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# The Constitution of China: What Purpose Does it (Not) Serve?

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It is widely accepted that constitutions serve several important purposes in Western as well as non-Western traditions. In this article, I propose that constitutions ought to serve at least the following six 'core' purposes: signify a break from the past, organise political power, provide legitimacy to the legal system, empower people, limit the power of government organs, and work as a unifying force for diverse interests and groups. Against this background, this article seeks to ask and answer the following question: does the Constitution of the People's Republic of China ("PRC") serve these core purposes? Although the PRC Constitution resembles – at least in appearance – Western liberal constitutions in many respects, it is really doubtful if it serves many of these core purposes. This is not to suggest, however, that the PRC Constitution is devoid of any real value. It does serve some other 'secondary' purposes within the current Chinese legal framework. This article will try to shed some light on what those purposes are and whether they mean anything to people outside China interested in the study of constitutionalism.

## INTRODUCTION

Almost all countries now have a constitution of some sort.[1] There must be then some 'common' purposes for having a constitution. But what are these purposes that constitutions generally serve? This question does not pose a great difficulty in relation to liberal constitutions adopted by Western and non-Western countries, where it is generally accepted that liberal constitutions signify a break from the past, organise political power, provide legitimacy to the legal system, empower people, limit the power of government organs, and work as a unifying force for diverse interests and groups within a given country.[2]

At the same time, it is believed that constitutions rooted in communist ideology might not be meant to serve these purposes.[3] Against this background, a distinction has also been drawn by scholars between liberal constitutions on

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1. The constitution may be written or unwritten (as in the UK, Israel and New Zealand); it may be called 'constitution' or something else like 'basic law' (as in the case of Germany).
2. *See* K.C. WHEARE, MODERN CONSTITUTIONS 5-9 (1966); ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 14-21 (1998); YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 83 (1999).
3. *See* ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 39-40 (2004).

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the one hand and nominal, semantic or facade constitutions on the other.[4] However, considering that not many communist states (or even communist constitutions) exist today, the erstwhile division between liberal constitutions and communist constitutions might not be very illuminating.[5] This is more so because constitutions of formerly communist states are adopting – incrementally or in one go, *in toto* or with suitable localisation – various features of liberal constitutions.[6] The constitutions of such countries could then be considered 'transitory' in that they have not yet reached the stage that they aspire to reach.[7]

This article, therefore, poses the following question: what is the extent to which such 'transitory' constitutions serve the purposes normally fulfilled by liberal constitutions, or ought to be fulfilled by any constitution for that matter? It seeks to answer this question with reference to the 1982 Constitution of the People's Republic of China (PRC),[8] which could be considered a 'transitory' constitution in this sense. An attempt is made to compare the constitutional text as well as the practice of the PRC Constitution with the following six core purposes that constitutions, in my view, ought to serve: embodying a fresh start; organising political power; providing a normative grounding; limiting power; empowering people; and operating as a unifying force.[9]

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4. Giovanni Satori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCIENCE REV. 853, 861 (1962); CHEN, *supra* note 3, at 39-41; EDWARD MCWHINNEY, CONSTITUTION MAKING: PRINCIPLES, PROCESS, AND PRACTICE 8-9 (1981).
5. *See* BARENDT, *supra* note 2, at 6 ("It is important to distinguish liberal constitutions from the nominal or "facade" constitutions of the kind that existed in the Soviet Union or Nazi Germany."). *See also* CHEN, *supra* note 3, at 40 ("Constitutions of communist or "totalitarian" states differ from those of Western countries in both formal authority and substantive content.").
6. For example, when examining the issue in the case of Eastern European countries, Ludwikowaski concludes that "the new East-Central European model will be an embodiment of features commonly recognised as essential for Western constitutionalism: parliamentary and liberal democracy, limited government, an open society providing a broad coverage for human rights, legality or the rule of law, enforcement of constitutional principles, and guarantees for private ownership of property and market mechanisms." Rett R Ludwikowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT'L L. COM. 91, 170 (1991). *See also* Rett R Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development* 23 GA. J. INT'L & COMP. L. 155 (1993).
7. The constitutions of communist states change in different stages. For example, "theoretically, a communist constitution reflects the progress towards the achievement of a classless and communist society, with each major step towards that goal a new constitution is adopted to consolidate the progress and to establish the framework for the achievement of the next stage." GHAI, *supra* note 2, at 89.
8. Adopted at the 5th Session of the 5th National People's Congress on 4 December 1982. The 1982 Constitution has been amended four times so far, i.e. in 1988, 1993, 1999, and 2004.
9. These six purposes have been selected from a review of various scholarly writings, for not all scholars have emphasised all of these purposes or have used different terminologies. Barnett, for example, conceives the functions of a constitution as follows:

   "In addition to the function of defining powers and duties and relationships with other bodies, a constitution fulfills two related purposes – those of definition and evaluation. In its defining function, the constitution is both descriptive and prescriptive (or normative). ... the constitution will both define the manner in which the rules in fact operate and dictate what ought to happen in a given situation. As such, the rule or normative statement in question sets a standard of conduct or behaviours which is regarded as correct and which is expected

The analysis will show that the PRC Constitution seems to serve, if at all, most of these six purposes associated with liberal constitutions at a very low level. Is this problematic, or could comparative law scholars justify this difference by employing some theory of constitutional pluralism? I propose that although a certain amount of diversity between constitutions might be necessary in terms of purposes that they seek to serve, the differences should not become so stark that the constitutional reality bears no resemblance to how the term 'constitution' is generally understood by people. To give an analogy: no harm is caused if all of us start referring to the colour blue as red; but it would create chaos if the colour red is used by some to describe both blue and red.

This is not to suggest that the PRC Constitution does not serve any useful purpose. For example, it still organises the political power within the state and provides a language to discuss the functioning of state organs. It also arguably serves as a reference point for future reforms, both for Chinese leadership and comparative law scholars.

The attempt made in this article to move the debate beyond 'real' versus 'facade' constitutions could invite one criticism: that testing non-Western constitutions with reference to purposes associated with Western constitutions smacks of Western imperialism. At least two justifications can be offered for this attempt. First, although it is true that the six purposes have generally been propounded in relation to Western constitutions, this has not been the case always, as some non-Western countries have also successfully adopted liberal constitutions and/or their features.[10] Second, even if the notion of 'constitution' is Western in origin,[11] there is no harm in learning from its Western history if that could offer useful lessons for others. After all, one must have "a standard against which to measure"[12] constitutional developments taking place in China.

## I. Why do We Need Constitutions?

For the purpose of this article, I take the following basic premise: that almost all states adopt a constitution because constitutions do (or ought to) serve *certain core* purposes which are common amongst all states.[13] Of course, beyond these

to be adhered to by those to whom the rules are addressed. ... when such normative rules exist, they provide a standard against which actual conduct can be judged or evaluated." Hilaire Barnett, Constitutional and Administrative Law 6 (2004).

