was still aligned with “revolution”, the effort to join all possible forces was renewed.³¹

The 1982 Constitution made material adjustments to the regulations regarding the United Front. These adjustments were mostly due to the bitter lessons from the Cultural Revolution.

In the long years of revolution and construction, there has been formed under the leadership of the Communist Party of China a broad patriotic United Front, which is composed of the democratic parties and people's organizations and which embraces all socialist working people, all builders of the

²⁹ XIANFA preamble (1975) (China).

³⁰ XIANFA preamble (1978) (China).

³¹ Ye Jianying had an explanation for this: “Chairman Mao repeatedly taught us in the past that ‘the proletariat must rely on its broad allied forces to exercise dictatorship, but the single class of the proletariat can not do so all by itself.’ The Chinese proletariat ‘must rely on the population of hundreds of millions of poor and average farmers, poor residents of the cities, poor craftsmen and the revolutionary intellectuals, in order to exercise dictatorship. Otherwise it won’t be possible’.” See Ye Jianying (叶剑英), *Guanyu Zhonghua Renmin Gongheguo Xianfa Caoan de Baogao* (关于中华人民共和国宪法草案的报告) [Report on the Draft Constitution of the People's Republic of China] (Mar. 1, 1978), <http://www.people.com.cn/item/xianfa/07.html>.

socialist cause, all patriots who support socialism and all patriots who stand for the reunification of the motherland.³²

Firstly, the nature of the United Front was changed from “revolutionary” to “patriotic”, the original “democratic”, however, was not restored. Since “patriotic” ceases to emphasize class identities, the United Front possessed limitless internal capabilities. Secondly, the clear leadership of the Party over the United Front again replaced the leadership of the working classes over the United Front. Lastly and most importantly, the Political Consultative Conference was again incorporated into the constitution and received a constitutional rank. Although it was neither acknowledged as a state organ nor an organ of state power, it nevertheless received constitutional acknowledgment under the identity of the organizational form of the United Front.

The discussion above served as a rough examination of the changes of the United Front and the Political Consultative Conference within the New China constitutions. Beginning from the 1954 Constitution, ascertaining the position of the United Front and the Political Consultative Conference in the system of constitutionalism has been a major issue for Chinese constitutionalism. From “democratic” to “revolutionary” and lastly to “patriotic”, the constitution has experienced several reversals in coping with this task. But why is that? The United Front itself is the struggle tactic of the Party. It can accept and reject particular groups on a selective basis and according to the needs of the political situation. This was an inevitable choice at times when the logic of the proletarian revolution could not be carried out fully. The United Front is therefore not a rigid structure, but rather a constantly regenerating mechanism.³³ However, when the United Front was linked to the Political Consultative Conference in the wake of the establishment of the state, it had a more national character and became a representative institution of a clearly representative nature. Despite the Common Program stating that the Political Consultative Conference would become a consultative body after the convocation of the people’s congress, it was unclear what the nature of the Political Consultative Conference as such a body would be, nor was it known what its constitutional rank and relationship with the People’s congress would be.³⁴

³² XIANFA preamble (1982) (China).

³³ Mao, *supra* note 20, at 606-07.

³⁴ In fact, these questions already arose as early as the Common Program was drafted. ZHOU Enlai had the following to say to this: “During the discussions two further ideas occurred: The first is that after the convocation of the people’s congress there will be no further need for an organization such as the People’s Political Consultative Conference; The second is that due to the unity of all parties, the promotion of the new democracy will be rapidly developing and the existence of the parties will not last

The United Front and the Political Consultative Conference are the mechanisms for political consultation of the Communist Party and the other democratic parties. If the United Front and the Political Consultative Conference are completely abandoned, it needs to be considered how the problems of the democratic parties can be addressed. Without the United Front and the Political Consultative Conference, the democratic parties will undoubtedly have to pass the elections for the people's congress in order to enter it, thereby creating true multi-party politics. Therefore, the United Front and the Political Consultative Conference need to remain in existence. Besides, if the constitutional rank of the Political Consultative Conference is maintained, even if it is simply acting as a consultative body, it will also involve issues of power struggle with the people's congress, thus possibly evolving as a true bicameral system.³⁵

In the drafting process of the 1982 Constitution, a few people proposed to inscribe the Political Consultative Conference's functions of "political consultation" and "democratic supervision" into the constitution.³⁶ Hu Qiaomu opposed this, suggesting that the "political consultation" and the Political Consultative Conference are tautological, whereas the "democratic supervision" would undoubtedly be right for the Political Consultative Conference.³⁷ However, the inscription of these into the constitution would bear a legal nature and would therefore create a complex legal relationship

very long. Afterwards, everyone suggested in the discussions that these two ideas are inappropriate, because they do not fit well with the development and construction needs of the Chinese revolution. After the general elections for the National People's Congress are held, the Political Consultative Conference will admittedly continue to provide consultancy to the Central Government in the role of a consultant and stimulator for an adequate period of time. Besides, in the era of new democracy there exists all different classes and so will all different kinds of parties. The rulers of the old democratic state were the bourgeoisies; the parties to which they belonged were inevitably contradictory and struggling for power. The classes of the new democracy under the leadership of the working class, however, are, united in their common claims and in the major policies, despite all differences between the classes in their interests and opinions. The preparations for the draft of the Common Program, which is about to be passed, are the clearest evidence for this. Besides, the different claims and contradictions within the People's Democratic United Front can and should be regulated, particularly in light of the struggles against the vestiges of imperialism and feudalism." See Zhou Enlai (周恩来), *Renmin Zhengxie Gongtong Gangling Cao'an de Tedian* (人民政协共同纲领草案的特点) [Characteristics of the Draft Common Program of the People's Political Consultative Conference] in *Kaiguo Shengdian: Zhonghua Renmin Gongheguo Dansheng Zhongyao Wenxian Ziliao Huibian* (开国盛典——中华人民共和国诞生重要文献资料汇编) [The Founding Ceremony: A Compilation of important Documents of the Emergence of the People's Republic of China], *supra* note 21, at 316.

