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Chapter 1 Introduction

1. Methodology

This research explores how constitutional hybridity of different traditions shape the core political institutions in China, Hong Kong and Taiwan. Three sets of constitutional traditions mix, intertwine and interact in these political systems: a Chinese tradition, a Communist tradition and a Western tradition. The most crucial platforms on which these dynamics play out are the party-state, in the People's Republic of China (PRC), and executive-legislative relations (PRC, Hong Kong and Taiwan). This choice of focus does not downplay the importance of judicial institutions in the constitutional hybridity of Chinese polities. But since most crucial political decisions are made through the party-state and the executive-legislative process, they are the most important force in China's constitutional development.

Constitutional hybridity has always been a common phenomenon of political institutions. It is a core feature of the institutions which influences the allocation of and separation of powers. Nowadays, the studies on "hybrid regimes" worldwide draw our attention to the complexity of the inner workings of non-democratic regimes. The concrete blending of different traditions in diversified institutions within a specific constitution could also form a good case study about the actual effects of such hybridity. This dissertation will analyse constitutional hybridity at three levels. First, the thesis will extract the major dynamics of constitutional hybridity from the relevant political theories, constitutional rules and institutional practices, then, second, apply them to the analysis on Chinese polities, to explain and illuminate the features of Chinese polities and, thirdly, to then use these Chinese experiences to confirm and contest existing theories about constitutional hybridity. Constitutional hybridity can take diversified forms, which must be contingent upon the actual situations and characteristics of specific countries and regions. Therefore, this thesis will not engage a thorough typology of concrete ways of hybridity. But when it touches issues like mixture of institutions, a combination of rules and employment of diversified ideas to legitimize policies, it means to incorporate them all as embodiment of constitutional hybridity. Aristotle wrote of the 'mixed constitution', where different social groups were included within constitutional processes. The mixed constitution need not be a hybrid constitution, but there are, as we shall see possible connections between the two. Hybridity may serve to incorporate different constitutional ideas and traditions within a single polity. In so doing, it may facilitate the interaction of different social groups with that polity, and constitute a form of mixed constitutional order.

Constitutional hybridity – the intersection of Chinese, Communist and Western constitutional traditions - both provide the primary historical backdrop against which modern Chinese polities are formulated, and the institutional framework under which they currently operate. Furthermore, it is a promising prospect for understanding constitutional systems more generally. Hybridity is not a distinctively Chinese feature, but rather a worldwide phenomenon. Studying it can also offer implications for the research of political transition and regime-change.

The major questions constitutional hybridity generates have great importance for the way we conceive constitutional evolution in Chinese civilisation. What are mixed constitutions? Through what exact ways are they mixed? What are the positive and

negative effects of hybridity? These are all the major questions this thesis seeks to answer.

By Chinese political systems I mean the People's Republic of China (PRC), the Hong Kong Special Administrative Region within the PRC, and Republic of China (ROC) in Taiwan. These polities have shared historical and political origins. Modern China started as a democratic republic in 1912. But like many new democracies, it was plagued by constant political turmoil and governance failure, and divided into the hands of warlords. Frustrated by the weakness of a western-modelled republic, a radical force of revolutionaries emerged. Both Democrats and Communists eventually embraced the organizational expertise and political doctrine of Leninism, especially Lenin's vision of the Party-State.¹ Nevertheless, the formal constitutional framework of China was still a republican structure based on the western tradition. The blending of this republican formal structure and a Leninist Party-State has had a continuing influence in both the ROC regime in Taiwan and the newly established People's Republic of China after 1949. Meanwhile traditional meritocratic elements, found in the older Chinese tradition of government, were also actively used by PRC in reformative era. When China resumed sovereignty over Hong Kong in 1997, some elements of the PRC constitution, embodying these different traditions, were transmitted to Hong Kong, in an indirect manner, as manifested in the Basic Law, a functioning sub-national constitution with dense constitutional hybridity.

Constitutional hybridity is in the very nature of Chinese political systems. In fact, hybrid regimes seem to be a widespread phenomenon even after the "end of history". Autocratic and democratic traits are mixed in many regimes, giving rise to institutional ambiguity.³ Constitutional tools are important for these regimes to maintain basic order and deliver effective governance. Analysis of constitutional hybridity is key to identifying the driving force, strengths and limitations of these regimes. Such analysis can place Chinese polities in a broader context of political transition, and so create a framework for academic dialogue.

2. Constitutional Hybridity in China, Hong Kong and Taiwan

Hybridity analysis can fill gaps in our understanding of the politics of the PRC and provides a more illuminating and logical conceptual framework. Traditionally, the word "authoritarianism" is the most frequently used concept to frame narratives of Chinese political systems. The concept breeds a plethora of derivatives, such as "fragmented authoritarianism"⁴ (and "fragmented authoritarianism 2.0"),⁵ "decentralized authoritarianism",⁶ "bargained authoritarianism",⁷ "contentious

¹ A brilliant historical study on this topic is 王奇生. *党员, 党权与党争: 1924-1949 年中国国民党的组织形态*. 上海书店出版社, 2003.

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⁴ Lieberthal, Kenneth G. "Introduction: the 'fragmented authoritarianism' model and its limitations." *Bureaucracy, politics, and decision making in post-Mao China* (1992): 1-30.

⁵ Mertha, Andrew. "'Fragmented authoritarianism 2.0': political pluralization in the Chinese policy process." *The China Quarterly* 200 (2009): 995-1012.

⁶ Landry, Pierre F. "Decentralized authoritarianism in China." *New York: Cambridge University Press* 6 (2008): 31.

authoritarianism”,⁸ and “consultative authoritarianism”.⁹ For those who recognise the puzzling stability and vibrancy of PRC polity, “authoritarian resilience”¹⁰ has become a popular analytical framework through which to interpret the underlying reasons for this stability. These theories all made crucial contributions to our understanding of Chinese politics. Nevertheless, accounts framed by “authoritarianism” are focused on the external manifestations of dominant political power. Adjectives were placed before “authoritarianism” to explain the difference between such theories and the more qualified reality of governance in China, and to explain the workings of the institutional machinery of the state. But accounts like these may be a little bit “fragmented”. They may have overlooked the possibility that there could be an alternative and more systematic account of Chinese politics, focusing on constitutive rather than behavioural factors. Such an account could provide insight into the actual operation of the regime, as well as the scope for further reform.

The constitutional hybridity framework is one such alternative. While fully recognizing the authoritarian nature of the regime, analysis from a constitutional hybridity perspective can explain how this nature is formed, culturally, historically, and institutionally. It offers a unified account, that connects the dots of the various theories derived from “authoritarianism”, therefore explaining the actual governing patterns in China more clearly. For instance, progress in governance is directly linked to the revival of a meritocratic tradition in China and the transplant of modern administrative norms, such as the rebuilding of a high-calibre bureaucracy through the examination system, as well as increasingly sophisticated laws about the performance and accountability of government. The responsiveness of Chinese governance, to a large degree, could be attributed to the deliberate diffusion of powers of initiative to local authorities and social sectors, a practice that was customary in traditional China though not in communist doctrine. The progress – whilst limited – in rule of law and political accountability, with no doubt, is attributable to the influence of modern administrative law system as based on western model, combined with the pragmatic needs of the regime to restore basic order after the self-destruction of the cultural revolution.

Mixed institutions inevitably require a mixture of political theories legitimizing and underpinning those institutions. To a certain degree, constitutional theory in China has become an arena for competing theories trying to reconcile *ad hoc* elements in the fusion of institutions, as well as identifying the ultimate source of the legitimacy of the regime. Accounts like “Confucian mixed polity”, “party-state constitutionalism” and “constitutional party-rule” proliferate, creating even more puzzles. Theoretical issues like such will be explored in chapter 6 and 7. It will be shown that a core structure of the Chinese constitution is the dual-representation structure, a product of mixing Marxist popular sovereignty and the Leninist supreme

7 Lee, Ching Kwan, and Yonghong Zhang. "The power of instability: unraveling the microfoundations of bargained authoritarianism in China." *American Journal of Sociology* 118.6 (2013): 1475-1508

8 Chen, Xi. *Social protest and contentious authoritarianism in China*. Cambridge University Press, 2012.

9 Teets, Jessica C. "Let many civil societies bloom: The rise of consultative authoritarianism in China." *The China Quarterly* 213 (2013): 19-38.

10 Nathan, Andrew J. "Authoritarian resilience." *Journal of Democracy* 14.1 (2003): 6-17.

party leadership. A gradual political process in which the liberal function of those mixed elements can be played out may ease this tension.

This leads to the next proposition: constitutional hybridity helps to formulate more feasible guidance for political reform. In the very general sense, since each tradition has been legitimized to some extent, a sensible direction for political reform may be a “mixed constitution”. A compromise that reflects the interest of advocates of each political tradition would provide a more stable platform for gradual and incremental reform. More concretely, if it can promote the positive elements in each tradition, such as modern administrative law and the representative function of the National People’s Congress NPC, and contain the negative elements, reform is more likely to be successful.

Hong Kong’s constitutional evolution also reflects constitutional hybridity. China deliberately made Hong Kong’s political system a hybrid one. The need to ensuring the political loyalty of Hong Kong’s leadership and the pressure to fulfil the promise to give Hong Kong a “high-level of autonomy” prompted the Chinese government to adopt a wide range of institutional designs, drawn from different archetypes, but principally by mixing presidential and parliamentary elements. Beijing retained the bulk of the colonial governing structure, but with some modifications. The colonial governor was replaced by an elected chief executive accountable to the central government. An elected legislature, a earlier form of which was also established in the colonial period, is another pillar of Hong Kong’s democracy. Other elements include the functional constituency, an entrenched group of parliamentary seats reserved for various industries and interest groups, like a transplant of the quota system in the configuration of the NPC and People’s Political Consultative Conference (CPPCC) in the PRC. The executive was given an upper hand by equipping it with a broad array of institutional instruments for agenda-setting and a veto power. This pattern of constitutional arrangement can be conceptualized as “executive dominance” and is championed by the PRC as a requirement for Hong Kong’s constitutional system. Nevertheless, despite these systematic empowering mechanisms, the chief executive and government of Hong Kong have been politically weak, and frequently beaten by political opposition in the Legislative Council. This weakness has contributed to Hong Kong’s unsatisfactory performance in governance, despite of its developed economy with a highly-educated workforce and ample financial resources. This creates a puzzle: why a supposedly strong executive power is actually weak, and why Hong Kong is plagued by frequent political impasses between the executive and legislative branch. There are, of course, very obvious political factors at play. Academic studies on this domain suffer from partisan criticism, from either, or all, political camps involved. While many pro-democracy scholars may blame Beijing’s harsh suppression as the main reason for Hong Kong’s dim prospect of democracy, pro-Beijing scholars equally denounce political opposition in Hong Kong as an illegitimate abusing of political procedure.

Both sides use highly polemical language reflecting their ideology (pan-democratic slogans vs “one country, two systems”) to project their political stance. In addition, in concrete terms, they are using different sorts of technical instruments (common law vs Chinese law, for instance) between which there is almost no conceptual bridge that might enable a meaningful exchange of views. Under these circumstances it is hard to expand our understanding of the nature of Hong Kong’s ongoing pathology. More phlegmatic institutional analysis is needed, and this thesis will endeavour to provide it. An analysis of constitutional hybridity can offer an

effective framework for open dialogue, diluting political ideology and focussing constructive institutional thinking. For example, one constitutional cause of Hong Kong's political dysfunction is the way in which institutional structures such as agenda-setting and veto powers have been combined. Presidential and parliamentary institutions of decision-making are mixed and twisted. The results of such hybridity are incompatibility, conflicts and distortion, with ineffective political bargaining and frequent constitutional deadlocks.

To ameliorate the current situation we need a better configuration of these mixed institutional elements. A reasonable approach is to interpret the current constitutional rules flexibly, regulating the allocation of agenda-setting power, so as to build a constructive political bargaining framework in which each side is structurally motivated to cooperate and to compromise. This approach will be elaborated in chapter 8.

Taiwan stands out as a case of highly successful democratization, which was followed by a long period of disappointing governance and political gridlock¹¹. Constitutional hybridity is again the core institutional cause of such problems. This manifests itself in heated debate about the proper direction of constitutional change, towards either parliamentarism or presidentialism.¹² The technical qualities of these two archetypes are of only secondary importance for those engaged in this debate. History teaches us how political opportunism can be restrained. Taiwan's original constitutional framework in 1946 had contained mixed elements on account of the constitutional design process undertaken before the Republic of China (ROC) retreated to Taiwan. The rounds of constitutional amendment during and after democratization only exacerbated the problem of institutional incompatibility. The main impact of hybridity is that Taiwan's constitutional system could not impose clear political responsibility and ensure effective decision-making. The result is endless obstruction and little action. Though constraints on political power can be desirable for democratic transition, Taiwan may have gone too far, undermining effective governance. One solution would be to choose a clear constitutional prototype, preferably a parliamentary system, consistent with the suggestions of many empirical studies by political scientists.¹³

It is not only technical arrangements of parliamentary and presidential models that are intertwined in Taiwan. Leninist and Chinese tradition both live on. The party-state legacy of the National Party (Kuomintang, KMT) still haunts Taiwan. Its main effects including fostering local clan politics, fragmenting the party system and feeding pork-barrel politics. These topics will all be addressed in chapter 9.

The main propositions and arguments in the research should not be regarded as efforts to justify whatever happens within these Chinese polities, and especially in the

11 For instance See, Copper, John F. "Taiwan's failed president." *Asian Affairs: An American Review* 34.4 (2008): 179-192. In general, while the international observers are more cautious and describe Taiwan's messy politics as only "but lost points in government efficiency and infrastructure" (<http://www.taipeitimes.com/News/front/archives/2017/06/02/2003671743>), local media in Taiwan is more straight forward in calling it "political chaos(政治乱象)". Even the government sponsored think tank in Taiwan has published article studying exact the phenomenon of "political chaos"(<https://www.npf.org.tw/1/12246>).

12 For instance, <http://news.ltn.com.tw/news/politics/breakingnews/2207736>

13 Power, Timothy J., and Mark J. Gasiorowski. "Institutional design and democratic consolidation in the Third World." *Comparative Political Studies* 30.2 (1997): 123-155.

PRC. Neither do they seek to predict the fate of these polities. Rather, the thesis attempts to identify certain crucial institutional dynamics for reform, in the belief that political institutions shape political action. There are many counter examples which question the phenomena identified in this thesis. The point is to depict a complex picture more clearly, but not to deny such complexity. Inevitably, there have been and will be events that may challenge some of the institutions and norms discussed in the research. Also, there are always parallel dynamics in the PRC polity that can be manoeuvred to bring the regime towards a brighter direction.

3. How This Thesis Will Proceed

The thesis contains 10 chapters, divided into four general parts. The first four chapters will offer a general theoretical framework for the analysis to come. The first chapter, the introductory chapter, will lay out of the main topics and structure of the thesis.

The second one will then pave the methodological path for later analysis. It will first clarify relevant concepts such as “constitutional” and “hybridity”. The concrete ways in which constitutional tradition influences present politics will then be explored. The literature that addresses the theme of constitutional hybridity will be reviewed. This can be classified into three main types: philosophical analysis of the “mixed constitution”, “hybrid regime” studies in comparative politics, and concrete case studies into how constitutional design in specific regimes contain hybridity. Finally, we will extract the main constitutional implications from this literature.

The third chapter will introduce Chinese tradition, focussing on both Confucianism and Daoism, as well as the later combination of the two in Ming dynasty. The meritocratic tendency, anti-factionalism, and flexible governance will be presented as the main elements of this Chinese tradition.

The fourth chapter will introduce the western and communist traditions. The main western models for constitutional design are parliamentary, presidential and semi-presidential. Each has distinctive features that affect decision-making and political bargaining. The rise of the administrative state and the growth of administrative law will also be discussed, because many have been transplanted into greater China. The communist tradition consists of a mixture of Marxism and Leninism. Marxism results in the formality of a state apparatus which possess ample democratic mechanisms. Leninism leads to a dominant party leadership that renders Marxist democracy a mere formality. The general decision-making structure of the communist system of governance will also be described. It is easy to over-simplify certain aspects of communist governance. This chapter will caution against this tendency, especially in respect of the migration of the Russia tradition into Chinese polities. This fundamentally shaped the formal structure of Chinese political systems, but was marginalized in the reform era. The revival of party dominance in recent years suggests a new and distinctively Chinese model of bureaucratic autocracy, rather than resurrection of orthodox Leninism or a rigid imitation of Stalinist politics.

The fifth chapter will present a historical review of the constitutional evolution of the PRC. Constitutional hybridity has been an underlying theme of China’s modern history. The chapter will show how a newly born and fragile Republican China suffered from political chaos and gradually chose to embrace communist revolution and a Leninist party-state in order to achieve modernization. During this process, different constitutional traditions blended with each other and left legacies that remain in the present day. The initial effort to establish a republican regime modelled on

western polities failed on account of unprincipled political struggle. Communist and Leninist movements gradually gained popularity in China. Both the then-ruling KMT and the CCP embraced Leninist models of the party-state to advance revolution and state-building. Elements deriving from these various traditions were gradually incorporated into the Chinese polities considered here. This complex history is the starting point for the concrete case studies on China, Hong Kong, and Taiwan.

The argument then turns to the institutional cornerstone of the reform era, the separation of the Party and the State. This was a political separation, if not constitutional one. It was caused by constitutional hybridity and, in turn, it generated further constitutional hybridity. The communist orthodoxy necessarily requires a parallel party-state structure, to achieve a genuinely representative government. The division of labour between party and state apparatus created space for the institutionalization of governance. It made China's institutions more sophisticated. Next, the structure, powers and personnel of the NPC will be discussed and analysed, along with the government apparatus.

The above-mentioned chapters set out the historical and theoretical background. They are followed by four chapters with concrete case analysis of the PRC, Hong Kong and Taiwan.

The PRC polity is addressed in two chapters. The sixth chapter gives a general introduction to the constitutional framework and explores the rise of constitutional governance in PRC, the driving force for which is constitutional hybridity. The PRC polity is a hybrid one in which a meritocratic bureaucracy, regulated by modern administrative law, operates under the control of a secular Leninist party. This whole set of institutional practices is formally legitimized by a supreme assembly and controlled by a powerful party. The separation of Party and State generates the overarching structure of this system. It has both formal but and substantive constitutional functions. The momentum of constitutional governance, if properly harnessed, could fuel meaningful political transformation, through a mixture of Chinese meritocracy, communist democracy, and Western administrative law. A Chinese tradition underpins the revival of merit-based bureaucracy in both the government and the legislature, Western administrative laws to a considerable degree tame arbitrary government.

This constitutional governance is operated by empowering the legislature, normalizing executive power and regulating the interaction between the two. The NPC is strengthened by Leninist bureaucratization which enhanced its law-making capacity. The executive has been strengthened by re-embracing the Chinese tradition of meritocratic bureaucracy. Meanwhile, governance is also being regulated by increasingly sophisticated legal and political rules, many of which are modelled on modern administrative laws in western countries. The governance assessment rules, transparency laws and administrative procedures for decision-making are important examples. Executive-legislative interaction also takes on new features. The legislature is gradually acquiring more agenda-setting and veto powers, which strengthen its leverage and help to place executive power under stronger oversight. A crucial legal mechanism, the Chinese version of "Vorbehalt des Gesetzes"¹⁴ was established by legislation to become a constitutional principle guiding power-allocation. Moreover, by flexibly using mechanisms like delegation and temporary suspension of laws, the legislature and the Legislation Law also guides policy experimentation and responsive

14 See chapter 6

governance. These hybrid elements influence one another. Legislative scrutiny also makes the exercise of executive power more rational and predictable.

Chapter 7 argues that due to constitutional hybridity, the fundamental institutional structure of the regime is a dual-representation structure, which gives rise to a dual-normative system.¹⁵ There is tension within this dual-authority structure. Orthodox communism demanded a rudimentary sort of popular sovereignty, as embodied by a supreme assembly, which exhibits features of parliamentary sovereignty, at least in theory. Leninism placed great emphasis on the role of vanguard party. But however dominant the ruling party could be, it could not dismantle this fundamental constitutional structure because that would amount to denying its own legitimacy. In turn, that legitimacy underpins the present development of the administrative state. In the reform era(after 1978), although party control has always been tight, the theoretically supreme authority of the legislature, as well as the corresponding institutional subordination of executive power, can still achieve political balance and drive progress towards rule of law.

This tension between two theoretically supreme authorities triggers a great deal of academic discussion. This chapter will demonstrate that, though these legal theories offer certain insights, many of them are not convincing because they take the representativeness of the party for granted. An alternative political approach may provide a more sensible way to resolve this tension and to advance China's constitutional development. The possible lines of such development will also be addressed.

This chapter will go on to identify three existing dynamics that could catalyse constitutional evolution, based on this political approach. These dynamics are all products of constitutional hybridity. First, in party-executive relations, though the party always claims absolute control, the regulation of executive power regulates the party itself. Administrative litigation in China, via strategic interpretation, could extend to party power and create a channel for administrative justice. In addition, the party's efforts to strengthen the coherence and quality of its internal legal system, to a great degree, imitate and transplant administrative law. Second, an institutional framework that creates a supreme representative organ of the people suggests a channel for civic activism through participation in legislative elections. For the regime, this is also a way to co-opt and to assimilate dissent. Similar dynamics exist in the incorporation of social groups into the NPC and CPPCC. Third, the party is also placing emphasis on its supposedly representative role and on transforming some of its functions. This takes place subject to the political will of the leadership, so it cannot be taken for granted. Nevertheless, gradual progressive reform is a possibility.

The eighth chapter addresses Hong Kong. It begins with a detailed description of the basic constitutional framework, focussing on the executive and the legislature, whose tasks, structure, and personnel will be introduced. The history of the framing of the Basic Law, the constitution within Hong Kong, will then be introduced, examining the different traditions behind this polity. Then, the chapter will highlight the current paralysis in Hong Kong governance. It identifies a puzzle: why a supposedly strong and dominant executive has become so weak and unable to govern effectively. It will then suggest an answer to this puzzle: constitutional hybridity generates institutional

15 Ling, L. I. "'Rule of Law' in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China." *Asian Journal of Law and Society* 2.1 (2015): 93-113.

conflict, insufficiency, redundancy, and distortion. The ambivalent role of political parties is a key aspect of this institutional failure. Drawing on analysis of agenda-setting and veto-playing, it will show that the inelegant combination of a presidential executive power and a parliamentary law-making process compromise both executive effectiveness and legislative activism. A Chief Executive without a partisan base cannot govern effectively, while a legislature with no real power of initiative has a structural incentive to confront the executive. The fragmentation of party system in the legislature might have been thought to weaken this legislative opposition. However, this caused even greater trouble for the executive, since fragmentation makes effective coordination even more difficult. Without functioning political parties to act as a mediating institution, constructive political bargaining cannot be achieved between the executive and the legislature in Hong Kong. This basic constitutional flaw also affects the legal landscape generating legal controversies, such as the line between executive and legislative power, and legal constraints on executive orders. A concluding section will summarize the main arguments and lay out some institutional suggestions that might ameliorate constitutional problems in Hong Kong.

The ninth chapter will first review the historical origins of constitutional hybridity in Taiwan. This reflects the constitutional legacy of the KMT Party-State regime, which was founded in 1912, and whose government retreated to Taiwan province in 1949. Taiwan is a twisted hybrid of western political institutions such as parliamentary supremacy and presidential power. The process of democratisation cannot be regarded as a failure since it did, finally, lead to the building of a full democracy in Taiwan. However several rounds of political and constitutional reform characterised by unprincipled compromise and opportunism complicated the political system, stymieing effective decision-making and diffusing political responsibility. This constitutional reform process was also reliant on constitutional transplants, mainly from the French Fifth Republic and from Germany. The system of dual executive authority unexpectedly became a device for the ruling party to evade responsibility and seek factional balance, rather than a means to forge a clear ruling coalition that agree and implement policy. In the meantime, in Taiwan's legislature the disproportionate allocation of veto power, as a result of political compromise, paralyzes democratic representation and renders the law-making process much more prone to abuse. The final part of this chapter draws conclusions about constitutional hybridity in Taiwan and discusses possible lines for reform.

The thesis ends with a concluding chapter summarizing the main points of this research. Constitutional hybridity is a feature of late-developing countries trying to catch up. The mixture of indigenous traditions and western institutions, as well as the clash of different western elements, have complex influence on political transition. Three elements in this process are particularly important, inclusiveness, constructive political bargaining and responsiveness. The role of political parties is a key element and we consider whether party building can be effectively addressed in the messy process of reform. The PRC polity establishes effective mechanisms for inclusiveness and responsiveness. But the omnipotent CCP means political bargaining is at best marginalized, and healthy compromise and consensus are hard to achieve. Hong Kong and Taiwan suggest different lessons. While democratic reform can easily offer an effective channel for inclusiveness and can ease tension about legitimacy, a hybrid structure of political bargaining can paralyze decision-making and cause constitutional gridlock. Specifically, as discussed, the Hong Kong case shows a

simple but often neglected point: a dominant executive is not necessarily a strong executive. Politics requires the art of compromise. If a dominant player does not offer other players any benefits from participating it will be weakened, since dissidents with nothing to lose will be motivated to confront it. The Taiwan case demonstrates a parallel problem, that if political power is diffused, then this may not lead to effective decision-making in especially if each diffuse power holds a veto. Moreover, because no political group bears the diffuse responsibility, political opportunism can thrive. Hong Kong's and Taiwan's experiences offer implications for each other. While Hong Kong's constitutional dysfunction features a technocratic executive that is constantly opposed by its legislature, Taiwan's dysfunction features a political executive power that fails to take responsibility for the technical aspects of governance.

China should draw upon these experiences and avoid similar problems. While there are no current signs of moderation in the Leninist tradition of an omnipotent Party-State, the CCP must learn to engage all political actors and form meaningful consensus, by sharing some power and establishing a constructive structure for bargaining and deliberation. Institutional dynamics deriving from several different traditions could play a positive role if artfully combined and played-out. This process of power diffusion in Chinese political reform should not undermine effective governance.

Chapter 2 The Constitutional Hybridity of Different Traditions

1. Introduction

This research will explore how different traditions intertwined during the constitutional development of Chinese polities, with a focus on party–state and executive–legislative relations. Such a mixture and its corresponding effects are the underlying forces behind constitutional evolution of Chinese polities. The aim and function of this chapter, following the introduction, is to clarify relevant concepts, explain methodologies, and place the overall thesis into the context of relevant literature and theories, preparing an analytical framework for the substantive parts of the thesis.

After this introductory section, Section 2 and 3 will provide basic conceptual framework for understanding constitutional traditions and constitutional hybridity. Section three will also review the main literatures and propositions about constitutional hybridity of different traditions, which mainly fall into three different yet inter-connected categories, the political theory of mixed constitution, the studies of comparative politics on hybrid regimes and the specific analysis on hybrid elements in concrete constitutions. Based on such review, section three will end with identifying the main institutional dynamics deriving from constitutional hybridity, which will be referred to in later chapters when analysing how constitutional hybridity of different traditions shapes Chinese polities. The final section will provide a summary of the main content.

2. Explaining the Influence of Constitutional Traditions

Perhaps it is not possible to provide a perfect and unified definition of a constitutional tradition.¹⁶ Some regard it as the aggregation of weighty ideas and philosophies in history¹⁷ while others equate it with certain important historical events and facts.¹⁸ Some may regard it simply as another term for history itself or as a major part of history.¹⁹ They are all reasonable. The multi-faceted nature of constitutional tradition is a fact that should be taken as a starting point; therefore, this thesis is not intended to be an exercise in pure conceptual study, and will not build a precise definition of ‘constitutional tradition’. What matters to this dissertation is the institutional elements contained in each tradition. It may suffice to regard

16 “Few concepts are talked about more these days than tradition. Few are so seldom defined.” Lienesch, Michael. “The constitutional tradition: History, political action, and progress in American political thought 1787-1793.” *The Journal of Politics* 42.1 (1980): 2-30.

17 De Bary, Theodore. “The Constitutional Tradition in China.” *J. Chinese L.* 9 (1995): 7.

18 Fritz, Christian G. “The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West.” *Rutgers LJ* 25 (1993): 945.

19 Ward, Alan J. *The Irish constitutional tradition: responsible government and modern Ireland, 1782-1992*. Catholic University of Amer Press, 1994.

constitutional tradition as a broad array of institutions, ideas, and historical facts that are crucial for constitutional matters in a given region, country, or civilisation.

Constitutional tradition has a strong and inevitable influence on current constitutional politics. This continuity of relevance can be partly explained by the theories of historical institutionalism in the broader terrain of the social sciences.²⁰ They illustrate that decision-making in any given circumstance is always limited by decisions made in the past or by the previous experiences of a person or an institution, even though they may no longer be relevant. A familiar example is the strange layout of the QWERTY keyboard: the technical limitations of early typewriters resulted in 'locked-in' effects and determined subsequent keyboard arrangements which are still in place today.²¹

Naturally, the development of constitutional institutions is different from economics and technology, but the underlying logic of how its influence is exerted is solid. However, it is rarely possible to make a clear-cut tracing of the origins of a type of institution. The influence of constitutional tradition can be easily felt and described, such as how the legacy of Confucian paternalism still resonates in modern China; but it is technically almost impossible to pin down, to prove, the ad hoc causal links between one tradition and a particular concrete institutional feature in current political systems. Also, the concrete forms of interaction between mixed traditions may not be neatly categorised and precisely enumerated, since politics is heavily shaped by historical, cultural, and social contingencies. After all, tradition is not a scientific inevitability or a kind of genetic code that could be deciphered or even edited. This makes constitutional hybridity a complex and context-sensitive topic, which is perhaps also the reason for its richness and appeal. Claims that a given constitutional arrangement is the product of a particular tradition, or the interaction of a number of traditions, must be made with caution.

This said, sensible explanations can still be made about the plausible impacts of constitutional traditions. First, we can identify those direct influences that can be proven or supported by historical and textual evidence, such as the combining of presidential and parliamentary elements in the Republic of China's constitution in 1946, as clearly demonstrated by the discussions and articles of contemporary politicians and scholars.

Second, constitutional tradition is a continuous and organic process that gradually forges a shared understanding of fundamental political issues within a community; that is, it provides a common and meaningful background to

20 Pierson, Paul. "Increasing returns, path dependence, and the study of politics." *American political science review* 94.2 (2000): 251-267. Liebowitz, Stan J., and Stephen E. Margolis. "Path dependence, lock-in, and history." *JL Econ. & Org.* 11 (1995): 205. Bennett, Andrew, and Colin Elman. "Complex causal relations and case study methods: The example of path dependence." *Political analysis* 14.3 (2006): 250-267.

21 David, Paul A. "Clio and the Economics of QWERTY." *The American economic review* 75.2 (1985): 332-337. Whenever the writer tried to press two or more neighbouring keys at a fast pace, a physical error occurred inside the machine, resulting in a 'crash' of the pressed letters. To solve this problem, the inventor Christopher Sholes distributed 'the most used keys' as far as possible away from each other, so that the crash frequency would decrease. Then later, when people had become accustomed to such a keyboard layout and its market had been consolidated, even though the previous technical shortcomings had been solved the QWERTY layout continued to dominate

understanding contemporary issues. Even if constitutional tradition is not cited as a normative basis for advancing certain political initiatives, it is indispensable in understanding the reasons and significances behind them. For instance, in discussing China's reform which started in the 1980s and led to the building of a unified, meritocratic, and norm-based civil service, it is almost impossible to overlook people's conscious or unconscious references to ancient meritocratic tradition because this is the historical backdrop that decision-makers were aware of, and are likely to have been influenced by. This is why it is acknowledged that:

'...tracing the initial conditions of the Chinese legal system in these terms adds a powerful way of understanding the distinctive public law approaches and institutions in the Chinese legal system and the trajectory of their reform. This Russo-Leninist dimension to Chinese public law and institutional development provides an important window for understanding the initial conditions of post-Mao legal reforms as well as current possibilities for reform.'²²

Third, being an organic or living-tree process means that every specific constitutional tradition constitutes a general spectrum with closely or loosely connected elements, such as philosophies, laws, rules, customs, usages, and practices.²³ They may not form a unified system and neither be uncommonly diversified or even mutually conflicting, yet all are legacies of the past. It is possible that a general constitutional tradition could generate two sets of totally opposite impacts on political practice, but both may have a direct and crucial influence on modern politics.

Fourth, constitutional tradition is not antiquated and belonging purely to the past but can also be a modern creation. Commonly, traditions are used to legitimate a decision or institution by establishing its linkages, or similarities, with the past.²⁴ In particular, constitutional rules, theories, and conventions can have tremendous legitimising effects on political practice. Recalling the significance of a decision in the precedential traditions and their overall effects on the future has been actively carried out in constitutional politics. One example, that will be analysed in Chapter 9, is how the legislature of Hong Kong (and some of its lawmakers) deliberately aligns with the Westminster tradition in the UK, even though there exists a written constitution of Hong Kong Basic Law establishing a clear and independent origin of its powers. In light of this, Hong Kong legislature's use of the confidence vote could be seen as a strategical employment of parliamentary tradition to justify its stance on concrete political issues. In such cases, the influence of constitutional tradition is vivid and can be effectively identified.

Fifth, the simple recurrence of similar institutional or cultural patterns in constitutional affairs should suffice to remind us to refer to past constitutional traditions because such a comparison, whilst it may not necessarily (but usually does) testify to the significance of these traditions, could contribute to an understanding of the status quo by illuminating new factors that drive the current political entity to resemble, either in form or in substance, its ancient tradition.

22 Partlett, William, and Eric C. Ip. "Is Socialist Law Really Dead." *NYUJ Int'l L. & Pol.* 48 (2015): 463.

23 For some discussion on the subtitles of them in political and constitutional sense, see Wheare, Kenneth Clinton. *The constitutional structure of the Commonwealth*. Clarendon Press, 1960.

24 Lienesch, Michael, *ibid.*

The effects of constitutional traditions and how they potentially shape the current constitutional affairs of Chinese polities will be frequently referred to throughout this dissertation, especially during the analysis. The aim of this section has been to examine and justify this methodology.²⁵

3. Constitutional Hybridity: Concepts, Literatures and Dynamics

3.1 Basic Concept

As a general and workable concept, constitutional hybridity simply means the mixing and mixture of different constitutional elements. It is a common feature of political systems. Almost all modern polities contain varying degrees of constitutional hybridity. The previous section showed that constitutional tradition is both broad and continuous, rendering it strongly relevant to fundamental constitutional issues in present times. Often, constitutional hybridity necessarily involves the blending of different constitutional traditions in order to incorporate and connect a multiplicity of institutional elements. This thesis will pick out a number of features of the systems studied in which constitutional hybridity can be identified. The relationship between representative agency and executive agency is a central theme in constitutional politics. This is also the primary platform for playing out the dynamics of constitutional hybridity. This research will therefore focus on party-state and executive-legislative relations in Chinese polities, since they are the most fundamental forces shaping the constitutional development of China.²⁶

By reviewing the ideas and theories about constitutional hybridity, this section will show that studies regarding this issue mainly fall into three categories: the political theory and philosophical history of mixed constitutions, the observation and anatomy of hybrid regimes in comparative politics, and the concrete analysis of institutional hybridity in specific constitutions. This also means that the concept of constitutional hybridity at least has these three layers of meanings. In later chapters, the concept of constitutional hybrid will be used as incorporating these different layer of meanings, because all these issues are intertwined in the constitutional evolution of Chinese polities. But the subtle differences will also be elaborated when necessary. Each of these perspectives generates volumes of literature and the following sections will provide a brief review of these before exploring the general dynamics and effects of constitutional hybridity.

25 Besides previous analysis, there are many works that could exemplify such methodology. Some of them are based on quite loose and formal connections between current state and constitutional tradition, therefore may contain certain mistakes, but they still make sense. This research will strive to identify more solid and substantial influence from constitutional tradition. But simply identifying similar institutions, practices or even rhetoric also contributes to the general discussion. Examples, see, Partlett, William, and Eric C. Ip. "Is Socialist Law Really Dead." *NYUJ Int'l L. & Pol.* 48 (2015): 463.; Bui, Son. "The Law of China and Vietnam in Comparative Law." (2017). Baum, Richard. "Modernization and legal reform in post-Mao China: the rebirth of socialist legality." *Studies in Comparative Communism* 19.2 (1986): 69-103.

26 This point does not downplay the importance of judicial politics in Chinese political systems. Nevertheless, a research must find a neat them and cannot study everything. So, in this dissertation hybridity involving judicial factors will be not discussed.

3.2 Theories of Mixed Constitution

Mixed constitution is concerned with the integration of different social classes in the government of the state, not direct blending of different traditions. But to do so usually involves establishing a political system mixing agencies representing these social sectors, therefore resulting in a certain degree of institutional hybridity. Such representative agencies not uncommonly may have inherent ties with different traditions, especially in modern polities undergoing political transition.

Aristotle's theory of mixed constitution must open the discussion, though early thinkers like Plato already had similar ideas.²⁷ Aristotle's account of ideal polity as a mixed constitution is well known and requires little repetition; but the virtues of mixed constitution in his theory may require more exploration.

The first virtue of a mixed constitution, according to Aristotle, is a stable political order created by a strong capacity for regime inclusion. By observing the constitution of Sparta, he argued that '[f]or a constitution to be secure and stable it is necessary that all the parts desire it to exist and to remain the same as it is.'²⁸ But according to him, such stability does not come from, in modern terms, 'checks and balances'.²⁹ Rather, it is the arrangement whereby each political camp has a stake in the government and this fact structurally motivates it to preserve the constitutional order that gives it that stake. Using contemporary academic language, this is an idea that gives credit to the inclusive and power-sharing effects of hybrid constitutional system. Aristotle believed a purer regime's conception of justice must always be flawed, since they are often one-sided and overly focused on the factional interests of a certain class, such as of democrats or oligarchs. A mixed constitution is an indirect but more practical system for building a just constitutional order because its combination is 'deliberative' which qualifies the moral flaws of alternative regime principles as well as the institutional arrangements stemming from them.³⁰

Lastly and related to the previous point, there is potentially a fundamental legitimacy clash within a mixed constitutional government. Aristotle acknowledged that the blending of different regime types also leads to a mixture of different legitimacy principles.³¹ He hoped that in a mixed constitution the deliberative and qualifying nature of institutional interaction could ease such tension so that legitimacy principles of alternative regimes would not trump each other but be required to reach a compromise and consensus. Such moderating effects not only concern struggles over interest but also sublimate competing ideas and ideologies. However, all types of institution may fail and this arrangement may give rise to direct conflicts of such legitimacy rules. As will be analysed in later sections, this is the common problem facing modern Chinese polities.

27 Hahm, David E. "the Mixed Constitution in Greek thought." *A Companion to Greek and Roman Political Thought* (2009): 178-198.

28 Hahm, David E. "the Mixed Constitution in Greek thought." *A Companion to Greek and Roman Political Thought* (2009): 178-198.

29 Reliance on checks and balances is closer to Plato's thoughts, Ibid.

30 Walker, Graham. "The New Mixed Constitution: A Response to Liberal Debility & Constitutional Deadlock in Eastern Europe." *Polity* 26.3 (1994): 503-515.

31 Hahm, ibid

Mixed government is also a crucial component of political and legal theories regarding English constitution, common law, and other liberty-oriented theories.³² The most prevalent characteristic of England's constitution seems to be that it comprises a mixed form of government.^{33,34} This fact had long been acknowledged by monarchs and scholars alike:³⁵ 'The 'British constitution,' William Blackstone explained in his renowned Commentaries on the Laws of England (1765-9), entrusted the 'legislature of the kingdom ... to three distinct powers': the king ('a single person'), the lords ('an aristocratical assembly'), and the commons ('a kind of democracy'); which by operating jointly escaped 'the inconveniences of either absolute monarchy, aristocracy, or democracy', while uniting 'so well and so happily' the benefits of each pure form (Blackstone, 1979, I, pp.50-2)."³⁶ In such academic works, the focus of the function of a mixed constitution, nevertheless, seems to be on how it might protect liberty. The exceptional levels of political freedom in England were attributed to a system using institutional complexity to effectively prevent arbitrariness or tyranny of powers.³⁷

In modern times, especially in recent decades, whether classic political theories could be applied to solve contemporary problems, in particular in non-western and non-democratic regimes, is doubtful because political theory is increasingly indifferent to actual institutions and confined within Western contexts.³⁸ Maybe such normative analysis needs an institutional turn to expand its explanatory and prescriptive power. In terms of mixed constitution, there have been such efforts.³⁹ Academics have argued that this theory is an optimum choice over orthodox liberalism as a guiding principle to reform and rebuild post-communist polities in eastern Europe⁴⁰ because it is more feasible to juxtapose both liberal and non-liberal principles in such countries caught between the transformation from old regimes to

32 Machiavelli was also an important thinker in bringing liberty to a higher position in the understanding of mixed constitution. Pocock, John GA. "Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century." *The William and Mary Quarterly: A Magazine of Early American History* (1965): 549-583.

33 Lieberman, David. "The mixed constitution and the common law." (1999). Wilson, Francis G. "The mixed constitution and the separation of powers." *The Southwestern Social Science Quarterly* (1934): 14-28. Grotke, Kelly L., and Markus J. Prutsch, eds. *Constitutionalism, Legitimacy, and Power: Nineteenth-century Experiences*. OUP Oxford, 2014.

34 Charles, I. "His Majesties Answer to the Nineteen Propositions of Both Houses of Parliament."

35 Macias, Steven J. "Legal Thought from Blackstone to Kent and Story." *A Companion to American Legal History* (2013): 484-505.

36 Lieberman, David

37 Ibid

38 Waldron, Jeremy. "Political political theory: An inaugural lecture." *Journal of Political Philosophy* 21.1 (2013): 1-23.; Rossi, Enzo, and Matt Sleat. "Realism in normative political theory." *Philosophy Compass* 9.10 (2014): 689-701.

39 Walker, Graham. "The New Mixed Constitution: A Response to Liberal Debility & Constitutional Deadlock in Eastern Europe." *Polity* 26.3 (1994): 503-515. Halmai, Gabor. "Constitutionalism, Law, and Religion in Israel: A State's Multiple Identities." (2016).

40 Walker, *ibid*.

new. Other works also put forward transformative regimes requiring more sophisticated guiding theories to build constitutionalism.⁴¹

There are serious reasons to choose this approach. In transformative regimes there are usually competing 'principles of legitimacy'⁴² and political values. Mixed constitution is supposed to integrate different social classes. Not uncommonly, the advocates of these diversified principles are from different or even conflicting sectors. They usually have their preferred constitutional tradition to champion, such as conservatives supporting communist institutions while liberals eager to democratize the whole political system. Mixed constitution seems to be the most capable of offering a structure to accommodate such competing interests by combining institutional reminiscences of old regimes and import of democratic institutions. In this case, the accommodation of different classes and different constitutional traditions overlap or interlink with each other. Such constitutional hybridity is valuable in maintaining the basic level of inclusiveness and order of a political system.

In contrast, the success of a liberal constitutional order⁴³ is preconditioned on a generally homogenous society or at least one with a vibrant and dominant political culture.⁴⁴ It is able to choose to be neutral toward all identity groups because of this general homogeneity and stability. Transformative regimes usually do not have such luxuries. Under such conditions, liberal constitutional order may not suffice to maintain a basic level of stability, since many people may feel that their values (if not concrete interests) are underrepresented because 'liberalism trivializes (diversity) by privatizing and relativizing substantive differences.'⁴⁵ In such cases, it is easy to see that people may become hostile towards Westernization, especially when nationalistic radicalism is used to inspire people. A mixed constitution is preferable because it could avoid such a dilemma and maintain a necessary level of liberty, on condition that its mixture is principled. But besides political practicality, it also has moral appeal. The pure liberal model of regime may carry a risk: 'though apparently allowing people to be whatever they wanted, [it] was a mechanism for making them all want the same thing, as Tocqueville foresaw it.'⁴⁶ Creating conditions for people to be in a formative and limiting community is a requirement of upholding humanness. A mixed constitution is more convenient and capable of this task, especially in changing and divided societies.

41 See Pieterse, Marius. "What do we mean when we talk about transformative constitutionalism?: journal." SA Publiekreg= SA Public Law 20.1 (2005): 155-166. This article focuses on the judicial aspect of constitutionalism-building. But the same logic also applies to designing forms of government.

42 Ibid.

43 Walker rightly acknowledged that there is hardly pure type of liberalism, in liberal democracies there are always certain degree of institutional mixture. Nevertheless, he also rightly argued that it still made a difference whether the regime upholds liberalism as the No.1 defining constitutional principle, such as in US. Walker, *ibid*.

44 Classic discussion in Almond, Gabriel Abraham, and Sidney Verba. *The civic culture: Political attitudes and democracy in five nations*. Princeton University Press, 2015.

45 Walker, *ibid*

46 Ibid. Tocqueville's discussion is in *Democracy in America*, Chapter 2.

3.3 Hybrid Regimes and Chinese Politics

Studies on ‘hybrid regime’ from comparative politics also offer illuminating implications on the constitutional analysis of Chinese politics. A wide range of features in hybrid regimes has been discussed by academics and their resonance can also be found in Chinese politics, in particular about how authoritarian system delivers governance and maintain basic order.

The term ‘hybrid regime’⁴⁷ mainly refers to a series of regimes proliferating from the ‘third wave’ of democratisation.⁴⁸ They are neither fully democratic nor purely authoritarian but combine elements of both types. They come into being through diversified paths, such as by the decay of a full-blown authoritarian regime, emergence of a new (electoral) authoritarian regime upon the sudden collapse of an old authoritarian one, or by the decay of a current democratic regime.⁴⁹ Their existence and development give rise not only to conceptual bewilderment but also to rich institutional implications because their hybridity plays out through their institutional structures,, especially in their constitutional arrangements.

A growing body of literature has come up with laborious analyses, reflections, and adjectives to capture the nature and operation of such hybrid regimes. Larry Diamond first highlighted their relevance and offered insights on the dynamics, causes, limits, and possibilities of regime types and regime change.⁵⁰ He devised a principle typology for hybrid regimes and identified crucial features, such as whether an authoritarian regime is ‘competitive’ or not, and how electoral formalities are blended into authoritarian fabrics to make a type of ‘electoral authoritarianism’.⁵¹ Nevertheless, he placed China into the category of closed authoritarianism, which seems unconvincing in retrospect, though China clearly does not fall into other major categories either.

Based on such a conceptual basis, academic works on this topic thrive. Zakaria drew attention to ‘illiberal democracy’ and warned against the dangers of formal democratic institutions without constitutionalised liberal order.⁵² Levitsky and Way weave delicate empirical research into an impressive account of ‘competitive authoritarianism’⁵³ to shed light on the regimes whose opposition has mechanisms of contestation but where authoritarian rule still dominates through real but unfair competition. They also cautioned against the stereotypical thinking that authoritarian systems tend towards the direction of democratisation. Rather, some non-democratic regimes may have been institutionally consolidated and have become the normal

47 For the dissents on the use of this term, see Morlino, Leonardo. "Are there hybrid regimes? Or are they just an optical illusion?." *European Political Science Review* 1.2 (2009): 273-296.

48 Though clearly, before that, there were also a number of typical hybrid regimes, such as Taiwan(before democratization) and Mexico.

49

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51 Ibid

52 Zakaria, Fareed. *The future of freedom: illiberal democracy at home and abroad (Revised Edition)*. WW Norton & company, 2007.

53 Levitsky, Steven, and Lucan A. Way. *Competitive authoritarianism: Hybrid regimes after the Cold War*. Cambridge University Press, 2010.

status by default.⁵⁴ Andrea and Figueroa used South American cases to illustrate the existing dynamics of ‘authoritarian constitutionalism’, under which pattern some constitutional discipline is somewhat upheld and has positively normalising effects, such as in Article 83 of non-re-election in Mexico’s constitution from the years 1929–2000.⁵⁵

Such a list could be endlessly long⁵⁶, and rhetoric innovation centring on adjectives is not the major concern of this paper, though they certainly all make a contribution. To follow the theme of this research, attention will be paid to what insights studies on hybrid regimes could offer for the institutional dynamics of constitutional hybridity which have been an underlying force in shaping its present and future. Usually, such a transformative system must combine elements of both old and new politics; for example, research on legislatures in post-soviet systems showed that: ‘one of the most significant findings ... was that the new parliaments were influenced predominantly by borrowings from their own culture and history rather than taking off-the-shelf models proffered by external bodies.’⁵⁷

The following themes in hybrid regime studies are worth serious attention.

First, institutions maintaining inclusiveness in hybrid regimes have caught the attention of many academics. Usually constitutional hybridity is the institutional basis and framework for such arrangements. Many hybrid regimes allow a limited degree of competitiveness through elections so as to channel political participation and also contribute to their legitimacy.⁵⁸ Non-electoral mechanisms for achieving inclusivity are also employed by entrenching them into constitutional structure. China’s political consultative conference, an elite collaborative mechanism based on political selection, is seen to have considerable participatory and integrative functions.⁵⁹ Power-sharing is also facilitated during the day-to-day operation of political parties, government, and legislatures. Even nationalised enterprises could have a similar role to play.⁶⁰ It has also been demonstrated that such an inclusive strategy is crucial for the stability and smooth cooperation of the ruling alliance, or else the risk of political civil war increases significantly.⁶¹

54 Levitsky, Steven, and Lucan A. Way. *Competitive authoritarianism: Hybrid regimes after the Cold War*. Cambridge University Press, 2010.

55 Pozas-Loyo, Andrea, and Julio Ríos-Figueroa. "Authoritarian Constitutionalism." (2017).

56 For instance, see the proliferation of terms to summarize the features of non-democratic regimes, Landry, Pierre F. "Decentralized authoritarianism in China." *New York: Cambridge University Press* 6 (2008): 31. Truex, Rory. "Consultative authoritarianism and its limits." *Comparative political studies* 50.3 (2017): 329-361. Matfess, Hilary. "Rwanda and Ethiopia: Developmental authoritarianism and the new politics of African strong men." *African Studies Review* 58.2 (2015): 181-204.

57 Norton, Philip, and David M. Olson. "Post-communist and post-Soviet Legislatures: beyond transition." *The journal of legislative studies* 13.1 (2007): 1-11.

58 Jayasuriya, Kanishka, and Garry Rodan. "Beyond hybrid regimes: more participation, less contestation in Southeast Asia." *Democratization* 14.5 (2007): 773-794.

59 Xiaojun, Yan. "Regime inclusion and the resilience of authoritarianism: the local people's political consultative conference in post-Mao Chinese politics." *The China Journal* 66 (2011): 53-75.