10. The Indian Constitution is a good example. For an account of how the Indian Constitution seeks to fulfil these purposes, *see* Shukla's Constitution of India A44-A61 (Mahendra P Singh, 2008).
11. Although the term 'constitution' also existed in ancient Chinese literature, its meaning differed from how the term is understood in modern times. *See* Lin Feng, Constitutional Law in China, 3 (2000).
12. Donald C. Clarke, *Legislating for a Markey Economy in China, in* China's Legal System New Developments, New Challenges, 13 (Donald C Clarke ed., 2008).
13. After reviewing several definitions of 'constitution', one commentator concludes that all constitutions 'have something in common'. *See* Lin, *supra* note 11, at 2.

limited number of core purposes, constitutions might seek to achieve some additional purposes as required by unique sets of circumstances. My focus in this article is only on 'core' purposes that all constitutions – not merely the liberal ones – should serve.[14] As explained below, there are at least six such core purposes.

### *A. Embodying a Fresh Start*

Why do states adopt a constitution in the first place or decide to go for a new constitution? States normally adopt constitutions to make a fresh start – that fresh start might be needed because of independence from a colonial power, establishment of a (con)federation, transition from revolution, or a fundamental change in the political system.[15] If one looks around the world, the current constitutions of numerous countries such as the United States, Australia, India, South Africa, Iraq, Afghanistan and Canada are illustrative of making a fresh start that could not be accomplished by constitutional amendments. Constitutions may often mention, in their Preamble, the *past* from which a departure was sought to be made and point to the *new future*. The Preamble of the Afghanistan Constitution 2004 exemplifies this. It states that we the people of Afghanistan realise "the injustice and shortcoming of the past, and the numerous troubles imposed on our country" and seek to establish "an order based on people's will and democracy".[16] The Preamble of the 1996 South African Constitution does the same. It declares: "We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity."[17]

Regardless of their past historical, political, cultural, or religious diversity, constitutions make a fresh start, which may again be diverse. That is why one commentator has rightly suggested that "[i]n the past two hundred years constitutions have been the most visible and most dynamic *manifestation of a people's determination to establish an entirely new basis of its polity*."[18] The success of a constitution, or the polity that it seeks to establish, will depend, to some extent, on the level of agreement amongst people of a given state on the need for, and the contours of, making such a fresh start.

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14. To draw an analogy, Professor Backer tries to identify core elements of constitutionalism. *See* Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671 (2009).
15. *See* BARENDT, *supra* note 2, at 2-3; MCWHINNEY, *supra* note 4, at 42.
16. THE CONSTITUTION OF AFGHANISTAN, Jan. 3, 2004, *available at* http://www.supremecourt.gov.af/PDFiles/constitution2004_english.pdf.
17. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, May 8, 1996, *available at* http://www.info.gov.za/documents/constitution/1996/index.htm.
18. ULRICH K PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 2 (Deborah Lucas Schneider trans., 1995) (emphasis added).

### B. Organising Political Power

Constitutions invariably organise political power within a given state.[19] A constitution is like a 'power map' as it is concerned with "the creation, distribution, exercise, legitimation, effects, and reproduction of *power*."[20] It is, therefore, appropriate to say that "one main function of a constitution is to establish the institutions that serve as authoritative sources of law and endow them with legislative power."[21] Murphy puts succinctly this organising function of any constitution: "At minimum, a authoritative constitutional text must sketch the fundamental modes of legitimate governmental operations: who its officials are, how they are chosen, what their terms of office are, how authority is divided among them, what processes they must follow, and what rights, if any, are reserved to citizens."[22]

By organising political power, constitutions not only indirectly contribute to limiting state power but also bring an element of predictability in terms of who would exercise which powers and by following what procedures. The importance of this function can be understood with reference to Israel, where "the tension that exists today between the Supreme Court and the Knesset [the nation's legislature] ... is in large part a result of the lack of a constitution clearly delineating the respective powers of the judiciary and the legislature."[23]

### C. Providing a Normative Grounding

Constitutions enshrine supreme rules of law;[24] they normally sit at the top of legal hierarchy within a country and thus, provide a normative grounding to the legal system. Different state organs and officials derive their power from the constitution. The normative character of a constitution also confers legitimacy on the exercise of power by state organs in different forms. In other words, "every state of affairs not conforming to the norms established by the constitution loses its legitimacy."[25] Constitutions, therefore, provide both legality and legitimacy to all centres of power within a given state. What makes

19. "Constitutional law is concerned with the role and powers of the institutions within the state and with the relationship between the citizen and the state." BARNETT, *supra* note 9, at 3.
20. VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 223-24 (1999) (emphasis in original) (quoting H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Greenberg *et al.* eds., 1993).
21. TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS 5 (2006).
22. JACKSON & TUSHNET, *supra* note 20, at 197 (quoting Walter Murphy, *Constitution, Constitutionalism, and Democracy, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Greenberg *et al*, eds., 1993)).
23. *Constitution for Israel: Why is a Constitution Necessary? available at* http://www.cfisrael.org//why_constitution.html.
24. "[A] constitution is, first of all, a legal document. *It is intended to state supreme rules of law.*" WHEARE, *supra* note 2, at 50 (emphasis added).
25. PREUSS, *supra* note 18, at 31.

constitutions superior to other laws, however, is a separate question. One may take recourse to Kelsen's *grundnorm*, or rely on 'We, the people' for conferring this authority on to the constitution.

### *D. Limiting Power*

It is trite that constitutions aim to limit the power of government organs.[26] Limiting the powers of the government is, in fact, considered one of the fundamental rationales for having a constitution.[27] A "constitution sets limits both to the powers which can be exercised and to the manner in which they may be exercised."[28] People consider constitutions desirable because constitutions help in achieving the goal of establishing a limited government by controlling arbitrary exercise of its power.[29] A constitution that fails to limit the government's powers is often labelled a constitution without constitutionalism.

Constitutions limit power by specifying precisely, as far as possible, the powers of different government organs. In addition, constitutions employ a variety of power-limiting principles such as the rule of law, fundamental rights, checks and balances, separation of powers, judicial review, and independent judiciary. The power-limiting role of constitutions operates at both vertical and horizontal levels. At the horizontal level, constitutions demarcate powers amongst the three branches of government (executive, legislature and judiciary) and other institutions. Constitutions also limit the scope of the power of government organs and institutions vis-à-vis citizens at a vertical level. In either case (i.e., if a branch or institution usurps the power allocated to another branch, or a branch encroaches upon the rights of people) constitutions prescribe remedies to affected persons or institutions to challenge the exercise of power before an independent adjudicator.

### *E. Empowering People*

Constitutions empower people by recognising (if not conferring) rights,[30] for rights can be invoked, depending upon the need, both as sword and shield

26. "It is characteristic of documentary constitutions, particularly those guaranteeing fundamental rights, that they impose constraints on the powers of the legislature and the government." BARENDT, *supra* note 2, at 1.
27. "The real justification of constitutions, the original idea behind them, is that of limiting government and of requiring those who govern to conform to law and rules. Most constitutions ... do purport to limit the government." WHEARE, *supra* note 2, at 137.
28. BARNETT, *supra* note 9, at 7.
29. "[A]ll over the Western area people requested, or cherished, "the constitution," because this term meant to them a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government"." Satori, *supra* note 4, at 855.
30. "Constitutions are designed ... to formulate rights and freedoms and other fundamental values for the community." BARENDT, *supra* note 2, at 3-4.

against the governing centres of power. "First and foremost, a constitution must list the...individual rights which lawmakers were bound to respect".[31] Rights are not, however, protected by merely enlisting them. A majority of modern constitutions enshrine several other complementary principles – such as the independence of the judiciary, separation of powers, the rule of law, and judicial review – to afford robust guarantees to peoples' rights. The extent to which rights are protected depends largely on three factors: the nature and scope of the rights protected, the constitutional position of the legislation enacted to secure these rights, and the manner in which rights are upheld and enforced.[32] The constitutional empowerment of people and civil society not only ensures their participation in governance but also helps in establishing a limited government.