³⁵ In the process of drafting the 1982 Constitution, "there was also another suggestion advocating that the Political Consultative Conference should become the upper house in a bicameral system with the National People's Congress. However, the majority suggested that the Political Consultative Conference should exercise a special function in the political life of the state, and it would therefore not be suitable to simply place it into the National People's Congress." Of course, along with the eventual neglecting of the bicameral system, this "other suggestion" also vanished without a trace. See Xu, *supra* note 3, at 564, 574, 591.

³⁶ *Id.* at 664.

³⁷ *Id.*

between the Political Consultative Conference, the National People's Congress and the State Council.

The democratic supervision is politically correct, but it should not be inscribed into the constitution. Otherwise it will cause inconveniencies and ambiguity and it will influence the role of the National People's Congress and its Standing Committee as the highest organ of state power [...] when the National People's Congress issues decisions, no consultation problems occur. The consultation between the parties can also not be confused with the functions of the power organs.³⁸

The constituents' concerns regarding this issue were evident. They couldn't be deleted but they also couldn't be substantialized. Therefore, the only choice was to completely segregate the United Front and the Political Consultative Conference from the people's congress by placing them as mechanisms of the democratic parties. In order to retain the United Front and the Political Consultative Conference, they had to be depoliticized. The 1982 Constitution eventually chose the "patriotic United Front", which was the ultimate expression of said de-politicization.³⁹ Since discrepancies in opinions between the political parties need to be resolved within the Political Consultative Conference, the United Front and the Political Consultative Conference create a barrier preventing any essential contact between the democratic parties and the people's congress, and keeps party politics out of the people's congress. The will of the Communist Party after having passed the endorsement of the Political Consultative Conference can then enter into the people's congress and eventually become the state's will.

The United Front and the Political Consultative Conference occupy a very unique role and function in the system of Chinese constitutionalism. They cannot enter the system of sovereignty and thereby become a component part of sovereignty. But at the same time, they cannot be completely deleted or abandoned, since their "segregation" function is crucial to the composition and stability of the true sovereignty system – the system of "Communist Party and people's congress". For the system of Chinese constitutionalism, the United Front and the Political Consultative Conference are seemingly unimportant but in practice are indispensable, as they

³⁸ *Id.* The fourth amendment to the constitution in 1993 added the following regulation to the preamble "The system of multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time", the "democratic supervision", however, was still not inscribed into the constitution. See Xianfa Xiuzheng'an (宪法修正案) [Amendment to the Constitution of the People's Republic of China, 1993] (promulgated by the Nat'l People's Cong., Mar. 29, 1993) art. 4 (Chinalawinfo).

³⁹ XIANFA preamble (1982) (China).

constitute the invisible links of the sovereignty structures of the 1982 Constitution.

Another issue may be mentioned in passing here: The preamble to the constitution establishes the leadership of the Communist Party, but hardly anyone has ever explored what the legal implementation mechanisms for the leadership of the party in the constitution are. Viewed from the perspective of the historical origins of the constitution and the expressions of the preamble, the Party's leadership over the people is obtained through the United Front and the Political Consultative Front. This leadership is political in nature, and it is a leadership over the vanguards of all different classes, ranks or groups. Therefore, it differs from the people's congress, which is based on a "one man one vote" electoral system. Clarifying this issue is crucial to understanding the system of Chinese constitutionalism, however, a detailed argumentation of this problem cannot be presented at this point. This issue will, nevertheless, be taken into consideration in the following discussion of the problem of the relation between leadership and representation in the structure of sovereignty.⁴⁰

III. LEADERSHIP AND REPRESENTATION

Although the Common Program did not mention the leadership of the Party, it was formally inscribed into the constitution beginning with the 1954 Constitution and continued until the 1982 Constitution. Therefore, why is the party adhering to "lead" the people instead of "representing" them? And now that the Party's leadership is upheld, why did the system of the people's congress have to be established and how to coordinate between the Party's leadership and the people's congress? These are fundamental constitutional questions.

First, we need to trace back the changes of the leadership of the Party and of the People's Congress in the constitution. The Common Program stated in its preamble:

The Chinese People's Democratic Dictatorship is the state power of the People's Democratic United Front composed of the Chinese working class, peasantry, petty bourgeoisie, national bourgeoisie and other patriotic democratic elements,

⁴⁰ Before discussing "leadership and representation" it needs to be explained that the constitution established the principle of popular sovereignty, with the people being the only sovereign. The people, however, cannot execute sovereignty directly, but need to establish a sovereignty structure as an implementation mechanism. The separation of power is one possible implementation mechanism, as well as the parliamentary system. The 1982 Constitution, however, established a different unique system, namely the "Party - people's congress" system. This is neither a so-called dual representative system nor is it in line with the so-called "Chinese people under the leadership of the Communist Party". The understanding of its uniqueness requires the combination of the contradictions between the leadership principle and the representation principle.

based on the alliance of workers and peasants and led by the working class.⁴¹

Although the leadership of the Party can be derived from the fact that the Party is positioning itself as the vanguard of the working class, its leadership was after all never expressly stated, and the only reference was that,

[...] the Chinese People's Political Consultative Conference, composed of the representatives of the Communist Party of China, of all democratic parties and groups and people's organizations, of all regions, of the People's Liberation Army, of all national minorities, overseas Chinese and other patriotic democratic elements, is the organizational form of the Chinese People's Democratic United Front.⁴²

This is the only time the Communist Party is mentioned in the Common Program, merely being a participating party in the Political Consultative Conference.