60 Boix, Carles, and Milan W. Svolik. "The foundations of limited authoritarian government: Institutions, commitment, and power-sharing in dictatorships." *The Journal of Politics* 75.2 (2013): 300-316.

61 Ibid.

Second, many studies note some distinctive features of executive–legislative relations in hybrid regimes. Pure authoritarian regimes usually place no checks and balances between the executive and legislative branches. In fact, the legislature or even executive branch may have no real autonomy and function except as a rubber stamp. In hybrid regimes, by contrast, though parliaments may be still weak, they can effectively function as potential platforms for the opposition.⁶² Some studies note the danger of unprincipled political competition carried out in the loosening of authoritarian control. It may upset the public and in turn create a psychological basis for embracing a more centralised strongman-prone political pattern.⁶³ For instance, in Tanzania: ‘60 percent of the respondents appreciate the need for a multiparty system. Still, in recent years (2001–5) as many as 37 percent have agreed that ‘political parties create division and confusion; it is therefore unnecessary to have many political parties in Tanzania.’ Also, some 48 percent of respondents have felt that ‘politics and government sometimes seem so complicated that you can’t really understand what is going on.’ ”Studies have shown that one underlying factor of such fragmented party politics is the political legacy of previous traditions.⁶⁴

Third, many hybrid regimes have, or are very keen to have, the capacity for strong state action to promote a model of state-led development. Therefore, many of them choose to build competent bureaucracies, marginalise judicial independence, and foster oligarchic parties. There may be two reasons for this: hybrid regimes usually need strong economic performance to gain popular support and forge their legitimacy; alternatively, the centrality of liberal neutrality and negative liberty in a very simplified version of ‘Western tradition’ cannot, either in theory or in practice, resolve problems such as welfare inequality, ethnical tension, or ideological cleavages.⁶⁵

Fourth, many case studies offer the lesson that political institutions might be opportunistically abused. For instance, in Russia, the electoral rules were modified seemingly on the justification of enhancing incumbency advantage. The electoral threshold was raised from 5 to 7 percent to make it more difficult for a small party to break in. Furthermore, only parties with more than 50,000 members were entitled to run candidates in the elections. A curious question is whether authoritarian legacies (including authoritarian controlled parties or legislature) or other traditions could be strategically utilised to enhance the momentum of political reform. Such dynamics do

62 Levitsky and Way, Ibid. Case, William. "Democracy, Hybridity, and Accountability in Southeast Asia's Legislatures." *Routledge handbook of Southeast Asian democratization* (2015): 250-267.

63 Ekman, Joakim. "Political participation and regime stability: A framework for analyzing hybrid regimes." *International political science review* 30.1 (2009): 7-31.

64 Whitehead, Richard. "Historical legacies, clientelism and the capacity to fight: exploring pathways to regime tenure in Tanzania." *Democratization* 19.6 (2012): 1086-1116.

65 East Asia's economic take-off may offer some direct examples. In Japan, Korea, and Taiwan alike, a crucial driving force behind economic development and the corresponding social transformation were the specialised government agencies in charge of strategically coordinating state policies and steering political-commercial relations.

exist, especially manifesting as the delicate balance between mixed elements, as literature in both political and historical studies have shown.⁶⁶

Such discussion on hybrid regimes have tremendous implications for the constitutional analysis of China, which has been acknowledged by Chinese scholars. Hybrid regime also becomes one of the main themes in discussing constitutional development of China. Zheng Yongnian compared the role of the CCP as an 'organizational emperor',⁶⁷ arguing that it plays the central role in a framework similar to a constitutional monarchy with the NPC as a platform for democratic elements and the CPPCC as a kind of effort to institutionalise aristocratic elements. Economist Yao Yang shared this observation and provided further empirical evidence on how meritocratic elements could effectively function by way of a responsive performance assessment system, which means the promotion of bureaucrats would be to a great degree merit-based.⁶⁸ He also argued that the Chinese regime's dilution of the communist tradition and integration of the party into the state fabric is an indication of the transformation of its guiding ideology. Rather than upholding a purely class-based system, nowadays the party's ideology is highly 'de-politicized', which means it favours no particular class but claims to represent the overall and general interest of the people as a whole.⁶⁹ Political theorist Ke Huaqing proposed an account of a constitutional party's leadership (立宪党导制), in the hope that the party might self-bind according to its own rules and act like a constitutional monarchy. Following the same logic, scholars like Chen Duanhong and Jiang Shigong argue⁷⁰ that, in quite a far-fetched manner, China does in fact have 'political constitutionalism' with the party's leadership and laws as the core elements. Modern Confucian scholars have also made attempts to capitalise on the popularity of the hybrid regime and move China in this direction⁷¹; though the institutional proposals they make seem rather impractical and of doubtful moral attraction, such as the institutionalising of a powerful upper chamber of intellectuals into a three-chamber system that claims to respectively represent the elements of heaven, humans, and

66 North, Douglass C., and Barry R. Weingast. "Constitutions and commitment: the evolution of institutions governing public choice in seventeenth-century England." *The journal of economic history* 49.4 (1989): 803-832. Shiao, Chyuan-jenq. "State and Society in Taiwan's Authoritarian Transformation." *The Transformation of an Authoritarian Regime: Taiwan in the Post-Martial Law Era* (2001): 63-88.

67 Yongnian, Zheng. *The Chinese Communist Party as organizational emperor: Culture, reproduction, and transformation*. Routledge, 2009.

68 Yang, Yao, and Zhang Muyang. "Performance of Officials and the Promotion Tournament—Evidence from Chinese Cities [J]." *Economic Research Journal* 1 (2013): 013.

69 <http://www.nsd.pku.edu.cn/teachers/professorNews/2017/0407/28871.html>

70 陈端洪. "宪法学的知识界碑——政治学者和宪法学者关于制宪权的对话." *开放时代* 3 (2010): 88.; Chen Duanhong, Xian Fa Xue De Zhi Shi Jie Bei—Zheng Zhi Xue Zhe He Xian Fa Xue Zhe Guan Yu Zhi Xian Quan De Dui Hua (The Benchmark of Constitution Studies—Dialogue of Constituent Power between Scholars of Politics and Constitutional Law), Kai Fang Shi Dai (Open Times) 3(2010):88; Shigong, Jiang. "Chinese-style constitutionalism: on Backer's Chinese party-state constitutionalism." *Modern China* 40.2 (2014): 133-167.

71 Tongdong, Bai. "A confucian version of hybrid regime: how does it work and why is it superior?." *Prajna Vihara* 13.1-2 (2012). Also, Jiang Qing, Jiang, Qing. *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future*. Princeton University Press, 2012.

earth.⁷² In later chapters, the majority of such narratives and theories will be discussed to show that many may need much more solid ground to be of serious academic significance. Hong Kong and Taiwan prior to democratisation were also regarded as hybrid systems. Such constitutional hybridity will be analysed in depth in sections 8 and 9.

3.4 Constitutional Hybridity in Ad Hoc Cases

In modern times, newly established political systems also face the problem of how to properly accommodate constitutional elements with different origins and underlying logic, usually in situations where competing political forces all try hard to control or even manipulate institutions to their advantages. The clashing of political ideologies behind diversified institutional traditions may exacerbate political chaos. But hybridity could also have positive effects in moderating social tensions. Digging into such cases generates valuable insights into the implications of constitutional hybridity.

Gyampo conducted a case study on Ghana's 1992 constitution⁷³ – a hybrid constitution that intertwines both a presidential and Westminster-style approach and is modelled on three different existing constitutions. The guiding principle of its drafting was that a mixed constitution is superior to other alternatives. Nevertheless, the following years witnessed its malfunctioning with over-dominant executive power and imbalance in executive–legislative relations, due to the extensive powers conferred on the presidency, such as de facto exclusive bill-proposal power and the power to freely appoint regulatory commissions and MPs as ministers. By luring the lawmakers with ministerial posts and pressuring them with party whips, the executive power stifled legislative power. Problems caused by similar distortion also happen in Hong Kong and Taiwan, as later sections will show, but they also demonstrate the possibility that legislature can become bellicose and unconstructive when influenced by constitutional hybridity.

Constitutional hybridity has formed a major component of some institutional schemes to create basic political order in divided societies. Consociationalism is the term for conceptualising such efforts. Ljipart in his seminal works champions such a model passionately. Some of his institutional proposals are not methods of constitutional hybridity but the sophistication of a specific constitutional pattern, such as strengthening proportional representation under a parliamentary system; however, other systems in the school of consociationalism are of a hybrid nature. A most recent chief example of this is the generally appraised rebuilding of Northern Ireland's constitutional structure to consolidate peace and facilitate cross-group cooperation. Its system is a somewhat hybrid design, entrenching a type of double-executive structure within a parliamentary framework. The mandatory coalition mechanism ensures that previously battling political forces must obtain their opponents' support in order to secure their own political power, thereby motivating them to cooperate and co-rule rather than beating the other side in a zero-sum game.⁷⁴

72 Jiang Qing, *ibid.*

73 Gyampo, Ransford Edward Van, and Emmanuel Graham. "Constitutional hybridity and constitutionalism in Ghana." *Africa Review* 6.2 (2014): 138-150.

74 Farry, Stephen. "Consociationalism and the creation of a shared future for Northern Ireland." *Consociational Theory*. Routledge, 2009. 181-195.

3.5 The Institutional Dynamics of Constitutional Hybridity

The previous sections permit us to identify certain major institutional dynamics of constitutional hybridity. They can be used to either reinforce liberal reforms or to defend autocratic rule, depending on the political will of those making the decisions. In later chapters, it will be shown that they are highly influential on the constitutional evolution of Chinese polities.

First, as is easily seen, constitutional hybridity often increases institutional multiplicity which is not uncommonly relied on to maintain a basic level of inclusiveness for a transforming regime. A framework to accommodate both conservative and progressive forces is critical in securing a necessary degree of order for a peaceful and smooth transition. The constitutional monarchy in the UK is a successful example of gradual and incremental reform based on a mixed constitution. In countries like China, institutional hybridity is the basis for the preservation of traditional authority (the CCP: theological authority) and a participation channel for wider sectors of society (the CPPCC: presidential election).⁷⁵ Political scientists also argue that institutional multiplicity is conducive to promoting adaption through political turmoil, since when one institution fails to win support and build acceptable order, others may step in as backup.⁷⁶ Even so, such arrangements cannot work if they are mere formality. The overall functionality of the entire system hinges on to what degree the decision-making process is interactive and participatory. Inclusive institutions also elevate people's expectations of further reform. Therefore, it is to some extent a self-reinforcing mechanism; if a regime does not pursue continuing steps, it is likely that people will be more disappointed and susceptible to even more radical changes.

Second, constitutional hybridity easily brings about legitimacy and institutional conflicts; hybridity may entail that there is no clear constitutional narrative of legitimacy within the state. The integrative effects of hybridity cannot be taken for granted. Though Aristotle envisaged a structure for generating legitimacy similar to 'constitutional patriotism' under which major political actors may oppose each other but also sustain the underlying political framework that institutionalises their interaction rules, in practice the facts are much messier. In a constitution, mixed elements can also extend to different legitimacy rules thus resulting in a kind of 'legitimacy tie'.⁷⁷ This phenomenon will be analysed later on in the context of such problems that exist across China, Hong Kong, and Taiwan. Beyond legitimacy issues, a mixture of institutions also gives rise to inevitable problems of incompatibility. With diversified operating rules and guiding theories, frictions are likely to occur. This is why in hybrid political systems, constitutional and legal rules to reconcile such tensions are crucial to regime survival and transformation. This research will pinpoint

75

Abdolmohammadi, Pejman, and Giampiero Cama. "Iran as a peculiar hybrid regime: Structure and dynamics of the Islamic Republic." *British Journal of Middle Eastern Studies* 42.4 (2015): 558-578.

76 Huntington, Samuel P. "The change to change: Modernization, development, and politics." *Comparative politics* 3.3 (1971): 283-322.

77 Linz, Juan J. "The perils of presidentialism." *Journal of democracy* 1.1 (1990): 51-69.

the main constitutional rules that shoulder this task in Chinese politics and analyse their strengths and weaknesses.

Third, constitutional hybridity could contribute to a sophisticated system of governance and strengthen its performance. This is a crucial component of political modernisation – as Huntingdon noted:⁷⁸

'[P]olitical modernization involves the differentiation of new political functions and the development of specialized structures to perform those functions. Areas of peculiar competence – legal, military, administrative, scientific become separated from the political realm, and autonomous, specialized, but subordinate, organs arise to discharge those tasks. Administrative hierarchies become more elaborate, more complex, more disciplined. Office and power are distributed more by achievement and less by ascription.'

An example of this dynamic occurred during the economic catch-up of eastern Asian countries where Confucian bureaucracy, the formal Western governmental structure, and military autocracy were intertwined to fuel rapid socio-economic transformation.⁷⁹ Similarly, a major driving force of governance in the current PRC regime is also the revival of traditional meritocratic bureaucracy and the increasing sophistication of its institutional structure and working methods. Moreover, a greater level of institutional sophistication may bring forth mutual checks and interlocking effects. Such institutional dynamics are desirable in placing normative constraints upon arbitrary powers but may also exacerbate unprincipled political chaos.

Fourth, the previous points lead to the issue of the importance of a structured institutional dynamic for the moderation of politics. This could take different forms – for example, a system of special decision-making regulations such as voting rules regarding concurrent majority and consultative procedures. Another example could be the implementation of contestation mechanisms upon the results of decision-making, such as judicial review. Or a set of rules designed to enforce cooperation within governing leadership, such as the mandatory coalition in Northern Ireland or the non-re-election rule for a fixed period in the Mexican constitution. In democratic systems, the core logic behind institutionalising political moderation is to motivate constructive political bargaining. A later analysis of both Hong Kong and Taiwan will demonstrate that the fundamental root of their constitutional deadlock is the lack of such structure. In non-democratic regimes like China, in order to achieve moderation in politics and to offset the absence of formal bargaining processes, deliberative and consultative mechanisms may be required.

Whatever types they are, the existence of them is fatal to the survival and functioning of a regime with constitutional hybridity. What needs to be moderated, however, is the domination inclination of authoritarian powers. Moderation seems to be a precondition for the realisation of all the possible benefits of constitutional hybridity.

78 Ibid

79 Im, Tobin, Jesse W. Campbell, and Seyeong Cha. "Revisiting Confucian bureaucracy: Roots of the Korean government's culture and competitiveness." *Public Administration and Development* 33.4 (2013): 286-296. Michell, Tony. "Administrative Traditions and Economic Decision - making in South Korea." *ids Bulletin* 15.2 (1984): 32-37.

4. Summary

This section will attempt to establish a very general framework for the research and clarify some methodological issues.

Constitutional traditions continue to have a significant influence upon contemporary constitutional affairs, especially when they are intertwined to forge constitutional hybridity. The effects of tradition and hybridity could be feasibly observed and expressed.

Studies of constitutional hybridity have generated important insights and are mainly of three types: theoretical discussion on mixed constitution, political analysis of hybrid regimes, and closer institutional analysis of ad hoc cases. Based on the preceding review of such literature, it can be concluded that major institutional dynamics are influential in constitutional hybridity.

Chapter 3

Constitutional tradition of China: Confucianism and Daoism

1. Introduction

Chapter 3 and Chapter 4 will introduce the core elements of constitutional hybridity in Chinese polities: the Chinese, western and communist traditions. The focus is on their influence in party-state and executive-legislative relations, where the mixture of them shapes Chinese polities fundamentally.

This chapter will give a general account of the major schools of Chinese tradition, Confucianism and Daoism. Both ideas and institutions in each tradition will be discussed. The meritocratic elements in Confucianism will be illustrated, in particular that mechanisms similar to ‘affirmative action’ were used to ensure the fairness and inclusiveness of bureaucracy selection. Anti-factionalism, a principle deriving from Confucianism’s emphasis on the moral virtues of noble man, was gradually institutionalised into political customs, and later, penal codes, leaving a legacy into even the republican era after the fall of the Qing Dynasty. It will also be shown that Confucian and Daoist elements were intertwined over the course of history and developed more liberal constitutional thinking upon the dawn of modern times

Chinese political tradition is more than just Confucianism.⁸⁰ A wide range of political philosophies, as well as the practices and policies deriving from them, had also exerted deep and far-reaching influences on the ancient Chinese State.⁸¹ Altogether, they offered a kaleidoscope of political thinking, competing, co-existing and blending with each other.

Therefore, the ancient Chinese polity exhibited a mixture of constitutional traditions, rather than being dominated solely by Confucianism and the opportunistic interpretation of it. Among them, Daoism is of exceptional significance. It held a comparatively more liberal perception of politics, emphasising the function of natural evolution in building a social order rather than relying on any divine, royal, or intellectual authority. It is argued that Daoist thinking even influenced Western

80 For a discussion of Confucianism, see Jiang, Qing. *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future*. Princeton University Press, 2012. It should, however, be noted that this book is in many ways flawed, especially that it makes a quite fantastical understanding of Confucian theories and the political realities of ancient China. This thesis has no space to rebuke many of its claims in detail. But some relevant issues will be discussed a little, as this so-called school of ‘Confucian constitutionalism’ offers quite a few meaningful contributions to reframe a Chinese version of constitutionalism.

81 Usually legalism is the most frequently studied theory besides Confucianism. Nevertheless, this dissertation will not follow this pattern because legalism was later integrated into the political practices of Confucianism to a serious degree, especially in the emphasis of centralised bureaucratic control. The difference may be that Confucianism valued benevolence, opposing the use of law as pure instrument. But in terms of constitutional structure, the two had massive overlapping areas.

scholars such as Smith⁸² and Hayek. They and Daoism shared the appreciation of the spontaneous order of human beings.⁸³

In the latest period of ancient China, Confucianism and Daoism blended and formed a new type of enlightened political thinking.⁸⁴ A quasi-republican framework was discussed and advocated, with constitutional separation of powers between the emperor and intellectual bureaucracy, as well as principles of responsible government.⁸⁵

These two schools contributed to different features of Chinese tradition, making it multi-facet and complex. Confucianism no doubt led to a paternalistic state and excluded vibrant partisan competition in politics. But on the other hand, as will be explored, its moralism, egalitarianism, and welfarism also facilitated the building of inclusive institutions in ancient China. Daoism, to a certain degree, neutralized the rigidity and paternalism of Confucianism, advocating a type of non-interventionist and non-dominant ruling. Its understanding of how social order evolves was quite similar, with the typical propositions of 'invisible hand' and 'spontaneous order'. It believes that the thriving of private initiatives, rather than paternal imposition of public planning, could lead to true prosperity for a community.

In later chapters, it will be shown that in the Reformatory era(after 1978)⁸⁶, meritocratic bureaucracy-building was used to deliver effective governance and offer participatory channels, while the polity became more flexible in delegating initiative powers to the state and society.⁸⁷ Such facts demonstrate the continuing relevance of ancient Chinese traditions into modern times. The legacy of Confucianism and Daoism are mixed together also in contemporary Chinese politics. More details and discussions will follow in later chapters.

2. Basic Historical Background: Political Centralisation and Bureaucratic State

It would be difficult to discuss ancient political theories in China without laying the historical background. For the major part of history, China had always been governed by the emperor and a centralised bureaucracy. This general institutional feature was the result of gradual historical development based on the basic socioeconomic conditions.

In ancient times, a ruler in a country like China might face a thorny problem: neither they, nor the imperial family alone could effectively rule over a vast empire. This constitutional problem had obsessed the Chinese State from the early period of

82 Lockwood, William W. Adam Smith and Asia. *The Journal of Asian Studies* 23.3 (1964): 345-355.

83 Kapust, Daniel. "Hayek and the Daodejing on Order and Coercion." *A Bridge Too Far? Commonalities and Differences between China and the United States* (2009): 73.

84 田文军. 儒学的演生、分化、整合与发展[J]. 求是学刊, 2006, 33(6):20-22. ; Tian Wenjun, Ru Xue de Yan Sheng, Fen Hua, Zheng He yu Fa Zhan, (*The Origination, Differentiation, Integration and Development of Confucianism*), *Qiushi Journal*, 33(6):20-22.

85 黄宗羲. 明夷待访录[M]. 中华书局, 1981 ; Huang Zongxi, Ming Yi Dai Fang Lu (Waiting for the Dawn: A Plan for the Prince), China Publishing House (Zhong Hua Shu Ju), 1981. It will be discussed in greater depth in later sections.

86 The general policy of reform and opening up was made in the third session of the 13th CCP Plenary Conference in 1978.

87 Chapter 5,6,7

its history.⁸⁸ The initial solution was to use a system based on the feudal system of Mediaeval Europe: the emperor would separate the territory into dozens of units and distribute them among the imperial family.⁸⁹ But this arrangement contains an explicit danger of instability. Family bonds invariably weaken over time, not to mention the non-imperial kings, who might have been awarded their fief for services to the imperial family and might hold less allegiance to the emperor. The loss of a central and supreme political authority did not lead to peaceful local self-government, but rather to wars and conflicts among the numerous kingdoms to compete for resources like fertile land and water. This was how the so called 'Warring Kingdoms' period began, and this was the period in which Confucianism emerged. Confucius' idea to end this Chinese version of 'state of nature' was to restore the supreme authority of the emperor and instil high standards of morality into the whole society. But it did not work like this immediately. After hundreds of years, the unification (or reunification) of China was finally achieved by the powerful Qin Kingdom, which used disciplined organisation⁹⁰, strict laws, rewards and punishments⁹¹ in order to increase the national wealth and military force.

The Qin Dynasty took lessons from the Chinese 'feudal' period by refusing to distribute areas of the empire among family members. Instead, it created a vast bureaucracy system running from central to local. Three levels of government: the central government, 36 lower-level districts and over 1,000 counties, amounted to a bureaucratic web that could effectively govern the whole country. Local governors were selected and dispatched to central government.⁹² The Qin Dynasty was short-lived due to over-extracting of resources in order to build Great Wall against the barbarian invaders. But the district-county system survived, and has been developing ever since.⁹³

With such a large executive system in place, further major constitutional issues gradually loomed large: the central empire needed to build a bureaucratic system that was sophisticated and competent enough to govern through this administrative system. Though the level of complexity of administrative affairs in ancient times could not equal modern times, the sheer scale of territory and population determined that it was no easy task.⁹⁴

88Fukuyama, Francis. *The origins of political order: from prehuman times to the French Revolution*. Profile books, 2011.

89 Such historical backgrounds are generally agreed common sense in the study of Chinese history. See 吕思勉. 吕思勉中国通史[M]. 吉林人民出版社, 2013. Lv Simian, Zhong Guo Tong Shi(General History of China), Jilin People's Press, 2013.

90吕思勉. "秦汉史 (上)." (1982). 上海古籍出版社 Lv Simian Qin Han Shi(First Half)(The History of Qin and Han Dynasty), Shang Hai Gu Ji Press, 1982

91 Ibid

92 Ibid

93 The revival of the feudal system was trialed in the years after Qin, but all failed. Chinese historians widely agree that Qin set the basic governmental form of ancient China which has continued ever since.

94The first population in survey was in Han Dynasty, which inherited the short-lived Qin. The peak population was 60 million people, with a territory estimated to be 10 million square kilometers. A considerable part of that were the loosely controlled frontier regions, on which the main tribes claimed subordination to the Han. Minus these areas, the core territory of the Han still amounted to at least 5

The core issue at that time narrowed was to find an appropriate way to constitute this bureaucratic system. The initial efforts for bureaucratic selection all had rather acrimonious results. After the Qin Dynasty (221–207 BC), the following dynasties used several ways to construct a governing system under the emperor. There were two main patterns to this. First, during the Han Dynasty (202 BC– AD 220), the local governments were required to recommend ‘virtuous and capable people’ (察举制)⁹⁵ to the central government as a reservoir for future officials both at the central and local level. But this institution degenerated into a corrupt system due to the obvious drawbacks of a lack of clear standards.

The second pattern is related to the first one. The powerful and privileged families or clans (门阀⁹⁶) became the dominant social force after the Han. They controlled not only assets but also educational resources, and sometimes even armies. As a result, people in these families had been better educated in both literature and politics. To suit their interests, a similar recommendation system was developed based on the Han model, with more sophisticated and systemic criteria being introduced. Local governments were required to make a local ‘database’ of capable people and evaluate them using a nine-level scoring system. But still, this institution could not solve the problem of corruption and monopoly, resulting in arbitrariness, corruption and oligarchic politics. This made the central empire vulnerable in the face of barbarian invasion and resulted in another long period of fragmentation and warring throughout China after many different barbarian tribes conquered the central region and established their own kingdoms.

Reflecting on these experiences and lessons, starting from the Sui dynasty (581–618), perhaps the most important constitutional institution in ancient China, the Keju system, the system by which government officials are selected by exam, was gradually developed and improved, and became the major integrating force that held the society together.⁹⁷ The exact timing of the advent of this new institution may not be coincidental. Several conditions were necessary in order to make this system possible. First, an academic examination to select politicians on basis of merit required at least the standardisation of a written language. This process started during the Qin Dynasty. Over several hundred years, although oral languages were still differentiated into dialects, the written language of ancient China had been unified and standardised. Cultural scholars tend to conclude that without this achievement, the long-time unification of the empire may not have been sustainable.⁹⁸ Second, the academic and educational activities needed to thrive in the society, in order to train enough scholars. Ever since the Han Dynasty, the central government established a state-run educational institution called ‘Central University’ (太学), to provide

million square kilometres. 许倬云. 汉代农业: 中国农业经济的起源及特性. 广西师范大学出版社, 2005. Xu Zhuoyun, Han Dai Nong Ye: Zhong Guo Nong Ye Jing Ji De Qi Yuan Ji Te Xing (Agriculture in Han Dynasty: The Origin and Feature of Chinese Agricultural Economy) For a contrast, the total area of the EU member states altogether, is approximately 4.4 million square kilometers.

95 Lv Simian, Ibid

96 On the rise and fall of such aristocratic clans, see 田余庆, 东晋门阀政治, 北京大学出版社, 2005. Tian Yuqing, Dong Jin Men Fa Zheng Zhi (Politics of Oligarchy in East Jin Dynasty), Peking University Press, 2005.

97 余英时. 士与中国文化. 上海人民出版社, 2003. Yu Yingshi, Shi Yu Zhong Guo Wen Hua, (Noble Man and Chinese Culture), Shanghai People’s Press, 2003.

98 Ibid

academic training and research to the people recommended and selected from different localities, and who would be offered government positions at both central and local level after their training. Confucian philosophy and state affairs were the main content of such education. These trained intellectuals disseminated Confucius's teaching nationwide, gradually forming a predominant tradition of Confucianism.

The content and procedures of this examination system had been developing ever since it was established. However, the core structure and spirit remained unchanged: the state organised national academic examinations regularly and every person, regardless of social background⁹⁹, was eligible to participate. The examination was generally conducted fairly and the only criteria in ranking were academic and intellectual merit. The content of the examination was mainly classical Confucius, history, policy analysis and literature. Those who passed the exam would be appointed as government officials to both local and central government according to their scores and grades. To a certain degree, it had given rise to a kind of technocratic bureaucracy with limited autonomy.

3. Confucianism: Ideas and Institutions

Confucianism can be likened to a financial product. Its derivatives¹⁰⁰ reached such a number and diversity that the essentials could barely be observed. It is beyond the capacity of this thesis to perform a complete analysis of all these Confucian derivatives, though they should be subject to stricter 'regulation'. This section will only discuss several of the most essential elements of Confucianism, which might have had the profoundest influences on the constitutional tradition of China.

Moreover, Confucian legacies are also shaping constitutional landscape in contemporary China. The Confucian meritocracy was, to a limited degree, revived in the RPC polity not only to build up executive competence, but also to empower a formally representative assembly. The generally inclusive and egalitarian inclination of Confucian politics influenced the ruling party to soften the typical 'proletariat dictatorship' of communist tradition, creating certain power-sharing mechanisms such as fixed quotas in the allocation of congressional seats, 'united front' institutions, and deliberative practices. The anti-factionalism principle of Confucian thoughts, in contrast, shaped people's understanding and reaction to the messy party politics of the early Republican era (1912-1928) and facilitated China's embrace of the Communist revolution and the Leninist Party State. Moreover, the banner of Confucianism is also

99 There were some restrictions upon people if they came from backgrounds such as prostitution. Families with such backgrounds had to wait three generations before their descendants could participate in Keju. See 张森. 科举资格限制下的中举之人[J]. 文化学刊, 2010(1):99-105. ; Zhang Sen, Ke Ju Zi Ge Xian Zhi Xia de Zhong Ju Zhi Ren, (The Restriction on Participating in Keju) Wen Hua Xue Kan, 2010(1):99-105. On the other hand, there were also certain restrictions on people from powerful family backgrounds in order to prevent privilege manipulating the system, see 张晓政. 古代科举对官宦子弟的限制[J]. 报刊荟萃, 2013(6):54-55.; Zhang Xiaozheng, Gu Dai Ke Ju Dui Guan Huan Zi Di De Xian Zhi (Restriction in Keju on Candidates from Bureaucratic Families), Bao Kan Hui Cui, 2013(6):54-55

100 Such as the recent discussion on 'Confucian constitutionalism' and Daniel Bell's version of political meritocracy with democratic basis. But, to clarify, political meritocracy itself is not to be blamed.

ostentatiously upheld on certain occasions to supplement official ideology and function as a minor source of legitimation.¹⁰¹

3.1 Ideas: Meritocracy, Inclusiveness and Non-partisan Spirit

This section will show that Confucian understanding of politics centres on meritocracy as both a morally and politically ideal form of government. Confucianism focuses on the individual: being wise will lead to being noble, therefore ensuring a minimum level of moral self-discipline. Correspondingly, Confucianism shuns partisan activity as this can too easily deteriorate into dirty political games. It was the responsibility of the ruling elite to build an inclusive and responsible governing polity.

3.1.1 Self-cultivation to Become a Noble Man

To begin with, Confucianism focuses on moral and intellectual self-cultivation, essentially to turn oneself into a ‘saint’ (圣贤). Such a process is highly introverted, and is one which entails arduous learning, thinking, and practising Confucian philosophy in day to day life. By this process, everyone could be a ‘saint’ by practising this internal self-cultivation (人皆可为尧舜).¹⁰³ It is also believed that when everyone is purified by such endeavours, a harmonious public order could be achieved in which people can prosper and lead harmonious lives.

Self-cultivation also leads to the external realisation of one’s ideals and learning in politics. It can be paraphrased from Chinese as ‘from internal saint to external king’.¹⁰⁴ Confucianism envisaged and practised (with partial success) a collective form of philosophical ‘king’, in which a group of intellectual bureaucrats would rule alongside the emperor. The underlying presumption is that moral and intellectual self-cultivation could enable a Confucian nobleman to deal with the complicated tasks of politics and administration, because human rationale could discover the essential rule of everything, which is equivalent to saying that Confucians, using self-cultivation, could interpret (or even monopolise) and practice such basic rules. In one of the most famous lines from Confucian doctrine, the Great Learning, the process of achieving desirable political order was interpreted thus:¹⁰⁵

¹⁰¹ Holbig, Heike. Ideology after the end of ideology. China and the quest for autocratic legitimation. *Democratization* 20.1 (2013): 61-81.

¹⁰³ From the Dialects of Mencius. See 张奇伟, 高书文. 人皆可以为尧舜——评孟子理想人格思想的现实性特点[J]. 北京师范大学学报(社会科学版), 2007(3):105-110.; Zhang Qiwei, Gao Shuwen, Ren Jie Ke Yi Wei Yao Shun---Ping Meng Zi Li Xiang Ren Ge Si Xiang De Xian Shi Xing Te Dian(Everyone Can Become a Saint: Comments on the Ideal Personality in Mencius Theory) Beijing Normal University Journal (social science edition), 2007(3):105-110.

¹⁰⁴ It should be noted that, according to linguistic studies, the word for ‘king’ in Chinese ‘王’, actually means a status in which a doctrine or virtue or capacity could run across different sectors in human lives. In other words, a comprehensive understanding or mastery of human knowledge and practices is what makes a leader. But it is undeniable that regardless of the original content of this concept, in the customary understanding by the common people, the word ‘king’ simply refers mainly to the authoritative leader of a feudal state or an empire.

¹⁰⁵ This translation can be seen in *A source book in Chinese philosophy*. Princeton University Press, 2008, page 86

'The ancients who wished to manifest their clear character to the world would first bring order (note: the original meaning is closer to "good governance" rather than only order) to their states. Those who wished to bring order to their states would first regulate (note: regulate may not be the accurate translation, it is more like making the family harmonious) their families. Those who wished to regulate their families would first cultivate their personal lives. Those who wished to cultivate their personal lives would first rectify their minds. Those who wished to rectify their minds would first make their wills sincere. Those who wished to make their wills sincere would first extend their knowledge. The extension of knowledge consists in the investigation of things. When things are investigated, knowledge is extended; when knowledge is extended, the will becomes sincere; when the will is sincere, the mind is rectified; when the mind is rectified, the personal life is cultivated; when the personal life is cultivated, the family will be regulated; when the family is regulated, the state will be in order; and when the state is in order, there will be peace throughout the world. From the Son of Heaven down to the common people, all must regard cultivation of the personal life as the root or foundation. There is never a case when the root is in disorder and yet the branches are in order.'

It demonstrated that self-cultivation, beginning with one's internal soul could lead to a domino-effect-like process, enabling the 'saints' to successfully manage public order from family to the whole world.

3.1.2 Rule of the Wise

Following the logic of self-cultivation to be an external 'king', it is by every means natural that Confucianism advocates elitist politics and meritocracy. To be sure, they are not inherently harmful. But history, especially the more recent history of China, has shown that critical reflection upon them is highly necessary.

Confucianism has a very egalitarian attitude towards public affairs. It sincerely believes in the welfare state, that everyone is entitled to some basic welfare.¹⁰⁶ Confucius argued that the greatest concern of the common people is not poverty or material shortages but inequality in wealth distribution.¹⁰⁷ It also claims that in an ideal world everyone could, and should be, a saint, as already mentioned.

But such egalitarianism is conditional and partial when it comes to capacity differentiation among people. It is clear that the first egalitarian argument, the equal distribution one, has always been stressed and practised in China, and which in later ages paved the way to embracing the communist and socialist movements. However, the second egalitarian argument, the 'saint' argument, requires subtler analysis. Though wishing and striving to make everyone a saint, society simply does not have enough time to wait for everyone to do so. During such lags between the ideal and the reality, how should public order be constituted?

Confucianism provided the answer: meritocracy. However passionate about promoting people's general welfare, Confucians inherently did not trust the ability of

106 Goodman, Roger, and Gordon White. Welfare orientalism and the search for an East Asian welfare model. *The East Asian Welfare Model*. Routledge, 2006. 21-42

107 '君子不患寡而患不均,不患贫而患不安',《论语·季氏十六》(Analects of Confucius, Jishi 16), English translation: 'I have heard that rulers of states and chiefs of families are not troubled lest their people should be few, but are troubled lest they should not keep their several places.' See http://www.cnculture.net/ebook/jing/sishu/lunyu_en/16.html

the commoners to successfully govern themselves.¹⁰⁸ The best form of governance, as is expressed in its salute to the best form of polity, the ‘great harmony society’(大同社会), has always been to choose ‘the wise and capable’:

*‘When the Great Principle prevails, the world is a Commonwealth in which rulers are selected according to their wisdom and ability. Mutual confidence is promoted and good neighbourliness cultivated. Hence, men do not regard as parents only their own parents, nor do they treat as children only their own children. Provision is secured for the aged till death, employment for the able-bodied, and the mean of growing up for the young. Helpless widows and widowers, orphans and the lonely, as well as the sick and the disable, are well cared for. Men have their respective occupations and women their homes. They do not like to see wealth lying idle, yet they do not keep it for their own gratification. They despise indolence, yet they do not use their energies for energies for their own benefit. In this way, selfish scheming is repressed, and robbers, thieves and other lawless men no longer exist, and there is no need for people to shut their outers. This is called the Great Harmony (大同)’.*¹⁰⁹

Confucianism seldom directly explains why the wise and capable, or the noblemen, have an inherent claim to political power. Their legitimacy to rule comes not from representation in the electoral sense. It is more like a trustee-model of representation¹¹⁰, in which the people entrust the intellectual elites with the task of providing effective governance, but retaining the power to seek accountability.¹¹¹ This logic, as will be elaborated upon in later chapters, is also what underlies the self-proclaimed representation of the Chinese Communist Party to the people.

The next question is to discover what are the qualities of the wise and capable. Although the translation highlights the intellectual capacity of the Confucian elites; in Chinese contexts, the true elites who could be endowed with political powers must first prove to be morally superior. To enumerate the acclaimed virtues in Confucian works would require too much space. For the purpose of this research, it may suffice to emphasise that morality is the prioritised defining feature of the ‘noble man’.

3.1.3 Public-Private Relativity and Rule of Rites

The question of whether, in Confucian tradition, there are certain elements to civil society and citizenry, always attracts the attention of academics¹¹². A short

108 ‘民可使由之，不可使知之’，《论语-泰伯八》(Analects of Confucius, Taibo 8) ‘The Master said, “The people may be made to follow a path of action, but they may not be made to understand it.”’ Ibid. However, it recognized that people are completely able to sense grave injustice. Therefore, they have the full intellectual capacity to complain about and overthrow bad rulers.

109 《礼记》，礼运篇大同章，English translation, see Zonggui, Li. *Between tradition and modernity: philosophical reflections on the modernization of Chinese culture*. Chartridge Books Oxford, 2015. Page 109.

110 Fox, Justin, and Kenneth W. Shotts. "Delegates or trustees? A theory of political accountability." *The Journal of Politics* 71.4 (2009): 1225-1237.

111 Frederickson, H. George. "Confucius and the moral basis of bureaucracy." *Administration & Society* 33.6 (2002): 610-628

112 For instance, see Madsen, Richard. "Confucian conceptions of civil society." *Alternative conceptions of civil society* (2002): 190-204

answer would be no. A more detailed answer would start with the way that ancient Chinese society was organised, and later influenced, by Confucian thinking.

Confucian social theory was highly family-based. It believed that society and state both grew out of the extension of families. A group of Chinese people are connected by kin, and this was how the Chinese community was built. In a society so constituted (whether it is a historical reality or self-perception), the rules to forge public order were always full of relativity. No absolute demarcations on different sectors and groups, as well as rights and obligations, were feasible (for an example, consider the perjury-to-save-my-father case). That is to say, there was no clear boundary between the public (gong) and the private (si). As stated by Fei Xiaotong:¹¹³

‘Sacrificing one’s family for oneself, sacrificing one’s clan for one’s family— this formula is an actual fact. Under such a formula what would someone say if you called him si [acting in his private interest]? He would not be able to see it that way, because when he sacrificed his clan, he might have done it for his family, and the way he looks at it, his family is gong [the public interest]. When he sacrificed the nation for the benefit of his small group in the struggle for power, he was also doing it for the public interest [gong], the public interest of his small group. . . . Gong and si are relative terms; anything within the circle in which one is standing can be called gong.’

The blurred distinction between the public and the private domains will eventually weaken the theoretical and cultural basis for individual liberty. The reason is simple. Though public and private both become relevant terms (or more relevant than in other places) in China, the private domain is more vulnerable because it does not have the natural support of political authority. In contrast, public power would always advocate the self-sacrifice of common people for the public interest. Private interest lacked such promoters, at least in ancient China. Numerous collective organisations, such as local communities and clans, would also duplicate this structure of strong public interest and weak individual autonomy.

The Confucian political order cannot ignore this potential problem. Therefore, it chose to legitimise and accommodate it with a type of normative pluralism, in which laws, rites, customs and administrative orders all have their parts to play.¹¹⁴ The rites may be the most important part of this framework, as it has a vague and broad meaning. Besides, the government-made laws, customs, ancient philosophical teachings, ritual rules, etc., could all be encompassed into the category of ‘rites’. The purpose of rites, of course, was to nurture and instil morality. Confucianism believed that morality should be institutionalised into the minds of people as a regular behavioural pattern. Therefore, the practice of rituals was important to foster both the sense and the respect for morality. The rites regulated both government and private affairs. In the imperial court, the complicated system of rites also functioned as an instrument to constrain the arbitrariness of the emperors.¹¹⁵

113 As in Madsen, Richard. *Morality and power in a Chinese village*. Univ of California Press, 1984, page 57

114 汤一介. 论儒家的“礼法合治”[J]. 北京大学学报(哲学社会科学版), 2012, Vol.49(3):5-9.; Tang Yijie, Lun Ru Jia De “Li Fa He ZHI”(On the Combination of Rites and Laws in Confucianism), Peking University Journal (Social science edition), 2012, vol 49(3):5-9

115 For instance, see 邓小南. 创新与因循:“祖宗之法”与宋代的政治变革[J]. 河北学刊, 2008, 28(5):61-63.; Deng Xiaonan, Chuang Xin Yu Yin Xun: “Zu Zong Zhi Fa” Yu Song Dai De Zheng Zhi

To be honest, it is difficult to find an absolute rule of recognition (to borrow the theory of Hart) in such a sophisticated system; there is no unifying principle in Confucian thought. The main benefit of this system, beside its feasibility, may be its flexibility in bonding the whole society. The scale of territory and technological limits of the ancient state may mean that the cost of enforcing a clear, coherent and pure legal system surpassed the ability of the government. The only dynasty carrying out legalistic governance, the Qin Dynasty, buried itself too quickly by a harsh enforcement of laws, which in ancient China mainly referred to penal codes about rewards and punishments. In Confucian political theory, laws have a natural tendency of self-proliferation. Other issues such as administrative rules and business activities were usually regulated by rites. Heavy reliance on laws to rule would inevitably give rise to a strict and harsh legal system, since it would cultivate a group of legal technocrats (刀笔吏), whose main interest was to further expand and strengthen the web of laws. Also, according to Confucian understanding, ‘only law is not enough, law cannot enforce itself’.¹¹⁶ In order to enforce a law, there must be more supplementary institutions, which, not surprisingly, are further sets of rules about punishments and rewards. This is also why law self-aggrandises. Additionally, lawsuits are a bone of contention (争讼) that will offer leeway for a nefarious kind of opportunism. Those who are greedy and eloquent will use this mechanism to further their own personal interests and distort justice. The Confucian plan to perform good governance is to use rites and morality to ease the tension and conflicts among the people.¹¹⁷ The alternative, guiding people with orders and coordinating them with penal codes, can solve disputes but cannot foster good virtues, which is why this pattern is not endorsed by Confucianism. Confucius wished to guide the people with morality and coordinate them with rites. He believed that this would foster a sense of morality and honour, and also make people more self-disciplined. Of course, that is not to say that law is irrelevant, but that it should be in a subordinated position.

3.2. Institutions: Keju System and Anti-factionalism

Two main elements of Confucian institutions, the Keju system and the legal and political rules about anti-factionalism are worth mentioning to exemplify how the Confucian ideas shaped, and continue to shape, China’s constitutional tradition of meritocracy and bureaucratic rule.

3.2.1 Constitutional Function of Keju System

A short introduction to the Keju system was made in the previous section. This section will focus on its constitutional implications.

In ancient China, this system was the key mechanism for political participation and quasi-representation. Its gate was open to people from all walks of life, therefore significantly facilitating social equality and social mobility. Empirical research has showed that this system achieved both upward and downward social mobility, thus contributing to the fair distribution of political and educational resources.¹¹⁸ In

Bian Ge (Innovation and Continuation: “Traditional Laws” and Political Reforms in Song Dynasty), He Bei Xue Kan, 2008 28(5):61-63

116 “徒法不足以自行” 《孟子·离娄上》, <Analects of Mencius>, Lou Li chapter, first half.

117 Tang Yijie, Ibid.

118 Yi, Lin. *Cultural exclusion in China: State education, social mobility and cultural difference*. Routledge, 2008.

different eras, the ratio of central-level intellectual bureaucrats from common families (which have no one holding government positions for the previous three generations) ranged from 30–50%.¹¹⁹ Meanwhile, due to the openness and fairness of the examination system, as well as the spread of printing technology, incumbent elite families or groups could no longer monopolise knowledge and political positions. The dominance of oligarchic clans gradually decreased after the introduction of the examination system.

For the imperial polity and state governance, the equal opportunity to acquire public positions through fair competition stabilised the society and added to the legitimacy of the emperor as well as to this elitist bureaucracy system. Confucian intellectuals were highly revered by society, both as officials and scholars. Education and culture became the main industry, helping civilisation to blossom. Also, participators from everywhere in the country brought the voices of the people to the government for consultation.¹²⁰ The retired intellectual bureaucrats, together with the second-level intellectuals who did not pass the exams but obtained certain qualifications, formed a crucial class of gentry in different localities.¹²¹ They continued to advocate Confucian teaching locally and served as a quasi-public authority in maintaining social order. Overall, modern scholars are right in claiming that ‘the traditional Confucian examination system was a meritocratic institution with potentially egalitarian implications.’¹²²

3.2.2 Inclusiveness and Equality in Keju System : A Case of ‘Affirmative Action’

A key point in making the Keju system work was to prevent it from deteriorating into an instrument for any privileged group to monopolise bureaucratic power. There were many mechanisms designed for this purpose, such as open registration, anonymous reviews and anti-cheating facilities among others. Among them, the careful and deliberate adjustment of enrolment quota among developed and developing regions, an effort similar to ‘affirmative action’, was a remarkable case showing the political and social value of this system.

The examination system, though nationwide, also considered the differences of the demographic, economic and educational conditions between regions. Therefore, it allocated the quota for selection according to the population of different provinces. Moreover, in every dynasty afterwards, the central authority adjusted the quota to achieve effects similar to ‘affirmative action’ to give the people in underdeveloped regions more chances. Conversely, sometimes when a particular region produced a lot of talented candidates, the authorities might also add to its quota.

119 Ibid

120 For instances, ever since this system, the *constitutional* harm of powerful clans exploiting people was contained. 钱穆. *中国历代政治得失*. 九州出版社, 2012. Qin Mu, *Zhong Guo Li Dai Zheng Zhi De Shi*, Lessons of Politics in Chinese History, Jiuzhou Press, 2012.

121 Fei, Hsiao-tung, and Xiaotong Fei. *China's Gentry: Essays on Rural-Urban Relations*. University of Chicago Press, 1980.

122 Fukuyama, Francis. "Confucianism and democracy." *Journal of Democracy* 6.2 (1995): 20-33.

The quota arrangement first entered into law in the middle of the Tang Dynasty. The law stipulated quotas for different academic divisions¹²³, and imposed a cap for some regions.¹²⁴ But such practices did not seem to be regular and systematic enough.¹²⁵ In the next dynasty, the Song Dynasty, the level of institutionalisation was further increased. Besides the central-level final examination, the quota system was further applied to the local preliminary examinations before the final central one. The preliminary exams determined how many candidates could be sent to the final exam, so adjusting the number of local preliminary exams would influence the distribution of government positions in the final one. The Song Dynasty considered not only the population, but also the disparity between social-economic and cultural developments of different regions. The laws regulating quota allocation clearly favoured the impoverished and frontier regions¹²⁶. The aims and motifs, if using modern academic rhetoric, was to achieve a kind of substantive rather than formalistic justice, or to care for the ‘positive rights’ of people in the underdeveloped regions. But in the central-level exams, the proportional adjustment of quotas were still handled politically, in every term, by the emperor. There were serious constitutional debates between the two camps about the principle of quota allocation in the final decision: selection on pure merit basis, and proportional selection on a geographical basis.¹²⁷ Finally the emperor instilled some balance, but still did not institutionalise a clear model at the central level.

In the Ming and Qing Dynasties, a systematic and sophisticated quota system was established in the state law system.¹²⁸ From the local preliminary exams to the final central exams, there were clear rules about quota allocation. The determination of the quotas were based on comprehensive evaluation on the population and the social conditions of the different regions. During the Ming Dynasty for example, the whole country was divided into a North, Middle and South district with the proportion of quotas being 55%, 10% and 35% respectively. The Middle district was used flexibly as a buffer between the North and South regions. Sometimes, underdeveloped provinces would be adjusted to the Middle district to give them more chances, while the bulk of the North and South districts were legally stable. During the later Qing Dynasty, the quota system improved with greater levels of institutionalisation and

123 The Examination system selects people from different academic divisions. In Tang, the main two types were Mingjing (Classics, 明经) and Jinshi (advanced studies, 进士). The latter was the most respected and promising channel for political appointment. 谢海涛. "科举录取名额分配制度发展形成的历史." 福建论坛: 人文社会科学版 1 (2009): 86-91. Xie Haitao, The History of Development of Quato in Keju System, Fujian Forum: Humanity and Social Science Edition (2009): 86-91.

124“其国子监明经,旧格每年送三百五十人, 今请送三百人;进士, 依旧格送三十人;其隶名明经, 亦请送二百人……金汝、盐丰、福建、黔府、桂府、岭南、安南、邕容等道, 所送进士不得过七人, 明经不得过十人。”王定保撰, 姜汉椿校注. 唐摭言校注[M]. 上海社会科学院出版社, 2003. Wang Ding Bao, Tang Zhe Yan, Selected Notes in Tang Dynasty, edited by Jiang Hanchun, Shanghai Social Science Press, 2003

125 Ibid, 18

126 李立峰. "科举配额制演化的历史考察——兼论“凭才取人”与“逐路取人”之争." *中国地质大学学报: 社会科学版* 1 (2008): 93-97. Li Lifeng, The Historical Review on The Development of Quota System in Keju---the Alternatives between “Merit-based” and “Equality-based” Approaches, *Journal of Chinese Geography University:social science edition* 1(2008): 93-97

127 Ibid

128 Ibid

sophistication.¹²⁹ The quotas were distributed delicately between each province (unlike the Ming practice of the three major districts), then to each county within the province, and then finally to the cities and towns in each county. Each province was required to allocate a certain fraction of the quota to the least developed region within it. As mentioned, since the intellectual bureaucrats could facilitate the investment of educational and political resources to their hometowns, this measure could effectively help each region. It was agreed that the approach of achieving substantive equality – using Hart's sentence 'treating different things differently' – was deliberately sought in ancient China.¹³⁰

3.2.3 Anti-factionalism : Laws and Politics

Confucius argued that the true noble man (君子) would work for the common good; while the despicable man (小人) would form factions to pursue only personal interests.¹³¹ Conspicuously, Confucianism does not think that orderly interactions between private interests could lead to the improvement of public interest. Therefore, in Confucianism, there was very little room for partisan competition and formalised political bargaining.