The empowerment that takes place through constitutional rights is not merely against the might of the government. In a democratic set-up, protection is also needed against the will of the majority. Constitutions, therefore, should and do safeguard individual or collective rights of minority groups from the threat of a tyranny of the majority.

### *F. Operating as a Unifying Force*

One purpose of constitutions that has not been emphasised a lot, but is important, in my view, is that constitutions operate as a unifying force. Most states comprise diverse interest groups and people, more so in an increasingly globalised world. In order to ensure national unity and cohesiveness, it is critical that there is a common force to bind diverse communities together. Constitutions are a natural choice for being such a force, because unlike ordinary laws, constitutions are regarded as the supreme and more stable source of law.

Minorities in particular look towards constitutions to protect their special interests, or to seek protection against discrimination. History demonstrates that the constitutions which protected the interest of minorities or indigenous groups were able to avoid coups or frequent constitutional breakdowns. If all sections of society find a representation of their voices in the paramount document, they will connect better with the given constitutional ethos and have an interest in preserving it. Such stakeholding of constitutions will also assist in constitutions securing wider legitimacy.

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31. PREUSS, *supra* note 18, at 30.
32. *See generally* Jonathan L. Black-Branch, *Parliamentary Supremacy or Political Expediency? The Constitutional Position of the Human Rights Act under British Law*, 23 STATUTE L. REV. 59 (2002).

## II. PRC Constitution: Something More than a 'Facade'?

In this Part, I first examine the extent to which the PRC Constitution of 1982 serves the six purposes identified above.[33] This is done with reference to both the constitutional provisions and constitutional practices. An examination beyond the constitutional text is crucial because focusing merely on provisions might not give the correct picture.[34] For instance, although the text of the PRC Constitution might indicate the incorporation of "all the functions of any Western constitution",[35] in practice it may not be achieving all such functions. This is also shown by the discussion below.

After examining the PRC Constitution on the touchstone of the six criteria, I investigate whether the PRC Constitution serves any special purpose within the political system of China.

### *A. PRC Constitution vis-a-vis the Six Purposes*

#### 1. *Embodying a Fresh Start*

The PRC Constitution of 1982 seems to embody a fresh start within the Chinese polity in its own way.[36] The swift demise of its predecessor (i.e., the Constitution of 1978) was triggered by the victory of Deng Xiaoping's ideology of economic construction and modernisation over Mao's policies of class struggle and political campaigns.[37] It may not be inaccurate to say that the adoption of a new constitution in 1982 was necessitated by the economic reforms initiated in December 1978.[38] Therefore, the 1982 Constitution did signify a new start in terms of how a socialist country was to embrace selective

33. For an excellent analysis of the pre-1982 PRC Constitutions, *see* Jerome Alan Cohen, *China's Changing Constitution*, 76 China Q. 809 (1978).

34. "Before we can conclude, however, that a country which has a constitution limiting the government, has also constitutional government, *we must see how the constitution works in practice*, and see in particular whether usage and conventions operate to strengthen or to weaken constitutional limitations." Wheare, *supra* note 2, at 137 (emphasis added). *See also* Ghai, *supra* note 2, at 82.

35. Lin, *supra* note 11, at 7.

36. Professor Ghai notes some of the changes as follows:
"The 1982 constitution marks a new path in various ways...The constitution is made binding on all institutions and person (including the Communist Party) and there is unprecedented emphasis on the importance of socialist legality...It gives a place of pride to fundamental rights...A form of collective and individual responsibility of members of the State Council is introduced...The supervisory role of the NPC and of its Standing Committee over the executive is firmly established...A limit of two consecutive terms is established for key posts." Ghai, *supra* note 2, at 88-89.

37. Chen, *supra* note 3, at 43-44; Clarke, *supra* note 12, at 15. On the economic reforms embodied in the 1982 Constitution, *see* Bin Liang, The Changing Chinese Legal System, 1978-Present: Centralisation of Power and Rationalisation of the Legal System 17-41 (2008).

38. "Since the 1980s, China's reform has progressed with such speed and force that the Constitution, even revised several times, has constantly lagged behind the progression of the economic reforms." Wen-Chieh Wang & Min-Chiuan Wang, *The 2004 Amendment to China's Constitutional Law*, 6 Perspectives 37 (2005).

features of the free market economy.[39] However, the PRC Constitution of 1982 did not represent a fresh start in the sense of a clear 'snap' from the past so as to begin with a clean slate, because key political ideas and governance philosophies from the previous constitutions were retained. Nor was the fresh start 'swift' – it was rather a beginning of the fresh start, a work in progress that was to be completed by subsequent constitutional amendments.

The current PRC Constitution has been amended four times so far: in 1988, 1993, 1999 and most recently in 2004.[40] If we treat these four amendments as part of this process of change that began in 1982 with the adoption of a new constitution, the idea of the 1982 Constitution making a fresh start becomes clearer, for these amendments introduced significant changes such as embracing a socialist market economy, protection of private property, declaration of observing the rule of law, and a commitment to human rights. The 1988 amendment provided that the "State permits the private sector of the economy to exist and develop within the limits prescribed by law" and that the "private sector of the economy is a complement to the socialist public economy."[41] It also acknowledges that the "State protects the lawful rights and interests of the private sector of the economy". The 1993 amendment replaced "planned economy on the basis of socialist public ownership" with "socialist *market* economy".[42]

The 1999 amendment further clarified the role of private ownership and the private sector. The amendment inserted a new paragraph in Article 5 of the 1982 PRC Constitution. The new paragraph states: "The People's Republic of China governs the country according to law and makes it a socialist country under rule of law."[43] Equally important was the acknowledgment that although the "basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production", the "non-public sectors of the economy such as the individual and private sectors of the economy, operating within the limits prescribed by law, constitute an important component of the socialist market economy."[44] However, the clearest recognition of the right to property was provided by the 2004 amendment of the Constitution. The revised Article 13 of the 1982 Constitution now reads as follows:

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39. *See* Surya Deva, *Does the Right to Property Create a Constitutional Tension in Socialist Constitutions? An Analysis with Reference to India and China*, 1 NUJS L. REV. 583 (2008).
40. The text of the amendments is available at http://www.npc.gov.cn/englishnpc/Constitution/node_2824.htm. *See also* CHEN, *supra* note 3, at 44-46.
41. P.R.C. CONST. amend. 1988, art. 1, *available at* http://www.npc.gov.cn/englishnpc/Constitution/node_2829.htm
42. P.R.C. CONST. amend. 1993, art. 7, *available at* http://www.npc.gov.cn/englishnpc/Constitution/node_2828.htm (emphasis added).
43. P.R.C. CONST. amend. 1999, art. 13, *available at* http://www.npc.gov.cn/englishnpc/Constitution/node_2827.htm.
44. *Id.* arts. 14 & 16.

