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# TRANSLATION

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## TRANSLATOR'S INTRODUCTION TO LIU SONSHAN, *1981: Embryonic but Inchoate Designs for a Constitutional Committee*

Keith J. Hand\*

When Xi Jinping took the reins of Chinese Communist Party (Party) and state power in the People's Republic of China (PRC), he catalyzed new discussion of constitutional supervision systems. In a 2013 Politburo speech on ruling the country in accordance with law, Xi emphasized the supremacy of the PRC Constitution and the importance of implementing the Constitution.<sup>1</sup> In October 2014, the Fourth Plenum of the Party's 18<sup>th</sup> Central Committee issued a major decision on the socialist legal system. This document set out a range of reform initiatives, including the development of more effective constitutional interpretation and supervision systems.<sup>2</sup> Xi's statements and the Fourth Plenum Decision are part of a broader effort to reinvigorate the Party's commitment to law and legal reform.<sup>3</sup> In the wake of these official statements, prominent Chinese jurists endorsed the idea of establishing a specialized

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1. *Xi Jinping Qiangdiao: Yifa Zhiguo Yifa Zhizheng Yifa Xingzheng Gongtong Tuijin* [Xi Jinping Emphasizes: Promote Ruling the Country in Accordance with the Law, Governing in Accordance with the Law, and Administering in Accordance with the Law Together], XINHUA.NET (Feb. 24, 2013), [http://news.xinhuanet.com/politics/2013-02/24/c\\_114782088.htm](http://news.xinhuanet.com/politics/2013-02/24/c_114782088.htm).

2. *Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding* [Central Committee of the Chinese Communist Party, Decision on Some Major Questions in Comprehensively Moving Forward the Governance of the Country in Accordance with the Law], RENMIN WANG [PEOPLE.CN] (Oct. 23, 2014), <http://politics.people.com.cn/n/2014/1029/c1001-25926893.html> (hereinafter *Fourth Plenum Decision*). Constitutional supervision in China includes constitutional review of legislation, review of the unconstitutional acts of state leaders, and the resolution of jurisdictional disputes among state organs. Cai Dingjian, *Constitutional Supervision and Interpretation in the People's Republic of China*, 9 J. CHINESE L. 219, 227 (1995).

3. See generally Jacques DeLisle, *The Rule of Law with Xi-Era Characteristics: Law for Economic Reform, Anticorruption, and Illiberal Politics*, 20 ASIA POLICY 23-29 (2015).

constitutional committee to ensure that the Constitution is enforced in practice.<sup>4</sup> What does China's constitutional history tell us about the prospects for such a reform?

As Professor Liu Songshan of the East China University of Politics and Law explains in his article *1981: Embryonic but Inchoate Designs for a Constitutional Committee*, proposals for a constitutional committee have a long history in China's reform era.<sup>5</sup> In 1982, China's leaders revised the PRC Constitution as a foundational step in their effort to modernize the country and construct a socialist legal system. During the revision process from late 1980 to 1982, the Secretariat of the PRC Committee on Constitutional Revision debated a range of constitutional reforms, including the creation of a specialized constitutional supervision organ. The Secretariat's discussion documents included detailed proposals for a constitutional committee within the National People's Congress (NPC) system, alternative models such as Supreme People's Procuratorate supervision of the Constitution, and corresponding draft amendments. Proposals offered by other experts and officials were even more wide ranging and included a centralized constitutional court, a system of people's supervision departments, constitutional tribunals within the people's courts, and other models.

Professor Liu's article offers one of the most comprehensive accounts to date of this key discussion on constitutional supervision at the dawn of the reform era. Liu draws on a range of sources, including the state archives and the memoirs and constitutional histories of key participants, to provide a detailed narrative and interpretation of proposals for a constitutional committee during the revision process.<sup>6</sup> This important part of China's constitutional history has received only limited attention in the English-language literature.<sup>7</sup> It is my hope that the translation of

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4. See, e.g., *Yifa Zhiguo Shouxian Yao Yixian Zhiguo* [To Rule the Country in Accordance with Law, We Must First Rule the Country in Accordance with the Constitution], XINJING BAO WANG [BEIJING NEWS NET] (Oct. 17, 2014), <http://www.bjnews.com.cn/news/2014/10/17/337633.html>; *Zuigao Renmin Fayuan Yuan Yuanzhang Jianyi Zai Quanguo Renda Zengshe Xianfa Weiyuanhui* [Former Supreme People's Court President Recommends Adding a Constitutional Committee Under the National People's Congress], BEIJING QINGNIAN BAO [BEIJING YOUTH DAILY] (Nov. 8, 2014), <http://politics.people.com.cn/n/2014/11/08/c70731-25993887.html>. In China's constitutional system, the National People's Congress and its Standing Committee are vested with the authority to supervise enforcement of the Constitution. In practice, the people's courts have not played a significant role in this process.