Other influential philosophical schools also shared with Confucius the antipathy of factional activities. They thought factionalism in government could dilute politics, because people in public positions would seek only private rather than public interest. For instance, they argued that government officials who liaise privately to form factions will eventually destroy the whole political system by stealing power from the king or emperor.¹³² A major school of thought that competed with Confucianism, the 'legalistic' school (法家)¹³³, also believed that factions in the government would harm true justice.¹³⁴ Altogether, rejecting partisan ideas seemed to be a consensus for ancient Chinese thinkers. It is no exaggeration to say that the whole of Chinese political tradition does not favour factionalism or partisan interests. Nevertheless, what these scholars discussed was basically that government officials under the emperor should not form factions – similar with the modern requirement of political neutrality of the civil service. Their discussions did not mention whether the people should form pressure groups to participate in politics.¹³⁵

129 《钦定科场条例》，Imperial Regulations of Examination System. For more discussion on this, see 覃红霞. 科举学的法律视角——以《钦定科场条例》为例[J]. 厦门大学学报(哲学社会科学版), 2010, 2010(5):67-74. Qin Hong Xia, Ke Ju Xue De Fa Lv Shi Jiao---Yi <Qin Ding Ke Chang Tiao Li Wei Li>, Laws on the Keju System--- A Case Study of < Imperial Regulations of Examination System >, Xiamen University Journal(philosophy and social science edition), 2010(5):67-74

130 Ibid, Li Lifeng

131 See "君子群而不党,小人党而不群",《论语》,卫灵公篇第十五,中华书局,1980;The Analects of Confucius, Chapter 15, Zhonghua Press, 1980. This sentence is not a direct translation, but an explanation of its meanings and implications.

132 “朋党比周,以环主图私为务,是篡臣者也” Xunzi, Chendao, Knoblock, John. Xunzi: A translation and study of the complete works. Vol. 1. Stanford University Press, 1988.

133 Which held that governance should be done by strict laws and strict implementations, under the rule of the emperor. It was more like rule by law rather than rule of law.

134 “群臣朋党比周以隐正道,行私曲”,《韩非子》,饰邪篇, Watson, Burton. "Han Fei Tzu: Basic Writings." (1964).

135 But Confucianism does always mention that the unjust emperors should be ousted by the people.

The strong rejection of factionalism was not always permanent. The intellectual bureaucrats made creative interpretations of Confucius's teaching to provide a legitimacy argument for their political struggles. Factional competition in the central government became a constant phenomenon. Each faction criticised the opposition as evil, but sometimes ignored the fact that their own faction was little different in nature.

Such anti-factional debate was gradually institutionalised into the legal texts of ancient China.¹³⁶ Since the Han Dynasty (202 BC–AD 220), factional activity was condemned by imperial decree.¹³⁷ Yet, it was not until the Ming Dynasty (1368–1644) that the 'evil faction(奸党)' became a serious crime in the criminal codes of state.

At the beginning of the Ming Dynasty, the emperor issued the codification of the laws of the country.¹³⁸ This codification contained many rules to regulate the corrupt and factional activities of the bureaucracy system, with the crime of 'evil faction' being a new creation in the legal history of China. The main content of the article states:¹³⁹

'Those who make malicious slanders on others and leads to the emperor believing it and killing the victim, shall be subjected to death penalty;

Those government officials who associate others to make unfaithful defence and advices to pardon those who truly break the law, shall be subjected to the death penalty;

Those government officials who form a faction and manipulate the governing affairs, shall be subjected to death penalty;

Those government officials and clerks in the criminal department, should not obey the illegal orders of their superiors to decriminalise their factional accomplice, or else shall be regarded as one of them; if they reported this to the higher level or directly to the emperor, they will not be punished but also rewarded.'

It was obvious that the factional activities were severely regulated and punished by the emperor. The main point of this crime was to prevent factions from deceiving the emperor and harming other officials. Nevertheless, interestingly, this crime seldom led to actual punishment, perhaps due to the vagueness of its definition.¹⁴⁰ The same crime was retained in the later Qing Dynasty. But the rulers of Qing, again, did not use this article actively. In the legal tradition of China, if an article in the criminal code was heavily used, gradually a series of implementing ordinances of that clause would be developed to add the necessary details for applying it. But this did not happen with the 'evil faction' article. Scholars in the late Qing Dynasty tended to think that the emperors only used this article as a political declaration to remind the

136 For more discussion, see 陈煜. "社会变迁与立法语境的转换——以“奸党”罪的嬗变为线索." *南京大学法律评论* 2 (2009): 148-161; 张宜. "明朝奸党罪及其法律适用." *华章* 28 (2012): 017. Chen Yu, *She Hui Bian Qian Yu Li Fa Yv Jing De Zhuan Huan---Yi Jian Dang Zui De Shan Bian Wei Xian Suo* (Social Change and Law-making Contexts---Analysis on the Evolution of "Evil Faction" Crime), *Nanjing University Law Review* 2(2009):148-161; Zhang Yi, *Ming Chao Jian Dang Zui Ji Qi Fa Lv Shi Yong* (Evil Faction Crime in Ming Dynasty and Its Application), *Hua Zhang* 28(2012):017.

137 Ibid

138 Laws in ancient China was not separated systematically into different branches, such as civil law and criminal law. All the legal rules were codified in one document.

139 大明律，奸党罪，The Ming Penal Code, the Article on "evil faction", see Chen Yu, *ibid*

140 Ibid

bureaucracy system of their supposed loyalty, since they knew this over-vague crime could never be seriously enforced without causing massive injustice.

In the last decades of the Qing Dynasty, a series of internal and external crises¹⁴¹ forced China to reform. The central authority of Qing realised this, and initiated a wide range of reforms. The legal system was firstly modernised to rebuild the state and society according to the Western model. The 'evil faction' crime was controversial and was criticised by those who were responsible for revising the legal system as being uncivilised and unreasonable. But it was still included in the new Criminal Act of Qing.

Nevertheless, the forces of change could not be resisted for long as constitutional reform finally came as well. The Qing authority enacted the 'Law for Assembly and Association (LAA)' in 1908¹⁴², which for the first time in China's history recognised the validity of political parties and organisations, in parallel with the administrative system of intellectual bureaucracy. This law, though still not fully democratic in the modern sense, was a significant step forward, especially considering that in the meantime, a series of other measures had also been underway, such as the establishment of consultative parliaments at the central and local levels (资政院, 谏议局) and the Constitutional Drafting Department (宪政编查院) to make intellectual preparation for a more systematic institutional reform.

The LAA opened the channels for political association and participation while in the meantime also controlling its growth. It did so by carefully distinguishing between 'political association and assemblies' and 'public affairs association and assemblies'. Political association and assemblies were subject to stricter regulations, in that they needed to be approved by the government while the other forms of associations were not. Also, the membership of a political association was limited to 200 people, so as to control their influence. This law was criticised as being too conservative at the time. However, it did facilitate the proliferation of political parties and organisations, a trend which had already been in place since the late period of Qing¹⁴³, as has been analysed by historians.

4. Daoism and Constitutional Virtues: An Overlooked Throng of Chinese Tradition

4.1. Beyond Confucianism

Discussions on Chinese political tradition and political philosophy are sometimes distorted by overwhelming attention focused on Confucianism, as if it is the definition of everything the word 'Chinese' denotes. But the reality is much more complicated and colourful than that.

141 Including but is not limited to, upheaval of poor peasants and the gradual encroachment on sovereignty by western powers.

142 丁进军. "清末宪政编查馆拟订政事结社集会律." *历史档案* 4 (1994): 55-57. Ding Jinjun, Qing Mo Xian Zheng Bian Cha Guan Ni Ding Zheng Shi Jie She Ji Hui Lv (The Constitutional Codification Department in Late Qing Dynasty and Its Enacting of Laws on Association), Li Shi Dang An 4(1994):55-57.

143 李金河. *中国政党政治研究, 1905-1949*. 中央编译出版社, 2007. Li Jin He, *Zhong Guo Zheng Dang Zheng Zhi Yan Jiu, 1905-1949* (Studies on Chinese Political Parties, 1905-1949), Zhong Yang Bian Yi Chu Ban She, 2007.

It is undeniable that Confucianism won the hearts and minds of rulers and became the 'official' philosophy. In addition, its monopoly of political rhetoric was also unrivalled. Nevertheless, in two aspects, it was just one of the multiplicity of philosophical schools that shaped Chinese political tradition. First, although being an official account of political theory, its non-religious nature saved it from being intruding and aggressive towards other philosophies and religions, leaving a great deal of them thriving in academia and society, if not in the imperial court. These philosophies blended into each other, creating a pluralistic intellectual landscape. Second, even for the imperial rulers, as well as their institutional partner of intellectual bureaucracy, the dominance of Confucianism over other political philosophies was nominal rather than substantial. Confucianism was particularly deployed to impose obedience, strengthen political order and to promote a moralistic way of life, but it did not handle everything. Other philosophies and schools of thought¹⁴⁴ guided state policies with equal magnitude. Also, the moralistic tune and benevolent orientation of Confucianism made it susceptible to absorbing elements of other philosophical schools, similar to how the broad-mindedness of the Church of England accommodates diversified protestant schools in England.¹⁴⁵

Among them, Daoism is perhaps the most crucial. In many aspects, it defines the inherent characteristics of Chinese civilisation more than Confucianism.¹⁴⁶ Its marginality in the studies of Chinese political tradition may be understandable due to a number of reasons such as its mysticism and vagueness in expression, with the corresponding difficulties in proper translation. In addition, the fact that the political thought of Daoism was used but not propagandised in order to maintain the façade of Confucianism, also contributed to it being a hidden, but core fabric of Chinese tradition. Last but not least, the naturalist ethos of Daoism gave rise to a broad array of other cultural activities, such as a religion sharing the same name, traditional Chinese medicine, martial arts, paintings, etc., which would distract people's attention¹⁴⁷ and make them neglect its central philosophical core. Nevertheless, such unconscious downplaying of its constitutional significance is both intellectually and historically unwarranted. Compared with Confucianism, it exhibits virtues that are more in keeping with modern constitutional thought.

As will be shown in later chapters, Daoism elements have also been absorbed by the PRC polity and in particular were influential in the Reformatory era (after 1978). The division of labour and the sophistication of political institutions, as fuelled by Party-State separation, have a clear tendency towards unleashing the initiatives of

144 For instance, the legalistic thinking, see 李力. "从另一角度审视中华法系: 法家法律文化的传承及其评判." *法学杂志* 33.6 (2012): 82-88. Li Li, Cong Ling Yi Zhong Jiao Du Shen Shi Zhong Hua Fa Xi: Fa Jia Fa Lv Wen Hua De Chuan Cheng Ji Qi Pi Pan (Chinese Legal System from Another Perspective: The Legacy of Legalistic Culture and Its Critique), *Fa Xue Za Zhi, Journal of Law*, 33.6 (2012): 82-88

145 Paxman, Jeremy. *The English*. Penguin UK, 2007.

146 Hansen, Chad. *A Daoist theory of Chinese thought: A philosophical interpretation*. Oxford University Press on Demand, 2000.

147 See Stephen, and Shawn Eichman. *Daoism and the Arts of China*. Univ of California Press, 2000. Maspero, Henri. *Daoism and Chinese religion*. Amherst: University of Massachusetts Press, 1981. Wile, Douglas. "Taijiquan and Daoism: from religion to martial art and martial art to religion." *Journal of Asian Martial Arts* 16.4 (2007): 8-46.

government agencies and society, which is also a clear theme of the reform in general. In this manner, the whole decision-making structure of the polity has been changed to incorporate more flexibility and dynamism. It will be shown that for different types of decisions, the polity, in fact, adopts different types of decision-making patterns in order to maximise its governing efficiency and effectiveness. After all, the greatest change in the Reformatory era, the recognition of the function of the market economy, is, in nature, highly compatible with the Daoist teaching that ‘I will take no trouble about it, and the people will of themselves become rich.’ The Daoist reformatory orientation also influences the operation of political institutions. Besides the obvious reduction of regulatory functions compared with a planned economy, legal principles and rules are also employed to boost more flexible governance and to constrain administrative interference. For instance, public powers are actively delegated to economic and social organisations to optimise the deliverance of public goods.¹⁴⁸ Daoist governing style extends to the consideration on accommodating the returning Hong Kong Special Administrative Region. By making a basic law to deliberately retain most social, economic and legal structures of Hong Kong’s colonial legacy, it could be argued that the Chinese authorities tried not to break the well-functioning socio-legal order of Hong Kong. This was arguably practising cautious governance, as Daoist thinking argues that ‘governing a great state is like cooking a small fish.’¹⁵⁰

4.2. Main Constitutional Tenets of Daoism

Daoism began in a very ancient time, and therefore its initial scriptures were concise and difficult to interpret, which also means vagueness and ambiguity especially for political thinking. Judged by modern standards, it would not be too offensive to exclude it from typical philosophy. Nevertheless, its style cannot deny its values. Though being textually unsystematic and sometimes quite poetic rather than grounded in reason, Daoism is still a rich mine of philosophy that includes insightful reflections on political and constitutional affairs.

The first thing to discuss is its rejection of rational constructivism. This tenet derived from the perception of Lau Tze (the author of the main work of Daoism – the *Dao De Jing*, the Book of Ultimate Rule and Virtue) on the fundamental law (in the sense of the universal metaphysicality of all things) of the world. To him, the most fundamental ‘law’, even if could be comprehended by the people, could not be expressed by human language and words.¹⁵¹ Once the fundamental law was phrased and expressed, it ceased to be a real fundamental law because human rationality could not give a perfect definition and explanation of it. Therefore:

‘The Tao that can be trodden is not the enduring and unchanging Tao. The name that can be named is not the enduring and unchanging name.’ (道可道，非常道；名可名，非常名)¹⁵²

¹⁴⁸ For examples, see Liang, Ruobing. Promotion Incentives, Departmental Interests and Land Lawbreaking under Fiscal Decentralization. *China Economic Quarterly* 1 (2010): 013.; Ke, Yongjian, and ShouQing Wang. Public private partnership development in China. *Public Private Partnerships: A Global Review* (2015): 74.

¹⁵⁰ Section 60 of *Dao De Jing*, <https://ctext.org/dao-de-jing>

¹⁵¹ “道可道，非常道；名可名，非常名”，楼宇烈。“老子道德经注校释。”北京：中华书局64（2008）。<Dao De Jing>, edited and commented by Lou Yulie, Zhong Hua Shu Ju 64(2008)

¹⁵² *Tao Te Ching (Legge)*. Simon and Schuster, 2013.

This understanding of human nature and rationality differs fundamentally from the moralistic stance of Confucianism. The basic teaching of Confucianism could be framed as noblemen promoting moral values, thereby acquiring the corresponding moral and political authority to do so, including setting the supreme rules for the society. This view would be dubious in Daoism in that the ultimate moral rules, which under reasonable deduction are part of the ultimate law, could not be perfectly represented by any man or group, whether noble or not. While Confucianism may use the same term of fundamental law, ‘道’, it stressed the authoritative aspect of it, implying the obligation of obedience by the commoners. Those who interpreted such moral authority, the intellectuals, therefore obtained, or even monopolised real political powers alongside the supreme reigning power of the emperor. Daoism highlighted the indecipherable nature of fundamental law, denying any artificial supreme authority, be it emperor, heaven, intellectual saints like Confucius, archbishops, etc. Extending this logic further, it would be very easy to reach at least a crude understanding of political equality, since everyone is equally incapable of legitimately representing the supreme authority.

As a matter of fact, Daoism explicitly denounced the systematic moralistic institutions that Confucianism advocated as the main governing system for human beings. Lau Tse opened fire directly at most central elements of Confucius’s political life:

‘When the Great Dao (Way or Method) ceased to be observed, benevolence and righteousness came into vogue. (Then) appeared wisdom and shrewdness, and there ensued great hypocrisy. When harmony no longer prevailed throughout the six kinships, filial sons found their manifestation; when the states and clans fell into disorder, loyal ministers appeared.’ (大道废，有仁义；智慧出，有大伪；六亲不和，有孝慈；国家昏乱，有忠臣)¹⁵³

‘If we could renounce our sageness and discard our wisdom, it would be better for the people a hundredfold. If we could renounce our benevolence and discard our righteousness, the people would again become filial and kindly. If we could renounce our artful contrivances and discard our (scheming for) gain, there would be no thieves nor robbers.’ (绝圣弃智，民利百倍。绝仁弃义，民复孝慈。绝巧弃利，盗贼无有)¹⁵⁴

The fundamental law, along this aforementioned vein, would naturally deny the governing system that Confucianism envisaged. When the true fundamental law was lost, there emerged morality to coordinate social order; when morality could not sustain itself, rituals were invented in order to implement moral demands. In the eyes of Daoism, all the institutions Confucianism brought forward were not morally superior, but were only expedient remedies to the initial failure of not following the fundamental law. Worse still, many such elements, such as moral rules and rituals, only reduced the quality of public life because they inevitably introduced usurpation, hypocrisy and manipulation under the banner of ‘fancy names’. Daoism even went so far as to claim the pursuit of ‘wisdom’ as a source of hypocrisy, since it could be a

153 English translation at <http://ctext.org/dao-de-jing>. Word-to-word translation of ancient Chinese may find much difficulty in expressing the complete connotation of the original texts. So here it would be added with some explanation from time to time, with due respect to the arduous work of the translators. Another version can also be found at *Tao Te Ching (Legge)*. Simon and Schuster, 2013.

154 Ibid

façade for pure opportunism. But reading it in full context, it is clear that Daoism is not equivalent to anti-intellectualism at all.

In one way, while Confucianism seemed to be optimistic about regulatory institutions on human behaviour and public life, such as moral rules and rituals, Daoism sharply reminded people of the disaster of institutional failures. The malfunctioning of those Confucian artificial institutions would not prompt Confucians to look into the deeper problems, but would only prompt them to duplicate similar institutions to regulate the previous ones, which is a downward spiral at best. Such a view is anticipatory to the subsequent problem of bureaucratic disease and social rigidity of ancient China, perhaps also modern China, as will be analysed in later chapters. In a proper simplification, the Confucian institutions cannot solve the problems because they *are* the problems.

Daoism also highlighted the problem of opportunism triggered by the establishment of moralist and legal institutions. When there is a clarified notion of what is beautiful, there would arise the notion of ugliness.¹⁵⁵ Similarly, the notion of virtue leads to the notion of evil. This is only the superficial meaning of the contexts. The deeper interrogation was on the desire to pursue beauty and moral good. In the opinion of Lau Tse, when beauty and moral good are pursued on purpose, it may lead to just the opposite, the ugly and the evil. From a political perspective, what he was referring to was not the efforts for beauty and goodness in individual lives, but to the opportunistic actions to twist social institutions for hidden selfish interests. Human history is full of such examples. In the name of God and Allah alike, innocent people were killed, which God and Allah would surely oppose. In the name of so called chastity, widowed wives in ancient China were forbidden to marry again, however young they were. Daoism opposed such twisted institutions harming human nature. It is why Daoism even used the radical rhetoric to argue that the abandoning of Confucian saints and wisdom would bring the common people enormous benefits.¹⁵⁶ This argument seemed to be especially convincing during the decline of the ancient Chinese empires, when the vitality of original Confucianism deteriorated into rigid lecturing, suppression and hypocrisy.

But in a certain respect, Daoism is not as simple as that. Although it denounced the negative effects of Confucian institutions, its concise lines also implied the acceptance of the necessity of such institutions. After all, when the ideal status of following the fundamental law is not achieved, the Confucian institutions could to a certain degree offset the immediate problems. Daoism is sharp in evaluating Confucian institutions, but tolerant in recognising its practical functions. This is a wiser attitude towards the Confucian pattern of politics than simply denouncing it. After all, there could hardly be a functioning society without such institutions. To de-mystify them, to deprive them and any elite groups of the self-claimed supreme moral authority, while in the meantime employing their practicality, seemed to be a sounder method to maintaining a desirable political system.

155 天下皆知美之为美，斯恶矣。All in the world know the beauty of the beautiful, and in doing this they have (the idea of) what ugliness is. See Ibid.

156 Ibid

4.3 The Institutional Implications of Daoism: Non-intervention and Natural Evolution

The naturalistic thoughts in Daoism did not stop at giving philosophical analysis on the fallibility of human rationality and institutions. Daoism may not provide a systematic account of the detailed institutional design of government, but it proposed a set of principles for the exercising of public powers. From certain perspectives, such principles constantly resonated throughout the history of China until now, and have crucial constitutional significance.

At the outset, given the outlook on nature, the world and fundamental law, it was logical and unsurprising that Daoism gave weighty credit to a non-interference style of governance, striking a sharp contrast with the paternalistic (or at least easily susceptible to paternalism) model of Confucian governance.

The core idea that described how to really follow the fundamental law, in terms of governance, is ‘non-interference’(无为). The actual term in ancient Chinese was more concise and elegant. Yet a plain and simplistic translation would be ‘do nothing’.¹⁵⁷ Therefore, to put some flesh on its bone is necessary for grasping the essence of this idea. In the context of political theory, perhaps no term is more accurate than ‘non-interference’. Daoism believes that the fundamental law emulates nature. If that is the case, how does nature function? Still, nature does not coordinate elements in the world in a rationally constructivist manner. The human community, as a part of nature, should also be governed in a pattern that does not violate the natural ways of life. To Lau Tse, under the rule of the ‘best king’, people merely know the existence of a king, but know nothing more specific about his or her persona; in the second best ruling pattern, the king wins the respect and admiration from the people; in the worse pattern, the people fear the king and therefore become subject to his or her rule; and in the worst pattern of all, the people despise the king.¹⁵⁸

These remarks showed that in Daoism, the best form of government bears a significant degree of the perception of ‘minimum state’. To be noticed, even the benevolent king who is loved by his people is inferior to the naturalistic non-intervention rule. In Daoism, as discussed, no institution would be immune from distortion, especially those programmes that aim to achieve greatness. A benevolent king, as great he may be, would be unable to prevent the downward spiral of his ruling pattern. For certain periods, they may be loved by the people, but when actively pursuing the love of the people, they would eventually lose it and would incur fear

157 “Not to value and employ men of superior ability is the way to keep the people from rivalry among themselves; not to prize articles which are difficult to procure is the way to keep them from becoming thieves; not to show them what is likely to excite their desires is the way to keep their minds from disorder. Therefore, the sage, in the exercise of his government, empties their minds, fills their bellies, weakens their wills, and strengthens their bones. He constantly (tries to) keep them without knowledge and without desire, and where there are those who have knowledge, to keep them from presuming to act (on it). When there is this abstinence from action, good order is universal.” See Ibid.

158 “In the highest antiquity, (the people) did not know that there were (their rulers). In the next age they loved them and praised them. In the next they feared them; in the next they despised them. Thus, it was that when faith (in the Dao) was deficient (in the rulers) a want of faith in them ensued (in the people). How irresolute did those (earliest rulers) appear, showing (by their reticence) the importance which they set upon their words! Their work was done, and their undertakings were successful, while the people all said, ‘We are as we are, of ourselves!’” Ibid.

and eventually hatred, even if that is not their intention. That is to say, political powers bring with it the natural risk of causing more problems. Therefore, to draw the boundaries of power and to know the limits of such power, would not only benefit the people, but would also benefit the ruler or anyone who wields such political powers. Powers are inherently dangerous. To Lau Tze, the ultimate achievement in politics is not the great programmes you have instigated, but to retreat from politics while leaving certain meaningful achievements.¹⁵⁹

In this case, how can one specifically achieve good rule? The desirable practice of governance is further specified (considering the length of the entire text, this would qualify as specified discussion) by Lau Tze:

‘Therefore a sage has said, “I will do nothing (of purpose), and the people will be transformed of themselves; I will be fond of keeping still, and the people will of themselves become correct. I will take no trouble about it, and the people will of themselves become rich; I will manifest no ambition, and the people will of themselves attain to the primitive simplicity”’

Another Daoist scholar argued that ‘if no one harms their private interests, if no one ever sacrifices their own interest for national interests, then there will be good governance.’¹⁶⁰ What is omitted in these arguments is a dynamic like an ‘invisible hand’.

Such laissez-faire ideas¹⁶¹ presuppose that ordinary human beings are capable of creating their own prosperity, with the state functioning only to provide subsidiary aid. To respect and promote people’s initiatives is what a truly wise king should do. This ancient version of the ‘invisible hand’ idea not only fits the market economy, but also the agricultural society in which the government need not overstretch into many domains except for providing basic public services such as security and order. The reason that non-interference governance would work, most possibly, is that Daoism trusts the ability of the society to develop its own order and prosperity, as Lao Tze elaborated in the above passage. The people do not need a superior authority to make them rich and happy. Being liberated from such forces would bring wealth and happiness. Had the ruler not incurred the unnecessary troubles and disturbances on the people, regardless in what names they justify them, the people would be doing just fine.

In reverse, if rulers try to actively fulfil their selfish ambitions, they will fail. Rulers with such a mentality have a strong desire to ‘conquer’ other states, or to use the rule of law as an instrument to build ‘greatness.’ Lau Tze never hesitated to

159 When the work is done, and one's name is becoming distinguished, to withdraw into obscurity is the way of Heaven. Ibid, Chapter 9.

160 Huang Zongxi, Ibid. I translate its meaning into modern terms for more convenient understanding. “天下” was the original term for national interest. What it means is like a grand public community for all the people, in ancient China it equalized with a country or nation, therefore, the term of national interests can accurately capture the core meaning of it.

161 For similar arguments, see McCormick, Ken. "The Tao of laissez-faire." *Eastern Economic Journal* 25.3 (1999): 331-341. Barbalet, Jack. "Market relations as Wuwei: Daoist concepts in analysis of China's post-1978 market economy." *Asian Studies Review* 35.3 (2011): 335-354.

Graupe, Silja. "Do Daoist Principles Justify Laissez Faire Policies? A Critical Examination of “Market Daoism”." *International Journal for Field-Being* 6.1 (2007): 1-16. Young, Leslie. "The Tao of markets: Sima Qian and the invisible hand." *Pacific Economic Review* 1.2 (1996): 137-145.

condemn such mindsets and actions because, just as before these ambitious adventurers would not succeed. Their ‘arbitrary’ use of ‘strength’ to conquer whatever they desire violates the true fundamental law (Tao).

‘If anyone should wish to get the kingdom for himself, and to effect this by what he does, I see that he will not succeed. The kingdom is a spirit-like thing, and cannot be got by active doing. He who would so win it destroys it; he who would hold it in his grasp loses it. The course and nature of things is such that What was in front is now behind; What warmed anon we freezing find. Strength is of weakness of the spoil; The store in ruins mocks our toil. Hence the sage puts away excessive effort, extravagance, and easy indulgence.’¹⁶² (天下神器，不可为也，不可执也，为者败之，执者失之)

The ‘saints’ in Daoism, therefore, are not moralist lecturers, as in Confucianism, but those who follow the fundamental law and maintain the order that everything can naturally take its own course without harming anything else. The saints achieved everything by doing nothing, and realised their own selfish interests by holding no selfish interests.

In many aspects, this idea of Daoism shared many common understandings of human nature and development with libertarian thinkers like Hayek. The Hayekian appreciation of the natural evolution leading to the spontaneous order of human beings could find a natural resonance in the philosophy of Daoism. They used different terms and analytical styles, but the ethos is the same. From a constitutional perspective, such anti-utopian thoughts have a strong shaping influence on Chinese polity, in particular on state-society relations, which draws a sharp contrast with typical Leninist Party-States.

5. The Blending of Confucian and Daoist Thinking and the Potentiality of Constitutionalism

As history moved forward, Confucian and Daoist political thinking blended together.¹⁶³ In the very late period of ancient China, Daoist influence helped to refresh Confucian political theory by introducing the recognition of private interests and initiatives, as well as a more balanced re-designing of political institutions. Power separation between the emperor and bureaucracy was proposed in order to lay the foundation of a more republican constitutional framework. In particular, the discussion of a cabinet-like institution as the leadership of the whole intellectual bureaucracy, and also as shouldering responsibility for the emperor, was not many steps away from embracing formalised political competition.

5.1 Historical Background

Political thinking could develop by blending many different systems together. In Chinese history, Confucianism, Daoism and Buddhism constantly nurtured and shaped each other. This mixture of political thinking gradually encouraged new ideas. Also, when it came to the Ming Dynasty(1368–1644), Chinese society and state had taken on new features. Commerce was prospering, as a continued momentum from the much more liberal Song Dynasty, which was interrupted by Mongolian rule over

¹⁶² Ibid, chapter 29.

¹⁶³ 董平. “儒道互补” 原论[J]. 浙江大学学报(人文社会科学版), 2007, 37(5):59. Dong Ping, “Ru Dao Hu Bu” Yuan Lun (Mutual-Supplementing of Confucianism and Daoism), Zhe Jiang University Journal (Humanities and Social Science Edition),2007 37(5)

China for approximately 90 years. This new trend revitalised public culture and changed social structure. Businessmen arose as a core social class. The value of commerce was exhibited by the concept of ‘Business’(贾道), which implied that commerce should acquire the same position with academic research, as driven by fundamental morality.¹⁶⁴ Many such businessmen were scholars who derailed from the traditional path of scholar-bureaucracy and took this new career path. For a certain period, this type of career change was seen normal for a ‘noble man’(士). Just as how the capitalist spirit fuelled the rule of law in Western civilisation, the emergence of the intellectually backed business sector during the Ming Dynasty also nurtured and disseminated ideas and institutional practices such as contractual obligation, freedom of trade and individual work ethic with the corresponding rewards. These ideas and practices singled the Ming Dynasty out as the period¹⁶⁵ that perhaps came the closest to achieving a possible capitalist transformation of Chinese society.

With these trends of social and political transition, correspondingly, the intelligentsia of China also grew rapidly and became a more organised force with the proliferation of private academies. These academies held regular and influential seminars and debates on Confucian philosophy and public affairs. Although a surge of public forums such as representative assemblies were not found in China, private academies did exert similar functions within a smaller but more elitist circle.

During the Ming Dynasty, the consistent influence of such socioeconomic elements finally gave rise to a refreshing of Confucian thought by combining it with essential Daoist thinking, in particular about how human nature should be respected when designing political institutions. Huang Zongxi was of little doubt the most prominent representative of this form of ‘Confucius Calvinism’.

5.2 Huang Zongxi’s Daoist Confucianism

It was recorded by historians that Huang Zongxi, a renowned Confucian philosopher, was also a lover of Daoism, as demonstrated by his knowledge of ‘the Book of Change’, a mysterious book that was said to reveal the ultimate meta-physics of the entire universe.¹⁶⁶

Putting intellectual hobbies aside, there is no doubt that Huang’s political theory, although still falling under the category of Confucianism, carried a great many Daoist elements and they formed a crucial basis for his reformed Confucianism. The core of them was his insistence that the liberalisation of the pursuit of private interests could lead to a shared prosperity. He came to this conclusion by hypothesising the initial natural state of human society as individuals pursuing their private and respective

164 武志. 社会经济制度变迁的政治经济学分析——以英国和明朝的资本主义萌芽与发展对比为例[J]. 当代经济研究, 2017(9):64-72. WU Zhi, She Hui Jing Ji Zhi Du Bian Qian De Zheng Zhi Jing Ji Xue Fen Xi---Yi Ying Guo He Ming Chao De Zi Ben Zhu Yi Meng Ya Yu Fa Zhan Dui Bi Wei Li(Analysis of Political Economy on Socio-economic Change: Comparing Seeds of Capitalism in Chinese Ming Dynasty and the UK), Dang Dai Jing Ji Yan Jiu(Study of Modern Economy), 2017(9):64-72

165 Arguably, the Song dynasty is widely regarded as the peak of ancient Chinese civilization, in both cultural richness and political civilization. It exhibited a broad range of signs of modernity, such as constitutional politics, market economy, vibrant civil society, etc.

166 李洁非. 天崩地解:黄宗羲传[M]. 作家出版社, 2014. Li Jie Fei, Tian Beng Di Lie, Huang Zong Xi Zhuan, Zuo Jia Chu Ban She, 2014. A biography of Huang.

interests.¹⁶⁷ Such propositions showed clear influences from the naturalistic thinking of Daoism.¹⁶⁸ In his theory, had there been no emperor, everyone could legitimately pursue their own interests and could enjoy the corresponding benefits.¹⁶⁹ This sentence was placed at the very beginning of his most important work, *Waiting for The Dawn* (明夷待访录)¹⁷⁰, showing the importance of this understanding of human nature. The emperor's existence, therefore, would make no sense if it could not guarantee that ordinary people could enjoy what they always enjoy. Following this logic, Confucian philosophers developed an individualistic or liberty-based understanding of constitutional order for human society, that the legitimacy of public authority rests not on their blood, but only on the function and duty to ensure and expand individual wellbeing. Of course, given the different topics and contexts in Huang's work, he did not extend this argument further, but this new direction of political philosophy was widely noticed and appreciated by scholars and politicians.¹⁷¹ Chinese tradition showed the potentiality of moving to a more individualist political theory and practice, by rediscovering the Daoist spirit and applying it to Confucian institutions.

Huang boldly used this method to re-interpret almost the whole set of Confucian political theories. Traditionally, factors like loyalty, obedience, order and the benevolence of the emperor were highlighted by Confucian scholars as the constituting methods of both political and social authority. However, although there were also discussions on how ill-behaved emperors and husbands should take responsibility for their greed, cruelty or suppression, no guidance on how institutions should adapt to prevent the inevitable evils of unconstrained power was offered. Huang was a major pioneer in not only highlighting the importance of political institutions in Confucianism, but also in embarking on a new rationale for institutional design. He was not, of course, proposing a completely novel set of constitutional institutions, but the values underlying his account had departed from the obsolete Confucian cliché, right in the midway, in order to embrace modern political perceptions like civic interests, representative and deliberative institutions, public rather than private loyalty, etc.

5.3 Constitutional Co-rule of Emperor and Intellectual Bureaucracy

Many works in Chinese political philosophy shared a common weakness: a very thin account of political institutions. A merit of Huang's works was that he thoroughly discussed institutional designing. The ruler of the whole political system, the emperor, was framed by his account into a pattern like 'constitutional monarchy', meaning that

167 “有生之初，人各自私也，人各自利也”《原君》，《明夷待访录》。English Translation, De Bary, William Theodore. *Waiting for the Dawn: A Plan for the Prince*. Columbia University Press, 1993

168 李海兵. "论黄宗羲政治哲学的逻辑建构." *船山学刊* 3 (2006): 69-71. Li Haibing, Lun Huang Zong Xi Zheng Zhi Zhe Xue De Luo Ji Jian Gou(The Logics of Huang Zongxi's Political Philosophy), *Chuan Shan Xue Kan* 3(2006):69-71

169 “向使无君，人各得自私也，人各得自利也”，Ibid, 《原君》

170 An English Translation: De Bary, William Theodore. *Waiting for the Dawn: A Plan for the Prince*. Columbia University Press, 1993

171 方祖猷. "黄宗羲《明夷待访录》对孙中山民主思想的启蒙." *北京大学学报: 哲学社会科学版* 48.5 (2011): 111-116. Fang Zuyou, The Inspiring Effects of Huang Zongxi's Ming Yi Dai Fang Lu on the Democratic Theories of Sun Zhong Shan, *Peking University Journal, Philosophy and Social Science Edition*, 48.5 (2011):111-116

the emperor's power, authority and legitimacy were not beyond legitimate challenge. Under the emperor as head of state, the core part of institutional design to make this whole system work was a strong cabinet, with the prime minister chosen from the class of intellectuals. The cabinet was supposed to undertake the daily administration of government, leaving the emperor institutionally detached from administrative work but retaining a final mandate to supervise and intervene.¹⁷²

This design was to a certain degree, a continuation of an existing trend. Although a parliament or similar institutions never emerged throughout Chinese political history, there had always been a major theme of power allocation between the emperor and the chancellor (or prime minister), which in fact was a separation of powers between the emperor and the intellectual bureaucracy. A broad range of either explicit or more conventional rules had been developed out of the intellectual bureaucracy to assert its power, entitlement and rights. For instance, in the Song Dynasty (960–1279), which was widely acknowledged as the peak of the humanistic, spiritual and cultural boom in ancient China, the founding emperor had set the rule that no ministers and officers should be subject to the death penalty for their criticism of the emperor. This was unimaginable in previous periods. The subsequent Song Emperors not only kept this promise but developed it further by showing greater deference and tolerance towards advice and criticisms from the officers in central and local governments.

The Ming Dynasty (1368–1644) abolished the chancellorship to prevent the potential threat to the supreme authority of the emperor. However, the task of governance required such a position. It was technically impossible for an ambitious emperor to pull all the strings of administrative affairs however strong their desire was to do so. Therefore, to build an effective organ to lead the bureaucracy but limit the personal authority of such leaders, the emperor of Ming, for the first time in Chinese history, formally introduced the 'cabinet', an organ functionally similar to the privy council of the English monarchy. The difference was that this cabinet was the collective leadership of the whole intellectual bureaucracy, not an embodiment of aristocratic forces. Many working mechanisms, both between the emperor and the cabinet, as well as between the cabinet and the whole governing apparatus, were gradually developed to make the large state system work. In an extreme case, the whole bureaucratic governance system worked smoothly enough to allow a lazy and indulgent emperor to abstain from meeting his officers for 20 years,¹⁷³ while at the same time the whole country did just fine.

Huang, in his works, adopted a more progressive stance to significantly advance this arrangement of emperor-bureaucracy power separation. The class of intellectual bureaucracy should claim allegiance not to the private interests of the emperor, but to the public interests of the whole realm. The intellectual bureaucracy system, according to Huang, needed to exert far more influence rather than just being the emperor's secretariat. The collective cabinet in the Ming Dynasty, according to him, fell short of a proper chancellorship, because it only followed commands from the emperor, albeit via certain normalized procedures.¹⁷⁴

172 Chapter 2- 7, 《明夷待访录》, De Bary, William Theodore. *Waiting for the Dawn: A Plan for the Prince*. Columbia University Press, 1993

173 But, this emperor, the Wanli Emperor, was also smart enough to maintain control over the bureaucracy.

174 Huang, *ibid*.

Huang advocated a semi-independent bureaucracy system as chaired by a chancellor. There must be constitutional separation of power between the emperor and the chancellor-led bureaucracy. Two main institutional forms were designed by Huang to re-shape imperial-bureaucracy relations. First, national politics should be discussed and decided by a grand cabinet meeting including the emperor, chancellor and relevant government officials.¹⁷⁵ Such meetings should be held regularly. Decisions should be made by wide consultation and deliberation. Normally, the government officials should make policy proposals while the emperor retained the final veto. He or she could give final approval and usually would not make decisions unilaterally. When the emperor is too busy to see all proposals, the chancellor should step in and make decisions on behalf of the emperor. Second, the main government ministries should be placed under the command of the chancellorship, making the chancellor capable of effectively governing and bearing clear responsibility.¹⁷⁶ This court for chancellorship was supposed to be the ‘real’ government, leaving the emperor as head of state rather than head of government. The emperor, therefore, cannot arbitrarily use bureaucracy as a tool, but must undergo official procedure to legitimise or effectuate his or her commands. This chancellor-led court, as well as the whole bureaucracy, must be filled by the long-existing examination system, meaning that all officials must be ‘noble men’ (士). In this manner, Huang proposed a power-sharing constitutional framework for the emperor and the intellectual bureaucracy class, to which there had been equal access through the examination system. Such arrangements departed from the patrimonial pattern of politics as stereotypically understood of Chinese tradition. To strengthen meritocratic element and weaken the monarchical element, the Huang Zongxi design moved the whole polity closer to a typical mixed-constitution model, by richer institutional theories for legitimacy, balance between powers, etc.

5.4 A Hybrid Assembly of Meritocracy and Representation

Another crucial institutional design was the assembly for public deliberation. A deliberative assembly, in Huang’s case, was the traditional academic institutions in China. Therefore, the assembly in his design showed features of both representative and meritocratic ethos.

He recalled the ideally described institutional framework of the pre-history period, which existed mainly in legends – the sage kings ruling wisely by consultation with the old and wise. One of the key institutions were local schools, in which scholars were trained and public affairs were discussed.¹⁷⁷ This may reflect the reminiscent memories of direct democracy as in most primitive human societies. In any case, Huang’s strategic employment of such traditions of what was in fact a novel proposal should be appreciated. The traditional state-run central academy, which was

175 “宰相一人，参加政事无常员，每日便殿议政，天子南面，宰相、六卿、谏官东西面以次坐，其执事皆用士人。凡章奏进呈，六科给事中主之，给事中以白宰相，宰相以白天子，同议可否。天子批红，天子不能尽批，则宰相批之，下六部施行。更不用呈之御前，转发阁中票拟，阁中有缴之御前，而后下该衙门，如故事往返，使大权自宫奴出也。”《明夷待访录·置相》，Huang, ibid.

176 “宰相设政事堂，使新进之士主之，或用待诏者。唐张说为相，列五房于政事堂之后：一曰吏房，二曰枢机房，三曰兵房，四曰户房，五曰刑礼房，分曹以主众务，此其例也。四方上书言利弊及待诏之人皆集焉，凡事无不得达。” Ibid.

177 《明夷待访录·学校》，Huang, ibid

mainly an educating organ and reservoir of junior officials, was transformed in Huang's works into a much larger and open-gated version of a senate or privy council.

The composition and duties of such an academy may reflect a crude awareness of representative politics underpinned by meritocratic processes. The academy, of course, should be composed of intellectuals who earned their position in the central agency through open and competitive examinations. The representativeness of this academy was achieved partly by its sheer size. Huang did not lay a detailed blueprint for the academy. Yet, from his appreciation of the Han Dynasty, in which 30,000 scholars actively discussed public affairs, it could be logically deducted that his design for a new deliberative academy must be a sizeable one.¹⁷⁸

Besides the bulk of scholar-background members in the academy, Huang argued that the head of the central academy (the chief scholar) should be a prestigious scholar or retired chancellor, who would obtain the same political rank of the incumbent chancellor. There should be, according to ancient custom, periodical academic lectures held in the academy. The emperor and the senior central bureaucracy should all attend and listen to the speeches given by the chief scholar. All of them should be arranged by rites in which they pay respect to the chief scholar as student to mentor. The emperors, when reaching the age of 15, should be enrolled in the academy for a certain period of study. By a very loose analogy, the central academy seemed to obtain a similar authority as that of a central church with an honorary archbishop, who in certain periods struck a balance with monarchical power.¹⁷⁹

Furthermore, the academy was not a single institution, but a whole set of vertical yet non-hierarchical systems. All localities should also have their own academy to perform similar functions. The qualified scholars within a local realm should be included in the local academy while famous scholars and retired senior officials should take the position of chief scholar. The discussion of local affairs by the academy, in Huang's design, was far more flexible than the central academy, in that participants and major theorists could be invited from a wide range of scholars and officials, regardless of their position and backgrounds. The chief scholar, if failing to live up to the expectations of the other scholars, could be dismissed by a collective decision of the entire academy. Yet Huang did not specify what exact procedures or types of procedures should be applied to substantialise this 'vote of confidence'.

This academy system should have two main powers.¹⁸⁰ The first would be to supervise the emperor and government. It should be an active forum for the discussion of politics. In particular, the chief scholar, as Huang seemingly implied, seemed to have a constitutional power to criticise and advise the emperor. The local academies should play the same function vis-à-vis local government. The corresponding errors and corruptions of local government should be subject to accountability-seeking mechanisms in the academy, such as exposure to the public or a protest organised by the academy as a mass mobilisation. Such a disobedience movement, of course, would be regarded as fully legitimate and valid under this constitutional order.

Second, the academy was also implied to have quasi-legislative powers against the imperial throne. The Chinese perception of law at that time was a mixture of

178 Ibid

179 Burton, Janet. *Monastic and religious orders in Britain, 1000-1300*. Cambridge University Press, 1994.

180 Ibid

binding rules, criminal codes, administrative conventions, rites and moral rules. So, it may have difficulty in illustrating this quasi-legislative function by comparing it with typical Western parliaments. Yet, Huang's analysis and arguments could still provide some clues. According to him, in the very ancient times (a utopian period known as '三代', or three generations), the sage king maintained the academy system to judge the rights and wrongs of policies in front of the whole public. Therefore, in this ideal pattern of politics, in stark contrast with Huang's contemporary times, 'what the emperor said is right may not be right, and what the emperor said is wrong may not be wrong.'¹⁸¹ The right and wrong should be publicly decided by public discussion and debate. To provide an institutional basis for such public deliberation, the academy system was the best candidate. The emperor, in Huang's argument, dared not dictate what was right and what was wrong if the important issues and decisions had already been publicly discussed in the academy system. The logic of Huang, if extended slightly, amounted to claiming a type of de facto law-making power of the academy, though it may not take on a clarified form as in typical legislation. The public discussions and moral arguments made in the academy, should have the effects of shaping the right and wrong in public affairs. More importantly, such opinions should enjoy greater legitimacy and authority than the emperor's personal judgements since they are 'public' opinions.

Though there was a lack of clear legal rules in Huang's proposal, it did bring forward a more progressive institutional framework to re-accommodate all the traditional elements of Chinese constitutional traditions. The emperor's power would be balanced by the bureaucracy in court, with a more powerful chancellor leading the intellectual bureaucracy. In the meantime a separate system in the form of the academy provided further balance on the general executive branch. The academy system was also mainly built upon examination to select learned scholars into politics. But it also set another channel for political participation and offered a different deliberation-oriented ethos than the administration-oriented bureaucracy.

6. Summary

The Chinese tradition is, in fact, also, in itself, a product of constitutional hybridity. Constitutional tradition in China was firstly significantly shaped by Confucianism. Yet, the process was not free from the influences of other political theories. They were absorbed into the political practice but had a much lower profile. Confucianism may possess an ideology-like façade that was necessary to maintain political order and cultural unity. But it did not exclude other schools. In fact, the active absorption of Daoism and Buddhism was considered to be a major feature of Confucianism in the middle ancient times (Tang and Song Dynasties).¹⁸² Therefore, the Chinese tradition is much more pluralistic than the common stereotype would

¹⁸¹ Ibid

¹⁸² 李四龙. "论儒释道 “三教合流” 的类型." *北京大学学报: 哲学社会科学版* 48.2 (2011): 42-51
Li Silong, *Lun Ru Shi Dao "San Jiao He Liu" De Lei Xing* (On the Integration of Confucianism, Buddhism and Daoism), *Peking University Journal (Philosophy and Social Science Edition)* 48.2 (2011): 42-51

suggest. In later chapters, it will be shown that all these elements still have resonance on constitutional affairs in Chinese polities.

With no doubt, Confucianism set the main theme of Chinese tradition. The historical investigation of this chapter has revealed the how Confucianism was used to facilitate a centralized and paternalistic state. It is because Confucianism, at its core, prefers a governing pattern of “rule by the wise”, which is fundamentally different from the individualistic and democratic pattern of politics. A meritocratic bureaucracy to balance the power of emperor was the main institution Confucianism relied on to build the governing structure of state. Furthermore, as also discussed in this chapter, Confucianism advocated a benevolent pattern of governance and therefore imposed equalitarian standard in the allocation of political resources. The enrollment quota in ancient China had the similar function of “affirmative action”. Perhaps most importantly, the meritocratic and benevolent perception of politics gave rise to a distrust of partisan politics. Since the wise should rule, and they can rule benevolently for the common interests of the people, there was little need to introduce competitive partisan activities to represent different interests. The analysis on the politics and laws of anti-factionalism demonstrated the strong influence of this principle, which lasts into modern times

Meanwhile, Daoism also played an exceptional role and offered balancing effects on the autocratic tendency of Confucianism. While Confucianism advocated a type of paternalistic yet inclusive meritocracy, Daoism provided a sharp reminder on the failure of any meritocratic and authoritative institution. Its naturalistic inclination directly led to the argument that spontaneous order of human evolution and non-interference governance is more likely to achieve shared prosperity and stable order. This respect for private initiatives and natural evolution was embedded in political tradition, constituting a crucial part of the capacity of responsive governance. Rulers in ancient China never stopped practising Daoist politics while upholding the banner of Confucianism, which was reflected in the central-local and state-society relations in the ancient Chinese states.

The Daoist favouring of ‘invisible-hand’-like statecraft, combining with Confucian emphasis on meritocratic deliberation and elitist benevolence, gave rise to the refreshing of Confucian political thinking in the late Ming Dynasty. The constitutional model of co-rule by emperor and scholar-bureaucracy, as proposed by Hung Zongxi, had already taken on partial features of power-sharing republicanism and responsible government. This intellectual trend was interrupted by the Qing Dynasty (who were originally from a northern nomadic tribe), because the new ruler was strongly concerned with its security, and adopted perhaps the harshest authoritarian institutional framework in Chinese history, with the scholar-bureaucracy system relegated to the role of private secretariat to the emperor and strict regulations on academia. Nevertheless, this latest development still revealed the potentiality of Chinese tradition’s self-transformation into political modernity.

Chapter 4 The Western Tradition and Communist Tradition

1. Introduction

The purpose of this chapter is not to provide a complete account of western and communist constitutional thought – such an exercise would clearly be beyond the scope of this thesis – but to pick out the strands of western thought that have had influence on the Chinese experience. They are all crucial element within constitutional hybridity in Chinese polities.

In western tradition, the most typical regime types, namely, presidentialism, parliamentarism, and semi-presidentialism represent three patterns of power interaction, power fusion, and dynamic allocation of powers between executive and legislative branch.¹⁸⁴ They are all highly influential in the functioning systems in Hong Kong and Taiwan. Furthermore, the rise of administrative state and administrative law is also a crucial feature of western tradition. When this element migrated to modern China, it had far-reaching effects on the constitutional landscape. These topics will all be discussed in later chapters.

To understand the communist tradition one should first look back to its historical origin. The fundamental institutional features of the communist tradition are centralized power and strong discipline. Though communist regimes worldwide also have differentiated and localized characteristics, this main theme is the most relevant ones within this context

2. Western Tradition

Western constitutional tradition is a very familiar topic for most people in modern times. Its obvious features, such as that of democracy, rule of law, and liberty, etc, are thoroughly analysed in the vast academic literature available on the subject. Therefore, there is no point for this thesis to re-tell the history of the development of these concepts.

Instead, this section will focus on the relevant elements of those concepts that influenced Chinese polities the most, especially the basic decision-making patterns in western polities. Generally, three types of E-L arrangements have gradually emerged in Western tradition: presidential system, parliamentary system, and semi-presidential system.¹⁸⁶ Behind these three constitutional forms of government are three different understandings of separation of powers and therefore also of the institutional framework for political bargaining.