> Citizens' lawful private property is inviolable. The State, in accordance with law, protects the rights of citizens to private property and to its inheritance. The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and make compensation for the private property expropriated or requisitioned.[45]

The 2004 amendment also inserted in Article 33 of the PRC Constitution a declaration that the "State respects and preserves human rights."[46] In short, the 1982 Constitution read together with these four amendments represents a fresh start in the sense of recognising the importance of incorporating values (the rule of law and human rights) in the supreme document. It is a different matter though that the introduction of the rule of law or human rights guarantees might be just a rhetoric, which may not signify any real change in government's practices.

Unlike Western or liberal constitutions, the PRC Constitution prescribes at length the economic system and economic policies to be practiced by the government.[47] Apart from the Preamble, Articles 1 and 5 of the Constitution declare that China is a socialist country. Article 6 elaborates further by clearly stipulating that the "basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people."[48] "Disruption of the socialist system by any organisation or individual is prohibited."[49] Against this background, one may understand why it became necessary to amend the PRC Constitution to align it with economic reforms introduced over the years – something that could have been avoided, had the Constitution been silent or more general on economic system to be in implemented in China[50]

### 2. *Organising Political Power*

The 1982 PRC Constitution outlines the powers and functions of various government organs.[51] Whereas some fundamental principles are outlined in Chapter I on General Principles, Chapter III contains detailed provisions specific to various organs such as the NPC, the President, the State Council, the Local People's Congresses, the Central Military Commission, and the People's Courts.

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45. P.R.C. Const. amend. 2004, art. 22, *available at* http://www.npc.gov.cn/englishnpc/Constitution/node_2826.htm.
46. *Id.* art. 24. For an analysis of the 2004 amendment, *see* Wang & Wang, *supra* note 38.
47. *See* Wang & Wang, *supra* note 38, at 43.
48. P.R.C. Const. 1982, arts. 7, 12 & 15, *available at* http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm.
49. *Id.* art. 1.
50. India is a good example where a generally socialist country embraced free market economy without the need for any constitutional amendments.
51. Cohen analyses this function in relation to the 1978 Constitution. *See* Cohen, *supra* note 33, at 836-37.

The Constitution provides that the NPC "is the highest organ of state power" and that the NPC and its Standing Committee exercise "the legislative power of the state."[52] The powers and functions of the NPC are outlined in Article 62. The NPC can for example amend the Constitution, supervise the enforcement of the Constitution, and enact as well as amend basic statutes concerning criminal offences, civil affairs, the state organs and other matters. On the other hand, the powers and functions of the Standing Committee are laid down in Article 67. The Constitution similarly lays down the composition, powers and functions of the State Council.[53] The Council, *inter alia*, adopts administrative measures and enacts administrative regulations in accordance with the Constitution and other laws; submits proposals to the NPC or its Standing Committee; draws up and implement the plan for national economic and social development and the State budget; conducts foreign affairs and concludes treaties and agreements with foreign states; alters or annuls inappropriate decisions and orders issued by local organs of State administration at various levels.[54] The State Council is made responsible to the NPC, or to its Standing Committee when the NPC is not in session.[55] The powers and functions of state political organs are, thus, clearly set out in the Constitution.

Section 7 of Chapter III of the Constitution is devoted to organising the powers of the judiciary. Article 123 provides that the people's courts "are the judicial organs of the state," which "shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals."[56] But the Supreme People's Court, declared to be "the highest judicial organ",[57] has been made "responsible" to the NPC and its Standing Committee.[58] Local people's courts at different levels are also responsible to the organs of state power which created them. This kind of a system of judicial independence differs significantly from the conventional understanding of independent judiciary as a means to promote constitutionalism.[59]

In a big country like China where the country is broadly divided into provinces, autonomous regions and municipalities,[60] one may imagine disputes or disagreements in relation to the division of powers would arise between the powers of the central government and these other governing units.[61] Similarly,

52. P.R.C. CONST., *supra* note 48, arts. 57 & 58.
53. *Id.* arts. 85-89.
54. *Id.* art. 89.
55. *Id.* art. 92.
56. *Id.* art. 126.
57. *Id.* art. 127.
58. *Id.* art. 128.
59. *See* Andrew Mayer, *The Rocky Road to Democracy: A Few Comments on Legal Developments in China since the Cultural Revolution*, 6 CHINA L. REP. 1, 5 (1989-91).
60. P.R.C. CONST., *supra* note 48, art. 30.
61. Section 6 of Chapter III of the Constitution specifically deals with self-government of national

disputes may arguably arise between the three organs of the government, in particular between the executive and the legislature. But in the context of China, such disputes are unlikely to take place for two reasons. First, China is a unitary country where all tiers of governing units operate under the direct control of the central government and are accountable to it under the principle of "democratic centralism".[62] The second reason is that since the whole country at all levels is governed, in effect, by the CPC, any differences are ironed out inside party committees. There is of course no possibility of leaders belonging to a different political party having diverse views on governance policies. These two factors ensure that the task of organising political power becomes much easier for a constitution in a country like China.

In addition to prescribing the powers and functions of different state organs, the constitution also declares the nature of polity. Article 1, for instance, lays down that the PRC is a "socialist state under the people's democratic dictatorship". Article 2 further provides that "all power in the People's Republic of China belongs to the people", who exercise this power through the NPC and other local congresses. As we will see later on, conferring on party congresses the power to rule the country as representative of the will of the people poses challenges to the normative standing of the PRC Constitution.

### 3. *Providing a Normative Grounding*

The PRC Constitution is generally regarded as fundamental law-the "mother law" (*mufa*) – of the country.[63] It enjoys "supreme legal status in comparison with any other legislation in the state"[64] and no "laws or administrative rules and regulations may contravene the Constitution."[65] Article 5 embodies this spirit of supremacy: "No organisation or individual is privileged to be beyond the Constitution or other laws."[66] The Law on Legislation also confirms that the PRC Constitution has the highest legal force.[67] A mechanism has

autonomous regions, including the extent of their powers.