5. Liu Songshan, *1981: Taidong er Weixing de Xianfa Weiyuanhui Sheji* [1981: Embryonic but Inchoate Designs for a Constitutional Committee], ZHONGGUO XIANZHENG WANG [CHINA CONSTITUTIONALISM NETWORK] (Mar. 13, 2011), <http://www.calaw.cn/article/default.asp?id=4576>.

6. Professor Liu draws on the accounts of Hu Qiaomu (first Secretary-General of the Committee on Constitutional Revision), Xu Chongde (a member of the Committee's Secretariat), Xiao Weiyun (also a member of the Committee's Secretariat), and others.

7. Cai Dingjian provides an overview of constitutional supervision proposals discussed during the drafting of the 1982 Constitution. Cai, *supra* note 2, at 221-22,

Professor Liu's article will help fill this gap and provide a more robust historical foundation for Western analysis of current Chinese debates on constitutional supervision.

Professor Liu is well placed to provide insights into this important discussion. He is the author of more than forty books and articles on PRC constitutional law and related topics. Prior to joining the faculty at the East China University of Politics and Law, Professor Liu served for a decade in the State and Administrative Law Office and the Filing and Review Office of the National People's Congress Standing Committee (NPCSC) Legislative Affairs Commission, where he worked on the Legislation Law, subsequent revisions to the PRC Constitution, and other key state legislation. He also worked with NPCSC organs on the compilation and editing of a four-volume biography of Peng Zhen, who played a key role in the constitutional revision process as Vice Chairman of the PRC Committee on Constitutional Revision.

It is not surprising that constitutional supervision was a topic of discussion in the early 1980s. China was still recovering from the lawlessness and upheaval of the Cultural Revolution. The drafting of a new Constitution signaled a sharp break from the mass political campaigns of the Cultural Revolution and confirmed the Party's commitment to stability, modernization, and socialist legality.<sup>8</sup> Chinese citizens involved in the constitutional revision process emphasized the need for a specialized organ to "prevent the re-occurrence of the Cultural Revolution phenomenon of tossing the Constitution aside in practice."<sup>9</sup>

Proposals for a specialized constitutional supervision organ were revived repeatedly during the revision process. As Professor Liu explains, following months of internal discussion, the Secretariat suddenly dropped proposals for a constitutional committee when it finalized its August 1981 discussion document. Although it reinserted language providing for a constitutional committee in the fall of 1981, it later removed the language once again. When draft constitutional amendments were circulated for comment in May 1982, the draft did not include provisions on a specialized constitutional supervision organ. Central departments, provincial and local governments, and social organizations noted the gap and raised concerns about supervision. NPC delegates raised similar concerns when the NPC held formal deliberations on the revisions in late 1982. Clearly, the issue was on the minds of many citizens involved in the revision process.

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241. For additional brief discussions of the proposals, see Hsin-chi Kuan, *New Departures in China's Constitution*, 17 *STUDIES IN COMPARATIVE COMMUNISM* 53, 65 (1984) and Thomas Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China* 13 (Indiana Univ. Research Ctr. for Chinese Politics & Bus., Working Paper No. 1, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2169298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169298).

8. William C. Jones, *The Constitution of the People's Republic of China*, 63 *WASH. U. L. QUART.* 707, 712, 724-26 (1985).