¹⁸⁴ More on this topic, see Tsebelis, George. *Veto players: How political institutions work*. Princeton University Press, 2002.

¹⁸⁶ For a general discussion, see Shugart, Matthew Soberg, and John M. Carey. *Presidents and assemblies: Constitutional design and electoral dynamics*. Cambridge University Press, 1992. Lijphart, Arend. "Constitutional design for divided societies." *Journal of democracy* 15.2 (2004): 96-109.

It is argued that the main differences within these types of western tradition lies in the structure for political bargaining, which manifests in the institutions and rules in executive-legislative relations (E-L relations). A common feature in these western archetypes, as will be introduced, is the rise of the administrative state and the proliferation of administrative laws, which are especially influential in shaping the constitutional framework of the People's Republic of China, because a great deal of them are transplanted and copied in China, posing institutional constraints on the operation of the party-state. In contrast, the Hong Kong and Taiwan systems are much more influenced by the varying decision-making and bargaining structures in western traditions. By blending parliamentary and presidential elements together in the fabrics of their constitutional scheme, both of them suffer from incompatibility and conflicts in the operation of executive-legislative relations.

2. 1. E-L Separation of Powers and Presidentialism

In general, a president rules by coordinating political bargaining,¹⁸⁷ while a prime minister or a cabinet government rules by commanding the legislative majority, as blessed by the institutional “fusion” of powers in parliamentary system.¹⁸⁸ These are the two simplistic yet fundamental archetypes of effective governance. Underneath these two patterns may be different understanding of the nature of governance. Parliamentart system exhibits an appreciation of centralized political authority and a readiness to oust an underperforming leader. Efficiency and responsibility, therefore, may become two defining features of a parliamentary system. As powerful as a government could be, it is also subject to the constant danger of losing the confidence of parliament and having to step down. In contrast, the archetype of presidential system may demonstrate a caution for centralized power and relentless prevention of its abuse. The comparatively more fragmented decision-making process, in which the executive leader and legislature have fierce conflicts and competition,¹⁸⁹ demands that effective decision may have to be achieved through rounds of political bargaining.

The doctrinal account of the tripartite separation of powers, as the core feature of presidential system, was discussed in the works of Montesquieu. To use power-separation as an effective mechanism to preserve liberty and prevent arbitrariness, he proposed a popular model to organise a state: establishing three equal-footed branches of the executive, legislature, and judiciary.

This theory was first practiced by the US founding fathers in designing its presidential system. The US model, was later widely transplanted, in particular in Latin American, central Asia, and some post-communist countries¹⁹⁰. As a result of the superpower status of US and its influence on other systems, the ‘US model’ has become a label for the institutional structure of a form of democratic system.

187 For instance, see Cameron, Charles M. *Veto bargaining: Presidents and the politics of negative power*. Cambridge University Press, 2000.

188 As famously argued by Bagehot, see Bagehot, Walter. *The english constitution*. Vol. 3. Kegan Paul, Trench, Trübner, 1900.

189 Linz, Juan J. "The perils of presidentialism." *Journal of democracy* 1.1 (1990): 51-69.

190 Van de Loo, Bastiaan. "The failure of the Philippine presidential system." *Asia Europe Journal* 2.2 (2004): 257-269. Mainwaring, Scott, and Matthew Soberg Shugart, eds. *Presidentialism and democracy in Latin America*. Cambridge University Press, 1997.

The inherent logic of the presidential system, as Linz argued, is the “legitimacy tie”, or to put it more plainly, the equal competition between the president and the legislature.¹⁹¹ It is exactly because they are equal-footed in legitimacy that the structure of political bargaining becomes so important for the presidential system. The president and legislature could both claim to be representing the people and therefore are equally armed (by legitimacy and authority) to struggle for political dominance. The legislative branch, unlike in a parliamentary system, could proactively exercise agenda-setting power. The veto power belongs to the president, though the legislature could override such veto with strict conditions (2/3 majority). However strong modern executive power has become, in a simplified and classical archetype of the presidential system, the president does not have formal bill-proposal power. The executive should faithfully implement what the legislation says, according to the constitutional orthodox. Though in practice, the chief agenda-setter in presidential politics is always the president.

In a nutshell, a key feature of such a bargaining structure is the generally balanced allocation of leverage. The incentives within this institutional dynamics are complicated. On the one hand, the successful passage and establishment of a policy necessarily require mutual-reliance; the two branches are pushed to reach sensible compromise and rule out radical policies. But on the other hand, the tension within this “legitimacy tie” does lead to serious confrontation and can cause constitutional gridlock.¹⁹² This seemingly entrenched confrontation was also identified as one of presidentialism’s main problems, especially in Latin America.¹⁹³ But this seems to be an unavoidable cost for the checks and balances system. In addition, with well-functioning auxiliary mechanisms, such as the party system, constitutional rules, and legislative procedure, the severity of potential pathology can be effectively lowered. In general, if these underpinning institutions are functioning well, the bargaining process will work effectively.

As empirical studies in political science have shown, the presidential veto has become a main device for structuring executive-legislative negotiation over policy-making and it has generally done the job.¹⁹⁴ It may be no exaggeration to say that in such a system of checks and balances the presidency functions as an “effective part” mainly by coordinating lawmaking through such bargaining devices. When it diverges from this path into more unilateral track, a danger of dictatorship arises. When it retreats from effective bargaining, the prospect of a ceremonial leader arises. The presidency could be strong or weak, but it could seldom escape from engaging in such bargaining. For good or for bad, the president rules by bargaining. When it stops doing so, it is dangerously inclined to become something else.

Another constitutional implication, which will be further analyzed in the Hong Kong chapter with more specifics, is that the presidential system could offer possible accommodation for a type of non-partisan democracy, with the executive leader being elected but without partisan basis, exactly due to this coordinative pattern of

191 Ibid

192 Linz, *ibid*

193 Mainwaring, Scott. "Presidentialism in Latin America." *Latin American Research Review* 25.1 (1990): 157-179.

194 Cameron, Charles M. *Veto bargaining: Presidents and the politics of negative power*. Cambridge University Press, 2000 ;McCarty, Nolan M. "Presidential pork: Executive veto power and distributive politics." *American Political Science Review* 94.1 (2000): 117-129.

effectiveness.¹⁹⁵ It is technically possible (but may not be likely) for an executive leader to govern effectively without partisan affiliation, unlike in the parliamentary system where party control in parliament is the prerequisite to form a government. This is not a merely thought experiment, but may have pragmatic implications for both transforming and stabilising regimes in contemporary times. With information technology shifting the ways of communication, mobilization, and organisation, it is possible to imagine electoral campaigns being fought and won with a new pattern of party politics, in which process the personal influence of candidate is amplified. Political parties are also becoming more diversified and flexible. Issue-focused campaigns, multi-centric grassroots activism, or even individual self-promotion have all taken up parts of the functions traditionally performed predominantly by party machineries. The case of Trump provides a clear example of such a trend.

Like almost all social phenomena, this one has mixed effects. But whilst it is one thing to offer normative evaluation, it is equally important to think of the possible institutional accommodations of this trend. The bargaining structure in typical presidential systems could be modified to shoulder this task. Provided that there is an appropriate re-allocation of specific powers, executive-legislative interaction could be balanced and constructive. For a strong executive leader, more checks could be added to policy-making process, so as to moderate executive strength through rounds of bargaining; for inexperienced and weak ones, a more coordinative role of the president could also be shaped by slightly amending the system, such as encouraging more legislative initiatives and also strengthening the presidential veto. Such dynamics, as will be analysed, are crucial to the amelioration of Hong Kong's constitutional impasse.

Furthermore, three technical points merit special attention regarding how the system actually works. First, the vigour of the executive was a crucial foundation for its operation. Hamilton claimed that "energy in the Executive is a leading character in the definition of good government."¹⁹⁶ The reasons for this lies in the systematic importance of executive in governance: steady administration of laws, protection from foreign attacks, protection of property, etc.¹⁹⁷ Such a tone about the executive's function implies a more active version of executive power in practice, especially considering the theory of government as a mechanical executing agency of legislations.

Second, though institutionally agenda-setting power is reserved by the legislature, in practice the president and legislature still share agenda-setting power through the party mechanism, which is conducive to effective governance and more compromise-oriented bargaining. Executive dominance of the political agenda, though by an indirect way, is the main pattern. But this does not necessarily imply a relative feebleness of legislative power. Quite the contrary, the more the executive needs to push forward its own agenda, the stronger leverage the legislature will have.

Third, the presidential system also has extra-legislative mechanisms for the input of executive's agenda. First, the presidential policy declarations function as a major channel for the president to declare his or her legislative plan and for urging its

195 Lowi, Theodore J. *The personal president: Power invested, promise unfulfilled*. Cornell University Press, 1986.

196 Hamilton, *ibid*

197 Hamilton, Federalist 70

acceptance.¹⁹⁸ Second, the presidential proclamation served in several critical historical moments as a direct mechanism for the president to establish a policy. One example is Lincoln's famous proclamation to liberate the black slaves, which was later recognised legitimate by Congress.¹⁹⁹ Third, in modern governance, especially in regulatory affairs, the president increasingly uses executive orders to set government policy. Though executive orders are only binding on the executive apparatus, by imposing the concrete requirement and criteria for policy-making, the president can still effectively advance his or her agenda, in particular as against the congressional efforts to control regulatory agencies.²⁰⁰

2.2 . Fusion of Powers and the Parliamentary System

An archetypical parliamentary system is capable of effective decision-making. The bargaining system of it is not bilateral as in a presidential system: the fusion of powers determines that executive and legislative power will be put in the same hands. Political bargaining in a parliamentary system aims to result in a clear dominant force, rather than in mutual-checks during day-to-day executive-legislative interactions. Meanwhile, the opposition party forms a shadow force to constantly contest the ruling power, which forces the government to be accountable and responsive.

This means that the parliamentary archetype has a more simple and clear-cut logic, just like as a scholar observed: "choose a government, and make it good",²⁰¹ rather than putting it into frequent institutional checks in day-to-day administration like in the presidential system. The effectiveness in parliamentary system is (comparatively) ensured by power fusion, unlike in the presidential system where effectiveness needs to be forged through delicate political bargaining.

The history of the parliamentary system is much longer than the presidential system. It might be the first major pattern for democratic governance (or at least towards that orientation) in modern history. Originating from UK with its initial role as an aristocrats' representative assembly to constrain the king's power, the parliamentary platform gradually evolved into the representative organ for the common people, and grew out the constitutional principle of parliamentary sovereignty.²⁰² Still, the original elements of royal and aristocrat power were also retained to different degrees.

The main governance mechanism within the parliamentary system, is the "fusion of powers"²⁰³ between the executive and legislative branch, meaning that the cabinet government that is constituted from the parliament majority party or coalition, therefore controlling both the executive and legislative power in the same time. The legitimacy basis of this structure is the unified popular mandate from the general election of parliament. This power fusion was appraised by Bagehot as the "efficient

198 Teten, Ryan L. "Evolution of the modern rhetorical presidency: Presidential presentation and development of the State of the Union address." *Presidential Studies Quarterly* 33.2 (2003): 333-346.

199 Rottinghaus, Brandon, and Jason Maier. "The power of decree: Presidential use of executive proclamations, 1977-2005." *Political Research Quarterly* 60.2 (2007): 338-343.

200 Cooper, Phillip J. *By order of the president: The use and abuse of executive direct action*. University Press of Kansas, 2014.

201 Bagehot, *ibid*.

202 General discussion, see Lyon, Ann. *Constitutional History of the United Kingdom*. Routledge-Cavendish, 2003.

203 Bagehot, Walter. *The English Constitution*, 1867. Oxford University Press, 1928, 47

secret" of the political system of UK and it has important implications for executive agenda-setting.²⁰⁴ Bagehot observed that the British cabinet can "compel legislation"²⁰⁵ while the US President could not – though the correctness of the latter claim is another issue. The House of Commons, according to him, is under the leadership and guidance of the political leader, in a way that "a good horse likes to feel the rider's bit."²⁰⁶

But such a constitutional framework does not mean executive power is free from constraints. The principle of parliamentary sovereignty determines executive's absolute²⁰⁷ political accountability to the parliament. The life of government depends on parliamentary support. When the cabinet loses confidence from the legislature, it must resign and a new government should be formed from a new general election.

The implicit element of "mixed government " in the original Westminster system, also suggest other legal mechanisms for agenda-setting besides cabinet's partisan control on parliamentary proceedings. First, the royal prerogative,²⁰⁸ a heritage of royal power, is now partially acquired by the modern executive as a mechanism to make decisions without the need for parliamentary action. Second, in parliamentary system the delegation of lawmaking power to the cabinet government is also active and often, for the duration of the Parliament, permanent, given it has been approved in a majority-controlled legislature to aid its government.²⁰⁹ The exercise of this delegated lawmaking power must be through certain legal mechanisms. Yet due to the complexity of this issue such rules inevitably cause controversies, the most eminent of which is how to supervise executive's norm-making power. For instance, in UK, Henry VIII clauses²¹⁰ empowers the government to modify legislature-passed acts upon future contingencies, causing great concern for rule of law.

With these concrete institutions, parliamentary system offers a broad range of constitutional implications. First, it could provide platforms for combined ways of building inclusiveness. While the general election of lower house is a way for channeling democratic input, the composition of upper house could function as a representative approach of inclusiveness, with conservative forces (such as aristocracy) and professional sectors (such as the appointed peers) being institutionalised and regulated by constitutional norms. Second, clear responsibility is the core of constructive political bargaining in parliamentary system. Parliamentarism is very generous in empowering the governing party with weighty leverage, such as fusion of powers, strong agenda-setting power, and delegated rulemaking power under modest scrutiny. But it is also very sharp in terms of imposing political responsibility. Change of national feeling and mood about the government could be swiftly channeled into the constitutional machinery, either by consolidating or

204 Bagehot, Walter. *The English Constitution*, 1867. Oxford University Press, 1928, 47

205 Ibid, 52

206 Ibid, 118

207 In that the cabinet is elected by the legislature and could be ousted by it. Moreover, the cabinet members are all from the legislature. Therefore the cabinet in form is an implementing agency of legislature.

208 Barnett, Hilaire. *Constitutional & administrative law*. Routledge, 2011, page 107.

209 Strøm, Kaare. "Delegation and accountability in parliamentary democracies." *European journal of political research* 37.3 (2000): 261-290.

210 A "nickname for clauses that allow a minister to amend the primary statute, or some other statute, though delegated legislation. " Paul Craig, *Administrative Law*, 718

removing the democratic support of government. There is no institutional guarantee for government terms, since loss of confidence could happen at any time, which forces the government to be vigilant against any vicissitudes.

2.3. Dynamic Allocation of Powers and the Semi-presidential System

In the 20th century, Weimar Germany's political system offered a new pattern of E-L structure which featured a more complicated checks and balances system, setting the path for the future proliferation of semi-presidentialism. The core feature regarding power separation in such a hybrid system, could be argued to be the dynamic allocation of political powers based on political contingencies.

Naturally, this kind of hybrid system is highly complicated, making smooth operation more difficult. In particular, a new polity facing the task of political transition would quite always fall a victim of such mixed system. On the one hand, the semi-presidential system has a potentially polycentric power structure, with the presidency, cabinet government, and parliament all having the potential to become the dominant power, which is appealing to competing forces and therefore also conducive to accommodating them into an integrated institutional framework. In this sense, it is a kind of system that has strong inclusive capacity. Nevertheless, on the other hand, the complication of structure to absorb political actors may bring the side effects of undermining constructive bargaining and effective decision-making, since each institution may be tempted towards self-aggrandizement; actors within this structure may be incentivised to confront, rather than to negotiate. In addition, responsibility is also blurred by the diversification of constitutional roles, such as whether emergency power should be incurred to break constitutional gridlock.

Tracing back to its origin, the constitution of the Weimar Republic, which is the first archetype of semi-presidential system, was under the direct and undiluted intellectual influence of political theorists and jurists.²¹¹ Three scholars, Weber, Preuss, and Redslob together laid down the theoretical foundation of this "presidential-parliamentary system." This seemingly-paradoxical term reflects their rejection of two modes, the "doctrinaire separation of powers"²¹² of the US and the chaotic parliamentary practices of the French Third Republic. The former was regarded as harbouring a Spoils system and detrimental to the German officialdom, while the latter was regarded as a "false" form of parliamentarism since the legislature was unbound and arbitrary.²¹³ Instead, the Weimar Constitution allocated political powers dynamically upon the specific political contingencies, so as to solve the problem of E-L confrontation and deadlocks. The key institution is the presidency which could choose to dissolve the parliament and restore political order between the executive and legislative branch. Yet the other side of the coin was that agenda-setting powers become split as well, resulting in a possibly over-intricate political landscape. First, even with legislative dissolution and reelection, the fragmentized party system might still produce deadlock after re-election. Meanwhile, the president did not have systematic agenda-setting power due to the design of "binding the president to the Reichstag through the cabinet",²¹⁴ which means presidential decisions needed to be

211Needler, Martin. "The theory of the Weimar presidency." *The Review of Politics* 21.04 (1959): 692-698.

212 Ibid

213Ibid

214Ibid

countersigned by chancellor and ministers. Second, the cabinet did not enjoy strong agenda-setting power either. The designation of cabinet members was the absolute prerogative of the president, who was not bound by membership and partisan requirements. To firmly control the whole government, a Weimar President usually appointed an outsider chancellor who could not effectively work with the legislature.²¹⁵ Finally, the fragmentized legislature, the popular strength of the presidency, and the anomalous chancellor's role all led to political impasse. To solve this problem, the president took an unusual measure of "ruling by emergency decree",²¹⁶ which to a certain degree accelerated the collapse of the Republic.

This Weimar model experienced certain modifications during its wide transplantation in the later 20th century.²¹⁷ The Fifth Republic of France adopted the institutional structure of Weimar Constitution, but strengthened the presidency with much more power to set the policy agenda, so as to settle down clear authority and responsibility.²¹⁸ This model of "semi-presidentialism" was given this well-received catchphrase decades later in political scientist Duverger's famous article.²¹⁹ Moreover, during the late 20th century many post-communist states found the semi-presidential structure convenient for accommodate democratic representation and conservative political forces, and used it for their new democratic systems.

2.4 General Patterns of Executive Agenda-setting Mechanisms

Decision-making in western democracies is mainly through formal and competitive legislative channels. Formal agenda-setting mechanisms are of particular importance in such process, because they form a vital component of the structure for political bargaining. To a certain degree, constitutional composition of agenda-setting powers may determine the relative strength and weakness of each institution. The feature that the executive branch enjoys massive agenda-setting power and the concrete measures for exercising them are crucial parts of western tradition. In the chapters on Hong Kong and Taiwan it will be shown that a main source of their malfunctioning is the distortion of agenda-setting mechanisms due to constitutional hybridity.

A crude typology could be made across different forms of democratic regimes. Generally, executive agenda-setting powers could be classified into five types: content control, timetable control, partisan support, unilateral rulemaking, and political conventions. These mechanisms could also be classified into two types, institutional ones and partisan ones. Institutional ones are those which are usually stipulated by constitution laws, while the partisan ones are usually exercised via party politics. But not uncommonly the lines within such classifications are not clear cut.

First, content control mechanisms mainly manifest as the exclusive policy jurisdiction of executive power. The government usually enjoys a monopoly or advantage in initiating certain types of policies, such as public expenditure-related

215 A similar scenario is also witnessed in Taiwan, political structure of which is in imitation of Germany, as will be discussed later.

216Needler, Martin, *ibid*

217Shugart, Matthew Soberg, and John M. Carey. *Presidents and assemblies: Constitutional design and electoral dynamics*. Cambridge University Press, 1992

218Wahl, Nicholas. "French Constitution of 1958 II. The Initial Draft and its Origins." *American Political Science Review* 53.02 (1959): 358-382.

219Duverger, *ibid*

policies, industrial regulation, and direction of foreign policies.²²⁰ The main rationale for this is to balance the potential manipulation of populism, such as elected representatives pushing for limitless welfare distribution to bribe the masses and endanger the long term interests of the community. Second, typical time control mechanisms include an array of mechanisms to speed up passage of executive bills, motions to cut filibustering, fast-track legislation, and systemic mandatory schedule for legislation.²²¹ Packaging normal policy bills with a confidence vote could also be regarded as a special time-table control instrument.²²² Third, partisan power for agenda setting is contingent upon regime type. In most parliamentary constitutions, the chief executive leads the majority party; therefore, that position enjoys dominant powers in legislation. In a presidential system, the presidency and legislature may be occupied by competing parties. The president's powers may be crippled by a hostile congress. But he or she could use his or her veto power to bargain with lawmakers and build policy alliances.²²³ In a semi-presidentialism system like France, the presidency, premiership, and legislature form a triangular relationship. The system is constantly shifting between "cohabitation"²²⁴ and a strong presidency, depending on whether the president's party controls the legislature. Fourth, the executive may also have extra-legislative channels to establish its own agenda. Three mechanisms exist to aid the executive's unilateral agenda-setting power. The use of executive decrees²²⁵ is an effective way to set policies. Law-making is frequently delegated to the executive branch, enabling it to promote its own agenda.²²⁶ The executive could use referendums to initiate a policy programme. Fifth, there could also be constitutional or political conventions aiding executive agenda-setting, such as the "Salisbury Convention" in UK that denies the upper chamber the authority to veto policies that have been approved by the people in general election.²²⁷

Agenda-setting does not end with the successful establishment of a policy. Effective implementation is an inconspicuous but fatal platform for the political rivalry of agenda-control between the executive and the legislature.²²⁸ Laws are inherently general, leaving many gaps between original ideas and concrete realities. These gaps are to be filled during implementation. The task of implementation has two crucial implications for executive powers. First, the executive could claim the

220 Rasch, Bjorn Erik, and George Tsebelis. *The role of governments in legislative agenda setting*. Routledge, 2013, chapter 1.

221 Ibid

222 Ibid

223 Tsebelis, George. "Decision making in political systems: Veto players in presidentialism, parliamentarism, multicameralism and multipartyism." *British journal of political science* 25.3 (1995): 289-325.

224 This concept means the president's party could not control the legislature. The prime minister is from the opposition party and become much more powerful since he or she also command the majority of the legislature.

225 For more, see Carey, John M., and Matthew Soberg Shugart. *Executive decree authority*. Cambridge University Press, 1998.

226 Lindseth, Ibid

227 Shell, Donald. "The future of the second chamber." *Parliamentary Affairs* 57.4 (2004): 852-866.

228 To be noticed, this point makes lesser sense in parliamentary system, since the legislature is always be controlled by the governing majority party.

power to interpret the laws and even the constitution.²²⁹ After all, to carry out a plan one must first know the true meaning of it. By claiming the interpretation of the constitution, the executive could even boycott or invalidate legislative agenda by denying its constitutionality.²³⁰ Competing with this claim, the legislature may impose the specific requirement of implementation in statutes. Second, the executive and the legislature compete for control of the bureaucracy system, which is the frontline implementer of laws. The executive leader may use executive orders to direct policy-implementation., such as executive orders obligating government contractors to take affirmative action to reduce racial discrimination in US.²³¹ On the other side, the competing legislature could establish its own implementing instrument of making use of independent agencies, which are usually shielded from the chief executive's powers.²³² Scholars who are concerned with the soundness of governance structure argue that the chief executive should control the whole executive system by hierarchical control on implementation, or else clear political accountability of the executive branch will be compromised.²³³

2.5 Rise of the Administrative State and Proliferation of Administrative Laws

In modern times, especially from the second half of 20th century, there was the rise of the administrative state. As administrative power expanded, there were also increasing calls to put administrative discretion into a more systematic legal framework. A broad array of mechanisms for administrative accountability are developed, such as information disclosure, public hearings, and more structured and standardised administrative decision-making procedures. As will be elaborated later in chapters 6 and 7, such patterns and elements are transplanted into Chinese law and play crucial roles in upholding executive accountability in a Leninist Party-State.

The rise of the administrative state is a common feature in many western democracies, regardless of regime type.²³⁴ It generally refers to the expansion of executive apparatus and powers, as well as its obscuring of crucial and traditional constitutional tenets like separation of powers and non-delegation.²³⁵ This exact term was first used by US political scientist Waldo to describe the on-going change in public administration and its relations with the written constitution.²³⁶ Meanwhile in UK and other European countries, such fundamental changes also took place.

229Strauss, David A. "Presidential Interpretation of the Constitution." *Cardozo L. Rev.* 15 (1993): 113.

230 Ibid

231Rodrigues, Ricardo José Pereira.*The preeminence of politics: executive orders from Eisenhower to Clinton*. LFB Scholarly Publishing, 2007, 277

232 For more discussion, see Kagan, Elena. "Presidential administration." *Harvard Law Review* (2001): 2245-2385.

233 Ibid

234 For instance, in US context, see Lawson, Gary. "The rise and rise of the administrative state." *Harvard Law Review* 107.6 (1994): 1231-1254. In European and UK context, Löffler, Elke. "The administrative state in western democracies." *Handbook of Public Administration, Londres, Sage* (2003): 478-488.

235 Lawson, *ibid*.

236 Waldo, Dwight. *The administrative state: A study of the political theory of American public administration*. Routledge, 2017.

Nowadays, academics broadly agree that a type of “regulatory state”²³⁷ and its concrete institutions have thrived in a political system where an unwritten constitution and a common law judiciary have placed assured and effective constraints on executive discretion.²³⁸ What drives the emergence of such a new governance mode is also simple and clear. The increasing complexity and sheer volume of public affairs necessarily demands a more systematic, technocratic, and autonomous administrative regime to get the job done. Nevertheless, it also naturally raises the concerns of how to make sure discretionary powers are not abused. Therefore, alongside the rise of administrative power is the proliferation of administrative laws.

Among them, government transparency laws, participatory mechanisms like public hearings, and standardised administrative decision-making procedures have particular relevance to China. Because, compared with other rules and principles which are more actively manifested in judicial review, these elements could be tolerated and even encouraged by the Party-State, since they ensue comparatively less possibility of judicial activism. The information disclosure laws and practices in western polities gradually prosper through the course of the building of administrative state. In US, since 1967, the Federal Freedom of Information Act has enabled the public to request records from any federal agencies. This basic model is intimated by Chinese information disclosure laws. In UK, the Freedom of Information Act in 2000 also ensures the right to request information access, and creates the role of an information commissioner to oversee such matters. Public hearings, and all other similar consultative practices, amount to an inherent part of the western democratic tradition, in particular in local self-governance. For instance, they are “among the most traditional methods for citizen participation in America”.²³⁹ English common law has developed sophisticated rules to guide such methods for public engagement, drawing on theories and precedents about natural justice and fairness.²⁴⁰ Similarly, US laws offer detailed statutes to normalise such procedures.²⁴¹ The administrative decision-making procedures in western democracies are also under increasingly formalised and standardised control. Accountability mechanisms such as consultation, hearings, transparency, and risk-assessments²⁴² are all intertwined to forge a more systematic form of regulation on administrative discretion.

In sum, as a country enters the phase of administrative state, administrative laws would shoulder a greater constitutional function to contain arbitrariness of powers. It is beyond the aim of this research to provide highly detailed account of these laws. This section has sought to identify the key features of three western constitutional traditions that have shaped the regimes that are the focus of this thesis.. Chapter 6 will provide a more elaborated discussion on their functions and influence in building an accountable meritocratic bureaucracy and balancing party power.

237 Loughlin, Martin, and Colin Scott. "The regulatory state." *Developments in British Politics* 5. Palgrave, London, 1997. 205-219.

238 Ibid.

239 Checkoway, Barry. "The politics of public hearings." *The Journal of Applied Behavioral Science* 17.4 (1981): 566-582.

240 R. Clayton, 'Fairness, Consultation, and the Supreme Court: There Is (Sometimes) an Alternative' U.K. Const. L. Blog (16th Mar 2015) (available at: <http://ukconstitutionallaw.org>)

241 For instance, see <https://www.law.cornell.edu/cfr/text/12/1209.12>

242 National Research Council. *Risk assessment in the federal government: managing the process*. National Academies Press, 1983.

3. Communist Tradition

3.1. Historical Origin

The constitutional structure of the communist regime originated from the idea of "the dictatorship of proletariat," meaning the working class controlling the political power in a state.²⁴³ For communists, it is a more genuine form of democracy than Western counterpart, which was a "democracy of bourgeois" ²⁴⁴and impeded the common people from taking part in by threshold of wealth and manipulation of election. The elite capitalists controlled elections and selected their agents in the government and the legislature to defend their interests, which were based on the exploitation of working class.²⁴⁵

Yet, the quality of institutional design calls for practical experiences, which the un-ruling communists lacked during the early period. Therefore, under Marx's theory, the concrete institutions for proletariat dictatorship were insufficiently discussed. Another reason may be that for Marx, the state will no longer exist in the ultimate realisation of true communism. The practical predecessor of communist political system was the short-lived proletariat government of the Paris Commune in 1871.²⁴⁶

This small-scaled regime was praised by Marx as an example for the constitutional structure of proletariat dictatorship:

*"The Commune was formed of the municipal councillors, chosen by universal suffrage in the various wards of the town, responsible, and revocable at short terms. The majority of its members were naturally workers, or acknowledged representatives of the working class. The Commune was to be a working, not a parliamentary body, executive, and legislative at the same time."*²⁴⁷

This observation summarised its major institutional features. First, it was based on universal and revocable elections, so as to fully represent the will of the proletariat. Second, this system features the fusion of executive and legislative powers, as well as the omnipotence of this fused power. Third, the amateur nature of the councillors was to ensure close ties between the representatives and the people, as well as to reduce opportunistic motivation for engaging in public service, since they were only minimally paid.²⁴⁸

Later, during the Russian revolution in 1905, the workers in St. Petersburg established a representative organ, the Soviet (meaning "council" in Russian), to coordinate the workers' strike. It had 400-500 representatives elected by about 200,000 industrial workers. Since then, the term "soviet" started to have a

243 For more, see Lenin's *Collected Works*, 4th English Edition, Progress Publishers, Moscow, 1965, Volume 30, pages 93-104

244 Miliband, Ralph, and Ralph Miliband. "Marx and the State." *From: Democracy and the Capitalist State* (1989).

245Luxemburg, Rosa. *The Russian Revolution, and Leninism or Marxism?*. University of Michigan Press, 1961, chapter 8

246 Reshetar, John Stephen. *The Soviet polity: government and politics in the USSR*. HarperCollins Publishers, 1978,page 192

247Marx, Karl (1986). "The Civil War in France". *Marx & Engels Collected Works* 22. New York: International Publishers. p. 331

248 For more, see Reshetar, *ibid*

distinguished political meaning for the Bolsheviks.²⁴⁹ It was adopted as the name of the supreme representative organ when the communist regime was established in Russia, and even became an interchangeable nomenclature for the whole regime.

Tracing the historical origins of constitutional tradition should avoid over-simplifying and over-focusing on the content of a specific tradition. There are studies showing that the formulation of communist tradition was under the heavy influence of Russia's centralised tradition; it was not a wholly new invention.²⁵⁰ This view is reasonable and compatible with the general understanding of Russia's history. Nevertheless, in the same article, the author identified the main element of Russia's legal tradition as "statism" and further argued that it is the main vein along which communist tradition spreads and continues to play an exceptional important role in modern Chinese regime. Statism is not the wrong word to describe Russian and communist tradition, but it is a simplification that requires some qualifications if it is not to mislead our understanding of the momentum of constitutional development in Chinese politics. First, legal tradition is still different from constitutional tradition. Constitutional tradition includes a focus on the actual institutions of a system, not just simple generalisation of such institutions. Therefore, statism is still not enough to offer a meaningful account of Russian tradition's influence on constitutional matters in a communist regime. Second, relevant to the first point, statism was hardly a distinctive feature of a specific country in pre-modern times. It was perhaps a dominant pattern of politics at certain periods in most countries, such as ancient China and the absolute monarchies of Europe. The role of party and the uneasy relations between party and state may be a more illustrative feature, as well as the rejection of separation of powers and right-based model of constitution. But statism alone is hardly a point that could explain much. Third, statism portrays the tendency of centralising powers into the state and regarding the interests of state as the main ends of political actions, and the view that law is instrument of the state. But this general feature can take many differentiated forms. A great deal of political systems are underpinned by concentration of state power, but their structure, governance style, and usage of laws may have tremendous meaningful differences. As such, the understanding of which statism could hardly offer much help. Fourth, it is doubtful to associate some phenomenon directly with statism, especially when the actual dynamics within such cases could be easily observed. Such simplification may also risk one to be misled and identify the wrong reasons for actual political events. For instance, Partlett and Ip²⁵¹ thought that the constitutional amendment to add "the People's Republic of China governs the country according to law and makes it a socialist country under rule of law" reflects a continuation of Soviet statist constitution. This view is contrary to the underlying facts. Moreover, noting the subsequent sophistication of administrative norms (in which a great deal of western rules and principles are borrowed and copied) using this "socialist rule of law" as rationale, it is quite clear that these rule of law efforts have much more to do with the

249 Ibid, 190

250 Partlett, William, and Eric C. Ip. "Is Socialist Law Really Dead." *NYUJ Int'l L. & Pol.* 48 (2015): 463.

251 Partlett, William, and Eric C. Ip. "Is Socialist Law Really Dead." *NYUJ Int'l L. & Pol.* 48 (2015): 463.

pragmatic needs to improve China's governance quality, the strategic posture of building international image, and the preparation to adapt to WTO's requirements.²⁵²

Given the complexity of China's history and politics, this thesis will focus mainly on the concrete institutional elements, and avoid generalisations. In later chapters, the analysis of Chinese regime will be centred not on principles like democratic centralism (which is obviously significant but has very little substantive contents), but instead on more concrete topics like the actual methods by which the legislature is empowered.

3.2 Party-State Formality and Strong Party Organization

What most fundamentally shaped the constitutional framework of communism was Lenin's revolutionary practices and his political thinking. Marx never had the chance to actually lead a violent revolution and run a country. But Lenin did. Marx offered theories of an ideal-type communist, while Lenin created the institutional tools to carry out such endeavours. From a constitutional perspective, Marxism advocated a type of popular sovereignty²⁵³ institutionalized through mechanisms similar to parliamentary sovereignty, while Leninism used such institutions as formality for legitimation, and relied on the vanguard party to rule. Marx gave communist movement its soul, while Lenin and soviet practices gave the movement its organisational strength.

Formally, the communist regime's constitutional structure could be loosely compared with parliamentary sovereignty. The people elect their representatives²⁵⁴ to a supreme congress (like the Supreme Soviet or National People's Congress in China), which exercised the "highest state power"²⁵⁵ on behalf of the general will of the people. Legally speaking, this supreme assembly should be regarded as the centre and ultimate authority in communist regimes. It is usually called a law-making organ but has wider and vaguely defined powers such as to decide on important national issues (the scope of which is vague and flexible) in the form of not only legislation but also political resolution.²⁵⁶ The government is elected by this supreme congress and should be accountable to it.²⁵⁷ The large size of the congress plenary session renders

252 肖金明. 中国入世背景下政府法制要点[J]. 法学家, 2002, 1(4):3-10.

253 Pashukanis, Evgeny. *The general theory of law and Marxism*. Routledge, 2017.

254 The election of representatives in communist regimes is based on a combination of geographical and professional representation. All localities, professions and social sectors can elect their representatives. Such elections are strictly controlled by the party in that candidates are proposed by relevant party units and voters are persuaded to vote according to party's will. The national people's representatives are elected by lower level People's Congress. The county level representatives are elected directly by people. See the Law of Election of People's Representative, Article 8-25,29-33, government link: http://www.gov.cn/flfg/2010-03/14/content_1555450.htm

Recently in China, there could be observed more competitiveness in the election of people's representative, see 邹树彬, 唐娟, and 黄卫平. "2003 年人大代表竞选的群体效应: 北京与深圳比较." (2004).

255 USSR Constitution(1977), Article 108, PRC Constitution, Article 57.

256 For instance, the NPC of China could "exercise such other functions and powers as the highest organ of state power should exercise." PRC Constitution, Article 62.

257 Such as in China, the NPC elects the president of the state, appoints premier according to president's nomination, *ibid*

collective action impossible. Therefore, a standing committee exercises most of its powers. In some countries, a ceremonial head of state is also usually elected by the congress, such as the president of China after 1982. This may make the system appear very similar to semi-presidentialism in the formal structure. But in the Soviet Union, the head of state was the chairman of the Supreme Soviet.

On the other side, practically, the party is the supreme political force that pulls all the strings. The party-state originated from Lenin's revolution theory and practice.²⁵⁸ Lenin offered a manual for the dictatorship of proletariat. First, the organisation of the party functions as a mechanism for state-governance. Organisation here means both the internal control of the party and external mobilisation of the society. While in Western democracies public participation is via representational function of parties in state institutions, in a communist regime the party is the core state institution itself, which serves as a core channel for representation.²⁵⁹ Internally, the party has efficient and strong decision-making and implementation capabilities. Externally, as Huntington insightfully pointed out: "it maintains contact with the masses through a system of transmission belts: unions, cooperatives, youth groups, soviets. The state apparatus is simply the administrative subordinate of the party."²⁶⁰ Such "transmission belts" are the very basis for its organisational strength. The subordination of state is the second feature of the party-state. The party is the real political branch in the system, while the state (both executive and legislature) becomes the administrative branch. This political-administrative dichotomy differs with Western democracy's election-based political branch and tenure-based administrative branch.

This system of organisation is theorised and effectuated by the general principle of "democratic centralism", which stresses obedience and discussion from central leadership to local party cell. The basic meaning of this could be clearly summarised as follows:

*"Representatives and responsible organs were to be chosen by election, for a specified period, and were to be accountable and subject to recall. There and other mechanism to ensure the democratic component of the principle were balanced by an insistence that the decisions of higher executive organs should be binding on lower organs, and that the autonomy of local units of the party should not override the ultimate authority of the centre. Verticality and horizontality were in this way to be interdependent: clear lines of executive authority were stipulated, but executive organs were to be accountable to the membership."*²⁶¹

Democratic centralism is regarded as a key principle of Leninism. Lenin himself defined it as "freedom of discussion" but "unity of action."²⁶² This principle fundamentally rejected the system of checks and balances in the Western legal systems, but emphasizing on the unified will of the party and the uncompromised strength in carry out such will. As had been observed, "this Leninist ideology in turn

258Huntington, *ibid*

259 Huntington, Samuel P. *Political order in changing societies*. Yale University Press, 2006, Chapter 5, Section 7, "Leninism and Political Development".

260 *Ibid*, 341

261 Waller, Michael. *Democratic Centralism: An Historical Commentary*. Manchester University Press, 1981.

262 Partlett, William, and Eric C. Ip. "Is Socialist Law Really Dead." *NYUJ Int'l L. & Pol.* 48 (2015): 463.

placed the most statist and centralizing institutions and discourses of the Russian legal tradition at the center of the socialist legal system. In the early 1920s, the Soviet leadership restored a number of traditional Russian legal institutions, including the Tsarist system of state-centered constitutional law, an administrative approach to punishment, the procuracy, and a highly centralised system of courts.”²⁶³ Nevertheless, in practice, it is not an exaggeration to say that this principle was much more “centralism” than “democratic”. Therefore, it is also a kind of formality, because the centralised tendency of authoritarian regimes is mainly because of the *realpolitik* needs to secure power. With or without such theoretical niceties like democratic centralism, the exercise of powers will always be centralised, like in many non-communist yet authoritarian regimes.

This fact also leads to another crucial topic, that is, the legitimacy tension between the formality of the state apparatus and the fact of party dominance. The principle of democratic centralism, as a vague deliberative and decision-making principle, is supposed to ensure both participation and effectiveness of decision-making, and therefore may coordinate between two theoretically supreme authorities, i.e. the supreme assembly and the party, because it implies formulating consensus by adequate deliberation. But since it barely functions in practice, there needs to be other ways to solve a crucial question: which is more supreme, the party or the people (represented by assembly)? This is the fundamental tension within the communist regime. Chapter 7 will give a thorough and in-depth analysis on this topic.

3.3. Decision-making Structure in Communist Regimes

In communist regimes, the power allocation among state institutions is contingent upon their ties with party hierarchy. Communist parties are organised by the principle of centralism, anti-factionalism, and the absolute obedience of members.²⁶⁴ Superior-subordinate structures are extended to the whole party, running parallel to the formal political system. Most personnel in state institutions have overlapping identities in the party apparatus. It is the party hierarchy that determines the status and power of the corresponding state institutions. Generally, the central committee functions like the supreme congress within the party. Important political figures such as the premier, ministers, the president of legislature, and local party leaders will all be in the central committee.²⁶⁵ Similar with the supreme congress, the inner circle is the political bureau (which includes dozens of senior politicians) in the committee and the bureau's standing committee, which usually has 5 to 9 most senior party politicians, which includes normally the party leader, the premier, and some vice premiers, head of legislature, chief ideologist, and chief discipline inspector.²⁶⁶ This standing committee is supposed to be the real leadership of the whole regime. Usually, the party leader may take the position of ceremonial head of the state. The No.2 figure may take the premier, and the No.3 figure may take the leadership of the supreme congress. After the first generation of charismatic revolution leaders are gone, usually the standing committee exhibits more features of collective leadership. It functions as

263 Ibid

264 For more discussion, see Reshetar, *ibid*, 151-156

265 Its membership also includes purely legitimacy-producing representatives like ordinary workers and farmers.

266 Such as in China, see 胡鞍钢,《中国集体领导体制》, 中国人民大学出版社, 2013; Hu Angang, *The Collective Leadership of China*, Renmin University Press, 2013

a coordination and bargain-making platform for major factions.²⁶⁷ Nevertheless, it is noticeable that in the current leadership, powers are increasingly concentrated into the hands of the supreme individual leader. But the formal structure of this collective leadership is still retained.

The combined picture of the formal institutional system and the party system illuminates the real decision-making process in communist regimes. The fundamental and omnipotent agenda-setter is the party, or the standing committee of the political bureau. Important policies and decisions are initiated in several ways. First, the committee members who occupy leadership positions in the state institutions will implement the party's commands in their own departments. Second, the party gives legislative suggestions to the supreme congress before its yearly convention of the plenary session. Third, the party issues joint orders with the government or the legislature in the name of its central committee or central office. Fourth, within the party apparatus, the central authority initiates direct orders and campaigns to implement policy-decisions, such as anti-corruption and reform of administrative procedures. Though such orders are binding only within the party apparatus, the nearly universal party membership of the office holders in state institutions makes their force universal as well. In all of these mechanisms, the party's power has no jurisdictional limitations, though a functional division of power does exist. For instance, proposals on cadre management may be initiated by the organisational department of the party and financial policies by economic committee. Yet the final approval or delegation from the Politburo standing committee is required for such policies to be implemented.²⁶⁸

For such a party-to-state process to operate, several institutional features of state institutions need to be outlined. First, the plenary session of the supreme congress is big in size and only convenes infrequently (e.g. once a year); therefore, it remains a symbolic rather than substantial decision-maker. Second, the amateur-nature of the representatives usually results in the fact that they would be inactive in initiating their own agenda. Third, wide delegation and bureaucratisation exist in both the supreme congress and the party's central committee. The standing committee of the supreme congress and the politburo of the party central committee are the real functioning machinery within the two representative organs. Their powers are constitutionally delegated from the infrequently convened assemblies.²⁶⁹ They are in fact the bureaucracy within a representative assembly, which are the institutional bases for the party to control and direct legislative affairs. Fourth, the party and state institutions employed legal and administrative expertise for their legislation and policy-making.

3.4 Understanding the Legacy of the Leninist Tradition

Sometimes the communist tradition is easy to be misread. Partlett and Ip thought that:

“post-Mao reinvigoration of Russo-Leninist legal transplants provides an important—but underexplored—window into understanding both the possibilities and limitations of contemporary Chinese legal formal reform. These transplants help us to

267 Hu Angang, *ibid*, chapter 1

268 *Ibid*

269 Article 67, PRC Constitution

understand the formal institutions of the system and therefore to better understand both the ‘roots and routes’ of Chinese law.”²⁷⁰

However, based on previous investigations, it needs to be noted that their observation about Russo-Leninist impacts are not completely accurate, especially in the constitutional dimension. The CCP as a bureaucracy group could easily employ Leninist instruments to rule. But the re-definition of ideology, re-design of an open-access system, and greater level of institutional sophistication may suggest a change of its nature, which makes the CCP regime much closer to the traditional bureaucracy rule of China rather than a typical Leninist regime. Besides, some major propositions in Partlett and Ip’s article seem to contain mistakes. For instance, they argue that the establishment of National Supervision Commission (NSC) and the Inspector system is a direct product of Leninist legacy. However, even the semi-official interpretation by regime-affiliated senior administrative law scholar Ma Huaide has clearly associate it with China’s own tradition of a large system of supervisory bureaucracy.²⁷¹ More implicitly, another inspiration of the NSC is reported to be the Independent Commission Against Corruption (ICAC) of Hong Kong. Chinese tradition and Hong Kong experience have much weightier influence than the Leninist theories. Also, the simple fact that NSC represents an effort to put previous party function under the more legalised and normalised realm of state agency reflected that it at least should differ from the more politicised Leninist model.

Another example of their lack of sensitivity of Chinese political reality is their over-interpretation of democratic centralism. Their argument that democratic centralism is “a tool for national consolidation and centralisation” is not wrong in a formal and ideological sense - the PRC regime indeed elevates this principle to a very high position - however, this principle has seldom been given clear and detailed implementation rules. The CCP has strong discipline, due to the practical needs of ruling the country. But it is upheld by the detailed disciplinary rules and practices, not by delicate interpretations of democratic centralism. In this sense, democratic centralism is more of a political decoration than governing principle. Moreover, the wide and diversified practices and institutions of decentralization of powers also deny that the regime cares about only national centralisation. To a certain degree, it could be deducted that the Chinese tradition seems to be playing a greater role in coordinating the whole apparatus of the regime. Leninist tradition has real impacts, some of which are very important, such as the party’s dominance over state system. But the examples Partlett and Ip picked are clearly elements which are akin to being mere formalities.

If one looks deeper into the actual institutional practice and pay attention to the gap between reality and political rhetoric in certain contexts, even in the constitution itself, it would become more clear that the mere existence of similar texts and similar slogans may not suffice to conclude a dense influence of Leninist tradition, because there is always distance between formality and practice. For instance, Partlett and Ip also used the similar arrangement of a standing committee within the legislature to argue for the continued influence of Russo-Leninist tradition in China. This argument is technically correct, but it overlooks other connected dynamics. The standing committee of legislature is a common institution in communist regimes. How the

270 Partlett, William, and Eric C. Ip. "Is Socialist Law Really Dead." *NYUJ Int'l L. & Pol.* 48 (2015): 463.

271 <http://news.163.com/17/0505/15/CJMCN9AJ000187VE.html>

standing committee actually functions, an examination not undertaken by Partlett and Ip, reveals the significant resemblance and differences between the two political systems. It will be discussed in later chapters that the NPC standing committee is a major platform for building a merit-based bureaucracy and this is the approach for the empowerment of the legislature. This trend reflects influence of Chinese tradition, and also the similar emphasis on cadres functionality in Soviet tradition, but not the over-simplified structural similarity identified in Partlett and Ip's article.

To sum up, not uncommonly statements which apparently exhibit a Leninist tradition would be mere formalities, while the actual governing mechanisms may reveal much more influence from other traditions.

4. Summary

Introducing the western and communist traditions, this chapter lays the basic historical and institutional back ground for further discussion on constitutional hybridity in Chinese polities, where western, communist and Chinese traditions mingle together .

This chapter borrows a little bit the analysis of agenda-setting and veto-playing to illuminate the essential regime types in western traditions. In the formal framework, the presidential system features equal allocation of agenda-setting and veto powers. Therefore, the decision-making within presidential system is carried out by active political bargaining and mutual-checks. In contrast, the constitutional configuration of agenda-setting and veto powers in the parliamentary system goes to another direction, by placing agenda-setting into the executive power and holding it accountable with the confidence of the executive branch. The decision-making pattern, therefore, features executive dominance in legislative initiatives and quite weak veto playing by the legislature. The semi-presidential system aims to combine presidential and parliamentary elements, forging a dynamic pattern of power-allocation. According to the composition of legislature and government, based on electoral results, it may exhibit different features, either closer to a presidential system or a parliamentary system. The rise of the administrative law system enables western regimes to cope with the expansion of administrative state. Administrative law plays a similar function in modern China.

Constitutional framework of communist regime is essentially a vast hierarchy of cadres. The principle of "democratic centralism" prevails from central to local authority. The supreme leadership of the communist regime, though, may not only take the form of personal dominance. "Democratic centralism" also provides

legitimacy basis for a type of “collective leadership”. This collegial body of “standing committee of political bureau”, as is usually named, function as a supreme commission. The state legislature of communist regime, correspondingly, has haughty status but weak de facto powers. In theory, it is the supreme political authority representing the ultimate will of the people, resembling parliamentary sovereignty to some degree. But in practice its function is certainly much more formal. The executive apparatus of state, in contrast, wields much more substantive powers in a technocratic manner. It is the administrative part of the politics and administration separation, with the party, rather than the electoral entities, as the “political” branch. The later analysis on modern China will reveal that there is much more to this simplistic picture, but this general portrait provides a starting point to understand more complex dynamics within the PRC.

Chapter 5 The Historical Origins and Development of Constitutional Hybridity in Modern China

1. Introduction

This chapter will demonstrate how constitutional hybridity of different traditions originated and developed in modern China, to lay a historical background for further chapters. Such historical experiences share the main implications extracted from studies on constitutional hybridity. Constitutional hybridity was employed for revolutionary mobilisation, regime inclusion and governance rationalisation. Nonetheless, just like the philosophical reflections on a ‘mixed constitution’ suggest, the root for clashes between institutional incompatibility and legitimacy was also embedded, which will be explored in more depth in the three case studies.

After 1912, the newly born and fragile republican China suffered from political chaos and gradually chose to embrace a communist revolution and Leninist party-state as a solution for modernisation. The country also blended other institutional elements in the reformative era to further modernisation, following disastrous experiences with irrational political movements such as the Great Leap Forward and the Cultural Revolution. During this process, it will be shown that different constitutional traditions blended with each other and left institutional legacies for contemporary times. The initial effort to maintain a new republican regime modelled on Western polities failed due to unprincipled political struggles, and communist and Leninist movements gradually gained popularity in China. Both the then-ruling National Party (Kuomintang, KMT), the party that would come to govern Taiwan, and the CCP, the party that would come to govern Mainland China, embraced the Leninist model of the party-state to advance revolution and state-building.