With the arrival of the 1954 Constitution, the leadership of the Party was formally inscribed into the preamble, as both leading the people in the establishment of the new China, and as leading the People's Democratic United Front. At the same time, the National People's Congress replaced the Political Consultative Conference. Two points are to be noted here: First, since the Political Consultative Conference had two identities during the period of the Common Program, namely, the organizational form of the United Front and the highest organ of state power, both of which were internalized into the sovereignty structure, the change in the sovereignty structure from the Common Program to the 1954 Constitution did not only comprise the replacement of the Political Consultative Conference by the People's Congress, but also the combination of the Party's leadership with the National People's Congress. Together, these two comprised the transformation of the sovereignty structure as set up by the Common Program. Second, the leadership of the Party over the people was in fact obtained through the Party's leadership over the People's Democratic United Front. The broad representational character of the United Front enabled the Party to translate the class character of its leadership right into a leadership covering the entire population. The 1975 Constitution was illegitimate by generally abandoning the United Front and allowing

⁴¹ Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (中国人民政治协商会议共同纲领) [Common Program of The Chinese People's Political Consultative Conference] (promulgated by the First Plenary Session of the Chinese People's Political Consultative Conference, Sept. 29, 1949) preamble (Chinalawinfo).

⁴² *Id.*

the Party to directly exercise leadership over the people's congress. Therefore, it was the success of the 1982 Constitution to reactivate the system of segregation between leadership and representation as set up by the 1954 Constitution.

The leadership of the Party received an unprecedented strengthening in the 1975 Constitution. Not only was it inscribed into the preamble to the constitution, but also into the main text. Firstly, the leadership of the Party was inserted between article 1 - The State System (socialist state under the dictatorship of the proletariat) and article 3 - The Political System (people's congress): "The Communist Party of China is the core of leadership of the whole Chinese people. The working class exercises leadership over the state through its vanguard, the Communist Party of China."⁴³ Secondly, article 15 clearly regulated the leadership of the Party over the armed forces.⁴⁴ Lastly and most interestingly, article 16 expressly regulated: "The National People's Congress is the highest organ of state power under the leadership of the Communist Party of China."⁴⁵ Whereas article 17 additionally provided that the National People's Congress appoints and removes the Premier of the State Council and the members of the State Council on the proposal of the Central Committee of the Communist Party of China.⁴⁶ In the 1978 Constitution, the leadership of the Party was slightly weakened, however, only the leadership of the Party over the people's congress was deleted. In the 1982 Constitution, the circumstances changed again and the leadership of the Party was formally dismissed from the main text of the constitution and only remained in the preamble to the constitution, a circumstance generally equal to the 1954 Constitution.

From the Common Program to the 1982 Constitution, the induction of the inscription of the Party's leadership into the constitution is worth considering. In particular, the subtlety of the 1982 Constitution's deletion of the Party's leadership from the main text of the constitution, especially the direct leadership of the Party over the National People's Congress, but retaining the leadership of the Party in the preamble to the constitution and thereby utilizing the formal and structural characteristics of the constitution itself, while creating a clear distinction between the leadership of the party and the people's congress and simultaneously bringing them into a balance.

The leadership of the Party and the people's congress embody the two major political principles in the constitution, which for the

⁴³ XIANFA art. 2 (1975) (China).

⁴⁴ *Id.* art. 15.

⁴⁵ *Id.* art. 16.

⁴⁶ *Id.* art. 17.

moment, shall be called the “leadership principle” and the “representation principle”, whereby the Party is leading the people and the people’s congress is representing the people. Leaving aside the question of why the leadership of the Party has been retained, we first explore why now that the leadership of the Party was retained, the system of the people’s congress still had to be established. This question is not easy to understand through Marxist ideology. The Party is positioning itself as the vanguard of the working class, seizing the orientation of the historical development of the world, and it perceives itself as the highest group, representing the direction of development both in material (productivity) and cultural matters.⁴⁷ The people’s congress inevitably covers the other classes apart from the Party and the working class, which according to Mao Zedong, are the backward-thinking classes and need to be educated.⁴⁸ However, despite being the highest organ of state power, this does not mean that the self-perceived highest party needs to be placed under the people’s congress, which according to the perception of the Party, cannot be equated with the Party. Isn’t that a logical oxymoron from the Party’s point of view?

Previously, the common understanding of this question was that the people’s congress is acting as a rubberstamp,⁴⁹ creating a character of legitimacy. Because of this, decisions of the Party that passed the people’s congress received a touch of legitimacy.⁵⁰ However, this seemingly understandable explanation does not, in fact, touch upon the core of the problem, but is only a misconception that is doing neither side a favor. The core of the problem is rather the question of why decisions of the party do not naturally possess a character of legitimacy when the constitution already acknowledges the leading role of the Party; or to put it another way, why do decisions of the Party have to receive the acknowledgment of the people’s congress before they eventually obtain a legitimate character? Does the nature of the Party as a vanguard not already ensure the effectiveness of the decisions of the Party? Also, if the people’s congress is seen as a rubberstamp, then how can it provide legitimacy? Would it not be foolish to assume that a rubberstamp can grant legitimacy? The fact that the party can retain leadership without representing can be explained through several aspects.

⁴⁷ Zhongguo Gongchandang Zhangcheng (中国共产党章程) [Constitution of the Chinese Communist Party] (revised and adopted by the Chinese Communist Party’s 18th Cong., Nov. 14, 2012).

⁴⁸ Mao, *supra* note 20, at 282-97.

⁴⁹ This “rubberstamp” phrase occurred as early as the drafting of the 1982 Constitution. The Constitution Drafting Committee had already tried to change the “rubberstamp” image through setting up a bicameral system and reducing the representational scale of the people’s congress. However, none of these ideas were adopted. See Xu, *supra* note 3, at 585-92.