62. P.R.C. CONST., *supra* note 48, arts. 3, 4 & 30. *See also* WANG SHUWAN, INTRODUCTION TO THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION 57-61, 177-178 (2000).
63. CHEN, *supra* note 3, at 47. The PRC Constitution "is the fundamental law of the state and has supreme legal authority." Daniel Farber & David Bryden, *The Constitution of the People's Republic of China* 3 CONST. COMMENT. 5, 7 (1986).
64. LIN, *supra* note 11, at 4 (pointing out that the PRC Constitution is considered fundamental law also for a unique reason, that is, for laying down fundamental tasks of the state).
65. *Id.* at 17. *See also* Guobin Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?* 43 SUFFOLK U. L. REV. 625, 632 (2010).
66. The Preamble also states: "This Constitution ... is the fundamental law of the State and has supreme legal authority. The people of all nationalities, all State organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation."
67. "The Constitution is the highest legal authority; no law, administrative regulation, local regulation, autonomous regulation, special rule or administrative or local rule may contravene the Constitution." The Law on Legislation of the Peoples Republic of China 2000, art. 78.

been put in place to invalidate laws or regulations inconsistent with the Constitution.[68]

The normative force of the PRC Constitution is, however, seriously dented by at least four factors. First, there is no *independent* institution in China to review the constitutionality of legislation. Since the courts do not possess any power of interpreting legislation and conducting judicial review,[69] there is no independent agency to provide interpretation of the statutes and pronounce declarations of unconstitutionality. Both the NPC and its Standing Committee have the power to supervise the implementation of the Constitution,[70] but so far they have never exercised this power to invalidate any law as being violative of the Constitution.[71] Commentators point out that there are "endless examples of the liberties taken with the text of the Constitution."[72]

Second, past practice highlights how the supremacy of the Constitution may not be upheld even against administrative regulations issued by the State Council, autonomous regions or municipalities. The Standing Committee of the NPC has the power to annul administrative regulations, decisions or orders of these executive bodies.[73] However, in practice, of the thousands of regulations submitted to the Standing Committee for record, no remedial action has been taken to annul regulations inconsistent with the Constitution.[74] Thus, a constitutional power that can be potentially useful in safeguarding the supremacy of the Constitution against subordinate legislation is not invoked in practice.

Third, the CPC, which "controls the operations of official law enforcement at every level of the government,"[75] remains outside the reach of law, including the Constitution.[76] Although the CPC is formally subject to the constraints of

68. CHEN, *supra* note 3, at 112-14.

69. Although the Constitution vests the adjudicative power in the people's courts (Art. 123), judges lack any power to interpret laws, let alone judicial review. "The Supreme Judicial Court and the entire judicial branch have no independent power to interpret the meaning of Chinese law." MICHAEL A SANTORO, CHINA 2020: HOW WESTERN BUSINESS CAN – AND SHOULD – INFLUENCE SOCIAL AND POLITICAL CHANGE IN THE COMING DECADE 103 (2009). *See also* CHEN, *supra* note 3, at 47.

70. P.R.C. CONST., *supra* note 48, arts. 62(2) & 67(1).

71. CHEN, *supra* note 3, at 48; LIN, *supra* note 11, at 299.

72. Stephanie Balme & Pasquale Pasquino, Taking Constitution(alism) Seriously? Perspectives of Constitutional Review and Political Changes in China 12 (unpublished paper, presented at the Conference on Constitutionalism and Judicial Power in China, Dec. 12-13, 2006) (on file with author). *See also* JACKSON & TUSHNET, *supra* note 20, at 248-49.

73. P.R.C. CONST., *supra* note 48, art. 67(7) & 68(8). For an analysis of the procedure and working of this review system, *see* Zhu, *supra* note 65, at 633-44.

74. CHEN, *supra* note 3, at 114. *See also* Thomas E Kellog, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China* 7 INT'L J.. CONST. L. 215, 220 (2009).

75. Hum. Rts. L. Foundation, *The Persecution of Falun Gong Practitioners in China*, 3 (Aug. 10, 2009).

76. "[T]he Communist Party remains in ultimate control. More significantly, the Party and its leadership remain outside the reach of the law...The government bureaucracy—including the courts and other legal institutions—are dominated by the Communist Party appointees at

the Constitution, "it is essentially above the law as "representing" the supreme will of the people."[77] Consequently, despite the amendment of the Constitution in 1999 to enshrine the rule of law guarantee,[78] the country is still governed more by the CPC than by the rule of law.

Fourth, the discussion among Chinese scholars on "benign" constitutional violations – violations which could be tolerated on grounds of promoting social and economic development – also suggests that the idea of constitutional supremacy is not very firmly grounded in China.[79] In other words, the supremacy of Constitution is a principle that can be sacrificed on the ground of social, economic or political expediency.

4. *Limiting Power*

The PRC Constitution limits power in the sense that it specifies and demarcates the powers of different state institutions such as the President, the State Council, the NPC as well as its Standing Committee, and the People's Courts. But beyond this, it does not really control how state organs, especially the top organs such as the State Council and the NPC, function and operate. In practice, "the people have limited influence" over the NPC's composition and work,[80] even though the Constitution vests all power in the people, to be exercised through the NPC.[81] Thus, as I have tried to demonstrate above, the supremacy of the Constitution does not mean much in practice.

In most common law countries and in many civil law countries, courts – which are independent of the other two organs of the government – are conferred with the power of judicial or constitutional review as a means to limit the powers of the executive and the legislature.[82] Constitutions may also resort to the separation of powers and/or institutionalise various checks and balances to control the exercise of such power. However, these power-limiting tools are by and large absent in China.[83] It is the legislative body, the NPC and

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every level, despite some autonomy for independent actors to develop the rule of law." Gary Feuerberg, *China's Human Rights Lawyers Face Major Obstacles*, THE EPOCH TIMES, (July 15, 2009) (quoting Professor Feinerman) *available at* http://www.theepochtimes.com/n2/content/view/19643/

77. GHAI, *supra* note 2, at 92. Lin also notes that "there may exist a paradox between the authority of the Constitution and the supremacy" of the National People's Congress. LIN, *supra* note 11, at 17.
78. "The People's Republic of China governs the country according to law and makes it a socialist country under rule of law." P.R.C. CONST. amend. 1999, *supra* note 43, art. 13.
79. LIN, *supra* note 11, at 290-94.
80. GHAI, *supra* note 2, at 101.
81. Art. 2 of the Constitution provides: "All power in the People's Republic of China belongs to the people. The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power."
82. *See* Xianhong Yu, *Administrative Litigation as a Functional Substitute: Revisiting the Constitutional Review System in China*, 5-8 (Mini-APSA Paper, Apr. 19, 2004) (unpublished manuscript) (on file with author).
83. The legislature (the NPC and its Standing Committee) however, exercises some control

its Standing Committee, that has the power to interpret the Constitution as well as supervise its implementation.[84] Thus, the courts in China do not have the power of judicial review, a position that has not changed since the adoption of the 1982 Constitution.[85]

Another difficulty in the Constitution's capacity to limit power relates to the status of the CPC. Although the CPC is supposed to be under the Constitution, "it is essentially above the law as 'representing' the supreme will of the people."[86] The CPC, in effect, remains outside the reach of constitutional law.[87] This position is not very surprising though. Professor Ghai points out that all communist constitutions suffer from this problem: "... no communist constitution has moderated the extra-constitutional status of the Communist Party, its leading role, or the absence of its legal accountability, a factor that has constituted an important contradiction in constitutions claiming to be moving towards greater democracy and legality."[88]

5. *Empowering People*

One can find quite an extensive list of fundamental rights in Chapter 2 of the PRC Constitution.[89] The list could be considered 'comprehensive' by international standards.[90] For instance, Article 35 guarantees citizens "freedom of speech, of the press, of assembly, of association, of procession and of demonstration." The Constitution also protects the freedom and privacy of correspondence,[91] declares the personal dignity and residences of citizens to be inviolable,[92] and secures freedom of the person, including against unlawful arrest and detention.[93] Chinese citizens also enjoy a fundamental right to

over the executive under Arts. 62 and 67. For example, the Standing Committee of the NPC supervises the work of the State Council and can annul administration regulations that contravene the Constitution or other laws. Thus, Zhu argues that the system of constitutional review that exists in China is one where the legislature rather than the judiciary has the review power. *See generally* Zhu, *supra* note 65.