The CCP localised and enriched communist traditions to construct a broader political alliance with peasants, intellectuals, businessman, and small landlords. Some institutions adopted for this purpose, including quota systems, satellite parties and political consultative conferences, have continued to influence the country after the new China was founded in 1949.

Meanwhile, the period between 1945 and 1949 was the watershed of KMT’s history and the prelude to the Republic of China’s rule in the Taiwan province. The ROC regime’s chaotic ending on the mainland included a new constitution written in 1946 after rounds of factional and opportunist political struggles. The major arrangements of executive-legislative relations in this constitution laid the foundation for the post-democratisation constitutional deadlocks in Taiwan, as will be introduced in greater length in the Taiwan chapter. How this constitution adopted such an institutional design is also highly relevant to the general historical course of this period.

The new PRC regime founded in 1949 was a hybrid political system. Under the guidance of the ‘new democraticism’ theory, the regime had some traits of the mixed constitution when it was created. The Soviet archetype was not blindly copied but was modified effectively to incorporate wider sectors of society into the new regime. Power-sharing mechanisms such as the quota system and the political consultative conference were heavily relied on. Meanwhile, the Leninist instruments for the party’s control, including centralised leadership, leading groups, and temporary institutions,

were never weakened as the party took control of the state. Together, they formed a mixed and complicated system. In the reformative era, the Chinese regime has further deviated from a type of Leninist authoritarianism to a Chinese type of bureaucratic autocracy. Along with influences from general democratic perceptions, Chinese tradition has been revived to enhance institutionalisation, inclusiveness and governance capacity. In this sense, it is no longer a sub-type of communist regimes but a distinctive political system with a remarkable level of constitutional hybridity.

These facts provide crucial historical background for further analysis. The concrete case studies on the PRC regime, Hong Kong and the ROC regime in Taiwan will be presented respectively in the following chapters.

2. Failure of the Republican Regime and the Rise of Leninist Party

2.1 Prelude: Chaotic Partisan Politics and the Rise of the Leninist Model

Since this thesis primarily focuses on the development of political institutions in China, it will be necessary to first discuss how the Leninist political party, which is the core institution of the party-state, arose in China.

After the establishment of the ROC in 1912, China witnessed the booming of party politics for the first time in its history. The newly emerged parties, including the most famous Revolutionary Party led by Sun Yat-sen, started to become the main actors in the political arena. Nevertheless, the activism of these parties was blemished by factionalism, opportunism, fragmentation and corruption,²⁷² which gradually led to the rise of the Leninist party to meet the needs of state-building, modernisation and self-improvement. The following factors were behind the rise of Leninist party.

First, there were almost no solid principles guiding party politics. Partisan opportunism twisted the designing of a constitutional framework. Second, parties were proliferating but had no clear policy, effective discipline and proper social basis. It was estimated that over 300 self-claimed political parties existed in China between 1912 and 1916,²⁷³ and some political figures such as elected lawmakers even joined four or five parties at the same time.

It was therefore no surprise that the politics and governance in the early ROC were extremely chaotic and that the public attributed the malfunctioning of politics to the institution of the political party. In the media and among the masses, the idea that 'partisan struggles harming the country' (党争乱国)²⁷⁴ became a public consensus. This fact echoed the scepticism of parties in the Chinese tradition. It was also a reflection that the lack of competitive party tradition made it harder for this new Chinese republic to deal with the rise of parties.

This is the crucial historical and social background for the popularity of Leninism in China. The people were disappointed by 'westernized'²⁷⁵ political parties,

272孙宏云. "再析民初政党政治失败的原因." *中山大学学报: 社会科学版* 1 (1999): 82-88. ; Sun Hong Yun, *Zai Xi Min Chu Zheng Dang Zheng Zhi Shi Bai De Yuan Yin*(Re-thinking Failure of Party Politics in the Early Republican Period of China), *Zhong Shan University Journal (Social Science Edition)*1(1999):82-88.

273 李金河. *中国政党政治研究, 1905-1949*. 中央编译出版社, 2007 ; Li Jinhe, <*Zhong Guo Zheng Dang Zheng Zhi Yan Jiu, 1905-1949*>(Studies of Chinese Political Parties, 1905-1949), *Zhong Yang Bian Yi Chu Ban She*, 2007, Chapter 1.

274 Li Jinhe, *Ibid*

275Those parties self-regarded as learning from western model of parties

and politicians also criticised the disorder brought about by a competitive party system. Sun had seriously reflected upon the failure of the old National Party (predecessor to the famous KMT) and concluded that learning from Western parties was both unsystematic and ineffective. According to Sun, weakness in organisation and discipline was the key reason for KMT's failure against other forces.

To solve this problem, KMT looked to the Soviet model of political parties. In 1924, after contacts with the Soviet Party and sending a delegate to learn about the Soviet Union's political organisation of the party, state, and army, KMT initiated a fundamental and massive reform of its organisational structure.²⁷⁶ Kuomintang had previously been an elitist revolutionary party that preferred to use diplomatic manoeuvres among the different warlords in China to achieve its aim of building a republic. After realising the necessity of learning from the Soviet model, Sun changed swiftly to embrace the idea of 'use the party to rule the state' (以党治国) and started to redesign the party's organisational system according to the Leninist model.²⁷⁷

First, the constitution of KMT copied the Soviet party's constitution of 1919.²⁷⁸ The two have the same structure and similar content and contained the following major sections in the same sequence: party members, organisational structure, central party unit, local party unit, discipline, finance, and party group. The reason for these similarities was easy to understand, and the new charter's draft was under the direct mentorship of the Soviet regime via a communist diplomat named Borodin. Kuomintang crafted a near duplicate of the Soviet Communist Party's charter but made a minor modification by adding a chapter about the position of Sun as the founding father and leader of the party. Perhaps more importantly, the new KMT fully embraced the Leninist ethos that this vanguard party was the only legitimate political organisation and other political forces were unqualified or simply anti-revolutionary.²⁷⁹

Second, the organisational structure and practices uncompromisingly copied the Soviet pattern. Kuomintang had been loosely organised, and the whole party was more like a personal faction of Sun. Membership registration was random and sometimes even undocumented, and there were few disciplinary mechanisms. The total amount of membership was 200,000 before this reform, but few participants were truly loyal. By transplanting the system of the Soviet Communist Party, KMT significantly strengthened its organisational competence. In particular, it started paying attention to the local populations and ordinary people by building grassroots party unity rather than focusing only on recruiting high-ranking social elites and intellectuals. However, KMT had never reached a comparable level of forging grassroots connections like true Leninist parties did, and this was considered as a technical reason for its eventual collapse in mainland China.

276 王奇生. *党员, 党权与党争: 1924-1949 年中国国民党的组织形态*. 上海书店出版社, 2003. ; Wang Qisheng, *Dang Yuan, Dang Quan Yu Dang Zheng: 1924-1949 Zhong Guo Guo Min Dang De Zu Zhi Xing Tai*(Membership, Power and Struggles: Organization of Chinese Nationalist Party from 1924-1949), Shang Hai Shu Dian Chu Ban She, 2003.

277 Ibid

278 Ibid

279 Ibid, The KMT officially declared that other parties were not allowed to share ruling power with it. But gradually, some political groups based on intellectuals and business elites became active as political parties.

Third, the discipline of KMT was seriously strengthened. The organisational principle of ‘democratic centralism’ was a core principle in communist parties and was also adopted by KMT, just with a different translation.²⁸⁰ This principle was not written into the constitution but was explicitly imposed by a special resolution of KMT’s first plenary conference, which was also a product of the Leninist reform. It required that the party membership should obey the will and orders of the party.²⁸¹

Fourth, perhaps most importantly, KMT copied the Leninist model of building a revolutionary army under absolute control of the party. The famous Huang Pu Military School (黄埔军校) in China was key to KMT's victory over the warlords and unification of China years later.

All these efforts eventually led to the new governing pattern of ‘use the party to rule the state’ (以党治国), which transformed the power structure of Chinese politics and the guiding spirit of it. Prior to KMT’s Leninist reforms, the main source of ruling legitimacy had been the constitution of the republic (however malfunctioning it was). After KMT’s reorganisation, the idea that the party should rule over state prevailed and was supported by a wide range of social sectors.²⁸²

Nevertheless, KMT ultimately enjoyed neither political success nor a moral reputation. When it lost the mainland to the CCP, the party was still weakly organised and ineffective. Even worse, it became astonishingly corrupt and incompetent. Historians have insightfully observed the serious degree of constitutional hybridity in KMT. Because of such institutional mixture, the KMT was not able to harness the positive effects of it, thus becoming rather vulnerable to the side effects caused by hybridity. On the one hand, the initial political theory of Sun was based on a Western model of democracy to reform China, and its institutional design for the state was generally a model that relied on the separation of powers. On the other hand, Leninist reforms brought communist elements into KMT's institutional system. Committees and units were established to enable the party to rule over the state, which was inevitably incompatible with a Westernised state system. The claimed guiding spirit of KMT, the ‘democracy’ ideal of Sun's theory, had difficulty accommodating the ‘party rule’ practices of KMT. Under such circumstances, the public and opposing factions often used the issue of incompatibility to question the rule of KMT. Even inside the party, some politicians regarded the lack of compatibility as a key reason for the weakness of KMT. As historians have summarised, KMT and its hybrid system had ‘no sincerity for democracy, yet no guts for dictatorship’ (民主无量，独裁无胆).²⁸³

2.2 The Birth of the CCP

When KMT arose and ruled China, the CCP had also been created by a small group of intellectuals. In its early years, the CCP had a rather simple institutional structure, but two fundamental elements were established and have not changed since

280 For instance, article 3 of KMT Constitution in 1924, “democracy with organization, liberty with discipline”

281 Ibid

282“此后政治中所争的将由法的问题变为党的问题。从前是约法无上，今后是党权无上；从前谈法理，今后谈党议；从前谈护法，今后谈入党；从前争法统，今后争党统。”李剑农：《最近三十年中国政治史》，上海太平洋书店 1932 年版，第 531 页；Li Jiannong, <Zui Jin San Shi Nian Zhong Guo Zheng Zhi Shi> (Political History of China in Recent Three Decades), Shang Hai Pacific Book Shop, 1932, page 531.

283 Wang Qisheng, Ibid

the party's founding. The first was a basic framework based on central committees that were elected by a plenary assembly. The second was the principle of 'democratic centralism'. Both features had been transplanted from the Soviet model.²⁸⁴

The CCP originated from the intellectual movements of Marxism in China. The success of the Soviet revolution made communism exceptionally appealing to Chinese intellectuals, who were desperate to rebuild the country into a strong and modernised nation.²⁸⁵ The utopian goal of a communist society also matched ancient China's ideal form of society, namely the 'society of great unity' (大同社会) that was based on egalitarian welfare and adequate material happiness.²⁸⁶ As discussed in chapter 3, communist ideas were highly compatible with the benevolent welfarism and egalitarianism of Chinese tradition.

The communist intellectuals initially organised certain small political groups to study and promote communist theories in different cities and provinces. In 1921, under the direct mentorship of the Soviet party via its agent organisation, the Communist International (Comintern), these communist groups gathered secretly in Shanghai and held the plenary conference that established the CCP. The following year, the CCP decided to join the Comintern during its second plenary conference, thus placing itself under firm control of Soviet regime.²⁸⁷ The early organisation of the party was quite simple but reflected the general pattern of its future structure.²⁸⁸ The national representative assembly would elect a central committee as the leading institution and would then convene annually to discuss and approve important decisions. In a simplistic manner, this structure partly resembled a parliamentary system. The political bureau resembled a cabinet government elected by the conference, but unlike a parliament, the plenary assembly only convened every five years.

2.3 Military Struggles and a More Centralised Party System

The young CCP soon encountered a series of challenges, which disrupted the peaceful environment for it to grow steadily. In 1927, after careful political calculation, KMT leader Jiang Jieshi decided to turn to the US and UK for patronage and support because the Soviets could not provide the aid he needed to control KMT and reunite China. Therefore²⁸⁹, KMT initiated a massacre against the CCP in 1927. A significant fraction of CCP members were killed, as were left-wing KMT members who sympathised with the CCP.

284 See the first party constitution of CCP,

http://news.xinhuanet.com/ziliao/2002-03/04/content_695953.htm

285 More detailed review of this history, see Van de Ven, Hans J. *From Friend to Comrade: The Founding of the Chinese Communist Party, 1920-1921*. Univ of California Press, 1992.

286 See 盛邦和. "中国“儒家社会主义”论析." *史学月刊* 4 (2007): 109-115.; Sheng Banghe, The Analysis on China's 'Confucian Socialism', *Journal of History*, 2007, 4

287 See 杨云若, and 杨奎松. *共产国际和中国革命*. 上海人民出版社, 1988.; Yang Yunruo, Yang Kuisong, *Comintern and Chinese Revolution*, Shanghai People Press, 1988

288 Ibid, the first party constitution of CCP.

289 The reason for KMT's slaughter on CCP also includes that, the CCP movement during that time became rather radical, workers and peasants were mobilized to conduct "proletariat dictatorship", occupying towns and cities to build communist societies and also holding endless strikes in cities to overturn capitalists. See Wang Qisheng, *ibid*

This turning point in CCP-KMT relations had important implications for the development of the CCP and the fate of China. When the normal and peaceful environment broke down, the CCP went underground and used revolution to achieve its political ideal. As a result, the institutional structure embedded in this approach became the dominant pattern for the whole party and has been retained through the present day.

The new tactics of the CCP were represented by Mao Zedong (Chairman Mao). He had disagreed with the previous approach of CCP leadership promoting a workers' movement in large cities because China was still predominantly an agricultural society and the industrial work force was quite marginal. Though he could not find a theoretical basis in classical Marxism and Leninism, Mao insightfully stressed that the victory of the CCP's revolution relied on the effective mobilisation of peasants, who made up the majority of the Chinese people.²⁹⁰ In this way, he redefined the class basis of communist revolutionary theory. Furthermore, he was a thinker and also a doer. After the massacre against the CCP in 1927, he retreated from large cities and went to the rural areas in the conjunction of several southern provinces to organise a peasant revolution and build a local communist regime. His success eventually attracted the central authority of the CCP to join him from Shanghai, where the central leadership had gone underground after the massacre and was suffering due to the harsh treatment by KMT.²⁹¹

The survival of this rural communist regime depended on military victory against the attacks from KMT armies, and the CCP army became the party's core institution. Since then, the organisational pattern of the CCP moved away from its earlier patterns. The party absorbed organisational elements of the military, which were actually quite compatible with the communist tradition given its stress on hierarchy and strong discipline. Nevertheless, one major difference between the army structure and party structure was that the existing feature of collective leadership became increasingly diluted into a mere formality. Strong personal leadership, an inherent quality of military command, emerged as an institutional feature of the CCP at that time.

Mao pioneered the building the CCP's army and can be considered the founding father of this red army. After 1927, he was the first to run the army and the local communist regime in the mountainous frontier of Jiangxi province, and he adopted several constitutional measures to forge a new form of army that was different from the warlords' army in China.²⁹² First, the party branch was established in the lowest levels of the army to allow a network of control for the CCP; there would be a party unit comprised of loyal party members in every unit of the army. Second, imitating the Soviet Union's Red Army, Mao established the political commissar system. In each combat unit there would be a party political commissar responsible for building morale and maintaining the loyalty of soldiers.²⁹³ Mao placed a heavy emphasis on the commissars' work. He drew on experiences from the army established by the intellectual bureaucrats in the late Qing dynasty and promoted systematic mental

290 鲁振祥. "略谈“农村包围城市”道路理论的形成与确立." *中共党史研究* 6 (1990): 11-22. ; Lu Zhenxiang, Lue Tan "Nong Cun Bao Wei Cheng Shi" Dao Lu Li Lun De Xing Cheng Yu Que Li, *Zhong Gong Dang Shi Yan Jiu* 6(1990):11-22

291 Ibid

292 See 张廷贵, and 袁伟. *中国工农红军史略*. 中共党史资料出版社, 1987; Zhang Tinggui and Yuan Wei, the History of Chinese Red Army, *CCP Party History Press*, 1987

293 Ibid

training to the army. However, the actual content of this teaching was quite distant from stereotypical ideological propaganda in communist regimes. It was more like combination of encouragement to defeat exploiters and Confucius moral teachings about being kind to people and being loyal to one's own faith.²⁹⁴ This was regarded as one important reason for the survival of the army. Third, pure egalitarianism was also a supporting principle of the army. All the members, regardless of position, had the same treatment in regard to food, clothes and other welfare, which struck a sharp contrast to the warlords' forces and KMT's army. This egalitarian ethos and a land redistribution policy won the backing of local peasants for the CCP.

Mao's explicit style of personal leadership triggered frictions with the central party, and historians have revealed that the CCP's central leadership was irritated by Mao's military-commander style²⁹⁵ because he ignored the established decision-making procedures of the party. Central leaders were concerned that the party would become an army's party, but they soon had to flee Shanghai to shelter with Mao. The rest of history had not materialised their worries. Though Mao's major political capital was his military talent and victories, he reinforced the party's absolute control over the army when assuming leadership of the whole party.

3. Mixed Government, Temporary Institutions and Internal Movement in Yan'an

The CCP's ruling methods were pragmatic, and it recongnized that dogmatic implementation of the Soviet model would suffered from severe setbacks. As a result, it deliberately modified its revolutionary theory and governing patterns by building a 'united front' with broader groups of society. It was therefore a 'Chinese' communist party that never wholly gave up the Confucian version of politics, even though the Leninist legacy still shaped the structure and ethos of the party and the subsequent Chinese regime.

The Jiangxi revolutionary region was not a lasting stronghold. After fierce attacks by KMT, the CCP finally fled northwest to the city of Yan'an in a situation that was not promising:

Twice defeated, routed from the revolutionary base areas they had constructed in the course of nearly a decade of guerrilla warfare and land revolution, on the eve of the

*Sino-Japanese War, the Chinese Communist Party and its besieged army were essentially confined to a poor and peripheral area of the Northwest, having narrowly escaped extermination in the course of the Long March.*²⁹⁶

In Yan'an, the CCP finally had a stable place to build its own government, which was soon occupied fighting against the Japanese invasion. During this time until the founding of the PRC in 1949, the CCP had a peaceful environment in Yan'an to experiment with the institutional design for its regime. The party used power-sharing

294 叶福林. 关于“三大纪律八项注意”几个问题的研究[J]. 中共党史研究, 2011(8):116-120 ; Ye Fulin, Guan Yu "San Da Ji Lv Ba Xiang Zhu Yi" Ji Ge Wen Ti De Yan Jiu, Zhong Gong Dang Shi Yan Jiu, 2011 (8):116-120

295 高华,《红太阳是怎样升起的:延安整风运动的来龙去脉》,香港中文大学出版社,2000; Gao Hua, How the Red Sun rises: the Process of Yan'an Rectification Movement, Hong Kong Chinese University Press, 2000

296 Selden, Mark. "Yan'an communism reconsidered." *Modern China* (1995): 8-44.

mechanisms to build a type of 'mixed government', with the aim of forging a broad political coalition and surviving the complicated situation. Such practices marked a difference from the Soviet tradition. Meanwhile, political struggles within the party gave rise to the pattern of using temporary institutions to carry out internal movements, the legacy of which gave rise to the paramount political dynamic in current Chinese politics.

3.1 The United Front and United Government

Unlike the pure Soviet model, where a political system was strictly based on the (theoretical) dominance of the worker class, the CCP did not strive to build a single-class regime during its early years. Mao's reliance on peasants was a continuation of traditional Chinese state-building style. In Yan'an, the situation did not allow the CCP to practice Soviet doctrines either because there were not many workers in that poor north-western region. The CCP's self-adaption used the Confucian tradition of building broad inclusiveness to strengthen its ruling basis. Such a multi-class basis was justified by its modified political theory of 'neo-democraticism'.²⁹⁷ This new theory was explained as exhibiting the traditional Confucian idea of 'gentlemen seek harmony but not uniformity.'²⁹⁸ Though arguably the political reality was an equally important reason to force the party to build a governing coalition, the inner spirit of inclusiveness in neo-democraticism was clear and quite compatible with Confucian vision of politics. The concrete institutional measures were as follows:

First, the CCP established a mixed-government in Yan'an to build a broad political coalition, and two reasons accounted for this. It was a time when fighting invading forces had become the overwhelming national priority, and the public called for all political forces to put aside their conflicts and unite to defend the country. Under those circumstances, the CCP advocated for a 'united front' to collaborate with all forces that wished to join the cause of repelling the invasion. The criteria to choose political partners was quite loose, as long as they were determined to fight the Japanese and did not resent the party. Their class backgrounds and ideological inclinations were somewhat overlooked, and this was the first time that this policy was elevated as a guiding principle for the CCP.²⁹⁹ During a national war against invaders, the CCP was clearly aware that imposing a 'proletariat dictatorship' and eliminating private ownership would be unwise. Therefore, the party designed a quasi-republican form of government to absorb local elites into the fibre of the regime.

297 韩学军, 李吉宁. 党在延安时期对中国新民主主义宪政的科学构想与实践探索[J]. 党政干部学刊, 2010(6):33-34.

298 吴兵兵. 论延安精神与儒家传统文化的内在关联[J]. 传承, 2015(12):9-11.

299 The similar idea also existed as the reason for the previous cooperation between CCP and KMT. And, this term had also been used by communist theorist Engels, and Lenin and Stalin. Nevertheless, it was at Yan'an that this policy was promote to an unparalleled height and scale. It could be argued that since then this principle has been embedded as a constant institution in CCP. When looking back at this period shortly before the founding of PRC in 1949, Mao in an article declared "united front" as the three key for CCP to succeed. The modern implication is that, within the CCP constitutional theories, "united front" provides a solid theoretical basis for the power-sharing mechanisms.

This government system partially used structures from a parliamentary system.³⁰⁰ A general assembly (参议会, Canyihui) had 'supreme power', and its representatives were directly elected by the people. The assembly would then elect the government and hold it accountable. After the government was formed, the plenary session of the assembly would end, but a standing committee would remain to oversee the functions of the legislature.

The crucial constitutional principle within this system was the 'One Third Principle' (三三制) that was suggested by the CCP, which was reminiscent of the traditional use of quotas in the ancient Chinese bureaucracy-building process to achieve a substantive type of equality, discussed in Chapter 3. The number of seats within the assembly would be allocated by certain quota to different social groups in elections, and the CCP volunteered to compete for only one-third of all seats. The remaining two-thirds of seats would be retained for other social forces to compete openly. The ministerial positions in the government would also be allocated under this pattern, meaning CCP members could occupy at most one-third of all the posts. This rule was welcomed and praised in the Yan'an region, and many local elites were elected and participated in policy-making via this channel. For instance, a major policy in the Yan'an regime, i.e., the policy of 'streamlining army and government' (精兵简政)³⁰¹, was proposed by a local physician who had been elected as a representative. His suggestion passed with wide support in the assembly.

3.2 Temporary Institutions and Internal Movement

The Yan'an period cannot be depicted as a time without conflict or trouble. Though the regime created an effective power-sharing structure, its exercise of power, especially in the Rectification Movement (整风运动), reflected the harsh dimensions of the regime.

With ideological unity, strong discipline and concentrated power, it was not uncommon for a Leninist party to use internal movement as a way to reshuffle the power structure. Nevertheless, for a large political organisation, the inherent ability of its institutional framework to facilitate internal movement matters a great deal for its power allocation and political stability.

In Yan'an, disagreements between factions of the CCP reached a final political confrontation.³⁰² Mao's faction tried to localise the doctrinal Marxism and Leninism in China by relying on peasants and rural areas. Mao also strived to win partial independence from Soviet control and sought to build his own regime via military struggle, which was contrary to the Soviet strategy to support KMT as the leading force in China. The Soviets mainly used the CCP as leverage to influence KMT, either

300 刘晨光. "“三三制” 民主: 原因, 问题与实质." *科学社会主义* 5 (2014): 148-151; Liu Chenguang, The Democracy of "One Third Principle": Reasons, Problems and Essence, *Scientific Socialism*, 2014, 5

301 At that time in Yan'an the public finance was under great pressure, since most resources needed to be devoted to fighting Japanese army in the frontline. Therefore, to reduce unnecessary units, both in army and government, seemed to be proper way to concentrate resources on the combat force.

302 Gao Hua, *ibid*

by cooperation or competition.³⁰³ The other major faction, which was formed mainly by party ideologists who were more aligned with the Soviet Union, preferred to follow Soviet orders and cooperate with KMT in a subordinating position.

The conflict between these two forces dates back to the very early period of the CCP, and their differentiating ideas, policies, and interests would demand a thick volume to be analysed properly. In addition, this thesis cannot fully document the actual process of their final confrontation and the political manoeuvres each side deliberately employed. However, what can be analysed here and what is most relevant to this research are the institutional elements that facilitated such movements. This political duel in Yan'an was conducted by combining with a movement to improve the atmosphere of the party (整风运动, Rectification Movement). It claimed to modify the problems of doctrinarism, factionalism, and formalism within the party.³⁰⁴ The pro-Soviet faction that represented these problems was finally defeated politically and was deprived of real power. The main institutional basis for implementing this campaign was establishing temporary institutions such as leading groups to carry out tasks, and this model has been embedded into the party ever since.

To initiate a systemic rectification in a party, the normal political procedures may not be conveniently used because the opposition may also hold a significant portion of power in regular institutions. Therefore, transferring power from normal institutions to a temporary one and using the new power-centre to promote internal campaigns became a handy instrument for players in this political arena. Following this logic, the 'Central Studying Committee' was established to be the leading organ for this campaign. To a certain degree, during the three years of this movement, this committee was the power-centre of the party.³⁰⁵ Mao was the nominal chair of this committee, which lacked formal rules to regulate its exercise of powers. There was no working code or party laws to regulate the ways it used power.³⁰⁶ The Central Studying Committee's major work was sending inspection delegates to party units and collecting the notes of high-ranking party cadres for supervision.

The political leveraging of temporary institutions was not coincidental. The constitution of the CCP established systematic rules about party institutions and their operational rules, including the powers and procedures of plenary assemblies, central committees and political bureaus. However, there were few rules about the powers and procedures to establish temporary institutions.³⁰⁷ The over-generalised principle of 'democratic centralism' could not effectively provide guiding rules for this issue. This was a gap between the Soviet model and the traditional Chinese model. Traditional Chinese bureaucracy was rigid and hierarchical enough to disallow the easy use of temporary institutions. But a revolutionary party might despise such

303 For academic studies, see McLane, Charles B. *Soviet strategies in Southeast Asia: an exploration of Eastern policy under Lenin and Stalin*. Princeton University Press, 2015. But perhaps Soviet's strategical focus on KMT was quite obvious by the fact the KMT was also invited to be a member of Communist International, while CCP as Soviet's disciple was still at conflicts with KMT

304 Gao Hua, *ibid*

305 Gao Hua, *ibid*

306 For the texts of all versions of CCP constitution during history, see the official website, <http://www.12371.cn/special/dzxd/>. In all these versions, there are no relevant rules regulating the propriety and procedure to establish temporary institutions.

307 See the different versions of CCP constitution during its history in the official database of the party's news agency, http://news.xinhuanet.com/ziliao/2003-09/27/content_1103387.htm

rigidity. The party at that time did not realize the potential danger of this leeway and did not have clear rules about it.

The party's constitution stipulated that the establishment and abolishment of the 'party's organisation' should be approved by the higher-level party committee. However, there were no rules about what procedures to follow when the central committee wished to establish temporary institutions. There was no higher authority above it, except the general assembly that only convened once a year. The vacuum of normative rules for these practices provided latitude for political contentions and empowered the leadership to strategically use various procedures such as political bureau conferences or central committee conferences to make decisions regarding the establishment of such organs.

4. The Hybrid Constitution of 1946 and the Outbreak of Civil War

In 1946, after victory against the Japanese invasion and several conflicts between KMT and the CCP and despite both parties holding numerous reservations, the two groups finally agreed to convene a national convention to settle crucial constitutional issues, including the form of state and government and relations between different parties and the state. The public expected that a new constitution could be made and a new coalition government could be established to restore peace and order. Nevertheless, the parties had grave disagreements, and though they finally passed a constitution, neither side would willingly form a coalition government. A civil war of three years then saw the collapse of KMT rule on the mainland and the rise of the CCP regime. While the constitution of 1946 could not be implemented on the mainland, it had enormous influence on Taiwan. The constitution's hybridity of parliamentary and presidential elements planted the seeds of Taiwan's hybrid and dysfunctional political system during and after democratisation and also created the fierce political struggles rooted in such issues. Zhang Junmai, a political scholar and crucial drafter of the new constitution, introduced strong parliamentary elements into the party-state system by establishing executive responsibility to the legislature and weakening the power of the presidency and National Assembly.

The main contention at the convention was over the model for the design of the new constitution. There were three possible patterns: the presidential model, the British model of a parliamentary system, and the Soviet model of party-state. Moderate democrats and the CCP both preferred the British model, which in the Chinese context would be that the previously strong president was elevated to a ceremonial and dignified position of the state. Meanwhile, real executive power would lie in the cabinet government, which would be formed by a parliamentary majority and be accountable to it.

It was on this point that Zhang's academic background had a significant impact. Zhang's educational experience in Germany made him a supporter of the Weimar Constitution.³⁰⁸ He used the formal structure of the Weimar model to accommodate an essentially parliamentary system with a dual-executive structure to weaken presidential power as a hedge against the possible dominance of KMT. In his plan, the Executive Yuan as the cabinet government would be directly accountable to the legislature. The president would act like the monarch of the UK but would hold some emergency powers like those of Weimar Germany's presidency.

308 Ibid <Zhang Junmai>

Putting aside the clear political motives behind such a design, there were also serious reasons for it. Constitutional hybridity was seemingly and deliberately pursued to overcome the flaws of each ad hoc archetype, though whether the approach resulted in additional or new problems is definitely worthy of discussion.

Zhang elaborated about the guiding spirits of constitutional design in several lectures.³⁰⁹ First, he argued constitutional design should focus on the long-term healthy operation of the constitution rather than manipulating it to accommodate interest groups. He believed the US had adopted the presidential system to strengthen the executive because the previous America confederation suffered from a feeble central government. In that case, a strong presidency was needed to ensure governing competence. For China, the situation was the opposite. A long tradition of imperial despotism needed to be counter-balanced by constraints on the executive power. Therefore, he rejected presidentialism, but paradoxically, he was also deeply worried about parliamentarism for China. He thought that only the two-party system rendered parliamentarism stable and that the fragmented party system³¹⁰ in China would cause a failure of governance. He cited the then-recent example of the chaotic French parliamentary system, where a multi-party situation caused frequent changes in government, as an example of problems with that type of system. As a result, his precise proposition contained many mechanisms that directly borrowed from the Weimar constitution to offset the drawbacks of a parliamentary system.³¹¹ The president should shoulder some 'national responsibility,' in that he or she could nominate the premier upon the consent of the legislature and mediate any possible confrontation between the premier and legislature. However, the government should be responsible to the legislature. The legislature's countersigning was needed to validate presidential decrees. There was also an effort to reduce the complexity of institutional frameworks. The National Assembly was believed to be redundant by Zhang because such sovereign powers should only be exercised by the people as whole rather than. For that reason, the body should be abolished, and the people could act upon their sovereign power by referendum and initiative.

This plan was opposed by KMT, especially the article stipulating that Executive Yuan would be responsible to the legislature.³¹² Yet it could not abolish this principle due to public pressure. It managed to impose some limitations on this arrangement, enumerating several limited ways that the executive would be accountable to legislature. First, the premier should make a policy address in the legislature and be inquired and supervised. Second, the legislature could ask the executive to reconsider its decisions. Third, the Executive Yuan could veto but should compromise or resign if overridden by a two-thirds majority of the EC.

309 张君勱,《中华民国民主宪法十讲》,商务印书馆,1947; Zhang Junmai, *Ten Lectures on the Democratic Constitution of ROC*, Business Press, 1947, Lecture 7

310 Though KMT regime was also a quasi-Leninist Party-State, it was not dominant to the degree of typical communist regimes. Other political parties or political groups were allowed to exist and operate. Also, at that time, the memory of how the early period of ROC regime was paralyzed by irresponsible and fragmented parties were still fresh.

311 Ibid, <Zhang Junmai>

312 For more detailed introduction of the history of constitutional drafting, see For more, see 张晋藩. *中国宪法史*. 吉林人民出版社,第六章,2004; Zhang Jinfan, *History of China's Constitutions*, Jilin Press, Chapter 6

Finally, KMT compromised and accepted the general plan, though with the above-mentioned modifications. The power of the presidency was inevitably weakened, and there is convincing historical evidence that this compromise was also a product of internal competition within KMT. An important figure engaged in this constitutional convention, Sun Ke, who was the son of Sun Zhongshan, aspired to take this chance to seize the position of premier, while elevating Jiang Jieshi to the high-ranking but un-powerful position of presidency. Sun Ke was not a military leader nor a capable party boss. His only political asset was his father's glory, and as such, he was eager to capitalise on this chance and realise his ambitions. Therefore, he facilitated the acceptance of this compromise and the hybrid constitutional design by sending the bill directly to the final vote stage so that Jiang and other KMT leaders found it too late to withdraw it.

The National Assembly eventually passed the bill. In this new constitution, the real executive power was placed in the Executive Yuan, which was highly similar to a cabinet government. The president was more like a ceremonial leader. The executive conference, which was supposed to be the main platform for policy-making, was to be led and summoned by the premier. The only success for KMT was to retain the National Assembly.³¹³ Nevertheless, this constitution was barely put into practice. Shortly after the convention, civil war broke out between the CCP and KMT, which ended in the eventual victory of the CCP while the ROC regime ruled by KMT fled to China's Taiwan province.

5. Founding of the PRC and the 1954 Constitution

5.1 The Founding of the PRC Regime

The constitutional procedure that established the PRC was the 'Political Consultative Conference' in 1949. As previously discussed, it functioned as a representative assembly to provide legitimacy for the new regime. The selection of representatives for the conference was certainly dominated and controlled by the CCP but with a considerable degree of inclusiveness.³¹⁴

This constitutional pattern marked a divergence from the archetypical Soviet model and reflected certain Chinese characteristics. First, there were institutional arrangements justified by 'new democraticism', including political consultative conferences and reserved government posts for social elites from capitalist and democratic backgrounds. These were not usually accepted in the typical Soviet model.³¹⁵ Upon the founding of the new regime, CCP leaders had reported this issue to Stalin and explained to him that China's situation was different from the Soviet

313 Ibid

314 张阳. 当代中国议行关系变迁研究. 复旦大学博士论文,第三章, 2012; Zhang Yang, The Change of Executive-Legislative Relations in Modern China, chapter 3, Doctoral Dissertation of Fudan University, 2012

315 It should be noted that, localized modification of communist model was not exclusive to China, but rather a quite common phenomenon. In the early period of post WW2 eastern European regimes, there were also open parliamentary elections and coalition between Communist parties and other parties. See Naimark, Norman. *The establishment of communist regimes in Eastern Europe, 1944-1949*. Routledge, 2018.

Union and therefore required a more inclusive constitutional framework.³¹⁶ Second, the PRC regime clearly rejected a federal structure because the unified tradition in China was so strong that other schemes had, at best, significantly weak support. Yet it needs to be noted that the PRC established special autonomous regions for ethnic minorities, though the nature of this institutional design was quite different from the typical federal structure.

The CCP's intention to share power with other social forces at that time should be considered as sincere, whether the party's motives were selfish or unselfish. Support from various social forces was necessary for successful state-building. The conference may not have wholly reflected the composition of the Chinese people; the unstable situation because of the still ongoing civil war made it difficult to hold a nation-wide election for representatives. Therefore, CCP selected the representatives by deliberation and consultation. The majority of social forces and groups were included. Among them, the main 'democratic' political parties and political groups, which sought to find an alternative to KMT and CCP's blueprint, continued to play a considerable role in government and in CPPCC through the current period.³¹⁷

The list of representatives for the constitutional convention was initiated and dominated by the CCP. Social groups generally welcomed the convention, and many of them went to Beijing to lobby the CCP for membership, including even some mafia and cult groups. The party had to cherry-pick the morally and politically decent ones. In order to organise the conference, a preparatory committee was established first. Among the 134 committee members, 37 of them were from the CCP and CCP-controlled groups such as the Chinese Liberation Army (PLA) and the National Worker's Union.³¹⁸

This political consultative conference passed the constitutional document called the 'Common Programme', as was previously mentioned.³¹⁹ It stipulated that the nature of the PRC polity was 'neo-democratism', a broad guiding ideology to combine the harshness of class-struggle in orthodox Leninism and facilitate inclusiveness of the regime. These claims were more than ideological decoration and were sincerely reflected in the composition of the government's first term. The system that this conference designed was a fusion of executive and legislative powers. A grand governing body called that People's Government Committee (PGC, 人民政府委员会) was elected by the conference to be the supreme organ of the new state. It resembled the Paris Commune, and held executive and legislative power together in one institution. The committee appointed an administrative branch called the 'State Council' (政务院) as the government in the narrow sense. Legislative power was exercised by this grand committee through a subcommittee of law, which was responsible for drafting bills and ordinances according to the will of the grand committee.³²⁰

The composition of this governing system continued the power-sharing approach used in Yan'an. The PGC consisted of 56 members, who held different positions from

316 刘文沛. 新中国政府体制的建构与苏联因素(1949-1954)[D]. 复旦大学, 2013. ; Liu Wenpei, Xin Zhong Guo Zheng Fu Ti Zhi De Jian Gou Yu Su Lian Yin Su (1949-1954), Fu Dan Da Xue, 2013.

317 孟红. "新中国《共同纲领》诞生记." 党史纵览 5 (2009): 4-10. ; Meng Hong, Xin Zhong Guo <Gong Tong Gang Ling> Dan Sheng Ji, Dang Shi Zong Lan 5(2009):4-10.

318 Ibid

319 Ibid

320 Zhang, Ibid

chairmanship to sub-committee positions. While Mao was the chairman, non-CCP politicians and non-partisan social elites occupied 27 of the 56 seats. The proportion indicated that it functioned as an actual 'united government'. In addition, 13 of the 30 ministers on the State Council were non-CCP 'democratic figures'. They held ministries such as light industry, agriculture, transportation and tele-communication, which were real-power ministries and were far from mere political decoration.³²¹

5.2 The 1954 Constitution

In 1954, after the regime was consolidated and the Korean War was over, the PRC finally made its formal constitution. The 1954 Constitution established the institutional basis for the PRC through the present era. While the 1982 Constitution modified the political system, which will be discussed later, the main institutional patterns emerged in the 1954 Constitution.

5.2.1 The Basic Institutional Framework

The 1954 Constitution was drafted according to the requirements of the 'Common Programme', in which a new constitution featuring the People's Congress as the fundamental political institution would eventually replace the 'Common Programme' as the appropriate source of constitutional order for the new regime. The constitution was drafted by the CCP and then presented to the 'Constitution Draft Committee' (宪法起草委员会) that had been established under the PCG. The committee included politicians from the central government and social elites from relevant fields. After several rounds of deliberation and modification, the final version was passed by the new National People's Congress (NPC) in October 1954.³²²

If one only considers the text, the 1954 Constitution of the PRC was quite liberal. Typical fundamental individual rights were provided by the document, and the institutional structure for the state was based on the People's Congress system, which the Constitution stated was the fundamental political institution of the regime. The former People's Governing Committee was replaced by the NPC, which functioned as the supreme political authority and to a certain degree resembled the parliamentary sovereignty of the UK. However, at least nominally, the PRC regime was much closer to popular sovereignty.³²³ The central government would be elected by the NPC and be accountable to it. The difference was that NPC did not exercise the vast range of executive powers that the PGC once had, and the NPC would function more like a standard legislature. The 1954 Constitution also officially recognised the State Council as the supreme administrative organ of the state. At least in text, the executive-legislative relations in China's constitutional order had reached a more balanced pattern, which has lasted until the modern period.³²⁴

321 Ibid

322 韩大元,《1954 宪法制定过程》, 法律出版社 2014 ; Han Dayuan, *The Making of 1954 Constitution*, Law Press, 2014

323 Article 2, 1954 Constitution. It stipulated that all powers belong to the people, and the people exercise these powers through the institution of people's congress. Therefore, it seems that it contains some parts of both the principles of popular sovereignty and parliamentary sovereignty.

324 Article 2, Article 21-52, 1954 Constitution of PRC, official texts available in NPC website: http://www.npc.gov.cn/wxzl/wxzl/2000-12/26/content_4264.htm

5.2.2 The Presidency: A Third Centre of Power

Executive-legislative relations in the PRC regime did not form a structurally concise bilateral pattern due to the third centre of power held by the presidency.³²⁵ It was personally proposed by Mao and could only be taken by him, in terms of both popular support and real political authority.³²⁶ This institution added a layer of subtlety and complexity to China's constitutional framework. Though the NPC was constitutionally recognised as the supreme political authority, the position of a state leader would imply that the presidency, the NPC, and the legislature would all share power.

In the 1954 Constitution, the institution of the presidency was designed to suit the organisational needs of a Leninist party, which were to forge clear and centralised leadership. The presidency was designed to Mao's idea, and he explained the chief function of a state president on several occasions, including during the deliberative conferences of the constitutional drafting committee.³²⁷ There were two major concerns. First, coordination between the NPC and the government would be necessary. Mao explicitly claimed that the third branch of the presidency could make the political system safer from malfunctioning because the risk of all institutions becoming dysfunctional at the same time would be lowered.³²⁸ In addition, the presidency could buffer the potential tensions between the central government and the NPC. Second, in times of emergency, the presidency could play a critical role in concentrating all powers to act effectively and to guard the state. This was quite likely a reflection of the tense diplomatic and geopolitical environment that the PRC faced during the Cold War.

The rationale for the presidency may indicate a twisting of the inherent logic of the PRC's nominal constitutional arrangement. The NPC as the supreme organ of state power seemed to need no coordination or interference from other institutions, interference which would risk violating the people's will as represented by the NPC and could trigger a constitutional crisis. The central government should be held accountable to the NPC, a quite clear and inherently logical approach for the quasi-parliamentary system. Nevertheless, the presidency could also hold the government accountable, thus putting it into a dilemma.

To ease these potential incompatibilities, the final version of the constitution established the presidency be electorally based and overseen by the NPC, which would elect the president and could also remove him or her. The strong opinions to select a president by a direct, nationwide popular election were rejected.³²⁹ However,

325 This position was actually called the "Chairman of the State". Yet, nowadays it is usually translated as the president of China, maybe to facilitate the easy and quick understanding of its nature. In this thesis, it will be referred to as the president.

326 Han, *ibid*

327 *Ibid*

328 *Ibid*

329 *Ibid*

the power conferred to the president could still overshadow the government³³⁰ and the NPC, which was always under strict party control and not fully capable of effective action.

Two powers³³¹ were generally regarded as crucial to making the presidency a real-power position rather than a ceremonial office. First, the president could summon and host the ‘Supreme National Affairs Conference’ (最高国务会议). The clause that appointed the president as the chairman of this conference indicated that he or she could institutionally dominate in this conference. The attendees at the conference should include the vice president, the speaker (Chairman) of the NPC and the premier who leads the central government. Other ‘relevant’ people could be flexibly selected. In this manner, the more-or-less separated powers could be reunited in the hands of a supreme state leader. This arrangement enabled the president to trigger an emergency law-making and decision-making channel, resulting in both executive and legislative institutions becoming potential subordinates. Mao did not frequently use this channel to exercise power because his personal authority could spare him this process but the jeopardy that this power could cause was conspicuous enough.

The second power the president was conferred was that of leading the military. This could cause potential conflicts with the NPC because the sovereign assembly should have control of all important affairs, including the exercise of military power.³³² The more far-reaching influence was that the dual leadership of both the state and army led to a power ‘trinity’ in the CCP regime that constituted the leadership of the party-state, meaning that the presidency, party general secretary and military commandship could be taken by the same person. Considering the Chinese tradition of centralised leadership, it was no wonder that a national president would be given military command. More importantly, in such a tradition, the commanding the military was the most crucial part of real leadership, especially considering the CCP’s history of military struggle and the famous mind-set of ‘Political Power grows out of the barrel of a gun.’. The separate allocation of military, party, and government leadership was generally regarded as causing instability, and this is why the CCP deliberately placed these powers into a single leader and created clear political authority in the reformative era.

330 There are at least two strong powers of the Presidency. First, it is the supreme leader of military force. Second, the president can summon an assembly of “supreme national affairs assembly” and preside over it. This in fact enabled the presidency to trigger an emergency law-making and decision-making channel, making both the executive and legislative institution potential subordinates of it power.

331 Article 42, 43, 1954 constitution of PRC, *ibid*.

332 The military leadership power was only vaguely presented in a general manner. The actual mechanisms to decide on issues about war and peace between the NPC and the president were not carefully established. The NPC, according to the clause, had the power to decide on issues about war and peace. But whether the president's military power suggested his or her overlapping duty in this domain was never clear. Such vagueness is an inherent problem of PRC constitution. The solutions over years was to develop a series of convention-like rules, such as the power "trinity", to underpin the orderly operation of power.

5.2.3 The National People's Congress

The NPC was not merely a central legislature but a vertically structured (though not hierarchical in theory) state system that operate at both local and national levels. Therefore, in the PRC regime, the structure of representation is a vertically transmissive type, at least in the text of constitution. This pattern strikes a contrast with the Soviet system. The USSR's Supreme Soviet, which was similar to and also the original archetype of China's People's Congress, was directly elected by different constituencies. This indirect representational pattern may have reflected the Chinese tradition of doubting the direct mobilisation of the masses and may have also indicated the need for a party-state to ensure the control of a representative system.³³³

According to the doctrinal communist state-design, the NPC should be the people's institution to practice democracy. The initial years of the NPC, especially the first term (1954-1957), were regarded as a period of orderly development, and the body was viewed as well functioning.³³⁴ Its democratic tasks seemed to be properly fulfilled, and the regime operated with a considerable degree of plurality and inclusiveness at that time. The basic duties of reflecting the people's voices, initiating policies and supervising the party and government were generally satisfied. Via serious deliberation and vibrant discussions in its first term, the NPC passed important 'plans', which were similar to legislation in Western democracies and mainly focused on industrialisation and the state's economic growth schemes.

Also during the first term, the annual amount of the representatives' policy initiatives and other suggestions rose from 34 to 243.³³⁵ Likewise, the CCP was sincere in setting a good example in this first term. Liu Shaoqi, who was the number two leader of the CCP, took the position of NPC chairman and was eager to encourage the voices of representatives and the people. Yet with radical political movements escalating (e.g. the anti-rightist movement and the Great Leap) and the political order deteriorating, the later terms of NPC suffered from disruption and paralysis. When the Cultural Revolution broke out, the NPC became a nominal institution.

5.2.4 Rise of Leading Group Mechanisms

The 1954 Constitution does not mention the nature and power of the leading group. Nevertheless, the party to retained de facto control over the state apparatus. Even though the constitution does not explicitly grant specific powers or roles to the leading group, the mechanism has remained a core element of governing through the modern era.

The leading group in the Yan'an period was a temporary institution. In the PRC era, it was institutionalised to strengthen party's concentration of power.³³⁶ In particular, under the planned economy, government departments covered various industries and domains. The party, if having no direct institutional ties with them and no effective coordinating mechanisms over them, might find itself detached from the

333 Han Dayuan, *ibid.* A main reason for such indirect election was the technical difficulty to organize such large-scale election in a poor country. Nevertheless, the other implications could also be extracted.

334 盛林. “两会机制” 研究. Diss. 2009.; Sheng Lin, On the "Two Session (NPC and CPPCC)System", doctoral dissertation of Nankai University, 2009

335 *Ibid*

336 周望. “中国 “小组” 政治组织模式分析.” *南京社会科学* 2 (2010): 77-81; Zhou Wang, The Analysis on the Politics of Leading Groups in China, Nanjing Social Science, 2010, 2, 77-81

actual process of policy-making. To stop this momentum and enforce its will more directly, the CCP established five leading groups in the party on 'Finance, Politics and Law, Foreign Affairs, Science, Culture and Education'. The direct motive for building the groups was to promote the party's radical economic policy of the Great Leap. Government departments were under the leadership of relevant leading groups, and the heads of these groups would coordinate ministerial business among the various agencies. This pattern, as mentioned, continues to the present day.

5.3. The CPPCC: Confucian Inclusiveness and Elite Collaboration

With the establishment of the NPC as the sole legislative assembly, the role of the CPPCC changed to a consultative and inclusion mechanism, and its influence persists into contemporary times.³³⁷ In the 1982 Constitution, it was stipulated that the CPPCC continued to function as a crucial power-sharing mechanism³³⁸ that featured 'broad representativeness.'³³⁹ However, the function and structure of CPPCC had already been set after the 1954 Constitution. Due length limitations and the necessity of analytical clarity, this dissertation will not make CPPCC a main topic. Yet it still worth some discussion because it is an example of hybridity in the PRC regime.

The CCPCC system reflected certain influences from the Chinese model of politics rather than Soviet version. Indeed, the Soviet system and other communist regimes in Eastern Europe did not have formal inclusive institutions like the CPPCC. Jowitt has acknowledged such regimes' efforts to include wider social sectors into their decision-making and productive systems, but these efforts were not institutionalised. Rather, inclusion efforts were improvised policies that responded to political contingencies from time to time and made careful adjustments to official ideologies. They have:

'taken the form of placing relatively greater emphasis on the weight of empirical premises (in contrast to ideological assumptions). Such an emphasis creates a more critical, less dogmatic orientation toward problem definition and problem resolution, in part through a greater appreciation of discussion, consultation, and experimentation. Finally, expansion of the productive system in these societies has resulted in placing greater emphasis on merit and procedural criteria. This emphasis indicates a heightened appreciation of formal rationalisation as an efficiency- and resource-expanding process.'³⁴⁰

A most comparable mechanism to formal institutionalisation seemed to be the 'Obshchestvenniki'. They were 'party members who, while active as consultants and even as officeholders in the party organisation, are not full-time party apparatus workers'.³⁴¹

337 Chen, Minglu. "From Economic Elites to Political Elites: private entrepreneurs in the People's Political Consultative Conference." *Journal of Contemporary China* 24.94 (2015): 613-627.; Regime Inclusion and the Resilience of Authoritarianism: Local People's Political Consultative Conference in Post-Mao Chinese Politics

338 Preamble of the constitution: "中国人民政治协商会议是有广泛代表性的统一战线组织，过去发挥了重要的历史作用，今后在国家政治生活、社会生活和对外友好活动中，在进行社会主义现代化建设、维护国家的统一和团结的斗争中，将进一步发挥它的重要作用。中国共产党领导的多党合作和政治协商制度将长期存在和发展。"

339 1982 Constitution, *ibid*

340

341 *Ibid*

The CPPCC system was not a perfect participatory channel, but being an exceptionally formal institution, this system was much less coarse and crude than similar practices in the Soviet Union and other communist regimes. It did not have determining power over decision-making but was effective in the consultative process and as a collaboration mechanism. Political consultation is not democracy. Nevertheless, studying the body's functions could better explain how the regime persisted and absorbed a broader range of opinions into the decision-making structure. The CPPCC mechanism and the CCP's corresponding 'united front' policy reflected the Confucian idea of pursuing agreement in politics and were facilitated by the realpolitik consideration of survival and development in the revolutionary era.