⁵⁰ Jiang, *supra* note 19, at 10-39.

First of all, the party itself is the vanguard of the working class, whereas the class distinction itself is the core of the proletarian class theory.⁵¹ This results in the inability of the Party to represent the entirety of the farmer class, the national bourgeoisie, the intellectuals as well as all the other classes or ranks. And even in times of the “Three Represents”, the Party only represents “the fundamental interests of the overwhelming majority of the Chinese people”.⁵² It represents the “interests” instead of the “will”, and it represents the “overwhelming majority of” instead of the “entire” population. The class character of the party limits the representative identity of the party. It is also because of this that the leadership of the party had to be obtained through the United Front and the Political Consultative Conference.

Second of all, the people’s sovereignty, the people becoming the masters of their own country - is a fundamental political idea that is accepted by the Party. Although the Party is using the class conception and the United Front to demarcate and organize the people, the Party is acknowledging that the people grant its power to it. Since the United Front has always existed widely, its connotation of the concept of people was by far exceeding the proletariat. When the Common Program adhered to the new democracy as the basis for the state founding, the people’s congress was necessary in order to establish a system apart from the Party’s and to organize and arrange the people.

Lastly, since the Party was clearly aware that the leadership principle and the representation principle are two entirely different principles, it had to separate the two through technical means and by utilizing the structural features of the constitution in order to prevent an open collision of the two. The leadership principle was placed in the preamble to the 1982 Constitution, and thus commanded the entire constitution, whereas the people’s congress was placed in the chapter on the state institutions, combining virtuousness and reality, and realizing the dialectical unity.

With regard to this problem of potential collision, Chen Duanhong suggests: “In contemporary China, the ultimate sovereignty belongs to the people, while the people are organized through the representational function of the Communist Party and the representational function of the people’s congress.”⁵³ “The concept of representation is assigned a double definition, namely the

⁵¹ Mao, *supra* note 20, at 3-11.

⁵² Zhongguo Gongchandang Dishiqici Quanguo Daibiao Dahui Baogao (中国共产党第十七次全国代表大会报告) [Report of the Chinese Communist Party’s 17th Congress] (promulgated by the Chinese Communist Party’s 17th Cong., effective Oct. 21, 2007), http://news.xinhuanet.com/newscenter/2007-10/24/content_6938568.htm.

⁵³ Chen Duanhong (陈端洪), Xianzhi yu Zhuquan (宪制与主权) [Constitutionalism and Sovereignty] 147 (2007).

representation of the people by the Party and by the People's Congress."⁵⁴ This so-called "dual representative system", however, not only ignores the historical changes of the Party's leadership within the constitution, but also its implementation mechanisms, namely the United Front and the Political Consultative Conference. Lastly, it also ignores the fundamental difference between the leadership principle and the representation principle.⁵⁵ Whereas the leadership principle makes the class difference a prerequisite and uses the unification of the classes (the United Front) as its implementation mechanism, the representation principle is instead founded on the equality of citizenship, which is in line with the Electoral Law's principle of "one man one vote".⁵⁶ The two are therefore completely different principles.

The contradictory combination of the leadership principle and the representation principle is not a problem unique to China. The same could be found in the Soviet system, creating a special political form. But what is the ideological basis for this political form? The leadership principle originated from the metaphor of the vanguard, whereas its ideological basis can be traced back to the historical philosophy and the dialectic of Hegel, which Schmitt explained as follows:

The *Weltgeist* only manifests itself in a few minds at any stage of its development [...] There will always be a vanguard of the *Weltgeist*, the apex of the development of consciousness, an avant-garde that has the right to act because it possesses correct knowledge and consciousness, not as the chosen of a personal God, but as a moment in development. This vanguard does not wish to escape from the immanence of world-historical evolution at all, but is, according to the vulgar image, the midwife of coming things.⁵⁷

The vanguards are not representatives chosen by God from top-to-bottom, nor do the people choose them as representatives from

⁵⁴ *Id.* at 148. An equal approach is also suggested by Jiang Shigong, see Jiang, *supra* note 19.

⁵⁵ However, when Chen Duanhong views the "leadership of the Party over the Chinese people" as the Chinese constitution's first fundamental law, and as the "first principle of organizing and shaping the Chinese people's sovereignty", he in fact abandons his so-called "dual representative system". "The representation through the people's congress" quietly disappears, and the internal tensions necessarily brought about by the "dual representative system" are completely avoided. See Chen Duanhong (陈端洪), *Zhixianquan yu Jibenfa* (制宪权与基本法) [Constituent Power and Fundamental Law] 283-286 (2010); see also Chen, *supra* note 53, at 147.

⁵⁶ *Quanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Xuanju Fa* (全国人民代表大会和地方各级人民代表大会选举法) [Electoral Law of the People's Republic of China for the National People's Congress and Local People's Congresses] (promulgated by the Nat'l People's Cong., July 1, 1979) (2010) art. 4 (Chinalawinfo).

⁵⁷ Carl Schmitt (卡尔·施米特), *Zhengzhi de Langmanpai* (政治的浪漫派) [Political Romanticism] 206 (Feng Keli (冯克利) & Liu Feng (刘峰) trans., 2004).

the bottom-up. Vanguarders do not represent any people. They are the personification of the *Weltgeist*, a selection of human history. Likewise, the Party assumes that its leadership role was historically granted, and this is not only referring to the past history, but also to the universality of history. The historical role of the Party as the vanguard of the working class was therefore never derived from a representation concept.