9. Liu, *supra* note 5, at Sec. III (as translated from the original Chinese article).

Of course, Chinese leaders ultimately rejected proposals for a specialized constitutional committee. Consistent with earlier versions of the Constitution and with Soviet practice, the final version of the 1982 Constitution retained a system of NPC supervision. To facilitate the constitutional supervision process when the NPC was not in session (and perhaps to address concerns about the need for more effective supervision), Chinese leaders also added constitutional supervision to the functions and powers of the NPCSC.<sup>10</sup>

However, the adoption of the 1982 Constitution did not settle the issue. Chinese scholars and officials continued to raise proposals for a constitutional committee. NPC and Party organs considered proposals for a constitutional committee on several subsequent occasions in the 1980s.<sup>11</sup> Later, reformers proposed a constitutional committee during the drafting of the 2000 Legislation Law and the 2006 People's Congress Standing Committee Supervision Law.<sup>12</sup> Most recently, after the Central Committee issued its Fourth Plenum Decision in October 2014, former Supreme People's Court President Xiao Yang again called for the establishment of such a committee.<sup>13</sup>

To date, Chinese leaders have not taken any concrete steps to advance these proposals. As I have argued elsewhere, they are unlikely to do so in the current political environment.<sup>14</sup> Instead, it appears that they intend to effectuate the Fourth Plenum's call for improved constitutional supervision by making modest changes to the process for filing and reviewing some lower-level legislation.<sup>15</sup>

The decision to shelve proposals for a constitutional committee during the 1982 revision has been a lasting one. Why did Chinese leaders push the concerns of many citizens aside and reject a constitutional committee during the revision process? What relevance does that decision, and the reasons for it, have for later debates on constitutional supervision mechanisms? Here, Professor Liu provides historical context that deepens our understanding of current constitutional dynamics in China.

In Professor Liu's account, Deng Xiaoping's position on a constitutional committee was decisive. Deng firmly opposed the establishment

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10. Cai, *supra* note 2, at 221.

11. *Id.* at 241-43; Liu, *supra* note 5, at Sec. II(2).

12. Li Yahong, *The Law-making Law: A Solution to the Problems of the Chinese Legislative System?*, 30 H. K. L. J. 120, 134-36 (2000); Jiandu Fa: *Minzhu Zhengzhi Shengzhang Dian* [Supervision Law: Growing Point for Democratic Politics], NANFANG ZHOUMO [SOUTHERN WEEKEND ONLINE] (Sept. 6, 2002), <http://www.southcn.com/weekend/commend/200209050005.htm>.

13. *Former Supreme People's Court President Recommends Adding a Constitutional Committee Under the National People's Congress*, *supra* note 4.

14. Keith J. Hand, *An Assessment of Socialist Constitutional Supervision Models and Prospects for a Constitutional Supervision Committee in China: the Constitution as Commander?*, in CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING (John Garrick & Yan Chang Bennett eds., forthcoming 2016).

15. *Id.*

of such an organ.<sup>16</sup> However, Professor Liu does not explain the specific reasons for Deng's opposition. As he indicates, the available historical records are incomplete on this important point.

Nonetheless, Professor Liu's general discussion of obstacles to a constitutional committee provides clues to some of the factors that may have animated Deng's thinking on the issue. Socialist legal theory was one obstacle. The 1982 Constitution incorporates basic elements of Soviet constitutional structure by unifying all state power in a supreme people's legislature. Consistent with this structure, ultimate authority to supervise the constitutional order is vested in the supreme legislature or its standing body.<sup>17</sup> In discussions on the revised Constitution, Peng Zhen emphasized Soviet practice and noted that state power must be centralized in the NPC and NPCSC. Thus, he concluded that it would be difficult to establish a separate organ with standing higher than the NPCSC to exercise constitutional supervision authority.

It is also possible that theoretical concerns provided a fallback rationale for a decision driven largely by other factors. By the time China began debating constitutional amendments in the 1980s, the de-Stalinization process had relaxed both scholarly discourse and state practice on constitutional supervision in the socialist world.<sup>18</sup> Professor Liu's article makes clear that the Secretariat was aware of these socialist innovations. Moreover, the 1982 Constitution departed from Soviet practice in several important respects,<sup>19</sup> and the Party has demonstrated repeatedly that it is capable of ideological dexterity when reform serves the Party's political interests. Arguably, Chinese leaders could have navigated the theoretical tensions associated with a constitutional committee had they been inclined to do so.