Its operations can be analysed in three layers. First, in the constitutional context, the CCP declared the Political Consultative Conference as the main organisational form of the 'People's Democratic United Front'. The CCP explicitly hoped it could play the role of an 'upper chamber'³⁴². This term mainly referred to the upper chamber in the Westminster system, where the aristocracy provided another layer of deliberation. However, the CPPCC in the Chinese system notably has only a consultative function. It cannot exercise any formal power in legislation. In the CCP's class-based political theory, the social elites in the CPPCC were a cooperative type of 'aristocracy'. They were progressive figures in other classes who supported the leadership of the CCP in the path to socialism and communism. In addition, via the CPPCC, a wide range of social sectors such as industries, businessman, religious leader, artists and scholars were included into the outer circle of higher politics, which helped create legitimacy for the CCP regime.

Second, closely related to issues of legitimacy, the CPPCC, the party's 'united front' work and the satellite 'democratic parties'³⁴³ formed delicate and systematic mechanisms for elite collaboration.³⁴⁴ This may be key to understanding how the authoritarian regime won support in the middle and upper classes of society, especially after changing to a market economy when capitalism revived and the middle class arose. One institutional feature to be noted was that the CPPCC, like the NPC, was not a mere a central-level assembly but a grand system that ran from the top to the bottom. The CPPCC system reached into the county level. This vertical structure meant that the CCP could effectively contact and collaborate with a great majority of social elites at all levels. To use the party's term, this mechanism indeed could 'unite' the targeted classes and groups. The establishment of the CPPCC system and the existence of satellite 'democratic parties' in China were also a notable institutional difference between the CCP and the Soviet regime. In the Soviet state, although a second chamber to accommodate the federal structure was used, there was no explicit collaboration of elites or a participation system like the CPPCC.³⁴⁵ Members of the CPPCC were chosen not by election but by selection. The nominee

342 Han Dayuan, *ibid.*

343 During the first half of 20th century, in China numerous political parties and groups emerged besides KMT and CCP. Though most of them did not last long, there were several influential political parties consisting mostly of intellectuals and social elites. After 1949, Eight of them were recognized by the CCP and constitution.

344 Xiaojun, Yan. "Regime inclusion and the resilience of authoritarianism: the local people's political consultative conference in post-Mao Chinese politics." *The China Journal* 66 (2011): 53-75.

345 Meyer, Alfred G. *The Soviet Political System: An Interpretation*. Random House, 1965.

lists were discussed and negotiated between the CCP (mainly through ‘united front’ department), the satellite ‘democratic parties’, professions and social groups.

Having made this analysis, it should not be understood that CPPCC was reoriented to be a platform for social elites to seek patronage and make political trade-offs with the CCP.³⁴⁶ Though varying degrees of transactions did exist in different times and institutions, the CPPCC has not had policy-making impacts. This goes to the body’s third function of representing interests and building a consensus, which should be what its name actually suggests. Accurately assessing the effectiveness of political consultations in the CCP regime would be seriously hindered by the complexity and opaqueness of its decision-making style.

6. The Reformative Era and the Continuation of Constitutional Hybridity

6.1 The 1982 Constitution and Reformative Order

In 1978, the annual plenary session of the CCP passed a resolution to conduct the policy of Reform and Opening Up. Reforms changed the previous political and social structure, causing clashes with old political and legal norms. A new constitution was therefore needed to consolidate and protect those reforms. In 1982, the NPC passed a new constitution that has been a cornerstone of the current constitutional order through the present era. In the reformative era, the archetypical communist model was gradually modified by incorporating more institutional elements from both Chinese and Western traditions.

Generally speaking, a core feature of a reformative political order is the loosening of rigid central control. This change in China was driven by real political needs, but it also reflected the Daoist tradition of releasing the vigour of private initiatives and natural evolution, such as can be seen in the famous saying of Deng Xiaoping, ‘crossing the river by touching the stones’. In regard to the institutional dimension, the various measures of decentralisation of political and fiscal activities have long been studied and argued as a source for China’s socio-economic transformation.³⁴⁷ The quasi-federal structure and political tournaments³⁴⁸ in China is a fascinating topic but is beyond the scope of this research. Therefore, central-local relations in China will not be explored in length. However, it needs to be noted that the Daoist tradition underpins a wide array of institutional measures to diffuse political powers and rationalise decision-making, which will be discussed in later chapters.

346 Tsang, Steve. "Consultative Leninism: China's new political framework." *Journal of Contemporary China* 18.62 (2009): 865-880. Xiaojun, Yan. "Regime inclusion and the resilience of authoritarianism: the local people's political consultative conference in post-Mao Chinese politics." *The China Journal* 66 (2011): 53-75.

347 For instance, Jin, Hehui, Yingyi Qian, and Barry R. Weingast. "Regional decentralization and fiscal incentives: Federalism, Chinese style." *Journal of public economics* 89.9-10 (2005): 1719-1742.

348 Zhou, Li-An. "The Incentive and Cooperation of Government Officials in the Political Tournaments: An Interpretation of the Prolonged Local Protectionism and Duplicative Investments in China [J]." *Economic Research Journal* 6 (2004): 33-40.

The 1982 Constitution was a crucial document and formed the legal basis of the current political order in China. The charter enhanced the regime's level of institutionalisation. First, it stipulated that all the parties, forces and social groups should conduct activities with the constitution as the ultimate guide.³⁴⁹ Second, it abolished unlimited terms for state leaders,³⁵⁰ although this limitation has recently been overturned³⁵¹. The president, the premier and the chairman of the NPC all became restricted to two consecutive terms, which was not part of the 1954 Constitution.³⁵² Studies have shown that one reason for this new rule was to learn from the democratic rules in Western countries.³⁵³ Avoiding the tragedy of the Cultural Revolution and the personal cult was clearly a chief reason, but term limits in a presidential system offered an easy and available experience to copy. Third, the 'leadership of the party' was highlighted in the preamble of the constitution as a self-evident historical fact but also as a source of the party's legitimacy and power to rule. This emphasis was clearly a continuation of the Leninist tradition of the vanguard party. Fourth, the NPC was strengthened to have more effective powers. The basic idea was to further fortify the standing committee of the NPC and make it a de facto legislature that would be more effective than the previous system. Later chapters will demonstrate that the main way of strengthening the NPC was to enhance the capacity and function of its internal bureaucracy, a reflection of the Chinese tradition to rely on meritocratic bureaucracy.

6.2 Party-state Separation and Redefining Social Basis

Though it was not explicitly stipulated in the constitution, party-state separation is certainly a core institutional structure of the regime. Its manifestation in regard to political representation and legitimacy is the dual-representation structure, which will be a main theme of the next chapter.

Separation of state and party was a naturally logical move forced by the communist tradition in which the source of legitimacy came from a supreme assembly, which created a vast state apparatus. Furthermore, it is in the Daoist nature to promote thriving policy initiatives and policy experimentation. During the Cultural Revolution, the party took over everything and left the state apparatus almost paralysed. Deng Xiaoping regarded this as a source of disorder and also a violation of the doctrines of communist democracy.³⁵⁴ The self-claimed democratic nature of communist parties required proper state institutions (even if formal) to prove the democratic nature of the regime. Following this logic, the party retreated from interfering with governance directly.

349 Preamble, 1982 Constitution of PRC, Official

texts:http://www.npc.gov.cn/npc/xinwen/node_505.htm

350 Previously, article 79, PRC Constitution.

351 http://www.npc.gov.cn/npc/xinwen/2018-03/12/content_2046540.htm

352 Article 66,79,87, the Constitution of PRC

353 刘荣刚. 1982 年宪法的制定过程及其历史经验[J]. 当代中国史研究, 2005, 12(1):41-49.

354 邓小平《党和国家领导制度的改革》《邓小平文选》第二卷,人民出版社,1994 ;Deng Xiaoping, On the Reform of the Leadership Institutions of Party and State, *Selected Works of Deng Xiaoping*, Vol 2, People's Press, 1994

Deng made a speech titled ‘Reforming the leadership institutions of the Party and State’ in an enlarged meeting of the political bureau on 8 August 1980.³⁵⁵ This speech sharply analysed the following problems inherent to the Chinese regime: bureaucraticism, over-concentration of power, political patriarchy, life-tenure of leaders and privileges of multiple types.’³⁵⁶ In the speech, he further elaborated on the content of the listed problems. Putting aside the customary political rhetoric of the CCP, most of them referred to the typical arbitrariness, corruption and privilege that were commonly understood worldwide. On other occasions, Deng also identified the undermining of governance efficiency as a major problem of party-state fusion, directly criticising the rigidity and passivity of a government apparatus that dared not push forward any initiatives unless explicitly approved or encouraged by party authority.³⁵⁷ Among them, the bureaucraticism and the over-concentration of power may have had the most crucial constitutional significance. While his criticism on bureaucraticism was mainly about individual bureaucrats who abused power and suppressed people,³⁵⁸ he rightly related it to the socialist system and the planned-economy governance in his analysis of the causes. According to him, the party and state at various levels had mistakenly interfered in many matters that they should not have touched and in which they did not have competence. Moreover, he also traced the root cause to the lack of systematic administrative laws and accountability rules. Deng’s thoughts were not exceptional. In the older generation of senior leaders, the disastrous memories of the Cultural Revolution constantly reminded them that some degree of reform was necessary, in particular the constraint on arbitrary personal power.³⁵⁹ In his criticisms of the over-centralisation of powers, he proceeded to examine the relations between the party and the state. To him, the over-concentration of political powers resulted from the excessive emphasis on the unitary leadership of the CCP. Deng also explicitly pointed out the lack of power separation among the party, government and society (the society as in the corporatist state). Deng also mentioned the lack of power decentralisation in economic organisations and mass organisations. These arguments set the fundamental institutional theme of the party’s later reforms, in particular the party’s redefinition of its ruling style and decentralisation of powers. Later at the CCP’s 13th plenary conference, the principle of party-state separation was even highlighted in the meeting’s political report. A system of introducing election-based political posts and

355 Deng Xiaoping, *ibid*, official text :

http://www.qstheory.cn/zl/llzz/dxpwjd2j/200906/t20090630_4642.htm

356 The term “leadership” in the context of Chinese language sometimes is similar to governing system.

357 See memoirs of Wu, <http://cn.nytimes.com/china/20140930/cc30wuwei31/>

358 In other occasions, he also counted the rigidity and passivity as a manifestation of bureaucraticis, *Ibid*.

359 For instance, see the remarks of Ye Jianying, a crucial leader in the early reform era, 陈弘君. "叶剑英对开启中国改革开放大业的历史性贡献." *中共党史研究* 5 (2007): 017; Chen Hongjun, Ye Jianying’s Historical Contribution to the Reform and Opening up of China, *Study on the History of Chinese Communist Party*, 2007, 5, 17; Also, see the influence of Peng Zhen, the then NPC Chairman, 朱力宇, and 丁乐超. "彭真民主法制思想及其对依法治国的指导意义." *法学杂志* 36.7 (2015): 53-61.; Zhu Liyu ,Ding Lechao, Peng Zhen’s legalist thoughts and their guiding implications for rule the country by law, *Law Journal*, 36.7 (2015): 53-61

tenure-based civil service was proposed, but the 1989 event led to the rejection of the entire plan. Still, this principle has never been officially changed or denied.

In addition, party-state separation and the corresponding socio-economic transitions prompted the CCP to redefine its social basis, which reflected a Confucian version of political benevolence and inclusiveness. This change has fundamentally influenced the representativeness and power-sharing arrangement of the party. In 2002, the CCP added the thought of 'Three Represents' into its constitution and declared it as a guiding principle. It claims to re-forge a broad social basis for the party, stating, 'The Party must always represent the requirements of the development of China's advanced productive forces, the orientation of the development of China's advanced culture, and the fundamental interests of the overwhelming majority of the people in China.'³⁶⁰

Penetrating the ideological mist, it simply indicates the CCP's expansion of its social basis. This change removed the shackle of the revolutionary class-based narrative and enabled the party to accommodate the new forces that emerged during reform.³⁶¹ The so-called 'capitalists', entrepreneurs, businessmen and others were allowed to join the party because they counted as part of the 'development of China's advanced productive forces'.

6.3 The Change of Presidential Power and Formulating the Power 'Trinity'

The presidency was abolished during the political chaos of the Cultural Revolution. It was revived in the 1982 Constitution without the substantive powers conferred by the 1954 Constitution. The power to preside over the National Affairs Conference and to lead the military were removed, leaving only procedural and ceremonial powers such as promulgation of laws and signing of political appointments. The principle of a power 'trinity' was gradually formulated, meaning that all political and military power should be concentrated in the hands of a single supreme leader, which was obviously quite compatible with the Leninist tradition of power concentration.

Nevertheless, the presidency may not be solely ceremonial leadership. According to the constitutional texts, it still enjoys a certain degree of executive powers, although the concrete mechanisms to exercise such powers may not be clear. The president can nominate the premier, who would then need to be approved by the NPC. This gives the president partial power in political appointments.³⁶² In addition, the trend in recent years seems to be increasing the diplomatic power of presidency as demonstrated by the 2004 constitutional amendment that the president shall have the power to represent the state and conduct state activities, which mainly refers to diplomatic activities.³⁶³ Previously, the diplomatic power of the president was mainly ceremonial and included actions such as appointing ambassadors based on the

360 PRC Constitution, 2004 modified version, see

http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm

361 More discussion, see Dickson, Bruce J. "Whom does the party represent? From" three revolutionary classes" to" three represents"." *American Asian Review* 21.1 (2003): 1

Guiheux, Gilles. "The political" participation" of entrepreneurs: challenge or opportunity for the Chinese communist party?." *Social Research* (2006): 219-244

362 Article 62, PRC Constitution.

363 Article 81, Constitution of PRC

decisions of the NPC. The added clause has given the presidency a certain degree of flexible power over diplomatic affairs.

Perhaps the incompatibility issues that a presidency may cause were also recognised by the regime. To solve these potential problems, a customary rule of the ‘power trinity’ was slowly formed and consolidated over the past decades, meaning that the position of state head, party boss and army commander shall be taken by the same person as the leader of the regime. The gradual loss of a generation of charismatic leaders also prompted the formulation of such a principle because the new generation of leaders has had to rely more on institutional rules rather than personal influence to maintain power and authority. The power ‘trinity’, as General Secretary Jiang Zemin expressly praised in 2004, is a proper rule for a large party and state in a country such as China.³⁶⁴ In fact, the constitutional change in 2018 to abolish term limits on the national presidency was officially justified on the grounds of maintaining this power trinity to ensure unified and clarified political authority.

6.4 The Establishment of the Civil Service System

The administrative branch experienced a great deal of development during this reform era. The establishment of the civil service system was a crucial constitutional change of the regime and a revival of its meritocratic tradition. Before the 1980s, admission to the regime’s bureaucracy system, including both the government and the party cadre system, did not have merit-based rules. Personal connections and arbitrariness in this process could not be properly prevented. This made access to government posts less and less fair and endangered the regime’s legitimacy by blocking the path for social mobility. To solve this problem and to strengthen governing competence, the Chinese tradition of meritocratic examination was revived quite naturally.³⁶⁵ From the 1980s, this system was gradually established by several laws, and the NPC standing committee passed several government ordinances to the Civil Service Law. A special note should be made that this examination system is not only for the governmental apparatus but admission to the party cadre system is also currently subject to examinations. Therefore, it could be argued that the whole regime now has a comparatively meritocratic and equality-oriented admission procedure. This has had the benefit of ensuring its ties with the general public and preventing detachment. Meanwhile, the party and government also recruit elite students from universities via the channel of the Communist Youth League. In present-day China, the ancient examination system still generally echoes in modern institutions.

6.5 Development of Administrative Law by Learning from Western Experiences

The establishment and development of an administrative law system has been a crucial institutional advancement in the PRC regime. Since the party has refrained from directly governing society and focused on designing a political agenda, the regime’s authoritarian power can only be exercised through state institutions, of which governmental power is the primary component. Therefore, laws regulating executive power would balance the authoritarian power and transform the manner of

364 Jiang's talk, see http://www.china.com.cn/zhuanti2005/txt/2004-09/21/content_5664321.htm

365徐湘林. "后毛时代的精英转换和依附性技术官僚的兴起." *战略与管理* 6.2 (2001). ; Xu Xianglin, Hou Mao Shi Dai De Jing Ying Zhun Huan He Yi Fu Xing Ji Shu Guan Liao De Xing Qi, Zhan Lve Yu Guan Li 6.2 (2001).

governance in China.³⁶⁶ The establishment of an administrative law system was accomplished via a significant amount of study regarding Western administrative laws.

In 1989, the Administrative Litigation Act was passed and promulgated. For the first time in China's history, civilians could sue the government if administrative actions violated law and infringed their rights and interests. In the 1990s, the passage of State Compensation Act enabled citizens to seek compensation from the state if wronged by an administrative act, but the law's scope was not limited to that. For instance, a wrong adjudication of the courts could also be subject to compensation, although the procedure to confirm this injury is much more discreet and strict. The Administrative Penalty Act constrained executive arbitrariness by requiring the law-execution agencies to provide sufficient legal reasons before making administrative penalties on citizens. The Administrative License Law provided that the people's acquired licenses should be protected. Without sufficient legal reason, it should not be compromised. Furthermore, it required that for the issuing of certain kind of licenses, a hearing procedure should be used to make decisions and stakeholders' rights to participate and make voices should be protected. The Open Government Information Ordinance was another milestone of administrative reform.³⁶⁷ The duty to publish government information by mandate and by application significantly forced government agencies to ensure the reasonableness and legality of their acts.

7. Summary

This chapter reviewed the historical development of the constitutional institutions in China, with a focus on how constitutional hybridity has shaped constitutional developments. It established a historical background for further discussion. The rise of Leninist Party-State was no coincidence in China. It was rooted in its compatibility with elitist inclination in Chinese tradition and also the inappropriateness of the attempt to incorporate western institutions to consolidate a newly-born and fragile republic. The two Leninist parties, KMT and CCP then experienced different fates the concrete process of which formed the common historical background of modern Chinese politics. The CCP did not follow Soviet pattern rigidly, but had come up with some distinctive ideas and mechanisms of regime-building, as discussed in this chapter. To a certain degree, it localized Leninism by blending in Chinese constitutional traditions. The power-concentration tradition of communism and power-sharing tradition of China were intertwined to establish the basic framework of the regime. Mechanisms following a pattern of quasi-proportional representation have been consistently used to build inclusiveness for the regime. This hybrid nature of the PRC regime is among the factors that have allowed it to outperform typical Soviet regimes. Nevertheless, it should be

366应松年. 中国行政法的回顾与展望[J]. 上海政法学院学报, 2008, 23(2):1-8. ; Ying Songnian, Zhong Guo Xing Zheng Fa De Hui Gu Yu Zhan Wang, Shang Hai Zheng Fa Xue Yuan Xue Bao, 2008, 23(2):1-8

367 Horsley, Jamie P. "China adopts first nationwide open government information regulations." *Freedominfo.org (Online)*9 (2007).; Tan, Yeling. "Transparency without democracy: The unexpected effects of China's environmental disclosure policy." *Governance*27.1 (2014): 37-62.

remembered that the party's dominance has always been strong and that diversified institutional devices have been developed to maintain this dominance. Related to the legal dimension, it has been shown that the rules about law-making have introduced norms for delegated legislation, while the development of administrative laws, heavily influenced by the Western model, has placed necessary checks on executive power. The eventual result of this trend may not be clear, but it should be cautiously acknowledged that these institutional developments have provided important stepping stones for more meaningful political reforms.

Chapter 6 Constitutional Governance³⁶⁸ in China (1):

Constitutional Hybridity and Institutionalisation of Politics

1. Introduction:

Constitutional hybridity has a fundamental effect shaping the modern Chinese polity. Returning to the themes set by chapter 2, this chapter will show that dynamics of inclusiveness-building and governance-improvement have been strategically employed in the People's Republic of China (PRC) to form a type of constitutional governance, in terms of institutionalization and sophistication. The hybridity of different traditions within party-state and executive-legislative relations is one of the main ways such a governance pattern has been constructed. The main functions and tensions within this constitutional governance strongly echo the main themes of the theories of mixed constitution. On the one hand, constitutional hybridity is employed to create power-sharing mechanisms and boost governance performance, but on the other hand, the mixed elements also give rise to potential conflicts of legitimacy rules, with the different traditions having different legitimating structures; further elaboration of which will be found in the next chapter. The account given in this chapter explains how constitutional hybridity shapes the basic operation mode of the regime. The next chapter will discuss the inherent tensions triggered by constitutional hybridity and how this may influence the future of the regime.

This chapter will analyse how this governance pattern is formed and argue that the underlying institutional basis for it is a constitutional hybridity of different traditions. The main functions and tensions within this constitutional governance strongly echo the main themes of the theories of mixed constitution. On the one hand, constitutional hybridity is employed to create power-sharing mechanisms and boost governance performance, but on the other hand, the mixed elements also give rise to potential conflicts of legitimacy rules; further elaboration of which will be found in the next chapter. The account given in this chapter explains how constitutional hybridity shapes the basic operation mode of the regime. The next chapter will discuss the inherent tensions triggered by constitutional hybridity and how this may influence the future of the regime.

This chapter will first give a brief introduction of the constitutional framework of the PRC regime. It will introduce the overarching party-state relations, demonstrating that there is combination of reformative and authoritarian elements, with the party power recently re-asserting itself by integrating with the state apparatus. Then the

368 As elaborated in previous chapter, “governance” is now a main concept the regime uses to accommodate real reform and still retaining ruling position. The sensitive terms such as democracy and constitutionalism are not as highlighted as the concept of “governance”. A broad array of reforms is put into the general campaign to promote “modernisation of state governance”. This is why exploring the actual governance framework and mechanisms are important. See, Xi Jinping’s address on this topic, <http://politics.people.com.cn/n/2014/0217/c1024-24384975.html>

structure, power, and personnel of the legislative and executive branch will be laid out. These provide the necessary institutional backgrounds for later analysis.

It will then discuss how the legislature of China is being empowered by combining the meritocratic and bureaucratic tradition of China into communist institutions. The NPC, as introduced in the previous chapter, relies on the internal bureaucracy to run the business of law-making. Bureaucracy building has become the main way of its aggrandisement, which somewhat offsets its weakness in activating its supposed constitutional powers. A crucial power that it recently acquires is the ‘constitutionality review(合宪性审查)’ power³⁷², which, arguably, also reflects the influence of western tradition. Again, there are strong evidence of the dynamics of constitutional hybridity in PRC.

The second part will consider how executive power has developed and transformed through the functioning of hybrid constitutional elements. Under constitutional governance, the operation of executive power has been increasingly normalised by a mixture of different elements. Firstly, the meritocratic tradition of China was prioritised by the regime to re-build its governing capacity after the catastrophe of the Cultural Revolution. Examination has again been used to build a merit-based and norm-based bureaucracy, but political meritocracy goes beyond examinations. Performance assessment also has tremendous significance and the regime has developed a growing system of government-performance assessment, blending into it various indicators to measure the achievements of the government. This managerial tool also shows the trend towards legislation as the chief measure for the implementation of policies and as structuring the accountability of the government. Secondly, the development of administrative laws inevitably puts more constraints on government power. Three sets of such legal rules: the government information transparency law, the laws about administrative decision-making, and the laws about participatory mechanisms will be identified and discussed. A great number of elements in modern administrative laws have been borrowed and blended into Chinese laws. For instance, the transparency law and administrative decision-making rules are both under the influence of Western administrative laws, such as the Freedom of Information Act of the UK and the due process principle of the US. Thirdly, this section will also touch the complex issue of whether administrative laws could further regulate and tame party power, concluding with a positive answer. The existence of this dynamic illustrates mutual-shaping effects of constitutional hybridity, as well as the possibility of its application to promote gradual and incremental political reform.

The third part will discuss the interaction between executive and legislative powers. Imported legal principles from western democracies to demarcate the line between them (the Chinese version of ‘Vorbehalt des Gesetzes’³⁷⁴) will demonstrate its crucial influence in forging current and prospective executive-legislative relations in China. Moreover, interactive mechanisms between government and legislature will also be analysed. It is through them that the NPC and government mutually influence each other in establishing the details of legislation.

³⁷² http://www.xinhuanet.com/english/2017-10/20/c_136694449.htm

³⁷⁴ The principle in German law to regulate the line between executive and legislative powers. It was deliberately bought by Chinese law. See, 秦前红. 法律保留功能的时代变迁[J]. 法学评论, 2008. ; Qin Qian Hong, Fa Lv Bao Liu Gong Neng De Shi Dai Bian Qian, Fa Xue Ping Lun, 2008.

It is unsurprising that some paradoxical phenomena and events occur from time to time, triggering pessimism, doubts, and criticism. This reflects the very essence of political reform: the existence of opposing or even multi-directional forces.³⁷⁶ True as they are, such a paradox suggests the importance,³⁷⁷ rather than the speciousness of this emerging governance pattern, for both academic understanding of Chinese politics, and the practical design of its reform. Under this constitutional governance, all the main political institutions involved, the Party, the central and local governments, and the legislature, have developed new features that may render stereotypical³⁷⁸ misperceptions of the regime obsolete. Of course, such developments should be subject to critical assessment.

2. A Hybrid Constitutional Framework of the PRC Regime

Since a relevant historical introduction has already been provided in the last chapter, and later sections will have much more detailed analysis on party and state institutions, this section will only provide a brief introduction to China's constitutional framework, for structural clarity and methodological propriety; but, the theme will continue to demonstrate that the system is defined by its entrenched constitutional hybridity.

2.1 Party-State Relations

As already discussed, party-state separation was a major constitutional feature of the reformative era. It was a natural logical development of the hybrid nature of the regime, since the Marxist orthodox did not give unlimited authority to the vanguard party, but rather to the supreme assembly. When reform is required, the most convenient move is to redefine the function of the state system.

Therefore, the actual implication of the party-state separation amounts to a rule-based division of labour between party and state apparatus. The People's Congress represents the ultimate will of the Chinese people; all other state institutions are chosen by this assembly and should be accountable to it. The party's dominance does not challenge this basic structure. According to its political leadership, the party exercises its ruling power by identifying the people's will and making legislative and policy proposals to the NPC, awaiting the latter to legitimise and approve its policies. It is argued that this relation is based on a division of two types of power: the power to govern (执政权) and the power to rule (统治权).³⁷⁹ The party's unshakable leadership is interpreted as exercising the power to govern, while the people, through the NPC system, still retain the power to rule.

This arrangement is the nominal pattern of party-state relations. In practice, of course, the party has many more mechanisms to control the whole regime, such as the previously mentioned leading group mechanism. In recent years, there is a clear trend

376 For example, see Alberts S, Warshaw C, Weingast B R. *Democratisation and Counter-majoritarian Institutions*[J]. *Comparative Constitutional Design*, 2012: 69.

377 Not that it justifies the regime's current status or ensures the success of its future reform, but that it relates tremendously to the building of a more desirable constitutional system for China.

378 Not by denying the totality of truth in such stereotypes, but by adding to it a significant load of new facts and perspectives, which may amount to a new description of the regime.

379 <http://www.people.com.cn/GB/14576/14841/1963870.html>

of the party's assentation and expansion of its power and structure. To a certain degree, the party seems to integrate with the state apparatus.

Firstly, within recent constitutional amendments, the party's leadership of the regime was explicitly entrenched into the constitution order by confirming that the leadership of the party is the 'inherent feature' of socialism with 'Chinese characteristics', therefore could be also interpreted as a core feature of the socialist system, which shall not be undermined.³⁸⁰ Secondly, the party established a new series of leading groups. Among them, leading groups to deepen reform, lead national security affairs, lead fiscal and economic affairs, and lead foreign affairs etc., could all be used to usurp government power and extend the party's direct influence. Now, the four have been changed into commissions. Thirdly, regarding the most recent constitutional amendments, many agencies in government apparatus were streamlined by being incorporated into relevant party institutions. For instance, the National Bureau of Movies was allocated to the party's Propaganda Department and The National Bureau of Religious Affairs was allocated to the United Front department. Administration of the civil service is now being directly handled by the party's organisation department.

The implications of this trend will be further discussed in the next chapter. The main proposition is that these changes do not overturn the function of party-state separation. The official resolution emphasised on the party's leadership on public affairs (which could also be expressed by the word politics '政') but did not alter the basic structure of the party state. After all, party-state separation is a division of labour, but not an institutional attachment of the two systems. It was an effort of function differentiation rather than a separation of powers. In the next chapter, it will also be argued that what matters more is whether the whole party-state apparatus is under increased legal constraints. The internal adjustment reflected the intensity of political struggles but may not be a fundamental constitutional change.

2.2 The Legislature: National People's Congress

The NPC is constitutionally identified as the 'highest organ of state power' of the country.³⁸¹ All other state institutions, the president, the central government, the supreme court and the supreme procuratorate, the central military committee, and the newly established National Commission of Supervision are elected by the NPC and shall be accountable to it.³⁸²

In terms of structure, the NPC should be understood as the combination of two institutions: the NPC plenum and the standing committee. While the plenum has stressed (even if formally) the spirit of broad representation, the standing committee seems to be developing with elitist and technocratic orientation, and functions as a bureaucracy within the NPC. The NPC plenum has around 3,000 representatives. The current term initially had 2,987 representatives.³⁸³ Such a large-scaled assembly may not convene as frequently as regular legislature. The NPC plenum only convenes annually, to discuss and vote on important decisions. The regular legislative work is done by the standing committee, as will be discussed later. NPC plenum is constituted

380 Article 1, PRC Constitution

381 Article 57, PRC Constitution

382 Article 62, PRC Constitution

383 The ongoing anti-corruption campaign in the regime caused the termination of some seats, mainly those officials who have been charged with the crime of corruption.

by a combination of direct and indirect election. In other words, the NPC system is not a single national legislature, but a nationwide vertical system of representative organs in the shape of a pyramid.³⁸⁴ At the very local level of township and county,³⁸⁵ the local people's congress is directly elected by voters. At higher levels, people's representatives are elected by the lower-level people's congress.

The standing committee of the NPC is the real functioning agency of it. It is constituted by senior party politicians, policy experts, and satellite party elites (mainly intellectuals). The current term of the standing committee has 161 members.³⁸⁶ They need to first be elected as the people's representative, then elected to the standing committee by the NPC plenum. This process is mainly under the control of the party, which recommends candidates for the standing committee to NPC representatives. Such recommendations, of course, are usually accepted. The chairman of this standing committee is the leader of the whole NPC system. In recent decades, it has been developed as a convention that the No. 2 figure of the CCP would take this position, to empower the NPC to its supposed political status.³⁸⁷ It also has 10 sub-committees and a large bureaucratic system. In later sections, it will be discussed in greater depth that the actual way to empower legislature is by bureaucracy-building.

In terms of power, the NPC and the NPC standing committee have a wide range of law-making and decision-making powers. Firstly, they have the full range of law-making powers.³⁸⁸ The representatives and standing committee of the NPC can freely make legislative proposals, and are not constrained by rules in favour of the government. It seems that the NPC could legislate anything, providing it does not violate the constitution. Of course, in practice, such powers are not actively used. The plan of law-making must be approved by the party leadership and will be carried out accordingly. However, if, in the future, further reform is to be promoted, the loose restriction on NPC law-making powers could be an advantage in building more pluralistic politics. Secondly, the NPC and its standing committee have political appointment powers over the important posts of other state institutions, as naturally demanded by its nature as the ultimate source of political authority within the state apparatus. Besides approving the premier, vice premier, chief justice of the supreme court, chief prosecutor of the supreme procuratorate, and the recently established National Commission of Supervision, a reflection of Chinese bureaucratic tradition should also be selected and appointed by the NPC. Thirdly, after a long period of gradual development, the NPC now enjoys the power of 'constitutionality review', a Chinese version of constitutional review power, though concrete ways to exercise it have not yet become clear. It was elevated to a higher and formal level by the CCP's political report in 2017 (the 19th CCP plenary conference) and it has been officially declared that the work of 'constitution-compliance review' (合宪性审查) should be promoted. Previously, the review power of the NPC system only applied to government-made rules and local legislation. There was no arrangement for reviewing NPC-made laws. The newly named 'Constitution and Law Committee' (previously

384 But it does not function as a hierarchy, the upper level people's congresses do not have power over the lower level congresses. It could only "give advice and guidance"(指导) to them.

385 China's central-local state structure has five layers from the top to the bottom, the central government (the state), the province, the city, the county, and the town.

386 NPC website, Ibid

387 For the discussion of these developing customary rules of PRC regime, see Jiang Shigong, *ibid*

388 Article 67. NPC Constitution

the Law Committee) in 2018 is officially mandated the reviewing body for NPC-made laws, which amounts to a formal constitutional review power. It is unnecessarily to enumerate all the powers of NPC here, since, in subsequent analysis, relevant powers and mechanisms will be discussed in greater depth and with further details.

In terms of personnel, NPC representatives are supposed to truly represent the social composition of Chinese people, while the standing committee is experiencing a process of bureaucratization. The composition of representatives is determined by the quota system, similar as the traditional methods in Yan'an period.³⁸⁹ General standards include the population of each province and the balance between different professions and social group.³⁹⁰ The guiding principle of allocating quotas is expressed as ensuring 'wide representation'. The modified <Election Law> in 2006 stipulated that people's representatives should have 'wide representativeness', with the 'proper amount' of 'ground level' and especially representative of 'workers, peasants, and intellectuals'.³⁹¹ In contrast, the standing committee has increasingly used meritocratic bureaucracy building to expand its power, which will be analysed as a focus in Chapter 3.

2.3 The Executive System

In terms of structure, the central executive system may be the closest in similarity to institutions within Western polities. As mentioned previously, the central government is a typical administrative organ with two layers of institutions: the heads and the ministries. Currently, the 'State Council', as this central government is named in China, has a general office, 25 typical ministries, and 47 regulatory agencies or other institutions, forming a large-scale administrative system.³⁹⁵ A defining difference may be there is no separation of politics and administration in Chinese government. The premier and ministers are also a part of the bureaucracy, but their terms are constitutionally limited to two. Another feature is the heritage from totalitarianism and planned economy, which leads to government-run news agencies, science academies, and state-owned enterprises, etc. All these agencies are directly administered by the central government. Their personnel are also party and state cadres and are subjected to the same ranking and disciplinary rules. Finally, as previously introduced, the recent move of the party's integration of state has resulted in some government ministries and agencies being directly managed by corresponding party agencies.

In terms of power, apart from the typical administrative powers, noticeable features of China's executive branch are its substantial powers of rulemaking and legislative proposal. The PRC constitution empowers the central government 'to adopt administrative measures, enact administrative rules and regulations, and issue decisions and orders in accordance with the Constitution and the law'.³⁹⁶ This gives independent rule-making power to the central government. This power is called

³⁸⁹ See previous chapter

³⁹⁰ Article 11, Election Law of People's Representatives

³⁹¹ Article 6 of Election Law, *ibid.* Also, see Zhao Xiaoli, *ibid.*

³⁹⁵ <http://www.gov.cn/guowuyuan/zuzhi.htm>

³⁹⁶ Clause 1, Article 89, PRC Constitution

‘functional law making’ (职权立法) power in Chinese academia. A more straightforward way to describe it is an independent rule-making power.

In fact, this power is of no significant difference from the typical power for executive rulemaking or executive order in modern governments. It is very similar to secondary legislation in the UK. The working code of the State Council requires that the enacting of administrative regulations must find its legal basis in legislature-passed laws. In practice, many administrative regulations are required to implement and detail the NPC-passed primary legislation. It is worth noting that this government law-making practice is not subject to effective legislature supervision. Although the NPC standing committee has the power to annul unconstitutional and unlawful administrative regulations, political reality means that this mechanism is rarely, if ever, used.

The central government makes most legislative proposals. Statistics provided by the State Council LAO suggest that government bills account for roughly 70% of the laws passed by the NPC and standing committee.³⁹⁷ The State Council could propose bills to both the NPC plenum and standing committee. Although the central government is quite dominant in legislative initiatives, the PRC constitution does not design other relevant agenda-controlling mechanisms, such as in the French constitution. In theory, once the bill from the government enters the legislative process, central government will lose control on its advancement. Currently, the unity of party control may render this situation only theoretically possible, but in occasional cases in which the NPC does boycott government bills, the government seemed to have few formal mechanisms to defend its bill.³⁹⁸

Another major power of the executive is the widely delegated law-making capacity of the NPC. The practice of delegation originates from the early reformative era in the 1980s, when the ongoing institutional reform required a timely supply of normative rules,³⁹⁹ but the NPC at that time was not competent in fulfilling this task. It delegated a wide range of law-making powers not only to the central government, but also to various local governments, to unshackle them and provide speedy rules consolidating reforms. However, in recent years, with law making becoming increasingly normalised, the control of delegated legislation has been tightened; this will be analysed in greater depth in the next chapter.

In terms of personnel, bureaucracy-building is based on meritocratic institutions. The civil service system is, to a certain degree, a revival of China’s ancient tradition of Keju. Another feature is its remarkable size. Recent official statistics in 2015 showed that the public service system has a population of 7,160,000.⁴⁰⁰ Compared with the overall population of China, this may not seem an over-large number. Nevertheless, this calculation is based on a narrow methodology. A broader method of calculation, including all the affiliated units funded by public finance, sees the total number of bureaucracy surpassing 50,000,000.

397 http://news.xinhuanet.com/ziliao/2003-08/21/content_1038060_1.htm

398 Such as the case of public transport bill, see Li Peng, *ibid*

399 王春光. "我国授权立法现状之分析." *中外法学* 5 (1999): 81-89.; Wang Chun Guang, *Wo Guo Shou Quan Li Fa Xian Zhuang Zhi Fen Xi*, *Zhong Wai Fa Xue* 5(1999):81-89

400

http://www.mohrss.gov.cn/SYrlzyhshbzb/dongtaixinwen/buneiyaowen/201605/t20160530_240967.htm

3. Legislature: A Marxist Assembly Empowered by Bureaucratisation⁴⁰¹

In modern times, it is usual for states to have at least the formality of a representative assembly. But in an authoritarian regime, it may seem paradoxical that the PRC regime would deliberately empower its legislature. It may also seem puzzling how any measures besides democratic empowerment – which is difficult or impossible to arrange in authoritarian regimes – could be employed to empower legislature. In this section, it will be demonstrated that empowering legislature is necessary for the regime and it is also played out with the dynamics deriving from constitutional hybridity, entrenching a meritocratic bureaucracy inside it, a repetition of Chinese tradition in a socialist legislature, underpinned by the communist version of popular sovereignty.

3.1. Constitutional Change to Empower the Standing Committee of the NPC

Prior to the reform era, China suffered tremendously from the lack of a stable and clear legal system. The 1982 Constitution chose to empower legislature to put necessary constraints on executive and party power, and the arbitrary power of the individual leader.⁴⁰² Since the NPC plenum is technically not a permanent organ that is capable of shouldering regular law-making power, the Standing Committee as the permanent legislature was given a series of legislative powers, as previously discussed. Later, in 2000, the Legislation Law also further empowered the NPC standing committee.

From 1976 to 1981, NPC working staff (the prototype of Law Affairs Working Committee⁴⁰³) led by senior revolutionary politicians such as Ye Jianying and Peng Zhen, drafted seven major laws that laid the foundation of the contemporary legal system of China.⁴⁰⁴ Upon the drafting of the 1982 constitution, the continuation of such working patterns – law-making by professional technocrats – seemed not only a strategic choice of the Party to retain control of legislature, but also a practical necessity to return the country to normalcy. After all, the typical representative-based law-making pattern was not pragmatic at that time, since very few of them had the basic knowledge or ability for legislative work.

Therefore, the strengthening of the Standing Committee power was adopted as a significant way to ensure legislative effectiveness and stable political order. The Standing Committee's acquisition of broad law-making power in the 1982 Constitution, in fact, amounted to a quasi-usurpation of the NPC's law-making power. Moreover, the 1982 Constitution placed very loose constraints on the Standing

401 The concept of bureaucracy is more of Max Weber's sense. Here it is a politically and morally neutral concept to describe a system features hierarchy, clear command, technocratic capacity and functional specialisation.

402 Deng, *ibid*

403 This then "Law Affairs Committee" consisted of 80 people. They were the most intellectually qualified persons available to shoulder lawmaking task at that time, though many of them did not have legal training. This list included previous lawyers before the founding of the PRC, previous entrepreneurs, senior party officials, etc. See 夏莉娜. 王汉斌回忆法制委员会与法工委建立的前后 [J]. 中国人大, 2009(3). Xia Lina, The Memories of Wang Hanbin on the Establishment of LAC, China NPC, 2009(3). This is the official research journal of National People's Congress.

404 http://www.npc.gov.cn/npc/xinwen/rdlt/rdjs/2013-11/08/content_1813097.htm

Committee's law-making power.⁴⁰⁵ There were certain exclusive law-making powers reserved for the NPC plenum, such as the power of Constitution-making, constitutional amendment, criminal and civil laws, laws about state institutions, and other 'basic laws' such as election law, nationality law, and marriage law.⁴⁰⁶ However, apart from these, all other laws could be made or amended by the Standing Committee,⁴⁰⁷ forming a very wide and flexible law-making power. Besides such law-making powers, the standing committee also acquired the powers of legal interpretation, supervising the implementation of constitution, annulling the executive-made rules and local NPC-made ordinances that violate the Constitution and laws. This is, in fact, a constitutional review power, though it is seldom triggered or materialised.

Later, the empowerment of the NPC system served as a strategy to boost political reform and resist pressure from the conservative force. The early period of the reform era witnessed a proliferation of laws, as well as chaotic conflicts and incoherence among them. The political inclination when solving this problem could determine the fate of reform. For instance, it was argued that anti-reform forces tried to block economic and political reform using the excuse of defending the integrity of the legal system.⁴⁰⁸ To tackle this problem, the legislature was undoubtedly a chief institution. The 2000 Legislation Law⁴⁰⁹ stipulated the hierarchical framework of the legal system and the procedural requirement of law making.⁴¹⁰ This law empowers the NPC system in three ways: firstly, to rationalise the hierarchy of laws, the NPC-passed laws have supreme normative authority over others. No other normative rules, such as Party Resolutions (at least on paper), government regulations, or local ordinances, could violate them. Secondly, the NPC Standing Committee was given the power of a quasi-form of constitutional review, meaning that it could annul laws and rules that are found to be in violation of the normative hierarchy of the legal system, such as government regulations that violate NPC-passed laws, or the delegated laws made by the government in similar cases. The local NPCs have similar norm-reviewing powers against governments. Thirdly, the principle of 'Vorbehalt des Gesetzes', as discussed previously, was established by the law and could function as a crucial power basis for the future empowerment of the NPC; this will be elaborated in subsequent sections. During the writing of this thesis, in 2015, Legislation Law was modified to include the imposition of tax in the reserved domain of legislation, which reversed the long-term practice of the regime so that the government could set taxes with a wide margin of discretion.⁴¹¹ This has significant meaning for actual policy-making, introducing more inter-branch deliberation into law making. A strong example is that, just after this change, the drafting of Real Estate Tax Act was brought into the official

405 Article 62, PRC Constitution

406 Article 62, PRC Constitution

407 Article 67, PRC Constitution

408 陈斯喜. 试论在改革过程中的立法方略[J]. 中国法学, 1993(5):22-25. Chen Sixi, On the Legislative Strategy during Reform, China Legal Studies, 1993(5):22-25

409 About the historical details of the making of this law, see previous chapter on the Constitutional development of the PRC regime. Due to the limit of length and the requirement of a more balanced structure, in this section it will not be introduced with details.

410 For official English translation of text, see

<http://www.china.org.cn/english/government/207420.htm>

411 Clause 6, Article 8, Legislation Law of the PRC

legislative plan of the NPC Standing Committee.⁴¹² This time, the details of the tax will be influenced by the NPC with greater magnitude, rather than by government departments. Anyone who has a moderate understanding of contemporary China knows the importance of the real estate market to society and the economy. Therefore, the fact that the NPC has played a central role in designing regulatory policies on this market does indicate its growing strength, and greater power-balanced and deliberation-rich decision-making process.

3.2. The Rise of Professional Law-making Bureaucracy

To carry out legislative work, the first task of the NPC Standing Committee is to find appropriate personnel for the job. The lack of representative democracy and the urgency of the work makes the choice of a professional bureaucracy for legislative vital.

The foundation of this legislative bureaucracy was the Legal System Committee, founded in 1979, to restore legal order to the country.⁴¹³ As an expedient, yet valued, agency to commence law-making works and make breakthroughs, its nature and function was obscure. It consisted of very senior politicians and officers with specific knowledge or experience. Peng Zhen, a high-ranking leader in the Party, was appointed as the chairman of this committee, and the vice chairman of the NPC Standing Committee. The Legal Affairs Committee, after the remarkable job of law-drafting (which was, strictly speaking, quite unconstitutional since before 1982 the Standing Committee did not have official law-making powers), was changed into a Legal Affairs Working Committee (currently using the same acronym as the LAC) in 1982, becoming a formal working agency under the Standing Committee. Yet, the LAC is not an authoritarian counterpart to the parliamentary subcommittees of Western democracies. Rather, it is like the cabinet office of the Standing Committee. It is a bureaucracy, rather than parliamentary agency. Therefore, it worked in a meritocratic and technocratic manner, making it constitutionally possible to recruit cadres and experts with a legal background. Reportedly, the LAC is one of the most influential legislative institutions in China. As introduced in the previous chapter, it has established a large system of professional law-making technocracy. The research units under it cover almost all domains of law and related policies. Also, it shoulders the drafting and coordinative works under the NPC Standing Committee. Although it is not a qualified constitutional unit to proposal bills, its influence on the actual content of the bills is direct and substantial, since legal research, public consultation, and drafting works are organised by it. Although the LAC could not directly coordinate the bill-drafting work of government departments, interactions and checks do exist. Its role is much more prominent within NPC-initiated laws, such as civil and criminal code, etc. The recent trend may suggest increasing activism of the NPC and

412 http://news.xinhuanet.com/fortune/2015-08/06/c_128097837.htm

413 白龙, 周林刚. 立法官僚的兴起与封闭——以 1979 年~2010 年全国人大立法为中心的考察[J]. 文化纵横, 2011 (3): 44-49. Bai Long, Zhou Lingang, the Rise and Closeness of Legislative Bureaucracy--Observation on the NPC Law-making Activities from 1979 to 2010, Wen Hua Zong Heng, 2011(3),44-49, The same article also expressed the concern of the closeness and rigidity of the legislative bureaucracy in the PRC regime.

LAC's work,⁴¹⁴ such as the NPC-sponsored drafting of the Real Estate Tax bill.⁴¹⁵ As mentioned, recent constitutional change that further constrains executive initiative powers and emphasises on legislature's exclusive domains, may be one reason for this.

Personnel in the LAC are appointed by the Standing Committee with discretion. This ensures its technocratic composition and ethos. A 'revolving door' exists between the LAC system and the legal staff of government bureaucracy. The current chairman of LAC, for example, has previously served as a senior official in the State Council Legal Affairs Office. In addition to this, the LAC is also shaped to include academic expertise. Scholars in relevant institutions, such as those in law schools, universities, and the Chinese Academy of Social Science, were invited to take on senior positions in the LAC and participate in legislative affairs.⁴¹⁶ The combination of academic and bureaucratic elements has contributed significantly to the competence of the LAC. The executive counterpart, the State Council's LAC, and the in-house counsel of the central government have also been constituted in a similar pattern.

Following the inherent logic of bureaucratic institution⁴¹⁷, the LAC has strong inclinations towards self-aggrandisement, which has been both accepted and encouraged by the regime. The growth of this working bureaucracy reflects the consistent idea of empowering legislature through bureaucracy-building. Over the decades post 1979, LAC has established a broad range of working agencies in accordance with different domains of law and public affairs, such as units of criminal law, civil law, administrative law, economic law, and the general research unit.⁴¹⁸ With such growth, the legislative bureaucracy under the NPC has not only developed technocratic skills but also powers in both the Foucauldian and institutional sense.⁴¹⁹ A comparative study has demonstrated that due to the financial and budget committee's understaffed team, the NPC plenum has been unable to promote the budget system effectively. Contrastingly, the LAC can project its power in legislative planning.⁴²⁰

The LAC now has become a major source of knowledge and skills for legislative affairs. For example, the content and process of China's legislative plan over the decades, sometimes referred to as a period of 'law-making campaigns' have been

414 This may be a system-wide trend, as is demonstrated in both central and local legislatures. For instance, in Anhui province, the 2016 legislative plan contains more than 50% of local NPC drafted bills. See <http://npc.people.com.cn/n1/2016/0105/c14576-28014809.html>

415 Other examples include bills of "E-commerce Law"(电子商务法), "Tourism Law"(旅游法), "Law of the Security of Special Equipment"(特种设备安全法). The 2016 legislative plan has 20 laws (including those that have not been finished in 2015), 18 are drafted or going to be modified by NPC Standing Committee or sub-committees.

416 The list of the leaders in LAC, http://www.npc.gov.cn/npc/fzgzwyh/node_5854.htm

417 Power would trigger the desire for more power. This is actually common sense. But for in-depth academic research on this phenomenon, see Parkinson, Cyril Northcote, and Robert C.

Osborn. *Parkinson's law, and other studies in administration*. Vol. 24. Boston: Houghton Mifflin, 1957.

418 Ibid

419 Townley B. Foucault, power/knowledge, and its relevance for human resource management[J]. *Academy of Management review*, 1993, 18(3): 518-545.