The ideological basis for the representation concept is rather complicated, particularly because it bears differences between the representation concept based on the Catholic tradition and the one based on the Protestant tradition as well as the difference between the Continental European and the Anglo-American representation concepts. Besides, these types of representation concepts are oftentimes confused. With regard to the representative democracies of today's secular rationalistic states, the representation concepts are generally based on the people as the sovereign and founded on rational assumptions and electoral techniques. The source of power here are the people and the representing of the people; therefore, representing is the means of achieving the people's sovereignty. As for the Party which is upholding the historical materialism, representing is definitely exercised from the bottom-up and coming from the people, whereas the leadership principle is definitely exercised from top-down and acting on the people. So how can the representation principle and the leadership principle be coordinated? This question can be observed from at least two perspectives: First, theoretically by transforming the leadership principle into the representation principle and second, by resorting to complicated electoral techniques.

The people's representatives have a double function, in that they are both direct producers while also representing the advanced elements within its position, class, group and different levels of society. Similar to the role of the Party as the vanguard of the working class, the representatives of the people's congress possess the character of a vanguard for their electoral units. Of course, this vanguard is organized and granted by the Party. Therefore, the people's congress in theory can be seen as the assembly organized by the vanguards of all regions, classes and constituencies, whereas the party is the vanguard of the vanguards: leading the vanguards. The representatives of the people's congress can thus be interpreted as a sample of diversity. However, this sample is not randomly selected, which is exactly why they can function as a sample. In their roles as vanguards in each area, position and different levels of society, they possess a typical representational character. It is then not hard to understand when a few star-like figures are ordered to become representatives to a People's Congress, since they are seen as

vanguards, which serve the purpose of enlightening and educating the other people.

Assuming that the party is the vanguard of the working class (of course this is only spoken in the sense of the very original theory), then the people's congress is the vanguard of the entire people, and based on the leading position of the working class, the party is therefore the vanguard of the vanguard. The underlying representation concepts of the people's congress are therefore the representation concepts transformed by the vanguard concepts. Therefore, it can be said that the people's congress as a national governmental organization and system of power is in fact the projection of the Party's organization and power system on the national level. The combination of "people's congress and people" was composed after the combination of "Party and working class," giving the organizational principles and power relations of the Party and of the state organs the same constructional character. For example, the principle of democratic centralism, an organizational principle of the Party, is necessarily also an organizational principle of the state organs.⁵⁸ This equality of the constructional character implies that unless a violent revolution or a large scale social movement occurs, changes in the political system will necessarily start from within the party. This kind of equality of the constructional character is a necessary phenomenon of a one-party state, which sets it apart from multi-party states as well as absolutist states. With regard to the former, there is a substantial difference between the systems of the parties and the state, whereas with respect to the latter, the systems of the Party and the state are unified, which according to our understanding is the prerequisite of the political-legal system of a one-party state. This also explains why other parties can exist but only within the Political Consultative Conference, and not within the National People's Congress. The reason for this is that if other parties would enter the National People's Congress, they would destroy the equality of the constructional character.

However, since the representatives to the people's congress are elected, the question is, how does the Party ensure that the elected representatives to the people's congress are indeed vanguards, that they are able to understand the equality of the constructional character and furthermore, that they operate this special mechanism together with the Party? This gives rise to complicated questions with regard to election techniques, demonstrating that the institutional arrangements of the Electoral Law as well as its specific

⁵⁸ After the Party obtained the leadership over the United Front, this equality in terms of the constructional character equally applied for the combination of "Political Consultative Conference and United Front". In fact, the Party had to first achieve the equality in construction on this level, before realizing the reform towards leadership of the representation principle, which would be realized with the equality in construction of "people's congress and people".

operations in practice require further exploration, which shall be discussed in another paper.⁵⁹ The coexistence of the Party's leadership and the people's congress is a mixed system or a transitional system. Just like the United Front was inevitable in times when the class struggles could not be carried out in full, the reliance on the people's congress is necessary in times when the leadership of the Party is not fully enforceable. It is important to remember that the Political Consultative Conference that once acted in the function of the people's congress was seen as the organizational form of the United Front, which is still true today. The Party's leadership and the people's congress are, however, two different systems based on two different principles. The equality of their constructional character is conditional and the relationship between the two is dynamic. The revealing and handling of this structure are the core issues of Chinese constitutionalism. The so-called "dual representative system" cannot truly summarize the structure of "leadership and representation", nor can it address or handle the true issues of it.

IV. THE NEW DESIGN OF CONSTITUTIONALISM

The discussions above mainly dealt with the 1982 Constitution. As pointed out in the first part of this paper, the 1982 Constitution is in fact backward-looking, the main task being the reconstruction of the sovereignty structure, namely the relation between the United Front (the Political Consultative Conference), the Party and the people's congress. Only if the relation among these three is adequately addressed, can stability for the sovereignty structure be achieved, and a stable political foundation for the era of reform and opening up be laid. The amendments to the 1982 Constitution, nevertheless, can remove these historical burdens so that the fundamental problems of sovereignty structure will not have to be addressed again, and a new design for constitutionalism can be created internally according to the new situational developments. This design for constitutionalism does not touch upon the change in sovereignty structure, but to some extent changed the social and ideological basis of the sovereignty structure, and paved the way for changes to the political construction of the constitution.

A simple statistic and analysis concerning the amendments to the 1982 Constitution will help clarify the issues mentioned above. The

⁵⁹ For example, article 32 of the Electoral Law states: "When a local people's Congress at or above the county level is to elect deputies to the people's congress at the next higher level, the nominees for deputies shall not be limited to the current deputies to the lower people's congress." This also implies that each election of a people's congress at or above the county level will, to a certain extent, bring about a fracture in terms of representation. *Quanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Xuanju Fa* (全国人民代表大会和地方各级人民代表大会选举法) [Electoral Law of the People's Republic of China for the National People's Congress and Local People's Congresses] (promulgated by the Nat'l People's Cong., July 1, 1979) (2010) art. 32 (Chinalawinfo).

four amendments comprises 31 articles, 5 of which involves the preamble, 16 the general principles, 2 the fundamental rights and duties of citizens, 7 the structure of the state and 1 the national anthem. The contents of these 31 articles involved in the amendments are complex, but overall they mainly cover the following three issues. The first is a new interpretation and repositioning of the “People’s Republic”. The second is to release the society from the state and achieve an initial separation between state and society. The third is the incorporation of articles concerning rule of law, protection of private property and human rights into the constitution, establishing the guidelines and spiritual basis of the new design of constitutionalism.