84. P.R.C. CONST., *supra* note 48, arts. 62(2) and 67(1).
85. Yu, *supra* note 82, at 13-15. However, courts have limited power to review "concrete" administrative acts (but not "abstract" administrative rules or regulations) of state agencies under the Administrative Litigation Law. *See* STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 205-7 (1999).
86. GHAI, *supra* note 2, at 92.
87. *See supra* note 76 and accompanying text.
88. GHAI, *supra* note 2, at 85.
89. Chapter 2 also lays down the duties of citizens. In fact, the Constitution considers rights and duties as inseparable. Art. 33 declares: "Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and other laws." Professor Chen argues that this "linkage of individual rights to the performance of social duties is again consistent with the Marxist tradition." *See* CHEN, *supra* note 3, at 56. *See also* LIN, *supra* note 11, at 43, 282.
90. CHEN, *supra* note 3, at 54.
91. P.R.C. CONST., *supra* note 48, art. 40
92. *Id.* art. 38-39.
93. *Id.* art. 37.

"criticise and make suggestions regarding any State organ or functionary."[94] The Constitution confers on workers a right to rest.[95] Citizens have the right to receive "education",[96] and "material assistance from the State and society when they are old, ill or disabled."[97] Moreover, some fundamental rights have been enumerated even outside Chapter 2, for example, the right to property in Article 13 is under Chapter 1 on General Principles.[98] It also seems that as compared to pre-1982 constitutions, the 1982 Constitution gave fundamental rights more prominence.[99] For instance, new provisions were inserted "to prevent the recurrence of the gross violations of human rights during the Cultural Revolution."[100]

The protection of fundamental rights is further strengthened, at least on paper, by two constitutional amendments. First, the 1999 amendment inserted the rule of law requirement in Article 5 of the Constitution, which reads: "The People's Republic of China governs the country according to law and makes it a socialist country *under rule of law*."[101] Second, in 2004, the following provision was inserted in Article 33 of the PRC Constitution: "The State respects and preserves human rights."[102] Commenting on the importance of the 2004 amendment, Professor Hu Jinguang noted that the protection afforded to the three pillars of human rights (life, property and liberty), especially the right to private property, had been strengthened by this amendment.[103] The Chinese government in a 2008 white paper entitled *China's Efforts and Achievements in Promoting the Rule of Law* confirmed its commitment to the rule of law and the realisation of human rights.[104]

Despite robust fundamental rights provisions in the Constitution, the 1999 and 2004 constitutional amendments and the public commitments made by the

94. *Id.* art. 41.
95. *Id.* art. 43.
96. *Id.* art. 46.
97. *Id.* art. 45.
98. P.R.C. Const. amend. 2004, *supra* note 45, art. 22.
99. Ghai, *supra* note 2, at 89; Lin, *supra* note 11, at 262.
100. Chen, *supra* note 3, at 54. Nevertheless, most Chinese constitutional law scholars did not embrace the Western notion of human rights until the 1990s. *Id.* at 53.
101. P.R.C. Const. amend. 1999, *supra* note 43, art. 13 (emphasis added). Commenting on the implications of this amendment, Clarke notes: "The words, of course, do not by themselves mean any change in the role of the legal system. But they do represent a policy declaration by the government that the legal system is to be given greater weight as a technique of governing." Clarke, *supra* note 12, at 17.
102. P.R.C. Const. amend. 2004, *supra* note 45, art. 24.
103. Interview by Consulate-General of the PRC in Los Angeles with Prof. Hu Jinguang, Dir. Research Center for Const'l Govt.& Admin. by Law, Rennin Univ. of China (Mar. 24, 2004), *available at* http://losangeles.china-consulate.org/eng/Topics/NPC/t80321.htm.
104. *China's Efforts and Achievements in Promoting the Rule of Law* (State Council Information Office, 2008), *available at* http://www.china.org.cn/government/news/2008-02/28/content_11025486.htm ("White Paper"). *See also Progress in China's Human Rights Cause in 2003* (State Council Information Office, 2004), *available at* http://www.china.org.cn/e-white/20040330/.

government, scholars generally agree that there is a huge difference between the human rights situation on paper and in reality.[105] One main reason for this difference is that the PRC Constitution currently lacks adequate framework for the realisation of rights. The constitutional rights are supported neither by an independent judiciary[106] nor by laws enacted to implement them.[107] Unlike the right to property that has been protected by the 2008 law, no specific law has been made to implement the rule of law or human rights guarantees. Citizens also lack appropriate remedies to sue different government organs for the breach of fundamental rights. Fundamental rights enumerated in the Constitution have no direct effect in the sense that no citizen can invoke the constitution to challenge any government action. This poses a serious limitation on the usefulness or efficacy of these provisions, because courts "cannot ensure supremacy of the Constitution if the direct effect of the rights is not guaranteed."[108] It is also pointed that the exercise of rights might also be limited – by relying on the language of Article 51 of the Constitution[109] – on grounds of serving the collective interests of the state or society.[110]

One may refer to actual practice concerning the exercise of the right to freedom of speech under Article 35 to understand better the human rights situation in China.[111] The recent trial and conviction of Liu Xiaobo, a co-author of Charter 08[112] and the 2010 Noble Peace prize-winner, for the crime of "inciting subversion of state power" is a case in point.[113] The court sentenced him to a term of imprisonment of eleven years and a deprivation of political

105. Lin, *supra* note 11, at 263; Jerome A Cohen, *Written Statement before Congressional-Executive Commission on China – Human Rights and the Rule of Law in China* (Sept. 20, 2006), http://www.cecc.gov/pages/hearings/2006/20060920/cohen.php (last visited Sept. 11, 2009).

106. Although Art. 126 of the PRC Constitution declares that the people's courts shall "exercise judicial power independently", the courts in China are not independent. *See* Zhiwei Tong, An Outlook for Development of Chinese Constitutionalism in Mid-and-Short Run 17-18 (unpublished paper presented at the Conference on Constitutionalism in China in the Past 100 Years and Its Future, Oct. 17-18, 2008) (on file with author).

107. *Id.* at 13-15.

108. Gagik Harutyunyan, Contemporary Imperatives in Ensuring the Individual Right to Constitutional Justice 4 (paper presented at the 15th Yerevan International Conference, Oct.22-23, 2010) *available at*, http://www.concourt.am/armenian/structure/president/articles/yerevan2010_en.pdf.

109. Art. 51 reads: "The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens."

110. Jackson & Tushnet, *supra* note 20, at 248; Lin, *supra* note 11, at 269.

111. This right has been a major source of friction between the West and the Chinese government. See Amnesty Int'l, *2009 Human Rights Report on China*, *available at* http://www.amnesty.org/en/region/china/report-2009.

112. 'Charter 08' refers to a call made by a group of Chinese writers, intellectuals, lawyers, and journalists demanding legal reforms, democracy and a better protection of human rights. *See* Hum. Rts. in China, *Charter 08*, *available at* http://www.hrichina.org/public/contents/press?revision_id=89851&item_id=85717.