420 Tanner, *ibid*.

strongly influenced by perceptions of the LAC. The LAC also organises legislative consultations and investigations, as well as replies to all state organs with inquiries concerning vagueness and controversies in law, all of which amount to a conduit for transmitting its understanding of legal affairs into policy-making. This is like a quasi-form of interpretation power.⁴²¹

Besides its general institutional capacity, stemming from its function and composition, the LAC is also strengthened by the legalisation and customisation of its powers and practices. The 2015 modification of Legislation Law recognised a wide range of LAC practices and has given them statutory basis, trickling down powers to the working agency of the NPC. This development further strengthens legislative power, with attention to the explicit requirement that law-making planning and coordination shall be led by the NPC standing committee, under which LAC is the chief working agency. Firstly, the law recognises the practice of legislative planning and provides that the Standing Committee should play a ‘dominant’ role in coordinating law-making business via such mechanisms.⁴²²

Secondly, the law also recognises that it should give an enhanced role in drafting to the LAC and its sub-committees. Previous customs have stated that most legal bills ought to be drafted by the government. The law attempts to balance this inclination by allowing the legislative branch to organise and dominate in law-drafting over matters that have a ‘comprehensive, overall and fundamental’ nature⁴²³. The LAC and sub-committees are eligible to participate before the bills enter the NPC process.

Thirdly, before the bills are reviewed by the Standing Committee, the LAC is required to give professional assessment on the feasibility, reasonableness, and social impact of the main content of bills. The initial review is officially conducted by the LAC, leaving the Standing Committee overseeing the second-hand review based on the assessment of the LAC.⁴²⁴

3.3. Political Authority Transmitted from Party Hierarchy

Non-authoritarian institutions could be empowered by authoritarian resources, a logical by-product of hybrid regimes. The Standing Committee of the NPC is designed to acquire political authority from the Party's power hierarchy to carry out its supposed functions.⁴²⁵ Contrary to some opinions, the senior cadres sitting at NPC may not be motivated to behave purely as a ‘rubber stamp’. The incentivisation of them is more complicated and contributes to a more delicate bargaining structure between legislature and the executive power. This will be further elaborated in later paragraphs.

The PRC's regime deliberately channels political authority to the NPC, making it effective, and establishing the customary rule that the ‘rank’ of the NPC's leaders ought to be placed at a high level of the Party's leadership.⁴²⁶ The second-highest leader in the Politburo Standing Committee takes the position of the president of the NPC Standing Committee, in which they lead and protect legislative affairs via the

421 Such mechanisms will be discussed with more details later

422 Article 52, Legislation Law

423 Article 52, *ibid*

424 Article 39, *ibid*

425 This is really a common sense understanding in China. For similar analysis, see Tanner, *ibid*, chapter

426 Bai Long and Zhou Lingang, *Ibid*

corresponding institutional and personal political authority and resources. The numerous vice presidents of the NPC Standing Committee usually include several members of the political bureau, who are the second-tier of leadership. It could be said therefore, that the Party hierarchy intertwines with the Constitutional supremacy of the NPC, resulting in a somewhat senate-like institution. In addition, the term limits on the national president and premier, a sign of the increased institutionalisation in Chinese regime, also means the ministerial and other subordinate posts will be reshuffled regularly. This will also routinely create many veteran politicians, who are not to retire completely but must migrate to other institutions. The NPC system becomes an important reservoir for them. Numbers could make strength. Though, admittedly, the influence of seniority should not be exaggerated too much.

In the middle-level leadership of the NPC, namely the sub-committees, the same logic applies. Sub-committees cover a full range of governance and political affairs, reviewing power over legislative bills. In the contemporary PRC regime, such a review is no longer merely a formality. Reviewing competence, and maybe also authority, are to a great degree derived from the ability and authority of the bureaucrat-transformed committee members.⁴²⁷ Many sub-committee members are close-to-retiring politicians, who were previously senior executive cadres, such as government (vice) ministers and provincial (vice) governors respectively. Senior bureaucrats, for instance, are deliberately placed in legislative branches to make full use of their knowledge and insights regarding government work and to supervise and deliberate on government bills. Due to having worked inside the inner circle of government, many members of the government staff's NPC sub-committee are very familiar with the typical loopholes the government tries to conceal, along with the special interests it tries to promote.

Worrying about second-line politicians to collaborate with the current government may underestimate the complexity of China's political logic. A common view among insiders is that the reviewing by committee members tend to be harsher if the bills are related to his or her previous department or agency, since such strictness is needed to counter-balance the doubt concerning special ties they may have had with previous colleagues. By institutionally exposing the potentiality of special ties amongst previous colleagues, the regime elevates the cost of collaboration and '*guanxi*' during political bargaining. After all, the sub-committee is a collective institution, with all members engaged in legislative scrutiny. Personal links with supervised government agencies may be more of a liability than an asset. However, unlike some Western democracies, in which one's parliamentary career may be a stepping stone towards executive leadership roles (both in parliamentary and presidential systems), the NPC sub-committee lawmakers are usually near the end of their political careers, although this does not necessitate their compromise and weakness. Instead, it is equally likely that these politicians will be bolder in their exercise of power, since they have almost nothing to lose. In addition, although losing executive power, these cadres would be compensated with more senior status in the Party hierarchy, which forces the corresponding government ministry to give certain reverence.

427 Ibid

3.4. The Law Committee and Academic Expertise

Political meritocracy values professional expertise and does not hesitate to blend it into the fabrics of regimes. The NPC entwines academic expertise into its working agencies. The Law Committee, a sub-committee that holds the power to review bills and provides legal counsel, is constituted mainly by former law academics or legal experts within the regime. For example, the current law committee includes the previous President of the Chinese University of Law and Political Science (Xu Xianming, a professor of Jurisprudence with a focus on human rights), the previous head of the Law Institution of China's Academy of Social Science (Xin Chunying, also professor of jurisprudence and translator of Dworkin's 'Taking Rights Seriously' in China), and the previous Vice Chief Justice of Supreme Court (Su Zelin).⁴²⁸ These members have sufficient professional expertise for their work. Moreover, as an institution, the committee is also empowered by the Legislation Law, stating that all bills should be put together for the law to review it.⁴²⁹ The proposal of this principle has incurred controversy since the early 1990s. Departmentalism became the main driving force behind competition for law review and other powers, not only among government departments, but also NPC sub-committee.⁴³⁰ The regime does not tolerate the fragmented law-making process that could incur conflict within the law and undermine the quality of the legal system. It was decided, therefore, that all law bills would be reviewed and coordinated by the law committee, and significant levels of academic expertise would be established to secure competency and impartiality. This case again reveals the logic of the PRC's regime, in which ancient traditions concerning meritocracy and the intellectualism of politicians have been used to rely on the establishment of a modern governance.

Academic influence also manifests beyond the functional committee of the NPC. It has become a noticeable pattern that a great controversy in crucial legislation will be first tested in academia, and that heated debates and discussions exist as a prelude for final versions. This is the channel for the ruling party to observe and collect different opinions and claims. It is, of course, hardly a unique law-making model in China, since timely academic feedback in law making is commonly seen worldwide. Nevertheless, the gravity of academic input on law making in China still deserves serious attention, such as the making of property law has demonstrated.⁴³¹

3.5. The Constitutional Review Power of the NPC?

Embodying popular sovereignty, the NPC system has the full nominal legal authority to exercise the power of judicial review. The NPC Standing Committee gradually acquires, though has not actively used, the power of constitutional review. According to the Constitution, the Standing Committee can interpret the Constitution and the law. It can also modify laws that are under exclusive jurisdiction by the NPC plenum. The executive-made rules and local legislation could also be subject to its

428 See the official website of the NPC, http://www.npc.gov.cn/npc/bmzz/falv/node_1622.htm

429 Article 33, Legislation Law

430 Tanner, *ibid*

431 巩献田. 一部违背宪法和背离社会主义基本原则的《物权法(草案)》——为《宪法》第12条和86年《民法通则》第73条的废除写的公开信[J]. 经济管理文摘, 2006(8):13-16. Gong Xiantian, A Bill violating Constitution and Socialist Fundamental Principles, *Journal of Economic Management*, 2006(8),13-16

scrutiny and modification if found violating the constitution or upper-level laws. This pattern is regarded as preferable to a special constitutional court, which was considered ‘immature’.⁴³² Based on this, the NPC Standing Committee has the role of ensuring the internal coherence and unity of the legal system. This gives it significant power to balance departmentalism and executive arbitrariness. This role has been increasingly emphasised in recent years. The review of ‘normative documents’ (mainly by means of laws, regulations, and resolutions) has been proposed as an important measure to deepen the reform by the report of the 4th Plenum of the 18th CPC Central Committee. As a main institution that has the competency to execute its job, the NPC Standing Committee (as well as the sub-committees and LAC) has also emphasised that reviewing “normative documents” is a major task to undertake.⁴³³ ‘Normative documents’ must be submitted to their respective institutions for record and review, such as when executive-made rules are drafted for the central government and local legislation, to provide for the NPC Standing Committee.

The power to trigger review of executive-made rules and local legislation is conferred on a wider range of entities. The triggering of such reviews reflects a pluralistic and participatory pattern, which is compatible with the ethos of communist democracy that emphasises a wide range of participation. State institutions such as the central government, central military committee, Supreme Court, Supreme Procuratorate, and local NPC Standing Committees, could all make formal recommendations that the NPC reviews the relevant rules and legislation. In contrast, the citizens, social organisations, and enterprises should also have the opportunity to provide. However, these parties can only make an ‘application’ rather than institute a formal review as a ‘requirement’. Their application is then be studied by the Standing Committee and then a decision is made to trigger the review or not.⁴³⁴ Citizens are increasingly aware of this mechanism and the importance of being politically active, and seek to pressure these organizations to trigger the review process, while institutional players within the political establishment remain passive about using this power.

Furthermore, the political report of CCP 19th Plenum has further enhanced this function of the NPC. It provided that the ‘constitutionality review work’ (合宪性审查工作) shall be ‘promoted’ so that the ‘authority of constitution’ can be safeguarded. The concrete mechanisms that run this newly heralded institution are still under discussion and partial implementation, but certain features could be observed as a start. Firstly, the NPC is now trying to use its bureaucracy machinery to carry out the constitutionality review work within the previously discussed mechanism of review of ‘normative documents’ (规范性文件备案审查)⁴³⁵. The LAC has regularly attempted to publish typical cases of executive ordinances and local regulations that violate the basic rule of constitution to enforce the integrity of the legal system. Citizen activism has also been emphasised and appreciated. During the current term of the NPC (2012–2017), citizens and social organisations have made 1,527 applications to the LAC regarding the review of specific laws and rules. Secondly, the LAC’s

432 李鹏. 立法与监督: 李鹏人大日记[M]. 新华出版社, 2006.; Li Peng, *Legislation and Supervision: Diary in the NPC*, Xin Hua Press, 2006. The author was the premier of China(1987-1998) and Chairman of the NPC(1998-2003).

433 <http://npc.people.com.cn/n/2014/1223/c14576-26256439.html>

434 Article 96, Legislation Law

435 http://news.xinhuanet.com/mrdx/2017-12/26/c_136852345.htm

intensification of reviewing work is supposed to be preparation for further institution building for constitutionality review, although the concrete institutional design for it has not been disclosed. The constitutional amendment of 2018 has changed the name from the Law Committee to the Constitution and Law Committee, implying that it will be the key institution in charge of constitutional review. It is obviously a thorny issue that this committee, which is deeply engaged in law-making, might be expected to fairly review the laws that itself makes. There has not been a clear answer to that. Nevertheless, it is still an effective starting point since documents other than NPC-made laws could be more effectively and strictly reviewed under this mechanism.

4. Executive Power: Meritocratic Elements and Power Normalisation

The executive power of the PRC regime may offer an example of how a Leninist system transforms towards the direction of openness and norm-based governance, by re-embracing Chinese tradition and importing modern administrative norms from Western systems. This hybrid process will be discussed in this section.

4.1. Institutional Basis of Political Meritocracy

4.1.1 Egalitarian Access to Political Profession

As discussed, the whole political system in China, including both the Party and State institutions, is managed in a unified manner as it is in a Weberian-like bureaucracy. As noticed:

*One of the most important differences between China's civil service and Western civil services is the scope of the civil service. The scope of China's civil service is at once broader and narrower than those in the West. It is broader because the entire state bureaucracy falls into the scope of civil service. As noted above, now there is no division between politicians and careerists. It is narrower because, in line with the desire to develop a more differentiated management framework, cadres working in service units and state enterprises are not included in the civil service.*⁴³⁶

Therefore, the design regarding the appointment to this unified system is crucial. An equal and merit-based selection would determine whether the privileged few or the commoners have access to political and administrative power.⁴³⁷ It strongly shapes the composition of political institutions and influences the legitimacy of the regime. At least in China, this channel for political participation has tremendous social support and approval.⁴³⁸

The civil service reform, which holds Deng's speech concerning the reform of the Party and State leadership as a justification, strengthened the cadre system by

436 Lam T, Chan H S. China's new civil service: What the Emperor is wearing and why[J]. Public Administration Review, 1996, 56(5): 479-484.

437 This does not deny the facts that patronage and privileged groups have tremendous influence on Chinese politics. Actually, in all societies, privileged elites in all sectors have more entitled powers. Yet, whether such disparity is institutionalised still makes fundamental difference.

438 As evidenced by the enthusiasm of citizens on this examination, in the most recent examination for central government, 1,48 million people participated. See http://www.chinagwy.org/html/xwsz/zyxw/201610/21_175535.html

introducing young, well-educated professionals.⁴³⁹ In 1982, the then Ministry of Labour and personnel (now Ministry of Human Resources and Social Security) issued a resolution that the cadres recruitment in the government and party institutions should be based on examinations. This approach, as the document claims, is a ‘merit-based selection’. Later in 1987, the 13th party congress further advocated the civil service system as a core feature of the reform of its political institutions. It has been explicitly stated that the operation of the civil service system should go hand-in-hand with the separation of the Party and State. In this report, it was proposed that there would be two types of civil servants: the political officer (政务公务员) and the professional officer (业务公务员), which was very likely a deliberate imitation of the Western political system.⁴⁴⁰ The former would be those who hold electoral positions and would be subject to term limits, while the latter are tenure-based and focus on examination recruiting. These reforms were abandoned after the change in political climate following 1989. The implications of political neutrality and independence, in the careerist branch, have been replaced by a re-emphasis on political loyalty, enforced through the internal mechanisms to sanction undisciplined civil servants besides state laws. However, the significance of a modern civil service system has been institutionally confirmed. In 2005, the unified Civil Service Law was passed by the NPC, marking the complete establishment of the civil service system in China. Nowadays, the examination is unified nationwide and is subjected to strict supervision. All political positions, including those in the government, the NPC, and the CPPCC, along with party apparatus employees, must be recruited by examination based on different requirements of educational level, work experience, party membership, etc.⁴⁴¹

4.1.2 Performance Assessment for Executive Power

Though its significance merits acknowledgment, the mere fact that using examinations as an entrance for the political profession may not suffice to build a meritocratic system. Conceptualising the PRC regime as a political meritocracy on the PRC’s regime is illuminating in some respects – as can be seen in those arguments brought forward by Daniel Bell⁴⁴² - yet whilst this model of the PRC may amount to a promising political theory for further political reform, it is not convincing enough to describe its current reality without exaggeration. Daniel Bell has proposed a vivid example of how a senior leader in a central organisation department is selected, through a set of delicate mechanisms incorporating election, examination, investigation, and so on⁴⁴³. Undeniably, this exemplifies similar advancements in this regime, but it is too early to argue that it has replaced or offset all factionalism, patronage, and clientelism. Too much focus on the selection of politicians may blur

439 徐湘林. 后毛时代的精英转换和依附性技术官僚的兴起[J]. 战略与管理, 2001, 6(2); Xu Xianglin, Elite Transformation and the Rise of Dependent Technocracy in Post-Mao Era, Strategy and Management, 2001, 6(2)

440 Political Report of 13th Party Congress

441 Minor exceptions do exist, but are mainly the elite-recruitment system as in universities, aiming at to absorb the political activists in young people. In certain sense, this is still reflection of the legacy of traditional examination system.

442 Bell, Daniel A. *The China model: Political meritocracy and the limits of democracy*. Princeton University Press, 2016.

443 Ibid

the true picture of meritocratic elements. The exercise of political powers after the selection of personnel bears no less significance for governance. Both competent and mediocre leaders should face constraints concerning the legality of their actions, their rationality, and whether they are accountable to the public.

Regarding this, performance measurement mechanisms have increasingly functioned as an even more important institution for merit-based governance.⁴⁴⁴ If compared with Western democracies, it may be argued that in the level of governance rather than politics, there may be supervising number of similarities in assessing government performance. For instance, 'the primary methods that have been used by the UK central government to evaluate the performance of local authorities have been: (1) performance indicators; (2) auditing; and (3) inspection. This set of practices has been further reinforced by the programme of Local Public Service Agreements and Comprehensive Performance Assessment (CPA).'⁴⁴⁵

The PRC regime employs similar mechanisms to assess the performance of governments and politicians at various levels. Among them, the performance indicator has become a main way for the regime to vitalise local governance and select well-performed cadres. Its importance also lies in its clarity and publicity within the regime. It offers a platform for more direct and clear oversight from both state organs and the public. Of course, both positive and negative effects are identified. The later parts of this study will discuss the limits and flaws of such assessment mechanisms.

Indicator-based evaluation, as the main pattern for governance performance assessment, has diversified types. Firstly, there are positive indicators used mainly for economic growth. Growth indicators such as annual GDP growth, tax revenue and investment amounts have been long used as a chief measurement of governance performance at all levels, using a 'the more the better' approach. Within China's power decentralisation framework of 'fiscal federalism',⁴⁴⁶ this mechanism has the constitutional function to implement central authority's development policy and decide who gets to be promoted to higher positions. In a regime with a historically burdensome centrally-planned economy, this approach is regarded by economists as part of a crucial reason for unleashing economic vigour on the country and further expanding local powers. Concepts such as political tournaments are used to categorise this institution.⁴⁴⁷ For the Constitutional virtue, this contest-like model of governance performance significantly boosts responsiveness, because the competition between local governments forces them to work hard on economic growth and prevent negative events from happening. Also, this system sets an equal and fair criterion for political promotion, which could help to identify more capable politicians, or equally as capable and opportunistic figures.⁴⁴⁸ However, it should be noted that impacts are

444 For general study on the topic, see Zhou Z. Study of Government Performance Management in China: A Historical Review and Critical Assessment [J][J]. *Journal of Public Administration*, 2009, 1: 004.

445 Andrews, Rhys, et al. "External constraints on local service standards: the case of comprehensive performance assessment in English local government." *Public Administration* 83.3 (2005): 639-656.

446 For instance, see Blanchard, Olivier, and Andrei Shleifer. "Federalism with and without political centralisation: China versus Russia." *IMF staff papers* 48.1 (2001): 171-179.

447 Li-an, Zhou. "Governing China's Local Officials: An Analysis of Promotion Tournament Model [J]." *Economic Research Journal* 7 (2007): 36-50.]

448 Considering the widely existing phenomenon of fake data.

greatly mixed. Many problems have resulted, or at least partially developed, from this approach, such as a nationwide economic bubble, local protectionism, corruption, and so on.

Secondly, there also exist negative indicators that apply to discourage local officials from making certain types of decisions. It is usually termed the ‘one vote veto’ (一票否决) in China, which signifies the occurrence of a certain prescribed phenomenon or incident that would automatically veto the chance of promotion or trigger disciplinary penalty. Typically, the following matters may be regarded as having strong vetoing effects on the career path of officials. The first is concerned with environmental protection. To tackle environment degradation and enhance supervisorial power of environment regulatory agencies, the PRC regime places environmental indicators, such as the quality indicator of air, the number of environmental incidents, official criticism from higher-level environmental supervisory agencies, and the mass incidents such as ‘pleas’ (上访) caused by environmental incidents, to assess governance performance. The occurrence of such facts would mean the whole annual work of local governments would be placed on the lower part of the local governance performance rank. Responsible local officials would also receive official criticism and be prevented from accessing the next stage in their career structure. The second area is birth control and the one-child policy (the latter has now changed). It is in this area that veto indicators originated in the 1980s and this is perhaps the most notorious use of the practice. As the one-child policy changed, the importance of the birth-control veto also decreased. The third concerns industrial security incidents. Industrial security, especially in mining and other heavy industries, is always under close watch of the regime. The fourth, social stability related issues, is mainly the prevention of ‘shangfang’ (a plea from local people; they usually go to a higher rank of government to expose their controversies with local governments).

Veto indicators are being trialled in various localities. New types of indicators could be invented and added to the list. For instance, in certain regions, the scale of local governments debt is also enlisted as a major veto indicator.

Overall, the truthful reflection of the needs of local governance requires rationalised and systematic development of such an assessment system. The sophistication of the indicator system and absorption of democratic input are two main patterns to improve the system. Most recently, more systematic programmes of measuring have proliferated. The central organisational department is keen to promote a more comprehensive and rationalised indicator system. Rather than relying on simply one or a few indicators, the comprehensive governance performance model includes a wide range of indicators that allocates to its corresponding weight. In employing this model, the performance and capacity of officials are tested against a more balanced criterion. The central organisational department believes this system will elevate governance quality.⁴⁴⁹

Democratic participation also arises in the design of performance indicators. To offer democratic input and enhance supervision in government, local governments have started to use certain ‘participatory assessment’ mechanisms which have similar effects to small-scale advisory referenda.⁴⁵⁰ For instance, in 2003, the Beijing

449 Central Organisation Department, *ibid*

450 王锡锌, and 章永乐. "我国行政决策模式之转型——从管理主义模式到参与式治理模式." *法商研究* 5 (2010): 3-12. Wang Xixin, Zhang Yongle, *The Transformation of Administrative*

government organised an online assessment of governance performance, open to all citizens. It attracted 141,634 people to provide scoring, a considerable turnover considering people's limited access to the Internet at that time.⁴⁵¹ Nonetheless, the results of that survey were not published. A lack of openness deterred participation and credibility. During the following year, the number joining assessment decreased to over 4,000. Though these participatory mechanisms have been used from time to time, there still needs to be a more systematic and institutional adoption for them.

Despite the benefits and progress of such assessment mechanisms, there are also problems and risks. Scholars have insightfully identified the negative effects of veto indicators, arguing that they contribute to the formation of a pattern called a 'rule of mandates' instead of the rule of law:⁴⁵²

*China's system for maintaining political control of lower level officials relies on well-defined incentives and sanctions designed to uphold party directives (Landry, 2008). Broad party directives, which are separate from and sometimes consistent with the public law, are issued at the highest level. Consistently among the highest national priorities are economic development, social stability, and the birth control policy, which are measured by figures such as income per capita, incidences of collective protests, and the population growth rate. At lower levels, more specifics are developed about the exact targets, priorities, reporting requirements, rewards for success, and penalties for failure; these thus vary from area to area....Some laws and issues are such low priority that there are no targets corresponding to them.*⁴⁵³

This institution may cause mixed results:

*With such criteria, at its best, the cadre responsibility system is set up to incentivise a precise but narrow space of accountability. At its worst, it does not incentivise actual accountability but only apparent accountability, since the criteria for evaluation are often not directly visible to higher cadres so data may be easily fudged or made up by lower cadres.*⁴⁵⁴

Acknowledging this problem, the regime seems to further realise that accountability is necessary to enhance the sophistication of this assessment system. Rather than solely relying on the technical sophistication of assessment indicators, it resorts to interactions with legislative power to spur more effective institutional dynamics for supervision. The main approach here is to offer clear and authoritative supervisory channels for legislature, consultative assembly, and the public. The more sophisticated system of indicators has been increasingly entrenched into legislation, in a wholesale or retail manner, as a favoured mechanism for law makers to facilitate enforcement.⁴⁵⁵ It also encourages law makers to embed further details into the bill, to deter it from being compromised during implementation. In the NPC and CPPCC's inquiries, referring to indicators, as well as questioning dubious indicators reported by the government, has become a main measure with which to supervise the government.

Decision-making Pattern---from Managerialism to Participatory Governance, Study on Law and Commerce, 2010(5),3-12

451 Ibid

452 Birney, Mayling. "Decentralisation and veiled corruption under China's "rule of mandates"." World Development 53 (2014): 55-67.

453 Ibid

454 Ibid

455 See article 68 of the Environmental Protection Law of the PRC,
<http://www.china.org.cn/english/environment/34356.htm>

After all, these indicators reflect a rationalised pattern of government, which means governance quality could be assessed by reasoning and therefore is more easily open to reasonable doubts and reflections.

Governance performance assessment is changing from a management tool to whip the work in a field to an overall normative requirement of government performance, and a bridge for more deliberative executive-legislative interaction. However, being under experimentation with diversified versions in different localities, it is still premature to assert that it will prove a successful institution.

4.2. Normalising Administrative Powers: Legalisation, Transparency, and Participation

Executive power is increasingly normalised by establishing a modern administrative law system modelled on Western laws. In this sense, the Chinese executive apparatus is one hybrid system that is constituted by a traditional meritocratic mechanism, controlled by Leninist discipline and increasingly regulated by a mosaic of west-imported (but also localised) legal rules and principles such as judicial review, legitimate expectation,⁴⁵⁶ information freedom, and due process of law and proportionality, etc. Surely, there is some tension between Western elements and party control. Nevertheless, since these imported laws mainly apply to constrain administrative power rather than party power, they are generally allowed, or even encouraged, by the regime. This section will identify three chief cases to show how executive powers are shaped by such hybridity. Compared with typical legal principles in judicial review, these elements are more directly influential on the actual decision making of executive power.

4.2.1 The Legalised Procedure for Executive Decision Making

Facing the thorny task of maintaining a ruling position, the regime's decision-making process ought to be carefully crafted to maximise the quality of policy-making and satisfy the public. The CCP regime tries to put executive powers into the legal framework of 'scientific and democratic decision-making'.⁴⁵⁷ Penetrating the ideological mist, the term 'scientific' may suggest policy research, professional knowledge, and serious deliberation, while the term 'democratic' indicates the need to include diversified voices via consultation. All these issues and themes are compatible within the meritocratic ethos of the regime and could function as a meaningful stepping-stone to a more in-depth reform.

Guided by such spirit, the executive decision-making procedural has experienced a gradual course of normalisation. At the beginning of the reform era, for example, the importance of law for executive decision making was mainly intended to prevent the

456 To be noted, transplanting of foreign legal principles is more relied on academic interpretation, rather than explicitly borrowing in legislation. Nevertheless, since the legal texts in China are not uncommonly vague and general, there is considerable space to make use of this approach. For instance, the interpretation on legitimate expectation, see 王锡铤. 行政法上的正当期待保护原则述论[J]. 东方法学, 2009(1):18-27.; Wang Xixin, Xing Zheng Fa Shang De Zheng Dang Qi Dai Bao Hu Yuan Ze Lun Shu, Dong Fang Fa Xue, 2009(1):18-27

457 The main concept for its decision-making norm. For some discussion on the concept, see 王春福. 论科学民主决策的社会利益表达机制[J]. 求实, 2006(4):63-66; Wang Chunfu, On the Channels to Express Social Interests in Scientific and Democratic Decision-making, Qiu Shi, 2006(4),63-66

disastrous arbitrariness of the Cultural Revolution. The Party initiated the political-legal norms for its rule of law. In 1979, the concept of the 'socialist rule of law' and 'governing the country according to law' first entered the Party's documents.⁴⁵⁸ In 1982, the modified party constitution stipulated, 'the Party should act within the boundary of constitution and law'. Nevertheless, during a long period, the specific procedure for decision making had been insufficient and vague. Clarity and consistency within the law seemed to be taken for granted, making 'governing according to law' theoretically easy, while the reality was rather messy, particularly regarding the boundary of political powers.

Furthermore, in the 1990s, the concept of 'governing the country according to law' was elevated to a fundamental strategy (基本方略 close to the meaning of the fundamental principle) of the Party.⁴⁵⁹ Being an entrenched principle of the Party, marked it as an ideology-like norm. Some ideas, when being promoted to such status, may stop developing and functioning as a hollow ideology, but the rule of law narrative received better treatment. It was further theorised and enriched by the regime whereby a main throng of developments was increasingly categorised as the rule of law for executive decision making.

In 2004, to implement the strategy of governing the country by the rule of law, the State Council issued an important resolution stipulating the practices and institutions for the 'advancement of law-based administration and building a rule of law government' (国务院全面推进依法行政实施纲要), instilling a set of guiding principles and theories compatible with modern administrative justice.⁴⁶⁰ Much more flesh was added to the bone, mainly by transplanting modern administrative law rules from the West, which were tailored to suit the requirements of government documents in China. For instance, besides the general requirement that administration should be within the boundary of law (legality), the document also proposed the principle of rationality under the requirement of reasonableness (合理性, which in current judicial practices is increasingly framed as like the principle of proportionality⁴⁶¹) of administrative action, stipulating that such actions and measures should be necessary and proportionate. If there are various measures to carry out administrative action, the ones that has the least impact on the rights and interests of parties should be chosen. For the actual design of an administrative decision-making process, this document, for the first-time, proposed a clear process of procedure, though with limited details and clarity. Another three elements, public participation expert review (专家论证), and

458 In the 1970 government working report to the NPC,

http://www.gov.cn/test/2006-02/16/content_200759.htm

459 The NPC's official review of this conceptual development,

http://www.npc.gov.cn/npc/xinwen/rldt/fzjs/2014-11/14/content_1886222.htm

460 Ibid. Official link, http://www.gov.cn/ztl/yfxz/content_374160.htm

461 The exact words the document used to explain the meaning of reasonableness are clearly based on the understanding of proportionality: "合理行政"的要求是："行使自由裁量权应当符合法律目的，排除不相关因素的干扰；所采取的措施和手段应当必要、适当；行政机关实施行政管理可以采用多种方式实现行政目的的，应当避免采用损害当事人权益的方式。"杨登峰，"从合理原则走向统一的比例原则，" *中国法学* 3 (2016): 88-105.; Yang Deng Feng, Cong He Li Yuan Ze Zou Xiang Tong Yi De Bi Li Yuan Ze, *Zhong Guo Fa Xue* 3(2016):88-105.

transparency were also incorporated into its decision-making process⁴⁶². Mechanisms such as public hearings, consultation conferences, and information disclosures were developed to be necessary steps of administrative decision making. The requirement of law-compliance assessment, which will later be imposed as a compulsory procedure, was loosely mentioned for major administrative decisions in this document.

Though this document does not provide a coherent and systematic account for the establishment of law-based decision-making procedures, it has brought into place the core constituent elements, which have formed the basis for further developments. The mechanisms for legality and participation will be elaborated and enriched in the legal norms to follow. Also, being issued by the central government, this document has initiated the system-wide proliferation of local implementing ordinances for implementation. A significant amount of detail has been added. These local experiments have also formed an institutional basis for further enactment of more systematic administrative procedures.⁴⁶³

To fuel and guide local implementation, the State Council issued the ‘Resolution on Promoting Law-based Administration in Municipal and County level Government’ [国务院关于加强市县依法行政的意见]⁴⁶⁴ in 2008, which has further developed legal norms on decision-making. Firstly, the mechanism of public hearing has been singled out, with emphasis on the representative. The selection of participants should be shaped by the nature, complexity, and scope of the discussed matter. The name-list of representatives should also be open to the public, alongside the replies and opinions from representatives. Secondly, the law-compliance procedure was also singled out and stipulated as a compulsory procedure for major administrative decisions. The legal affairs office in local government should issue a legality review report for major decisions as a compulsory part of the whole procedure. Law firms could also be hired to conduct this review. Major administrative decisions, following these procedures, should be made in a collective decision-making manner to prevent personal arbitrariness.

In 2010, the State Council issued the third resolution, ‘The Resolution on Strengthening the Establishment of Rule of Law Government’ (国务院关于加强法治政府建设的意见).⁴⁶⁵ It started to form systematic design for administrative decision making. It focused on decision-making procedures for ‘major administrative decisions’. Previous mechanisms were all incorporated into an archetype of six-step compulsory procedures for major administrative decisions, which involved public participation, expert review, risk-assessment, legal compliance review, collective discussion, and collective determination. The legal compliance review was

462 Arguably, the design expertise consultation in administrative decision-making procedure was under the influence of Chinese scholars’ advocacy of similar practices in US law. For instance, see 王锡铎. 公共决策中的大众、专家与政府---以中国价格决策听证制度为个案的研究视角[J]. 中外法学, 2006, 18(4):462-483.; Wang Xi Xin, Gong Gong Jue Ce Zhong De Da Zhong, Zhuan Jia Yu Zheng Fu---Yi Zhong Guo Jia Ge Jue Ce Ting Zheng Zhi Du Wei Ge An De Yan Jiu Shi Jiao, Zhong Wai Fa Xue, 2006 18(4):462-483

463 杨寅, 狄馨萍. 我国重大行政决策程序立法实践分析[J]. 法学杂志, 2011, 32(7):34-36.; Yang Yin, Di Xinping, The Analysis on the Legislative Practices of Procedure for Major Administrative Decisions, Journal of Law, 2011, 32(7), 34-36

464 http://www.gov.cn/zwgk/2008-06/18/content_1020629.htm

465 http://www.gov.cn/zwgk/2010-11/08/content_1740765.htm

established as a pre-conditional procedure, without which the result would have been illegal, and matters would not have entered the agenda of government meetings or discussions and would, consequently, not have been considered. A new pre-conditional element is risk-assessment, which has been presented in this document with significant details to include public participation, expert consultation, professional review, and so on, for concrete methods of solving the problem. Also, following the line of accountability in previous documents, this resolution continues to emphasise various accountability mechanisms, in particular that offices for legality review and risk assessment must shoulder direct responsibility if policies and decisions go wrong. In the meantime, local experimentation of administrative procedure design continues to thrive. Hunan became the first province to promulgate an independent ordinance of administrative procedure. Under the intensive influence of prestigious law professors in China,⁴⁶⁶ its administrative law reform introduced rich details. Participation and transparency were the core elements for the design of decision-making procedures in this regulation. Concrete criteria and procedures for the triggering and operation of public hearings and information disclosure were given, under explicit influence of the ‘due process’ jurisprudence of law within the United States.

So far, the regime has achieved the initial establishment of a legal system for administrative procedure. Based on decades of practice and development in this area, the Party authority started to entrench administrative decision-making procedures into its political theories, forging a crucial part of the overall effort to promote its rule of law. In the fourth session of the 18th plenum of the Party in 2014, the CCP issued the ‘Resolution on Advancement of Rule of Law in an All-round Way’ (关于全面推进依法治国重大问题的决定)⁴⁶⁷. This resolution elevated norm-based decision-making procedures to a strategic level, confirming a five-step process of major administrative decision-making-public participation, expert review, risk assessment, legal compliance review, collective discussion and determination, with transparency as quality ensured and regulated by the government information disclosure ordinance. This has become a binding model for all governmental units. Legal compliance review was again singled out and emphasised, with a requirement of establishing actual working mechanisms for legal compliance for major administrative decisions, mainly by realizing the review power of in-house legal counsel in government.

4.2.2 Participatory Mechanisms

An unavoidable question to deal with when discussing political institutions in China, especially those that may signify progress in governance and participation, is the doubt surrounding formality and authenticity. Such questioning is understandable but requires a greater deal of reflection. As a matter of fact, even in an authoritarian regime, institutions with democratic elements could flourish. As scholars have observed:

466 A number of senior professors on constitutional and administrative law were invited to provide advices on the drafting of the regulation. For instance, 应松年. 《湖南省行政程序规定》制定和实施情况的调查报告[J]. 国家行政学院学报, 2009(5):37-40. Ying Songnian, The Making and Implementation of Hunan Administrative Decision-making Procedure, Journal of National Academy of Administration, 2009(5):37-40.

467 <http://cpc.people.com.cn/n/2014/1029/c64387-25927606.html>

*The difference is that, in contrast to the developed democracies, the CCP seeks to channel political participation into the domains of administrative decision making, the economy, the judiciary, and – to a very limited extent – a nascent civil society. Let us call this domain ‘governance level’ political participation, reflecting its problem-focused, issue and domain-segmented nature. At the same time, we find little or no development of political participation at what might be called the ‘regime level’; powers of decision have not dispersed to the extent that they produce autonomous public spheres, independent political organisations, independent oversight bodies or oversight through separations of powers. Nor have they produced open-agenda public meetings, citizen initiatives, or – most obviously – multiparty elections. These limited governance-focused empowerments do not add up to regime democratisation. But they do contribute to the overall pattern of authoritarian deliberation by empowering domain and scope-limited forms of voice, and there exist functioning pockets of democracy constrained by geographical scope, policy, and level of government...*⁴⁶⁸

A crucial element in administrative decision-making norms is the public hearing. Perhaps in the PRC regime, for both the authority and the society, no other institutional element was once so expected to offer democratic input more than this one. Yet, its actual practice is with diversified patterns, mixed impacts, and complexity.

The Chinese administrative law finds no theoretical or institutional barrier in employing public hearings, since the Constitutional principle of party leadership does not reject consultative and deliberative mechanisms for socialist democracy. This holds true for as long as they accommodate individual participation rather than facilitate organised opposition. The use of public hearing first appeared in the <Price Law> in 1997.⁴⁶⁹ The determination to change the price of public services, such as gas and electricity, should be conducted via public hearing to debate its necessity and feasibility. This rule, like many rules in China, lacks the details to be executed and operated effectively. The law suffers from a problematic execution, such as unfairness in the selection of representatives. Nevertheless, it initiated the proliferation of this mechanism to numerous fields. The Administrative Penalty Law and Administrative License Law both established public hearings as a compulsory procedure before the relevant administrative decision was made. The existence of these procedural elements could enable the public to make judicial challenges to executive power. For instance, when the then Ministry of Railway elevated the railway price during its spring festival (via the approval of the then Committee of National Planning) in 2001, a lawyer challenged the legality of this decision on the basis that it violated procedural justice due to the lack of public hearing. This case forced the Committee of National Planning to provide greater details in implementing public hearing for price change.⁴⁷⁰

468 He B, Warren M E. Authoritarian deliberation: The deliberative turn in Chinese political development[J]. Perspectives on politics, 2011, 9(02): 269-289.]; Public Hearings and Others

469 韦大乐, 于施洋. 略论价格决策听证会制度[J]. 法学杂志, 1998(4):11-12. Wei Dale, Yu Shiyang, On the Public Hearing Mechanism in Determination of Price, Journal of Law, 1998(4):11-12

470 彭宗超. "公共治理视野中的中国听证制度改革." 公共管理评论 1 (2004): 004.] Peng Zongchao, Reform of Public Hearing from the Perspective of Public Governance For the case and ruling, see

http://www.pkulaw.cn/case/pfnl_1970324837054115.html?match=Exact

The use of public hearings is still far from satisfactory. People have said in jest that public hearings are indeed price-elevating hearings. The selection of social representatives to the hearings are also under enormous controversy. Put into a broader perspective, in recent years it has been proposed that the adoption of public voices should be carried out via various channels. If the very formal procedure of public hearing limits public participation, informal yet effective mechanisms such as deliberation conferences, deliberative polls, online publications, and opinion solicitation should also be mobilised to maximise the input of public voices. Some of these practices have been entrenched as a compulsory part of the paperwork involved in the executive conference for policy-making.

In the broader sense, with such developments of participatory mechanisms, it has been argued that a form of 'participatory governance' has taken root in the PRC regime.⁴⁷¹ It seems that such practices in China are purely pragmatic, in the sense that the government has sought the consensus of the public for administrative decisions, which could, in turn, alleviate the burden of the government to justify their policies in an uni-lateral manner. Therefore, all kinds of participatory mechanisms have proliferated in local governance. For instance,⁴⁷² in the Changsha county of the Hunan Province, some public affairs in the village and community were placed in direct referendum for decisions. In Wenling, a city in Zhejiang Province, the review of the government budget was channelled to public participation. For more than ten years till now, the local people's congress in Wenling organised annual sessions of 'democratic deliberation conference' (民主恳谈会), and have invited people's representatives and direct representatives by lottery to review the government's budget proposal and inquire about corresponding government officers. In addition, as the previous high-level norms have stipulated, the expert review and consultation are also active.

It is difficult to accurately assess the effectiveness and influence of such mechanisms, but close observers have provided positive feedback in some instances. For example:

*The Zeguo Deliberative Poll was scientific in using social science to consult the public; democratic in offering the voice of a random sample, not just the Party cadres; legal in submitting the results to the local People's Congress, which approved them overwhelmingly, before they were implemented.*⁴⁷³

It is possible there is some degree of exaggeration here, and other cases may not exhibit this kind of organisational quality. Nevertheless, this still means that such a mechanism could have real effects.

Apart from all these mechanisms, the pervasive influence of the internet and modern media should never be underestimated. The Internet has become the most efficient and vibrant public forum in China. The regime and the Party system, acquire information and feedback directly from the internet. Most executive and party units in the regime have special information office, who are directly responsible for collecting

471 王锡锌, and 章永乐. "我国行政决策模式之转型——从管理主义模式到参与式治理模式." 法商研究 5 (2010): 3-12.] Wang Xixin, Zhang Yongle, The Transformation of the Pattern of Administrative Decision-making---from Managerism to Participatory Governance, Law and Commerce, (2010):3-12

472 Ibid

473 Ibid

information from the Internet. Most government websites have online channels for people to voice their opinions and complaints.

In summary, these participatory channels during executive decision making are an important reason for the 'authoritarian responsiveness' of the regime. Regularisation and institutionalisation of such responsiveness may function as a catalyst for greater advancement.

4.2.3 Transparency and Openness

Compared with other more direct mechanisms for democratic contestation of government, transparency as a regulatory rule is more likely to be accepted or even endorsed during political transition, since it is an inherent technical quality of effective governance and does not directly challenge the regime. Therefore, in political transition, transparency can function as a crucial way to tame political power:

*Transparency of information (including ultimately a legal provision for citizens to sue for access to government information), and public involvement in the process of accountability, provide an additional check on wrongdoing. Such transparency and participation deter corruption and favouritism within the agencies of horizontal accountability while assisting them to acquire the information they need to perform their tasks.*⁴⁷⁴

In China, government transparency has been advocated and practiced with a varying degree of effectiveness since the 1990s.⁴⁷⁵ At the beginning, local government ordinances and party documents provided the bulk of legal norms for government transparency, but there were very few applicable legal mechanisms to fulfil disclosure requests. After years of experience and also under enormous social pressure, the regime enacted the first government transparency law in 2007. This Government Information Disclosure Ordinance established a legal regime for transparency with administrative litigation (judicial review in China) as the primary mechanism to implement the right to information. This ordinance adopted a bifurcated arrangement to ensure government transparency. On the one hand, there is compulsory information that the government is legally obliged to publish regularly, such as administrative laws and regulations, government budget and debts, administrative fees (items, legal basis, criteria etc.), administrative license (items, legal basis, criteria etc.), statistical information, organisational structure, and so on. On the other hand, citizens could proactively apply for disclosure of government information. The principle has been set so that information regarding state secrets is unavailable, along with information related to commercial secrets and individual privacy – all of which can only be disclosed by the approval of the relevant party or the overriding necessity of public interest. The government's refusal of disclosure, and inaction of compulsory disclosure, can be litigated in court. Ever since the promulgation of the ordinance, the annual number of information disclosure cases has stably risen in various provinces, with the top two in 2015–2016 reaching 2,257 (Jiangsu)⁴⁷⁶ and 2,192 (Beijing).⁴⁷⁷ It is also notable that citizens in developed regions are more active in using this mechanism.

474 Diamond, Larry. "The rule of law as transition to democracy in China." *Journal of Contemporary China* 12.35 (2003): 319-331.

475 刘恒. 政府信息公开制度[M]. 中国社会科学出版社, 2004. Liu Heng, Government Information Disclosure Institutions, Chinese Social Science Press, 2004.

476 <http://www.jiangsu.gov.cn/jszfxgk/zfxgkzl/gzndbg/201603/t20160330497046.html>

Certainly, there is tension between the government's disclosure work and the public pressure. In judicial cases, the Secrecy Law, Archive Law, and other rules are consistently employed by the government to shirk the responsibility of transparency. Nevertheless, transparency law still poses pressure on executive powers to normalise its decision-making processes and abide by the country's law. Insiders from the State Council have admitted that the worries and concerns over potential informational disclosure litigation have become a major impetus for prudent deliberation and design of policies. There are also mixed effects such that the government, due to the fear of potential disclosure, may only include 'safe' information in official documents.

The focal point of legal controversy over the boundaries of the government's power to hide information may be the issue of 'formulating information'.⁴⁷⁸ In 2010, the State Council chief office issued a guidance document of interpreting opinion on the implementation of government information disclosure. This guide added the rule that information that is still in the process of formulation alongside information concerning the internal management of the government, may not be disclosed, if the disclosure could cause harm to the public. The government, therefore, acquired a normative basis to exercise discretion over the disclosure of information, and held government meeting briefs, exchanged and discussed inter-agency documents, and so on. This of course caused enormous debate, as well as legal suits. In 2010, the Ministry of Health was sued because of its refusal to disclose the meeting record for the making of the national hygiene standard for milk.⁴⁷⁹ The argument the ministry posited was that the policy was still in its formulative stage. This became a major case for information disclosure in China. The ministry made the point by stating that the meeting brief could potentially harm both the industry and its regulatory policies, as well as cause unnecessary panic among the public.⁴⁸⁰ However, the process in reaching this conclusion could have benefited from being more well-reasoned and participation-friendly. The court ruled against the ministry and ordered it to reply again to the applicant, making this case a hallmark of information disclosure litigation. Growing from this case and many cases like it, academics' and practitioners' discussion on the issue proliferated. It has now been generally agreed, by both those in academia and the judicial system, that formulative information is not a safe harbour for the government.⁴⁸¹ If the information relates to public interest and has reached a status of being finalised as a single part, even if it has a complex process, it should not be immune simply because it is not the determinative action or policy.

477 <http://zhengwu.beijing.gov.cn/zwzt/2015xxgknb/t1428667.htm>

478 杨小军. "过程性政府信息的公开与不公开." 国家检察官学院学报 20.2 (2012): 73-78.; Yang Xiaojun, The Disclosure and Closure of Process Information in Government Information, National Academy of Prosecution, 2012, 73-78

479 http://www.pkulaw.cn/case_es/pfnl_1970324845185744.html?match=Exact

480 Shortly before that was the notorious poison milk scandal in China. The government might fear that all relevant information, once disclosed, would be somewhat distorted and cause greater panic. Nevertheless, it is a powerful argument and more transparency would eventually ease, rather than deteriorating social panic.

481 罗文岚, Luo Wenlan. 我国政府过程性信息公开的困局与纾解[J]. 行政与法, 2014(8):12-16; Luo Wenlan, The Deadlock of Process Information Disclosure and Solutions, Administration and Law, 2014(8),12-16

In sum, the development of norms for information transparency and the evolution of jurisprudence could serve as an example of how administrative norms could tame executive powers in decision making and facilitate more fundamental constitutional functions.

5. Executive-legislative Interaction : Boundary of Powers

Constitutional hybridity gives rise to a multicity of institutional elements, which functions as a framework for mutual-collaboration and mutual-checks between executive and legislative power in China. A broad array of working mechanisms for interplay have been in place to guide executive-legislative relations. In the legal domain, influenced by German law, the development of the Chinese version of 'Vorbehalt des Gesetzes' have set clear rules about the boundary between executive and legislative powers, the actual content of which is also transformed to be compatible with a socialist political system.

5.1. Cooperation, Interaction and Working Mechanisms of Law-making

Strengthened by bureaucratisation, the legislature will naturally assert its power, which will lead to adjusted executive-legislative interaction and the development of more concrete mechanisms. In the reform era of the regime, with the factional struggle and personal arbitrariness model, which has gradually faded, law making functions as an alternative, legitimising the mechanism for policies. The competition among different powers naturally propels the normalisation of law-making processes and institutions, since a level-playing field seems to be the only acceptable arrangement for each.

Furthermore, political bargaining of this kind also gives rise to executive-legislative cooperation. Executive powers need the legitimatising function of legislative process, while legislature finds no reason not to assert its power and influence.

The executive branch nowadays has a real motive to move their policy initiatives towards the NPC process, in order to seek a better chance to preserve the initial content of their policies through rounds of struggling with departmentalism. This may need some explanation. The PRC regime has entrenched a power balance; the executive branch has hardly operated by a single will. Instead, the internal decision-making process may be full of competition and fragmentation⁴⁸². Each ministry has its own professional fields and policy agenda, a great deal of which may overlap or even conflict on certain issues. The state council is one of the statutory bodies that could propose law bills to the NPC, yet, a great deal of these bills, as well as administrative regulations, are drafted by relevant departments and reflect their own preferences and interests.⁴⁸³ Although in the Legislation Act, the administrative regulations could be drafted and promulgated by the central government itself, the government is starting to rely on formal legislative procedure in the NPC to promote

482 Mertha A. "Fragmented authoritarianism 2.0": political pluralisation in the Chinese policy process[J]. *The China Quarterly*, 2009, 200: 995-1012. Also, see the case of specific policy, Lema, Adrian, and Kristian Ruby. "Between fragmented authoritarianism and policy coordination: Creating a Chinese market for wind energy." *Energy Policy* 35.7 (2007): 3879-3890.

483 Li-shen Y U. Expression of Interest, Communication of Opinions and Collaboration in Administrative Rule-making Process[J]. *Contemporary Legal Science*, 2004, 2: 002.

their agenda.⁴⁸⁴ This is also a signal of the NPC's conscious expansion of power. In both cases, the NPC process will become the procedure through which their will has the ability to materialise. With diversified preferences and interests, the bill from one department always needs the corresponding approval and cooperation from other departments. Therefore, departmentalism becomes a main hindering factor for arbitrary departmental law making. Facing this configuration of veto points, a drafting department or the legal affairs office of the State Council, may have to delete controversial clauses to make it pass in the final review of state council leadership. The department and sometimes the State Council itself have a strong motivation to bring a policy initiative to the NPC's legislative process, rather than retaining it in the administrative law-making process. This is because the NPC's coordination of various interest groups, which include governmental departments, relevant party units, social groups, and so on, are sometimes more effective and could easily override the departments' opposition to drafting. The comparative independence, the formal authority of supreme assembly and the seniority of the NPC politicians are factors that, to a certain degree, offset its weakness.