The amendments so far comprise five changes to the preamble to the constitution, among which three repeatedly amended the seventh paragraph of the preamble and two amended the tenth paragraph of the preamble. The tenth paragraph contains the regulations regarding the United Front. First, with the fourth article of the 1993 Amendment the following sentence was added: “The system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come.”⁶⁰ All builders of socialism were then added to the part constituting the patriotic United Front in the nineteenth article of the 2004 Amendment.⁶¹ In fact, this happened in order to expand the scope of the United Front. These two amendment articles can be seen as further improvements to the United Front and the Political Consultative Conference, whereas they did not alter the fundamental sovereignty structure.

The seventh paragraph of the preamble contains the self-positioning as well as the guiding ideology, tasks and goals of the People’s Republic. With respect to the self-positioning, the 1993 Amendments first added the sentence, “China is at the primary stage of socialism”⁶² which was later revised in the 2004 Amendment to read, “China will be in the primary stage of socialism for a long time to come,”⁶³ thereby officially establishing the theory of the primary stage of socialism. In terms of the guiding ideology, the amendments successfully added, “the theory of building socialism with Chinese characteristics,”⁶⁴ “Deng Xiaoping theory”⁶⁵ and the “thought of

⁶⁰ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 1993] (promulgated by the Nat’l People’s Cong., Mar. 29, 1993) art. 4 (Chinalawinfo).

⁶¹ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 2004] (promulgated by the Nat’l People’s Cong., Mar. 14, 2004) art. 19 (Chinalawinfo).

⁶² Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 1993] (promulgated by the Nat’l People’s Cong., Mar. 29, 1993) art. 3 (Chinalawinfo).

⁶³ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 2004] (promulgated by the Nat’l People’s Cong., Mar. 14, 2004) art. 18 (Chinalawinfo).

⁶⁴ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 1993] (promulgated by the Nat’l People’s Cong., Mar. 29, 1993) art. 3 (Chinalawinfo).

three represents”⁶⁶ to the “Marxism-Leninism and Mao Zedong Thought.”⁶⁷ With regard to the tasks, the following two passages were added: “persevere in reform and opening to the outside world”⁶⁸ and “develop the socialist market economy.”⁶⁹ With respect to the goals, the “high level of culture and democracy” was downgraded to read, “powerful, democratic and culturally advanced.”⁷⁰ In addition, the promotion of the development of “political civilization” was added.⁷¹ These amendments are rather trivial and the individual words were repeatedly amended. However, a comparative reading of the seventh paragraph of the preamble to the 1982 Constitution before and after the fourth amendment will show that the four amendments indeed in part already achieved a new interpretation and positioning of the “People’s Republic”. The mentioning of the theory of the primary stage of socialism as well as the re-establishing of the guiding ideologies, tasks and goals based on this theory will reposition the People’s Republic out of the initial inevitable environment of the communist utopia into a secular rational state of the present, and accomplish the return from the people’s democratic dictatorship state to a people’s democratic state. Therefore, the four amendments had a strong influence on the new interpretation and positioning of the sovereignty structure.

The reinterpretation and positioning of the People’s Republic is certainly not sufficient and further, it is part of a process of continuous amendments. But these limited changes brought about the possibility of the separation of state and society, which is particularly embodied in the general principles’ large-scale reform of the regulations regarding the economy. Nearly half of the articles in the amendments touch upon the reform of the economical system, mainly concerning ownership and the system of allotment, and the individual articles have also been progressively amended. These

⁶⁵ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 1999] (promulgated by the Nat’l People’s Cong., Mar. 29, 1999) art. 12 (Chinalawinfo).

⁶⁶ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 2004] (promulgated by the Nat’l People’s Cong., Mar. 14, 2004) art. 18 (Chinalawinfo).

⁶⁷ The “theory of building socialism with Chinese characteristics”, the “Deng Xiaoping theory” and the “thought of three represents” are often explained as the new developments of “Marxism-Leninism and Mao Zedong thought”. However, development would imply reform and reform would imply a new beginning. A careful observation, however, shows that the official documents and the media of today oftentimes only refer to the “theory of building socialism with Chinese characteristics”, the “Deng Xiaoping theory” and the “thought of three represents” while referring to guiding ideologies.

⁶⁸ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 1993] (promulgated by the Nat’l People’s Cong., Mar. 29, 1993) art. 3 (Chinalawinfo).

⁶⁹ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 1999] (promulgated by the Nat’l People’s Cong., Mar. 29, 1999) art. 12 (Chinalawinfo).

⁷⁰ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 1993] (promulgated by the Nat’l People’s Cong., Mar. 29, 1993) art. 3 (Chinalawinfo).