What other factors may have been at play? For one, Deng and other Chinese leaders exhibited a pragmatic impulse to shelve difficult constitutional issues at a delicate transitional moment. In his November 1978 speech to the Central Work Conference, Deng argued that China could

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16. Here, Professor Liu relies on the accounts of Gu Angran, former Chairman of the NPCSC Legislative Affairs Commission, and Liu Zheng, former Director of the NPCSC General Office Research Department and later Deputy Secretary-General of the NPCSC. Gu worked at Peng Zhen's side during the revision process. Liu, *supra* note 5, at Sec. II(3).

17. Rett Ludwikowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT'L L. & COMM. 91, 130 (1991). For a thoughtful discussion of the influence of Soviet legal theory on Chinese debates, see Kellogg, *supra* note 7, at 6-19.

18. For example, Yugoslavia established a constitutional court in 1963, and Romania established a weak constitutional committee under its supreme legislature in 1965. Poland and Hungary adopted constitutional amendments providing for specialized constitutional supervision organs in 1982 and 1983, respectively. See generally Ludwikowski, *supra* note 17 and Klaus-Jurgen Kuss, *New Institutions in Socialist Constitutional Law: The Polish Constitutional Tribunal and the Hungarian Constitutional Council*, 12 REV. SOCIALIST L. 343 (1986).

19. Kellogg, *supra* note 7, at 12.

not afford to wait for a “comprehensive revision of an entire body of law” to move forward with the legal construction process.<sup>20</sup> Peng Zhen’s instructions on constitutional revision reflected Deng’s pragmatism. Peng emphasized that the revision of the Constitution should not be contentious and directed his colleagues to take the 1954 Constitution as the basis, settle what could be settled, and avoid triggering disputes.<sup>21</sup>

Proposals for a constitutional committee touched on several contentious issues. For example, the question of whether the status of a constitutional committee should be higher than or equal to that of the NPCSC generated controversy. The former option involved major changes to the structure of the NPC system, while the latter option left open the issue of how NPCSC laws would be supervised. Deciding which leaders would sit on the committee also raised difficult political questions. Finally, as Professor Liu and others have observed, China lacked experience with constitutional supervision as a concrete practice.<sup>22</sup> In this context, it was politically expedient to shelve the difficult structural and political questions implicated by a constitutional committee and instead to revert to past practice on constitutional supervision.

Perhaps most importantly, Deng probably worried that the creation of a constitutional committee would complicate China’s political situation and invite challenges to the Party. Just a few years before, Deng had encouraged the Democracy Wall Movement<sup>23</sup> as his leadership faction consolidated power, only to find himself grappling with unintended consequences as the movement evolved and some participants began to challenge the Party and his leadership. Citizen references to constitutional rights and demands for constitutional guarantees were a prominent feature of Democracy Wall discourses. Deng demonstrated his political resolve by suppressing the movement.

In this context, including a constitutional committee in the revision of the Constitution posed political risks. While the revised Constitution enshrined the Party’s leadership and incorporated citizen duties to the state, the motherland, and public order, it also elevated the prominence of citizen rights (moving an expanded list of citizen rights from Chapter

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20. Deng Xiaoping, *Emancipate the Mind, Seek Truth from Facts, and Unite as One in Looking to the Future*, Speech at the closing session of the Central Party Work Conference (Dec. 13, 1978), <http://en.people.cn/dengxp/vol2/text/b1260.html>.

21. Liu, *supra* note 5, at Sec. II(1).

22. See Huang Jue, *Several Theoretical Issues on Constitution*, in CONSTITUTIONALISM AND CHINA 321 (Li Biyun ed., 2006).

23. During the Democracy Wall Movement of 1978-1979, Chinese citizens raised political criticisms on wall posters and in other media. Although these criticisms initially focused on Cultural Revolution abuses and leadership factions opposed to reform (and thus were useful to Deng), they evolved into broader critiques of the socialist system. For the movement and related discourse, see generally Kjeld Erik Brodsgaard, *The Democracy Movement in China, 1978-1979: Opposition Movements, Wall Poster Campaigns and Underground Journals*, 21 *ASIAN SURVEY* 747 (1981) and MERLE GOLDMAN, *FROM COMRADE TO CITIZEN: THE STRUGGLE FOR POLITICAL RIGHTS IN CHINA* 29-50 (2005).