113. Liu Xiaobo case, Criminal Case No. 3901 (2009). English translation *available at* <http://www.hrichina.org/public/contents/press?revision%5fid=172717&item%5fid=172713.

rights for two years essentially for exercising his right to speech in a non-violent manner. The Chinese government, including the court, considered that Liu incited subversion of state power by simply demanding respect for human rights and the introduction of democracy. Although the Beijing Municipal No. 1 Intermediate People's Court in its judgment acknowledged the defence counsel's use of the freedom of speech under the PRC Constitution, it noted that the defendant had exceeded the limits of this freedom.[114] The court did not however, explain how the limit was exceeded. Neither Liu nor his wife or relatives were allowed by the Chinese government to travel to Oslo to receive the Noble prize.[115] Therefore, it becomes critical, as Professor Henry Shue has argued, that people not merely "have" rights but are also able to "enjoy" or "exercise" them.[116]

### 6. *Operating as a Unifying Force*

Besides the majority Han Chinese, there are 55 other nationalities (ethnic groups) in China.[117] The PRC Constitution "incorporates the equality of all nationalities as a constitutional principle."[118] There are several provisions in the Constitution that recognise or protect their special interests.[119] Article 4 declares that the state "protects the lawful rights and interests of the minority nationalities" and prohibits "discrimination against and oppression of any nationality". The state is also mandated to assist "areas inhabited by minority nationalities in accelerating their economic and cultural development according to the characteristics and needs of the various minority nationalities."[120] The Constitution guarantees all nationalities "the freedom to use and develop their own spoken and written languages and to preserve or reform their own folkways and customs."[121]

There are two other important aspects of the PRC Constitution that deserve special mention. First, there is a provision for the representation of minority nationalities in the NPC as well as its Standing Committee.[122] But at the same it is notable that no such representation is ensured in the State Council – a body that is obligated "to direct and administer affairs concerning

114. The court judgment reads: "During the trial, the defendant Liu Xiaobo argued that: He was innocent; he had merely exercised his right to free speech as granted by the Constitution... Liu Xiaobo's actions have obviously exceeded the freedom of speech category and constitute criminal offense." *See* Liu Xiaobo case, *id.*
115. Verna Yu, *Empty Chair and a Standing Ovation in Honour of Liu* South China Morning Post, Dec. 11, 2010 at A1.
116. Henry Shue, Basic Rights: Subsistence, Affluence, and US Foreign Policy 16, 68-69 (1996).
117. Wang, *supra* note 62, at 57.
118. Lin, *supra* note 11, at 41.
119. P.R.C. Const., *supra* note 48, preamble, arts. 4, 59, 65, 70, 89, 99, 113, 114, 116, 119 & 122. *See also* Wang, *supra* note 62, at 59-60.
120. P.R.C. Const., *supra* note 48, art. 4(2). *See also* art. 122.
121. *Id.* art. 4(4).
122. *Id.* arts. 59 & 65.

the nationalities and to safeguard the equal rights of minority nationalities".[123] Nor are there any provisions for the representation of minority nationalities in People's Courts, People's Procuratorates or the Central Military Commission. Second, the people of minority nationalities are given the power to self-govern themselves if they live in "concentrated communities".[124] The people's congresses of such autonomous areas may enact regulations in the light of special political, economic and cultural characteristics of the concerned nationalities.[125] The self-governments of these regions also have the power to administer finances and manage educational, scientific, cultural, public health, and physical culture affairs in their respective areas.[126] It should be understood that these constitutional provisions directed at governance autonomy for minority nationalities are not at the cost of national unity. "All the national autonomous areas are inalienable parts of the People's Republic of China",[127] a policy the government strongly adheres to while dealing with Tibet or other minority regions.[128] It is also the duty of all PRC citizens to safeguard the unity of all nationalities.[129]

This review will suggest that the PRC Constitution aims to operate as a force to unify diverse groups of people. But despite these undoubtedly important guarantees, constitutional practices do not often match with the corresponding constitutional mandate. Ghai, for example, makes the following assessment of the extent of autonomy enjoyed by these regions: "The discretion of the organs of self-government in the discharge of their responsibilities is limited... Their policies and activities must be conducted within the general framework of national laws...Their financial and other resources depend on grants from the centre. There is no mechanism to resist encroachments on their powers by the centre. Any "autonomy" given by the law can be negated through the directives or influence of the Party."[130]

Another instance of a wide gap between constitutional promises and actual practice is provided by the policy of the central government to push for the use of Putonghua (the main language spoken by the majority) in all provinces and autonomous regions as part of the national unity agenda.[131] Under the new bilingual education policy, Putonghua is proposed to replace Tibetan as

123. *Id.* art. 89(11).
124. *Id.* art. 4(3).
125. *Id.* art. 116.
126. *Id.* arts. 117 & 119.
127. *Id.* art. 4.
128. *See The Dalai Lama and Tibet: Showing Willing*, ECONOMIST, Jan. 25, 2010, *available at* http://www.economist.com/world/asia/displayStory.cfm?story_id=15384117&source=most_commented.
129. P.R.C. CONST., *supra* note 48, art. 52.
130. GHAI, *supra* note 2, at 116-17.
131. See Raymond Li, *Tongue-tied by Push for One Nation*, SOUTH CHINA MORNING POST, Nov. 10, 2010 at A16.

the main teaching language in almost all subjects at schools.[132] A proposal to replace Cantonese news and satellite channels on Guangzhou TV by shows broadcast in Putonghua was also advanced.[133] These proposals have resulted in resentment and protests, amidst legitimate fears of risk to cultural heritage and diversity.[134] The government has in the past, used violence and harassed reporters to quell protests.[135] In other words, the Chinese government has adopted an approach of 'uniformity' rather than 'diversity' to unify minority nationalities. The government does not seemingly see diversity itself as a value to be promoted.[136] This approach, as the protests to date show, might backfire.

The above comparison of the PRC Constitution with six core purposes that a constitution ought to serve indicates that although its text by and large satisfies all six purposes,[137] the constitutional practices do not sit comfortably with the text, thereby reducing the extent of compliance. If we employ a qualitative yardstick – low, medium and high – to measure the PRC Constitution's level of compliance with these purposes, it is arguable that the Constitution enjoys a medium level of compliance record when it comes to embodying a fresh start and organising political power. But as far as the remaining four core purposes are concerned, the Constitution fares poorly. One main reason why the Constitution has failed to serve most core purposes that any constitution should serve, is the hegemonic and all-pervasive position of the CPC within the current system.

The most significant deficit of the PRC Constitution lies in its inability to protect people's fundamental rights and limit the powers of state organs. Barendt argues that "there is little point to framing a constitution, unless we are prepared to accept that power should be limited, even when it is exercised by a democratically elected legislature."[138] When the legislature is not democratically elected (such as the NPC of China), the role of a constitution in controlling

132. Minnie Chan, *Bilingual Preschool Policy Spurs Fears of Marginalising of Tibetan*, South China Morning Post, Dec. 4, 2010 at A4; Minnie Chan, *Qinghai will not Rush Over language Reform*, South China Morning Post, Oct. 24, 2010 at A5.