⁷¹ Xianfa Xiuzheng’an (宪法修正案) [Amendment to the Constitution of the People’s Republic of China, 2004] (promulgated by the Nat’l People’s Cong., Mar. 14, 2004) art. 18 (Chinalawinfo).

amendments process is more tedious than the amendments to the preamble. In brief, the content mainly contains pluralizing of the ownership and the allotment system, whereas the detailed contents of these amendments will not be discussed here. I would only like to point out the meaning of these amendments for constitutionalism, the civil society with the private economy, and the private life as its basis is released from the control of the state and developing gradually. The development and maturation of the civil society are the basis for the new design of constitutionalism. It was also precisely after the civil society developed to some extent that the guidelines of the new design of constitutionalism were finally inscribed into the 1982 Constitution in 1999 and 2004, namely in the regulations regarding the rule of law,⁷² the protection of private property and human rights.⁷³

The regulations regarding the rule of law and the protection of private property were placed in the constitutions' first chapter, and the regulation regarding human rights was placed in the constitutions' second chapter, they failed to enter the preamble of the constitution. From the constituents' perspective, it appears that these regulations are still in the fundamental patterns of constitutionalism as determined in the preamble to the constitution. The inscription of these three articles, in addition to the above-mentioned amendments to the constitution's preamble and the changes of the ownership system, has undoubtedly changed the social basis and spiritual structure of the 1982 Constitution, thus marking an early prototype of the new design of constitutionalism.

The reforms to the economical system have created a separation of state and society, causing civil society to develop. The incorporation of regulations regarding the rule of law, the protection of private property and the human rights have further created psychological conditions and a constitutional basis for the development of the public society. Finally, the gradual improvement of the new design of constitutionalism is dependent on the further improvement and development of the civil society and the public. Although the further progress of the current civil society is difficult and it will frequently touch upon profound issues, nevertheless, as long as the civil society is able to further develop, the development of the public will only be a matter of time.

In summary, this section argues that the amendments have added a few new constitutional principles into 1982 Constitution, and created the possibility of a new design for constitutionality.

⁷² Xianfa Xiuzheng'an (宪法修正案) [Amendment to the Constitution of the People's Republic of China, 1999] (promulgated by the Nat'l People's Cong., Mar. 29, 1999) art. 13 (Chinalawinfo).

⁷³ Xianfa Xiuzheng'an (宪法修正案) [Amendment to the Constitution of the People's Republic of China, 2004] (promulgated by the Nat'l People's Cong., Mar. 14, 2004) art. 22 (Chinalawinfo).

V. CONCLUSION: MULTIPLE COMPLEX STRUCTURE

This discussion shows, in regards to the sovereignty structure of the 1982 Constitution, that the combination of “Party and people’s congress” is without a doubt at the core of this structure. The pre-condition for the generation and stabilization of this sovereignty structure is the special treatment of the United Front and the Political Consultative Conference.⁷⁴ At the same time, along with the successive appearance of the four amendments to the constitution, the prototype for the new design of constitutionalism, although not touching upon the sovereignty structure of the 1982 Constitution, still changed the social and ideological basis of the constitution and paved the way for future changes to the constitution.

Beginning with the Common Program, the constitution has experienced a continuous addition of historical layers, which created multiple and complex internal structures. Only with these structures will it be possible to respond to the risky and complex status of development and open up all possible options for future changes. In fact, as early as 2002 when the 1982 Constitution celebrated its twentieth anniversary, President Hu Jintao already clearly pointed out the complexity of its structure: “The key to developing socialist democracy is to combine the need to uphold the Party’s leadership and to ensure that the people are the masters of the country with the need to rule the country by law.”⁷⁵ “Combining” means between the three and unnaturally so, whereas there exist several issues that need to be bridged.

In this multiple complex structure of the 1982 Constitution, the United Front and the Political Consultative Conference are the characteristics unique to China. Although a farfetched comparison to the tradition of republicanism can be drawn, there is also a reflection of the class republic. It is, nevertheless, very difficult to trace its direct ideological origin back to the system and practice of the

⁷⁴ Tian Feilong suggests that there are three “incarnations” of the sovereignty of the people in the 1982 Constitution: “based on the true leadership representation system of the party + based on the order of the people’s congress system + the participatory democracy system of the non-representative system”, whereas the so called “participatory democracy system of the non-representative system” is referring to the Political Consultative Conference. The author, however, suggests that this thesis remains debatable: First, “leadership” and “representation” are two completely different political principles. The term “leadership representation system” is therefore not only unhelpful for the clarification of the underlying problem, but will instead rather obscure the essence of the problem. Second, in a broad sense it can be said that the Political Consultative Conference embodies the participatory democracy. However, it needs to be noted that the Political Consultative Conference is essentially the mechanism of consultation between the parties. Although its mission is to achieve a sovereignty structure, it is not itself within the sovereignty structure. For the related treatises of Tian Feilong, see Gao & Tian, *supra* note 8, at 15-27.

⁷⁵ Hu Jintao (胡锦涛), *Zai Jinian Xianfa Shixing Ershi Zhounian Dahui Shangde Jianghua* (在纪念宪法施行二十周年大会上的讲话) [Speech at the Meeting Celebrating the 20th Anniversary of the 1982 Constitution, Dec. 4, 2002], http://news.xinhuanet.com/newscenter/2002-12/04/content_649591.htm.

Roman Republic. The United Front and the Political Consultative Conference are the results of the Communist Party's experience of many years of revolutionary struggles. In regards to the struggle tactics of the Party, those can indeed be seen as their magic weapons. With regard to the constitution itself, the so-called leadership of the Party or the "Chinese people under the leadership of the Communist Party of China"⁷⁶ was in fact achieved through the United Front and the Political Consultative Conference. Since the 1954 Constitution, the Party's leadership right has been firmly established over the United Front.⁷⁷ The right of leadership is thereby achieved in two ways. First, through the broad representative character of the United Front, expanding the leadership right to different classes, grassroots and groups. Second and more importantly, through the segregation function of the Political Consultative Conference, which ensures that the differences between the parties are resolved before the people's congress is convened, which allows a unified will to enter the people's congress. This becomes evident in the timely sequences beginning every year with the convening of the Party, through to the Political Consultative Conference, to the convocation of the people's congress.