3 to Chapter 2) and emphasized the supreme legal effect of the Constitution (in the Preamble and in Article 5).<sup>24</sup> How would citizens interpret this political-legal balance, and how aggressively would they seek to enforce new constitutional commitments to rights and socialist legality? Would citizens view a constitutional committee as a new platform to revive politically sensitive claims and thereby complicate Deng's effort to promote stability and economic modernization? Having suppressed the Democracy Wall Movement only a few years before, Deng may have been reluctant to elevate the prominence of rights provisions in the Constitution and to give citizens a new legal mechanism to enforce them.

In the end, socialist theory, pragmatism, and political risk probably all shaped Deng's position on a constitutional committee. As Professor Liu concludes, political conditions for a constitutional committee simply were not ripe in the early 1980s. Peng Zhen alluded to this problem in later statements when he emphasized that issues related to the development of constitutional supervision systems could not be fully addressed until basic political reform questions were settled.<sup>25</sup> Although the issue of a constitutional supervision organ was raised again when Party discussions on political reform reached their height in the late 1980s,<sup>26</sup> domestic unrest in 1989 and the collapse of communist regimes in Europe derailed those broader discussions.

The factors discussed here continue to manifest themselves in contemporary discourse on constitutional supervision. For example, the issue of a constitutional committee's status with respect to the NPCSC is still a contentious one. More importantly, current Chinese leaders have demonstrated a determination to contain citizen constitutional activism and the potential threats posed by grassroots constitutional claims. In recent years, they have left citizen constitutional petitions unanswered, shelved modest efforts to apply the Constitution in the courts, intensified repression of rights lawyers, imposed constraints on the discussion of constitutional issues in the media and classrooms, and presided over a campaign to criticize the concept of "constitutionalism" as inconsistent with the socialist system.<sup>27</sup> The Fourth Plenum Decision itself, while calling for

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24. In reporting the Draft of the Revised Constitution to the NPC in 1982, Peng Zhen emphasized Party leadership and the conditional nature of citizen rights. He made no mention of specialized constitutional supervision organs. Peng Zhen, *Explanations on the Draft of the Revised Constitution of the People's Republic of China, Speech delivered to the NPCSC on April 22, 1982*, BEIJING REVIEW, vol. 25, no. 19, May 10, 1982.

25. Liu Songshan, *Peng Zhen yu Xianfa Jiandu [Peng Zhen and Constitutional Supervision]*, ZHONGGUO FAXUE [CHINA LEGAL SCI.], no. 5, 2011., at Sec. I(2).

26. Cai Dingjian notes that proposals for a constitutional supervision organ were discussed during the drafting of the report for the Thirteenth Party Congress in 1987, but were not included in the final report. Instead, the issue was placed on the agenda of the First Session of the Seventh NPC in 1988. However, it was shelved again due to opposition at that time. Cai, *supra* note 2, at 221.

27. The wave of anti-constitutionalist rhetoric is discussed in Rogier Creemers, *China's Constitutionalism Debate: Content, Context, and Implications*, 74 CHINA J. 91



improved constitutional supervision, emphasizes that Party leadership is the core of China's socialist rule of law state.<sup>28</sup> In short, Chinese leaders appear to be as averse to the political risks of a constitutional committee as ever.

Finally, the simple fact that Deng so firmly expressed his opposition to a constitutional committee has special resonance in the current political environment. Xi Jinping has actively associated himself with Deng's reform model and legacy,<sup>29</sup> and he has renewed the Party's commitment to Deng's basic formula of economic liberalization, complementary but limited legal reform, and Party political supremacy. In this context, Chinese advocates of a constitutional committee must do more than overcome difficult theoretical and structural issues. They must also persuade China's leaders to reverse Deng's apparent judgment that a constitutional committee is not appropriate for China. In the current political environment, that is a difficult task indeed.

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(2015) and Thomas Kellogg, *The 2013 Constitutional Debate and the Urgency of Political Reform* (draft manuscript on file with author).

28. *Fourth Plenum Decision*, *supra* note 2, at Sec. I.

29. Shannon Tiezzi, *Deng Xiaoping: Xi's Role Model*, THE DIPLOMAT (Aug. 24, 2014), <http://thediplomat.com/2014/08/deng-xiaoping-xis-political-role-model/>.