133. *See* Frank Ching, *The Winning Ways of Minority Languages*, South China Morning Post, Aug. 2, 2010 at A11.

134. Verna Yu, *Cultural Heritage of China at Risk with Decline of Dialects*, South China Morning Post, July 24, 2010 at A1. It is reported that "Putonghua's superior status as a "civilised language" in nationwide campaigns has prompted some schools to go as far as punishing pupils for speaking dialects, even outside class." *Id.*

135. Verna Yu, *Hundreds Defy Orders not to Rally in Defence of Cantonese*, South China Morning Post Aug. 2, 2010 at A1; Mimi Lam, *Backlash as Cantonese Protests Spur Gag*, South China Morning Post Aug. 3, 2010 at A1.

136. For example, efforts to recruit minorities in the People's Liberation Army is driven not by a desire to enhance diversity in the workforce and thus enhance the sense of belongingness, but by a desire to better control riots in minority regions. *See* Minnie Chan & Kristine Kwok, *After Rioting, PLA Steps Up Efforts to Recruit Minorities*, South China Morning Post, Dec. 11, 2009 at A4.

137. Thus, Lin writes that the "Chinese Constitution has all the functions of any Western constitution". Lin, *supra* note 11, at 7.

138. Barendt, *supra* note 2, at 25.

power becomes more crucial because even democratic checks of controlling the exercise of power are missing. Under these circumstances it is doubtful if the PRC Constitution has been able to achieve the goal of establishing a limited government.[139]

### *B. Does the PRC Constitution Serve Other Purposes?*

If the PRC Constitution does not fulfil most of the six core purposes identified in this article, does it serve any other "uniquely Chinese" purposes?[140] If yes, do these purposes have any relevance to comparative constitutional law scholars? It seems that the PRC Constitution does serve some secondary purposes in the context of Chinese polity.[141] Professor Albert Chen highlights one such way in which the PRC Constitution is useful:

> [T]he constitution does provide the vocabulary, terminology, and language with which the operation of government is described in the official media and in which discussion about government and state affairs is actually conducted. Given the close relationships between language and human existence, or between objective social reality and the language in which people think and talk about reality, the study of constitutional language is significant in our attempt to understand China's political and governmental system.[142]

One may conceive of some other secondary purposes that the PRC Constitution has fulfilled over the years. For one, it serves the 'show off' function. The Constitution allows not only the Chinese government but also Chinese scholars to demonstrate to the world, by pointing to the constitutional text, that China is a country governed by the rule of law; that the Chinese government respects human rights of its people; and that the people enjoy a wide range of fundamental rights. They can also contend, again with reference to the text of the Constitution, that China is a democracy because all power belongs to the people, or that the courts exercise their judicial powers independently. This "show off" function perhaps also explains why the Chinese government bothered to amend the Constitution and expressly incorporated the rule of law and human rights guarantees – a sign of progress without changing much in actual practice. It seems, however, that these "show off amendments" are like a double-edged sword in that other states and commentators alike can highlight more easily the gap between the constitutional promise and constitutional reality.

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139. "China is a case in point because it seems to represent both the epitome of a political power without limits and a country where the constitution cannot be more than a mockery." Balme & Pasquino, *supra* note 72, at 13.

140. Chinese leaders and scholars seem to put lot of emphasis on "Chinese characteristics". For example, they often talk about the rule of law with Chinese characteristics, or socialism with Chinese characteristics.

141. See, with reference to the 1978 PRC Constitution, Cohen, *supra* note 33, at 836-37.

142. CHEN, *supra* note 3, at 41 (emphasis in original).

Another purpose that the PRC Constitution seemingly serves is facilitating *stakeholder activism*. The Constitution enables stakeholders – ranging from scholars to lawyers, workers, peasants, netizens, NGOs and the media – to invoke its provisions to question, criticise, challenge or even name and shame the Chinese government with reference to the constitutional text. Just to offer a concrete example, Liu Xiaobo, a co-author of Charter 08, stated the following in defence to the charge of subversion of state power:

> The country must respect and protect human rights, according to the powers given to the people in Article 35 of the Constitution. My freedom to express different opinions is the right of free speech given [to] me as a Chinese citizen under the Constitution. Not only should it not be limited or removed by the government; on the contrary, it should be respected and protected by the law. So the accusations against me infringe my basic rights as a Chinese citizen and are against the basic law of China.[143]

Although Liu's reliance on the Constitution failed to impress the court, this trend to employ constitutional provisions to challenge the exercise of state power is likely to continue and strengthen in the future.

Last but not the least, the PRC Constitution provides Chinese leaders as well as comparative law scholars an authoritative legal point with reference to which they can contemplate further constitutional reforms in China. There is hardly any doubt that the Chinese government has introduced progressive changes to the Constitution over the years by explicitly incorporating various liberal constitutional ideas in the text of the PRC Constitution. This again is likely to continue in future, because the 1982 PRC Constitution – in spite of the four major amendments – is still a work in progress. It is arguably a transitory constitution that will be moulded by further amendments, or replaced by a new constitution in the coming decades, as China continues on its path of embracing further legal and political reforms.

## Conclusion

Considering that almost all countries have a constitution, there ought to be certain common *core* purposes that constitutions serve, though we may disagree on what these common core purposes of constitutions are. In this article, I have proposed that all constitutions should serve the following six *core* purposes: embodying a fresh start; organising political power; providing a normative grounding; limiting power; empowering people; and operating as a unifying force. Constitutions may of course serve additional secondary purposes. The idea of identifying this core is to have a model with reference to

143. *Guilty of "Crime of Speaking" (Translation of the statement of Liu prepared for the court)*, South China Morning Post, Feb. 9, 2010 at A12.

which the usefulness of different constitutions could be assessed by comparative (constitutional) law scholars.[144] This process, which will allow us to differentiate constitutions as per the level of constitutionalism achieved by them,[145] is better than classifying constitutions as liberal or nominal/facade.

Against this background, this article has examined the extent to which the PRC Constitution of 1982 satisfies the six core purposes identified above. Admittedly, the PRC Constitution is not a typical constitution in the liberal perspective[146] and the concept of a constitution in China may vary from how it is understood in the West.[147] Nevertheless, in order to be classified as constitution in the true sense, it must serve these core purposes to a reasonable degree. A critical examination both of the provisions and practices of the PRC Constitution reveals that it barely satisfies most of these core purposes: the most glaring lacuna being its inability to limit the power of the government and protect people's human rights. However, this is not to suggest that the PRC Constitution is without any value. It seems to serve some secondary purposes within the current Chinese polity. But in the longer term, the PRC Constitution would need to fulfil these core purposes in order to gain any credible legitimacy both within and outside China. Until then, it can only be regarded as a 'transitory' constitution – a work in progress to support the most populous country and the second largest economy.

144. This is similar to what consumers or reviewers do when comparing a product manufactured by different companies and having common as well as distinct features.
145. Barendt argues that "adherence to constitutionalism means that the constitution must necessarily check absolute power; otherwise it does not deserve recognition as a proper, liberal constitution." BARENDT, *supra* note 2, at 6.
146. Cohen, *supra* note 33, at 837.
147. Mayer, *supra* note 59, at 6; LIN, *supra* note 11, at 3.