The sovereignty structure of "the Party and the people's congress" coming into existences is therefore largely attributable to the special roles and functions of the United Front and Political Consultative Conference. But this sovereignty structure cannot be called a "dual representative system", since the party is not representing the people, but instead leading the people, and only the people's congress is a people's representative organ in the legal sense. The precondition for the leadership of the Party is in fact the difference between and the sorting of the classes, whereas, according to Mao Zedong theory, the advancement of the party serves as its security.⁷⁸ Therefore the leadership is of political nature. The people's congress, on the other hand, is built on the equality of citizens and thus the key point to interpreting this particular sovereignty structure is the difference between the leadership principle and the representation principle, as well as the question of how the representation principle is transformed by the leadership

⁷⁶ Chen, *supra* note 53, at 283-86.

⁷⁷ In fact, as early as the Common Program was drafted, the Party had already established its leadership right over the United Front, only making a circumlocution in the Common Program stating "the leadership of the working classes". In the "Declaration of the First Plenary Session of the Chinese People's Political Consultative Conference" passed on September 30, 1949, not only the "leadership of the Communist Party of China" was clearly mentioned, but it was even mentioned "under the leadership of the people's leader chairman MAO Zedong". See *Kaiguo Shengdian: Zhonghua Renmin Gongheguo Dansheng Zhongyao Wenxian Ziliao Huibian* (开国盛典——中华人民共和国诞生重要文献资料汇编) [The Founding Ceremony: A Compilation of Important Documents of the Emergence of the People's Republic of China], *supra* note 21, at 536.

⁷⁸ Mao, *supra* note 20, at 282-97.

principle. This transformation mainly happens on an ideological level, while also depending on a set of electoral techniques from which the very special political structure of one-party ruling emerges - equality of the constructional character of the power organization system between the party and those of the state. The exploration and study of this equality of the constructional character will help us better understand the nature of Chinese constitutionalism and help us better predict expectations for its future.

Rule of law, private property rights and human rights are of course embodied in the specific law systems and practices. However, their normative value is still worthy of attention. Once rule of law, private property rights and human rights were entered into the constitution, they possessed normative power. They cannot simply be seen as doctrines filling the gaps, because on a practical level, they changed the societal structure under which the constitution functions and, on an ideological level, they changed our understanding of the constitution. For example, the concept of “counterrevolution” was revised into “endangering the state security,”⁷⁹ and “martial law” was changed into “state of emergency.”⁸⁰ Another example would be the interpretation of the term “dictatorship” within the constitution, as it needs to be ensured that any interpretation is consistency with the principles of rule of law and human rights. The term dictatorship is slowly transforming from an arbitrary treatment of class enemies to a legal punishment of criminals.⁸¹ Additionally, terms such as, “class struggles” are not to be directly promoted and are currently avoided. The fundamental principles of rule of law, private property rights and human rights also need to be taken into account when interpreting the other articles in the constitution, including the structural elements of sovereignty. These changes may not have an immediate effect, but once they have occurred, they are going to be a permanent force.

With the new design of constitutionalism seen in the structure of the 1982 Constitution, we see a fundamental constitution question: how should we approach the essential contradictions or discordances between the principles and values within the constitution, such as democracy and judicial review, freedom and equality, justice and efficiency. Of course, with regards to the 1982 Constitution, this is simply an expression of the multiple complex structure shown above. Towards these problems, Ronald Dworkin advocated the consideration and usage of a coherent and holistic interpretation. Dworkin argued that the constitution has internalized all sorts of different principles and values, all of which need to be interpreted

⁷⁹ Xianfa Xiuzheng'an (宪法修正案) [Amendment to the Constitution of the People's Republic of China, 1999] (promulgated by the Nat'l People's Cong., Mar. 29, 1999) art. 17 (Chinalawinfo).

⁸⁰ Xianfa Xiuzheng'an (宪法修正案) [Amendment to the Constitution of the People's Republic of China, 2004] (promulgated by the Nat'l People's Cong., Mar. 14, 2004) art. 26 (Chinalawinfo).

⁸¹ Peng, *supra* note 2.

within the overall context of the constitution once they are internalized by the constitution. Each value needs interpretation against the background of the other values. "It is not about organizing them by hierarchically grading, but about organizing them in a solid network."⁸² They need to be considered as a part of a more inclusive value structure, meaning that the interpretation of each concept requires the consideration of all the other concepts in this structure. Otherwise, it would be to the detriment of the holistic and coherent character of the constitution. The same concept applies when interpreting the 1982 Constitution - it needs to be placed in this multiple complex structure and interpreted holistically.

Every constitution is a system with internal contradictions. It is the meaning of constitutionalism to harmonize the many contradictions and to shelter or resolve them within the system of constitutionalism through measures such as constitutional interpretation and constitutional litigation. The 1982 Constitution is a constitution of multiple complexities. And it is precisely because of its complex character that it is able to respond to difficult issues in times of great change, which means that every structural layer of constitutionalism is responding to the respective problems and exercises a different function accordingly, whereas discordances and paradoxes between them are unavoidable. This, however, does not mean that one layer completely overwhelms or absorbs other layers, but rather that each layer is located within continuous compromises and reorganizations. At any given point in time and with any given issue, one layer will be dominant and at any other given point in time and with any other given issue, another layer will be dominant. In an era of great change, this is where paradoxes are located and filled with various human conflicts. Whether it is the transitional character or the temporary nature of the 1982 Constitution, both can exist in this inherent mechanism and play a role accordingly, since both are located within this complex structure of the constitution. The inevitable starting point for both are our praise and our criticism of the 1982 Constitution, serving the inquiries towards the current constitutionalism itself as well as towards the imagination of the future design of constitutionalism, and precisely the multiple complex structure created by the layering of history.

⁸² RONALD DWORKIN, *JUSTICE IN ROBES* 160 (2006).