The coordinative nature of executive-legislative relations is mainly embodied by the mutual-participatory mechanisms in the formulation of the Party's legislative agenda. A significant number of concrete mechanisms have gradually been developed, in a 'practice first, legalisation later' manner. In the drafting process of its legislative bills, the NPC and State Council have both engaged with one another. A deliberative conference is a typical way to discuss the issues and policies to be put on a bill, as well as the general principle for them, with more concrete details and technical issues left to the formal deliberative process of the NPC. On a grander level, the traditionally weak NPC system, as the legitimate supreme legislature, is now increasingly claiming its legislative powers with respect to its planning and coordination. It even phrases its function and role as the 'dominance in law-making'.⁴⁸⁵ As mentioned previously, the overall annual legislative work plan has become a main working mechanism for the NPC Standing Committee to materialise its agenda. It has been explicitly expressed in party media that the State Council's law-making work should also be incorporated into the general plan of the NPC's annual legislative work. Aiming at coordinating the whole range of law making, the NPC has enriched this legislative planning mechanism and has made it a systematic programme involving extensive opinion solicitation, consultation, investigation, and bargaining⁴⁸⁶, with not only the executive branch, but all relevant stakeholders.

Apart from its coordinative function, the NPC's system also has certain vetoing power over the executive. The concrete legal mechanisms for exercising vetoing power are as follows. Firstly, the NPC could just play its role of law reviewer and decide whether to approve the government bill or not. The party certainly would like to see the high approval rate of government initiatives, as they are also endorsed by the Party's authority, but as previously mentioned, in a broad range of middle and micro-level policies, the Party, in fact, leaves them to the normal executive-legislative process. There are regular cases in which governmental bills are not approved or forced to modify. These include the Highway Expenditure case, the vetoing of the

484 Ibid. Also, Kong B. China's energy decision-making: becoming more like the United States? [J]. *Journal of Contemporary China*, 2009, 18(62): 789-812.

485 <http://legal.people.com.cn/n/2014/1211/c188502-26186013.html>

486 Such works are mostly carried out by the LAC

local government and court's annual working report, the vetoing of government budget, the vetoing of the working report on the implementation of representatives' proposal, and so on. An obvious feature is that the exercise of vetoing is more frequently utilised at a local level.⁴⁸⁷

In fact, the actual frequency of such vetoing may have been much higher than people may think, as the flexible coordinative and communicative mechanisms between the executives and legislature could allow them to negotiate before the bills are placed into formal procedures. The substantial bargaining of the bill may have already happened even before the bill had been proposed. A series of examples, observations, and arguments have been proposed regarding this point. For instance:

*[...] most surprising is that not all draft laws which are brought to a formal vote at the NPC actually pass. According to interview sources, there have been at least two occasions on which the NPC Standing Committee has brought a draft law to a vote and has voted it down, thus sending it back for extensive revision before resubmission. Although the official press has noted the Standing Committee's willingness to vote down draft amendments to laws, it has not, so far as I have been able to discover, reported a negative vote on any draft law. It will probably surprise few sinologists that one of the ill-fated drafts was the highly controversial 1986 Enterprise Bankruptcy Law, which was reportedly voted down during its second attempt at passage at the August 1986 Standing Committee session. The second negative vote, surprisingly, occurred just a couple of months after the suppression of the 1989 student movement, when according to these sources, the Standing Committee voted down a highly restrictive draft of the Law on Public Demonstrations drafted and sponsored by the Ministry of Public Security.*⁴⁸⁸

Second, in detail of the previous point, the NPC's Standing Committee and subcommittees have the statutory authority to review and modify government bills. In its concrete procedure rules, certain mechanisms are in favour of the NPC's review and supervision. For instance, the government has always wanted to speed up the passage of its bills and has resorted to compiling multiple issues in one bill. The NPC

487 田必耀. 解读沅陵县人大否决财政预算报告[J]. 人大建设, 2003(2):10-11. 戚渊. 民主需要论证——沈阳市人大否决案剖析[J]. 法学, 2001(11):9-15. 周绍朋. 政府议案为何遭人大否决[J]. 决策, 2005(2):46-47. 丁爱萍. 人大否决法院工作报告的思考[J]. 楚天主人, 2007(9):31-32. 萧仁武. 南岸人大否决区政府报告 凸显人大“刚性”监督[J]. 公民导刊, 2015(1):27-27. 杨文浩. 人大否决局长任命何时不再是个“意外”[J]. 法治与社会, 2012(3):1-1. Tian Biyao, Interpretation of the NPC Veto on Government Budget Bill in Yuan Ling County, NPC Establishment, 2003(2):10-11, Qi Yuan, Democracy Demands Debate and Justification---Analysis on the Case of the NPC Veto in Shenyang, Journal of Law, 2001(11):9-15; Zhou Shaopeng, Why Government Bills are Vetoed by NPC, Journal of Decision-making, 2005(2):46-47; Ding Aiping, Reflections on NPC Veto of the Courts' Working Report, Chu Tian Zhuren, 2007(9):31-32; Xiao Renwu, Nanan People's Congress Vetoed District Government's Working Report: a Demonstration of the Effectiveness of Supervision, Guidance for Citizens, 2015(7), 27; Yang Wenhao, When Will NPC's Veto on Political Appointment Not Be an "Accident", Rule of Law and Society, 2012(1), 3; The most high-profile case, is the NPC Standing Committee's veto of the central government's bill of modifying the "Highway Law", see Li Peng, <Legislation and Supervision: Li Peng's Diary in the NPC>, Chapter 11; 李鹏, 《立法与监督: 李鹏人大日记》, 第十一章, 新华出版社, 中国民主法制出版社, 2006

488 Tanner, Murray Scot. "The politics of lawmaking in post-Mao China: Institutions, processes, and democratic prospects." *OUP Catalogue* (1999), chapter 5, page 34 of 75

may discover controversies and, therefore, ask for modifications to be made. The government may always claim that one place of modification should not hinder the passage of the overall bill or try to break up the bills and pass it along separately. Yet the NPC finds statutory basis in the legislative procedure to defend its power for this modification.⁴⁸⁹ It has also been clearly stipulated, by the Party's decision to advance its socialist rule of law, that the NPC's system should use the mechanism to review and vote on one single article of a bill when necessary.⁴⁹⁰

Thirdly, a similar kind of parliamentary enquiry session has been under development, exerting similar functions with the use of veto power, in terms of supervising and balancing the government. The so called 'Topical Enquiry' (专题询问) was first proposed in 2010 as a mechanism to improve the supervisory work of the NPC. It has been activated since 2013. The actual form and content is very similar to the typical inquiry in Western parliaments, with government ministers and vice premiers answering questions by representatives in the NPC Standing Committee. The enquiry is broadcast in text (currently) in the NPC's official website. The only problem is that it has not been regularised. Annually, there exist three topical enquiries in the NPC (2014, 2015), with similar frequency in local NPCs. To achieve better results, it should be permanent and regulated.

Fourthly, at a local level, a legislative platform is increasingly used by representatives to supervise and influence local government.⁴⁹¹ This trend even has the potential to carve out a type of political representation within the Party-State reform, that the representatives regard themselves and act as "delegates" and not Burkean trustees or Leninist party agents'.⁴⁹² It plays out as an 'extra-legislative variant of pork-barrel politics: parochial activity by delegates to deliver targeted public goods to the geographic constituency'.⁴⁹³ Such inter-branch activity could force the government to respond to local needs: 'authoritarian parochialism is a congressional design feature and not a flaw. The design is also incentive compatible: there are no losers when congressional delegates place the practical problems and circumstances of ordinary citizens on the local governance's agenda and respond accordingly'.⁴⁹⁴

489 Article 41,42, Legislation Law. Also, see 刘风景. 重要条款单独表决的法理与实施[J]. 法学, 2015(7):78-87; Liu Fengjing, The Jurisprudence and Practice of the Singled-out Vote on Important Clauses, Law Research, 2015(7):78-87

490 Official English version:

http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm. Also a case of local authorities implementing this decision, see 易明刚. 一次深入贯彻十八届四中全会精神的立法实践——广东省人大常委会出台《对法规案中个别重要条款单独表决的决定》[J]. 人民之声, 2015(3):21-21; Yi Minggang, A Legislative Practice that Implements the Spirit of Fourth Plenum of 18th Party Congress--- Guangdong People's Congress Standing Committee Promulgates "Decision on Singled-out Vote for Important Clauses in Legislative Bills", Voice of People, 2015(3):21-23

491 Manion, Melanie. "Authoritarian parochialism: Local congressional representation in China." *The China Quarterly* 218 (2014): 311-338.

492 Ibid

493 Ibid

494 Ibid

5.2. The ‘Vorbehalt des Gesetzes’ in China and the Changing Boundary between Executive and Legislative Powers

The ‘Vorbehalt des Gesetzes’ is a German constitutional rule that demarcates the boundaries of executive and legislative power. In recent decades, Chinese law borrowed this principle and built a Chinese version of it, which provides a leeway for the legislature’s growth of power.

The Chinese version of this German law concept has not always been a direction transplant. The first constitution in 1954 was not elaborate on the division of law-making powers, with the NPC having the sole power to change and implement laws⁴⁹⁵. The 1982 constitution was drafted during a period of a rapid change in politics and legal system. The out-dated norms might fail to accommodate the on-going reform. Expediency rather than formality ought to be a priority for reform to be implemented within the legal system. The simple model of a centralised law-making power in the supreme assembly is, therefore, clumsy and unwise. The 1982 constitution made a power-division arrangement that allocated law-making, or more accurately, norm-making powers to become diversified entities. The NPC and its Standing Committee acquired law-making power. The central government and its departments acquired the power to make rules in accordance with NPC-made laws. Local authorities acquired the power to make local legislation by local people’s congress, on the condition that they did not violate NPC-made laws and executive rules. Thus, a general hierarchy of law making was established.⁴⁹⁶

Nevertheless, a reformative era necessarily featured the frequent break of an existing norm system. The practical need to establish and consolidate policies gave rise to the active and sometimes arbitrary executive law making, which frequently encroached upon a typical legislature’s law-making domain. Also, local experimentation resulted in a wide range of new institutions and new policies, which did not have the proper legal basis and had even been adopted in violation of laws. Unconstrained and chaotic norm-making powers undermined legal certainty and endangered basic rights.

To tackle such problems, in 2000, the PRC regime introduced the Legislation Law, a functionally constitutional document that set the boundary and procedures for various kinds of law-making power. In Articles 8 and 9, the law set the cornerstone rule of separation for law-making powers between the central legislature and other entities:

Article 8

The following affairs shall only be governed by law:

1. affairs concerning State sovereignty;
2. the formation, organisation, functions, and powers of the people’s congresses, the people’s governments, the people’s courts and the people’s procuratorates at all levels;

495 韩大元. 1954 年宪法的历史命运与人民代表大会制度[J]. 法律科学-西北政法学院学报, 2004, 22(5):19-21.

Han Dayuan, The Historical Destiny of 1954 Constitution and People’s Congress System, Law as Science, 2004, 22(5):19-21

496 刘春华. 国务院立法权限若干疑难问题探讨[J]. 中外法学, 1998, 10(5):90-94; Liu Chunhu, Discussion on Legislative Power of State Council, Zhong Wai Fa Xue(Peking University Law Journal), 1998, 10(5):90-94

3. the system of regional national autonomy, the system of special administrative region, the system of self-government among people at the grassroots level;
4. criminal offences and their punishment;
5. mandatory measures and penalties involving depriving citizens of their political rights or restriction of the freedom of their person;
6. a requisition of non-State-owned property;
7. a basic civil system;
8. a basic economic system and basic systems of finance, taxation, customs, banking, and foreign trade;
9. systems of litigation and arbitration; and
10. other affairs on which laws must be made by the National People's Congress or its Standing Committee.

Article 9

If laws have not been enacted on the affairs specified in Article 8 of this Law, the National People's Congress or its Standing Committee has the power to decide to authorise the State Council to formulate, according to its actual needs, administrative regulations with respect to those affairs. The exception to this involves criminal offences and their punishment, mandatory measures, and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their people and the judicial system.

Such efforts were initially meant to ensure the clarity and consistency of the whole legal system, which necessarily strike similarities with the German model of 'Vorbehalt des Gesetzes', which is also generally explained by deliberate imitation.⁴⁹⁷ Under pressure from Chinese legal academia, it has now been predominantly interpreted as emphasising the legislature's inherent legitimacy in law making. A scholarly interpretation of it also favours the connotation of the separation of power and protection of fundamental rights against executive arbitrariness. In contrast, the official concern was more about claiming the authority of central legislation and prevent local legislation from violating its central norms.⁴⁹⁸

In any case, the regime's functional need for governance effectively overlaps with the building of the rule of law and constitutionalism. The exclusive jurisdiction of NPC law making is a chief mechanism to defend and expand its power. Section 10 of Article 8 set the reserved powers of the NPC with flexibility and vagueness. The preserved law-making domain of the NPC seemingly has three basic logical principles. The first, the logic of sovereignty and constitutional affairs, including state institutions, local autonomy, and so on. The second, the logic of the rule of law, such as criminalisation, which can, consequently, only be provided by legislature-made law, and the third, and arguably most critical, the logic of rights protection. The constraint on fundamental rights could only be established and regulated by legislature-made

497 For more detailed discussion, 刘连泰. 评我国《立法法》第八条、第九条关于“法律保留”制度[J]. 河南财经政法大学学报, 2003, 18(3):102-107. 蒋剑云. 论法律保留原则[J]. 行政法学研究, 2005(1):61-68. 秦前红. 法律保留功能的时代变迁[J]. 法学评论, 2008. Liu Liantai, Comment on the “Fa Lv Bao Liu” System in Article 8 and 9 of Legislation Law, Journal of Henan Finance ,Law and Politic University, 2003, 18(3):102-107; Jiang Jianyun, On the Principle of Fa Lv Bao Liu, Study on Administrative Law, 2005(1):61-68

498 From the main academic adviser of this law, 应松年. 《立法法》关于法律保留原则的规定[J]. 行政法学研究, 2000(3); Ying Songnian, The Legislation Law's Stipulation of Fa Lv Bao Liu Principle, 2000(3)

law. Recent development has shown the possibility of legislature's self-empowerment via the utilisation of this channel. In 2015, the imposition and contents of tax have been added to the list, changing the lasting practice that the executive power could easily set tax just by executive rules.

Nevertheless, a close reading of texts and other legal-political institutions of China may discover serious tensions in developing a balanced power dynamic with the utilisation of this measure. First, an equally flexible channel is also available with the inclusion of Article 9 and allows for the easy delegation of exclusive law-making powers to executive branches.⁴⁹⁹ The legislature's passivity is an exceptionally severe problem in China for obvious political reasons. Indeed, there is a clear classification of 'absolute reservation' and 'relative reservation', meaning that the 'the affairs concerning criminal offenses and their punishment, mandatory measures, and penalties involving depriving citizens of their political rights or restricting their freedom, within the judicial system' cannot be delegated, but it is still not enough. The range of fundamental rights that deserve a deliberative and lengthy law-making procedure is definitely broader than crime defining by law and personal freedom.⁵⁰⁰ In the list within Article 8, the deprivation of non-State-owned property would affect the basic right of property, which should fall under the exclusive domain of legislature. Also, the absolute reservation fails to include matters concerning freedom of expression and other political rights. Such insufficiency may be improved through the approach of expanding the list in Article 8, and therefore have left room and reason for hope.

6. Summary

This chapter demonstrates how constitutional hybridity contributes to the developing pattern of constitutional governance in China. It focuses on the legislative and executive branch, as well as the interplay between them. The legislature has been empowered by bureaucratisation and professionalization drawn from the Chinese tradition. Being transformed into a more competent semi-bureaucratic agency, it acquires stronger ability and leverage in aggrandising legislative power and influence, as testified by its increasingly explicit influence in actual law making (the acclaimed 'dominance' in law making) and the recent proposed work of 'constitutionality review'. That is to say, the bureaucracy-building of Chinese tradition could also help to materialize the nominal powers of the legislature, many of which are modelled on western constitutions, such as the mechanism of 'constitutionality review'.

The executive power has been increasingly institutionalized, combining elements from both the Chinese and the western tradition. The Chinese tradition offers basis for a meritocratic bureaucracy, while the western-imported administrative law helps to place legal constraints on such powers and, in so doing, helps render them effective. The government is, to a certain degree, a direct legacy of the ancient meritocratic tradition, with open examination of the civil service as a chief way for political participation and social mobility in modern China. Nevertheless, meritocratic elements alone cannot sufficiently build constitutional governance. Modern administrative laws based on western model play a vital role in normalising executive

499 Liu Chunhua , *ibid*

500 In comparison, see how the the non-delegation principle in US constitutional interacts with rights, Strobel M H. Delegation and Individual Rights[J]. S. Cal. L. Rev., 1982, 56: 1321.

powers. The three identified cases of government transparency, decision-making procedures and participatory mechanisms have demonstrated that administrative law is playing a crucial constitutional function.

The interplay between executive and legislative branches is also being normalised through mixing legal rules from different traditions, with the Chinese version of ‘Vorbehalt des Gesetzes’ maintaining the domain of legislative power. In addition, the expanding influence of legislature also brings with it more coordination mechanisms with the government, providing a certain degree of counter-balance to strong executive power.

The next chapter, the second part of this discussion, will further analyse the core structure of this overall constitutional framework and consider the dynamics available to transform the regime and in which direction this transformation should progress. Again, it will be demonstrated that constitutional hybridity is a crucial underlying theme in such institutional development.

Chapter 6 Constitutional Governance⁵⁰¹ in China (1):

Constitutional Hybridity and Institutionalisation of Politics

1. Introduction:

Constitutional hybridity has has a fundamental effect shaping the modern Chinese polity. Returning to the themes set by chapter 2, this chapter will show that dynamics of inclusiveness-building and governance-improvement have been strategically employed in the People's Republic of China (PRC) to form a type of constitutional governance, in terms of institutionalization and sophistication. The hybridity of different traditions within party-state and executive-legislative relations is one of the main ways such a governance pattern has been constructed. The main functions and tensions within this constitutional governance strongly echo the main themes of the theories of mixed constitution. On the one hand, constitutional hybridity is employed to create power-sharing mechanisms and boost governance performance, but on the other hand, the mixed elements also give rise to potential conflicts of legitimacy rules, with the different traditions having different legitimating structures; further elaboration of which will be found in the next chapter. The account given in this chapter explains how constitutional hybridity shapes the basic operation mode of the regime. The next chapter will discuss the inherent tensions triggered by constitutional hybridity and how this may influence the future of the regime.

This chapter will first give a brief introduction of the constitutional framework of the PRC regime. It will introduce the overarching party-state relations, demonstrating that there is combination of reformative and authoritarian elements, with the party power recently re-asserting itself by integrating with the state apparatus. Then the structure, power, and personnel of the legislative and executive branch will be laid out. These provide the necessary institutional backgrounds for later analysis.

It will then discuss how the legislature of China is being empowered by combining the meritocratic and bureaucratic tradition of China into communist institutions. The NPC, as introduced in the previous chapter, relies on the internal bureaucracy to run the business of law-making. Bureaucracy building has become the main way of its aggrandisement, which somewhat offsets its weakness in activating its supposed constitutional powers. A crucial power that it recently acquires is the 'constitutionality review(合宪性审查)' power⁵⁰², which, arguably, also reflects the influence of western tradition. Again, there are strong evidence of the dynamics of constitutional hybridity in PRC.

501 As elaborated in previous chapter, "governance" is now a main concept the regime uses to accommodate real reform and still retaining ruling position. The sensitive terms such as democracy and constitutionalism are not as highlighted as the concept of "governance". A broad array of reforms is put into the general campaign to promote "modernisation of state governance". This is why exploring the actual governance framework and mechanisms are important. See, Xi Jinping's address on this topic, <http://politics.people.com.cn/n/2014/0217/c1024-24384975.html>

502 http://www.xinhuanet.com/english/2017-10/20/c_136694449.htm

The second part will consider how executive power has developed and transformed through the functioning of hybrid constitutional elements. Under constitutional governance, the operation of executive power has been increasingly normalised by a mixture of different elements. Firstly, the meritocratic tradition of China was prioritised by the regime to re-build its governing capacity after the catastrophe of the Cultural Revolution. Examination has again been used to build a merit-based and norm-based bureaucracy, but political meritocracy goes beyond examinations. Performance assessment also has tremendous significance and the regime has developed a growing system of government-performance assessment, blending into it various indicators to measure the achievements of the government. This managerial tool also shows the trend towards legislation as the chief measure for the implementation of policies and as structuring the accountability of the government. Secondly, the development of administrative laws inevitably puts more constraints on government power. Three sets of such legal rules: the government information transparency law, the laws about administrative decision-making, and the laws about participatory mechanisms will be identified and discussed. A great number of elements in modern administrative laws have been borrowed and blended into Chinese laws. For instance, the transparency law and administrative decision-making rules are both under the influence of Western administrative laws, such as the Freedom of Information Act of the UK and the due process principle of the US. Thirdly, this section will also touch the complex issue of whether administrative laws could further regulate and tame party power, concluding with a positive answer. The existence of this dynamic illustrates mutual-shaping effects of constitutional hybridity, as well as the possibility of its application to promote gradual and incremental political reform.

The third part will discuss the interaction between executive and legislative powers. Imported legal principles from western democracies to demarcate the line between them (the Chinese version of ‘Vorbehalt des Gesetzes’⁵⁰³) will demonstrate its crucial influence in forging current and prospective executive-legislative relations in China. Moreover, interactive mechanisms between government and legislature will also be analysed. It is through them that the NPC and government mutually influence each other in establishing the details of legislation.

It is unsurprising that some paradoxical phenomena and events occur from time to time, triggering pessimism, doubts, and criticism. This reflects the very essence of political reform: the existence of opposing or even multi-directional forces.⁵⁰⁴ True as they are, such a paradox suggests the importance,⁵⁰⁵ rather than the speciousness of this emerging governance pattern, for both academic understanding of Chinese politics, and the practical design of its reform. Under this constitutional governance, all the main political institutions involved, the Party, the central and local governments, and the legislature, have developed new features that may render

503 The principle in German law to regulate the line between executive and legislative powers. It was deliberately bought by Chinese law. See, 秦前红. 法律保留功能的时代变迁[J]. 法学评论, 2008. ; Qin Qian Hong, Fa Lv Bao Liu Gong Neng De Shi Dai Bian Qian, Fa Xue Ping Lun, 2008.

504 For example, see Alberts S, Warshaw C, Weingast B R. Democratisation and Countermajoritarian Institutions[J]. Comparative Constitutional Design, 2012: 69.

505 Not that it justifies the regime’s current status or ensures the success of its future reform, but that it relates tremendously to the building of a more desirable constitutional system for China.

stereotypical⁵⁰⁶ misperceptions of the regime obsolete. Of course, such developments should be subject to critical assessment.

2. A Hybrid Constitutional Framework of the PRC Regime

Since a relevant historical introduction has already been provided in the last chapter, and later sections will have much more detailed analysis on party and state institutions, this section will only provide a brief introduction to China's constitutional framework, for structural clarity and methodological propriety; but, the theme will continue to demonstrate that the system is defined by its entrenched constitutional hybridity.

2.1 Party-State Relations

As already discussed, party-state separation was a major constitutional feature of the reformative era. It was a natural logical development of the hybrid nature of the regime, since the Marxist orthodox did not give unlimited authority to the vanguard party, but rather to the supreme assembly. When reform is required, the most convenient move is to redefine the function of the state system.

Therefore, the actual implication of the party-state separation amounts to a rule-based division of labour between party and state apparatus. The People's Congress represents the ultimate will of the Chinese people; all other state institutions are chosen by this assembly and should be accountable to it. The party's dominance does not challenge this basic structure. According to its political leadership, the party exercises its ruling power by identifying the people's will and making legislative and policy proposals to the NPC, awaiting the latter to legitimise and approve its policies. It is argued that this relation is based on a division of two types of power: the power to govern (执政权) and the power to rule (统治权).⁵⁰⁷ The party's unshakable leadership is interpreted as exercising the power to govern, while the people, through the NPC system, still retain the power to rule.

This arrangement is the nominal pattern of party-state relations. In practice, of course, the party has many more mechanisms to control the whole regime, such as the previously mentioned leading group mechanism. In recent years, there is a clear trend of the party's assentation and expansion of its power and structure. To a certain degree, the party seems to integrate with the state apparatus.

Firstly, within recent constitutional amendments, the party's leadership of the regime was explicitly entrenched into the constitution order by confirming that the leadership of the party is the 'inherent feature' of socialism with 'Chinese characteristics', therefore could be also interpreted as a core feature of the socialist system, which shall not be undermined.⁵⁰⁸ Secondly, the party established a new series of leading groups. Among them, leading groups to deepen reform, lead national security affairs, lead fiscal and economic affairs, and lead foreign affairs etc., could all be used to usurp government power and extend the party's direct influence. Now, the four have been changed into commissions. Thirdly, regarding the most recent constitutional amendments, many agencies in government apparatus were streamlined

506 Not by denying the totality of truth in such stereotypes, but by adding to it a significant load of new facts and perspectives, which may amount to a new description of the regime.

507 <http://www.people.com.cn/GB/14576/14841/1963870.html>

508 Article 1, PRC Constitution

by being incorporated into relevant party institutions. For instance, the National Bureau of Movies was allocated to the party's Propaganda Department and The National Bureau of Religious Affairs was allocated to the United Front department. Administration of the civil service is now being directly handled by the party's organisation department.

The implications of this trend will be further discussed in the next chapter. The main proposition is that these changes do not overturn the function of party-state separation. The official resolution emphasised on the party's leadership on public affairs (which could also be expressed by the word politics '政') but did not alter the basic structure of the party state. After all, party-state separation is a division of labour, but not an institutional attachment of the two systems. It was an effort of function differentiation rather than a separation of powers. In the next chapter, it will also be argued that what matters more is whether the whole party-state apparatus is under increased legal constraints. The internal adjustment reflected the intensity of political struggles but may not be a fundamental constitutional change.

2.2 The Legislature: National People's Congress

The NPC is constitutionally identified as the 'highest organ of state power' of the country.⁵⁰⁹ All other state institutions, the president, the central government, the supreme court and the supreme procuratorate, the central military committee, and the newly established National Commission of Supervision are elected by the NPC and shall be accountable to it.⁵¹⁰

In terms of structure, the NPC should be understood as the combination of two institutions: the NPC plenum and the standing committee. While the plenum has stressed (even if formally) the spirit of broad representation, the standing committee seems to be developing with elitist and technocratic orientation, and functions as a bureaucracy within the NPC. The NPC plenum has around 3,000 representatives. The current term initially had 2,987 representatives.⁵¹¹ Such a large-scaled assembly may not convene as frequently as regular legislature. The NPC plenum only convenes annually, to discuss and vote on important decisions. The regular legislative work is done by the standing committee, as will be discussed later. NPC plenum is constituted by a combination of direct and indirect election. In other words, the NPC system is not a single national legislature, but a nationwide vertical system of representative organs in the shape of a pyramid.⁵¹² At the very local level of township and county,⁵¹³ the local people's congress is directly elected by voters. At higher levels, people's representatives are elected by the lower-level people's congress.

The standing committee of the NPC is the real functioning agency of it. It is constituted by senior party politicians, policy experts, and satellite party elites (mainly intellectuals). The current term of the standing committee has 161 members.⁵¹⁴ They

509 Article 57, PRC Constitution

510 Article 62, PRC Constitution

511 The ongoing anti-corruption campaign in the regime caused the termination of some seats, mainly those officials who have been charged with the crime of corruption.

512 But it does not function as a hierarchy, the upper level people's congresses do not have power over the lower level congresses. It could only "give advice and guidance"(指导) to them.

513 China's central-local state structure has five layers from the top to the bottom, the central government (the state), the province, the city, the county, and the town.

514 NPC website, Ibid

need to first be elected as the people's representative, then elected to the standing committee by the NPC plenum. This process is mainly under the control of the party, which recommends candidates for the standing committee to NPC representatives. Such recommendations, of course, are usually accepted. The chairman of this standing committee is the leader of the whole NPC system. In recent decades, it has been developed as a convention that the No. 2 figure of the CCP would take this position, to empower the NPC to its supposed political status.⁵¹⁵ It also has 10 sub-committees and a large bureaucratic system. In later sections, it will be discussed in greater depth that the actual way to empower legislature is by bureaucracy-building.

In terms of power, the NPC and the NPC standing committee have a wide range of law-making and decision-making powers. Firstly, they have the full range of law-making powers.⁵¹⁶ The representatives and standing committee of the NPC can freely make legislative proposals, and are not constrained by rules in favour of the government. It seems that the NPC could legislate anything, providing it does not violate the constitution. Of course, in practice, such powers are not actively used. The plan of law-making must be approved by the party leadership and will be carried out accordingly. However, if, in the future, further reform is to be promoted, the loose restriction on NPC law-making powers could be an advantage in building more pluralistic politics. Secondly, the NPC and its standing committee have political appointment powers over the important posts of other state institutions, as naturally demanded by its nature as the ultimate source of political authority within the state apparatus. Besides approving the premier, vice premier, chief justice of the supreme court, chief prosecutor of the supreme procuratorate, and the recently established National Commission of Supervision, a reflection of Chinese bureaucratic tradition should also be selected and appointed by the NPC. Thirdly, after a long period of gradual development, the NPC now enjoys the power of 'constitutionality review', a Chinese version of constitutional review power, though concrete ways to exercise it have not yet become clear. It was elevated to a higher and formal level by the CCP's political report in 2017 (the 19th CCP plenary conference) and it has been officially declared that the work of 'constitution-compliance review' (合宪性审查) should be promoted. Previously, the review power of the NPC system only applied to government-made rules and local legislation. There was no arrangement for reviewing NPC-made laws. The newly named 'Constitution and Law Committee' (previously the Law Committee) in 2018 is officially mandated the reviewing body for NPC-made laws, which amounts to a formal constitutional review power. It is unnecessarily to enumerate all the powers of NPC here, since, in subsequent analysis, relevant powers and mechanisms will be discussed in greater depth and with further details.

In terms of personnel, NPC representatives are supposed to truly represent the social composition of Chinese people, while the standing committee is experiencing a process of bureaucratization. The composition of representatives is determined by the quota system, similar as the traditional methods in Yan'an period.⁵¹⁷ General standards include the population of each province and the balance between different professions and social group.⁵¹⁸ The guiding principle of allocating quotas is

515 For the discussion of these developing customary rules of PRC regime, see Jiang Shigong, *ibid*

516 Article 67. NPC Constitution

517 See previous chapter

518 Article 11, Election Law of People's Representatives

expressed as ensuring ‘wide representation’. The modified <Election Law> in 2006 stipulated that people's representatives should have ‘wide representativeness’, with the ‘proper amount’ of ‘ground level’ and especially representative of ‘workers, peasants, and intellectuals’.⁵¹⁹ In contrast, the standing committee has increasingly used meritocratic bureaucracy building to expand its power, which will be analysed as a focus in Chapter 3.

2.3 The Executive System

In terms of structure, the central executive system may be the closest in similarity to institutions within Western polities. As mentioned previously, the central government is a typical administrative organ with two layers of institutions: the heads and the ministries. Currently, the ‘State Council’, as this central government is named in China, has a general office, 25 typical ministries, and 47 regulatory agencies or other institutions, forming a large-scale administrative system.⁵²⁰ A defining difference may be there is no separation of politics and administration in Chinese government. The premier and ministers are also a part of the bureaucracy, but their terms are constitutionally limited to two. Another feature is the heritage from totalitarianism and planned economy, which leads to government-run news agencies, science academies, and state-owned enterprises, etc. All these agencies are directly administered by the central government. Their personnel are also party and state cadres and are subjected to the same ranking and disciplinary rules. Finally, as previously introduced, the recent move of the party’s integration of state has resulted in some government ministries and agencies being directly managed by corresponding party agencies.

In terms of power, apart from the typical administrative powers, noticeable features of China’s executive branch are its substantial powers of rulemaking and legislative proposal. The PRC constitution empowers the central government ‘to adopt administrative measures, enact administrative rules and regulations, and issue decisions and orders in accordance with the Constitution and the law’.⁵²¹ This gives independent rule-making power to the central government. This power is called ‘functional law making’ (职权立法) power in Chinese academia. A more straightforward way to describe it is an independent rule-making power.

In fact, this power is of no significant difference from the typical power for executive rulemaking or executive order in modern governments. It is very similar to secondary legislation in the UK. The working code of the State Council requires that the enacting of administrative regulations must find its legal basis in legislature-passed laws. In practice, many administrative regulations are required to implement and detail the NPC-passed primary legislation. It is worth noting that this government law-making practice is not subject to effective legislature supervision. Although the NPC standing committee has the power to annul unconstitutional and unlawful administrative regulations, political reality means that this mechanism is rarely, if ever, used.

The central government makes most legislative proposals. Statistics provided by the State Council LAO suggest that government bills account for roughly 70% of the

519 Article 6 of Election Law, *ibid.* Also, see Zhao Xiaoli, *ibid.*

520 <http://www.gov.cn/guowuyuan/zuzhi.htm>

521 Clause 1, Article 89, PRC Constitution

laws passed by the NPC and standing committee.⁵²² The State Council could propose bills to both the NPC plenum and standing committee. Although the central government is quite dominant in legislative initiatives, the PRC constitution does not design other relevant agenda-controlling mechanisms, such as in the French constitution. In theory, once the bill from the government enters the legislative process, central government will lose control on its advancement. Currently, the unity of party control may render this situation only theoretically possible, but in occasional cases in which the NPC does boycott government bills, the government seemed to have few formal mechanisms to defend its bill.⁵²³

Another major power of the executive is the widely delegated law-making capacity of the NPC. The practice of delegation originates from the early reformative era in the 1980s, when the ongoing institutional reform required a timely supply of normative rules,⁵²⁴ but the NPC at that time was not competent in fulfilling this task. It delegated a wide range of law-making powers not only to the central government, but also to various local governments, to unshackle them and provide speedy rules consolidating reforms. However, in recent years, with law making becoming increasingly normalised, the control of delegated legislation has been tightened; this will be analysed in greater depth in the next chapter.

In terms of personnel, bureaucracy-building is based on meritocratic institutions. The civil service system is, to a certain degree, a revival of China's ancient tradition of Keju. Another feature is its remarkable size. Recent official statistics in 2015 showed that the public service system has a population of 7,160,000.⁵²⁵ Compared with the overall population of China, this may not seem an over-large number. Nevertheless, this calculation is based on a narrow methodology. A broader method of calculation, including all the affiliated units funded by public finance, sees the total number of bureaucracy surpassing 50,000,000.

3. Legislature: A Marxist Assembly Empowered by Bureaucratisation⁵²⁶

In modern times, it is usual for states to have at least the formality of a representative assembly. But in an authoritarian regime, it may seem paradoxical that the PRC regime would deliberately empower its legislature. It may also seem puzzling how any measures besides democratic empowerment – which is difficult or impossible to arrange in authoritarian regimes – could be employed to empower legislature. In this section, it will be demonstrated that empowering legislature is necessary for the regime and it is also played out with the dynamics deriving from

522 http://news.xinhuanet.com/ziliao/2003-08/21/content_1038060_1.htm

523 Such as the case of public transport bill, see Li Peng, *ibid*

524 王春光. "我国授权立法现状之分析." *中外法学* 5 (1999): 81-89.; Wang Chun Guang, *Wo Guo Shou Quan Li Fa Xian Zhuang Zhi Fen Xi*, *Zhong Wai Fa Xue* 5(1999):81-89

525

http://www.mohrss.gov.cn/SYrlzyhshbzb/dongtaixinwen/buneiyaowen/201605/t20160530_240967.htm

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526 The concept of bureaucracy is more of Max Weber's sense. Here it is a politically and morally neutral concept to describe a system features hierarchy, clear command, technocratic capacity and functional specialisation.

constitutional hybridity, entrenching a meritocratic bureaucracy inside it, a repetition of Chinese tradition in a socialist legislature, underpinned by the communist version of popular sovereignty.

3.1. Constitutional Change to Empower the Standing Committee of the NPC

Prior to the reform era, China suffered tremendously from the lack of a stable and clear legal system. The 1982 Constitution chose to empower legislature to put necessary constraints on executive and party power, and the arbitrary power of the individual leader.⁵²⁷ Since the NPC plenum is technically not a permanent organ that is capable of shouldering regular law-making power, the Standing Committee as the permanent legislature was given a series of legislative powers, as previously discussed. Later, in 2000, the Legislation Law also further empowered the NPC standing committee.

From 1976 to 1981, NPC working staff (the prototype of Law Affairs Working Committee⁵²⁸) led by senior revolutionary politicians such as Ye Jianying and Peng Zhen, drafted seven major laws that laid the foundation of the contemporary legal system of China.⁵²⁹ Upon the drafting of the 1982 constitution, the continuation of such working patterns – law-making by professional technocrats – seemed not only a strategic choice of the Party to retain control of legislature, but also a practical necessity to return the country to normalcy. After all, the typical representative-based law-making pattern was not pragmatic at that time, since very few of them had the basic knowledge or ability for legislative work.

Therefore, the strengthening of the Standing Committee power was adopted as a significant way to ensure legislative effectiveness and stable political order. The Standing Committee's acquisition of broad law-making power in the 1982 Constitution, in fact, amounted to a quasi-usurpation of the NPC's law-making power. Moreover, the 1982 Constitution placed very loose constraints on the Standing Committee's law-making power.⁵³⁰ There were certain exclusive law-making powers reserved for the NPC plenum, such as the power of Constitution-making, constitutional amendment, criminal and civil laws, laws about state institutions, and other 'basic laws' such as election law, nationality law, and marriage law.⁵³¹ However, apart from these, all other laws could be made or amended by the Standing Committee,⁵³² forming a very wide and flexible law-making power. Besides such law-making powers, the standing committee also acquired the powers of legal interpretation, supervising the implementation of constitution, annulling the executive-made rules and local NPC-made ordinances that violate the Constitution

527 Deng, *ibid*

528 This then "Law Affairs Committee" consisted of 80 people. They were the most intellectually qualified persons available to shoulder lawmaking task at that time, though many of them did not have legal training. This list included previous lawyers before the founding of the PRC, previous entrepreneurs, senior party officials, etc. See 夏莉娜. 王汉斌回忆法制委员会与法工委建立的前后 [J]. 中国人大, 2009(3). Xia Lina, The Memories of Wang Hanbin on the Establishment of LAC, China NPC, 2009(3). This is the official research journal of National People's Congress.

529 http://www.npc.gov.cn/npc/xinwen/rdlt/rdjs/2013-11/08/content_1813097.htm

530 Article 62, PRC Constitution

531 Article 62, PRC Constitution

532 Article 67, PRC Constitution

and laws. This is, in fact, a constitutional review power, though it is seldom triggered or materialised.

Later, the empowerment of the NPC system served as a strategy to boost political reform and resist pressure from the conservative force. The early period of the reform era witnessed a proliferation of laws, as well as chaotic conflicts and incoherence among them. The political inclination when solving this problem could determine the fate of reform. For instance, it was argued that anti-reform forces tried to block economic and political reform using the excuse of defending the integrity of the legal system.⁵³³ To tackle this problem, the legislature was undoubtedly a chief institution. The 2000 Legislation Law⁵³⁴ stipulated the hierarchical framework of the legal system and the procedural requirement of law making.⁵³⁵ This law empowers the NPC system in three ways: firstly, to rationalise the hierarchy of laws, the NPC-passed laws have supreme normative authority over others. No other normative rules, such as Party Resolutions (at least on paper), government regulations, or local ordinances, could violate them. Secondly, the NPC Standing Committee was given the power of a quasi-form of constitutional review, meaning that it could annul laws and rules that are found to be in violation of the normative hierarchy of the legal system, such as government regulations that violate NPC-passed laws, or the delegated laws made by the government in similar cases. The local NPCs have similar norm-reviewing powers against governments. Thirdly, the principle of ‘Vorbehalt des Gesetzes’, as discussed previously, was established by the law and could function as a crucial power basis for the future empowerment of the NPC; this will be elaborated in subsequent sections. During the writing of this thesis, in 2015, Legislation Law was modified to include the imposition of tax in the reserved domain of legislation, which reversed the long-term practice of the regime so that the government could set taxes with a wide margin of discretion.⁵³⁶ This has significant meaning for actual policy-making, introducing more inter-branch deliberation into law making. A strong example is that, just after this change, the drafting of Real Estate Tax Act was brought into the official legislative plan of the NPC Standing Committee.⁵³⁷ This time, the details of the tax will be influenced by the NPC with greater magnitude, rather than by government departments. Anyone who has a moderate understanding of contemporary China knows the importance of the real estate market to society and the economy. Therefore, the fact that the NPC has played a central role in designing regulatory policies on this market does indicate its growing strength, and greater power-balanced and deliberation-rich decision-making process.

3.2. The Rise of Professional Law-making Bureaucracy

To carry out legislative work, the first task of the NPC Standing Committee is to find appropriate personnel for the job. The lack of representative democracy and the

533 陈斯喜. 试论在改革过程中的立法方略[J]. 中国法学, 1993(5):22-25. Chen Sixi, On the Legislative Strategy during Reform, China Legal Studies, 1993(5):22-25

534 About the historical details of the making of this law, see previous chapter on the Constitutional development of the PRC regime. Due to the limit of length and the requirement of a more balanced structure, in this section it will not be introduced with details.

535 For official English translation of text, see <http://www.china.org.cn/english/government/207420.htm>

536 Clause 6, Article 8, Legislation Law of the PRC

537 http://news.xinhuanet.com/fortune/2015-08/06/c_128097837.htm

urgency of the work makes the choice of a professional bureaucracy for legislative vital.

The foundation of this legislative bureaucracy was the Legal System Committee, founded in 1979, to restore legal order to the country.⁵³⁸ As an expedient, yet valued, agency to commence law-making works and make breakthroughs, its nature and function was obscure. It consisted of very senior politicians and officers with specific knowledge or experience. Peng Zhen, a high-ranking leader in the Party, was appointed as the chairman of this committee, and the vice chairman of the NPC Standing Committee. The Legal Affairs Committee, after the remarkable job of law-drafting (which was, strictly speaking, quite unconstitutional since before 1982 the Standing Committee did not have official law-making powers), was changed into a Legal Affairs Working Committee (currently using the same acronym as the LAC) in 1982, becoming a formal working agency under the Standing Committee. Yet, the LAC is not an authoritarian counterpart to the parliamentary subcommittees of Western democracies. Rather, it is like the cabinet office of the Standing Committee. It is a bureaucracy, rather than parliamentary agency. Therefore, it worked in a meritocratic and technocratic manner, making it constitutionally possible to recruit cadres and experts with a legal background. Reportedly, the LAC is one of the most influential legislative institutions in China. As introduced in the previous chapter, it has established a large system of professional law-making technocracy. The research units under it cover almost all domains of law and related policies. Also, it shoulders the drafting and coordinative works under the NPC Standing Committee. Although it is not a qualified constitutional unit to proposal bills, its influence on the actual content of the bills is direct and substantial, since legal research, public consultation, and drafting works are organised by it. Although the LAC could not directly coordinate the bill-drafting work of government departments, interactions and checks do exist. Its role is much more prominent within NPC-initiated laws, such as civil and criminal code, etc. The recent trend may suggest increasing activism of the NPC and LAC's work,⁵³⁹ such as the NPC-sponsored drafting of the Real Estate Tax bill.⁵⁴⁰ As mentioned, recent constitutional change that further constrains executive initiative powers and emphasises on legislature's exclusive domains, may be one reason for this.

Personnel in the LAC are appointed by the Standing Committee with discretion. This ensures its technocratic composition and ethos. A 'revolving door' exists between the LAC system and the legal staff of government bureaucracy. The current

538 白龙, 周林刚. 立法官僚的兴起与封闭——以 1979 年~2010 年全国人大立法为中心的考察[J]. 文化纵横, 2011 (3): 44-49. Bai Long, Zhou Lingang, the Rise and Closeness of Legislative Bureaucracy--Observation on the NPC Law-making Activities from 1979 to 2010, Wen Hua Zong Heng, 2011(3),44-49, The same article also expressed the concern of the closeness and rigidity of the legislative bureaucracy in the PRC regime.

539 This may be a system-wide trend, as is demonstrated in both central and local legislatures. For instance, in Anhui province, the 2016 legislative plan contains more than 50% of local NPC drafted bills. See <http://npc.people.com.cn/n1/2016/0105/c14576-28014809.html>

540 Other examples include bills of "E-commerce Law"(电子商务法), "Tourism Law"(旅游法), "Law of the Security of Special Equipment"(特种设备安全法). The 2016 legislative plan has 20 laws (including those that have not been finished in 2015), 18 are drafted or going to be modified by NPC Standing Committee or sub-committees.

chairman of LAC, for example, has previously served as a senior official in the State Council Legal Affairs Office. In addition to this, the LAC is also shaped to include academic expertise. Scholars in relevant institutions, such as those in law schools, universities, and the Chinese Academy of Social Science, were invited to take on senior positions in the LAC and participate in legislative affairs.⁵⁴¹ The combination of academic and bureaucratic elements has contributed significantly to the competence of the LAC. The executive counterpart, the State Council's LAC, and the in-house counsel of the central government have also been constituted in a similar pattern.

Following the inherent logic of bureaucratic institution⁵⁴², the LAC has strong inclinations towards self-aggrandisement, which has been both accepted and encouraged by the regime. The growth of this working bureaucracy reflects the consistent idea of empowering legislature through bureaucracy-building. Over the decades post 1979, LAC has established a broad range of working agencies in accordance with different domains of law and public affairs, such as units of criminal law, civil law, administrative law, economic law, and the general research unit.⁵⁴³ With such growth, the legislative bureaucracy under the NPC has not only developed technocratic skills but also powers in both the Foucauldian and institutional sense.⁵⁴⁴ A comparative study has demonstrated that due to the financial and budget committee's understaffed team, the NPC plenum has been unable to promote the budget system effectively. Contrastingly, the LAC can project its power in legislative planning.⁵⁴⁵

The LAC now has become a major source of knowledge and skills for legislative affairs. For example, the content and process of China's legislative plan over the decades, sometimes referred to as a period of 'law-making campaigns' have been strongly influenced by perceptions of the LAC. The LAC also organises legislative consultations and investigations, as well as replies to all state organs with inquiries concerning vagueness and controversies in law, all of which amount to a conduit for transmitting its understanding of legal affairs into policy-making. This is like a quasi-form of interpretation power.⁵⁴⁶

Besides its general institutional capacity, stemming from its function and composition, the LAC is also strengthened by the legalisation and customisation of its powers and practices. The 2015 modification of Legislation Law recognised a wide range of LAC practices and has given them statutory basis, trickling down powers to the working agency of the NPC. This development further strengthens legislative power, with attention to the explicit requirement that law-making planning and coordination shall be led by the NPC standing committee, under which LAC is the chief working agency. Firstly, the law recognises the practice of legislative planning

541 The list of the leaders in LAC, http://www.npc.gov.cn/npc/fzgzwyh/node_5854.htm

542 Power would trigger the desire for more power. This is actually common sense. But for in-depth academic research on this phenomenon, see Parkinson, Cyril Northcote, and Robert C.

Osborn. *Parkinson's law, and other studies in administration*. Vol. 24. Boston: Houghton Mifflin, 1957.

543 Ibid

544 Townley B. Foucault, power/knowledge, and its relevance for human resource management[J]. *Academy of Management review*, 1993, 18(3): 518-545.

545 Tanner, *ibid*.

546 Such mechanisms will be discussed with more details later

and provides that the Standing Committee should play a ‘dominant’ role in coordinating law-making business via such mechanisms.⁵⁴⁷

Secondly, the law also recognises that it should give an enhanced role in drafting to the LAC and its sub-committees. Previous customs have stated that most legal bills ought to be drafted by the government. The law attempts to balance this inclination by allowing the legislative branch to organise and dominate in law-drafting over matters that have a ‘comprehensive, overall and fundamental’ nature⁵⁴⁸. The LAC and sub-committees are eligible to participate before the bills enter the NPC process.

Thirdly, before the bills are reviewed by the Standing Committee, the LAC is required to give professional assessment on the feasibility, reasonableness, and social impact of the main content of bills. The initial review is officially conducted by the LAC, leaving the Standing Committee overseeing the second-hand review based on the assessment of the LAC.⁵⁴⁹

3.3. Political Authority Transmitted from Party Hierarchy

Non-authoritarian institutions could be empowered by authoritarian resources, a logical by-product of hybrid regimes. The Standing Committee of the NPC is designed to acquire political authority from the Party's power hierarchy to carry out its supposed functions.⁵⁵⁰ Contrary to some opinions, the senior cadres sitting at NPC may not be motivated to behave purely as a ‘rubber stamp’. The incentivisation of them is more complicated and contributes to a more delicate bargaining structure between legislature and the executive power. This will be further elaborated in later paragraphs.

The PRC's regime deliberately channels political authority to the NPC, making it effective, and establishing the customary rule that the ‘rank’ of the NPC's leaders ought to be placed at a high level of the Party's leadership.⁵⁵¹ The second-highest leader in the Politburo Standing Committee takes the position of the president of the NPC Standing Committee, in which they lead and protect legislative affairs via the corresponding institutional and personal political authority and resources. The numerous vice presidents of the NPC Standing Committee usually include several members of the political bureau, who are the second-tier of leadership. It could be said therefore, that the Party hierarchy intertwines with the Constitutional supremacy of the NPC, resulting in a somewhat senate-like institution. In addition, the term limits on the national president and premier, a sign of the increased institutionalisation in Chinese regime, also means the ministerial and other subordinate posts will be reshuffled regularly. This will also routinely create many veteran politicians, who are not to retire completely but must migrate to other institutions. The NPC system becomes an important reservoir for them. Numbers could make strength. Though, admittedly, the influence of seniority should not be exaggerated too much.

In the middle-level leadership of the NPC, namely the sub-committees, the same logic applies. Sub-committees cover a full range of governance and political affairs, reviewing power over legislative bills. In the contemporary PRC regime, such a

547 Article 52, Legislation Law

548 Article 52, *ibid*

549 Article 39, *ibid*

550 This is really a common sense understanding in China. For similar analysis, see Tanner, *ibid*, chapter

551 Bai Long and Zhou Lingang, *Ibid*

review is no longer merely a formality. Reviewing competence, and maybe also authority, are to a great degree derived from the ability and authority of the bureaucrat-transformed committee members.⁵⁵² Many sub-committee members are close-to-retiring politicians, who were previously senior executive cadres, such as government (vice) ministers and provincial (vice) governors respectively. Senior bureaucrats, for instance, are deliberately placed in legislative branches to make full use of their knowledge and insights regarding government work and to supervise and deliberate on government bills. Due to having worked inside the inner circle of government, many members of the government staff's NPC sub-committee are very familiar with the typical loopholes the government tries to conceal, along with the special interests it tries to promote.

Worrying about second-line politicians to collaborate with the current government may underestimate the complexity of China's political logic. A common view among insiders is that the reviewing by committee members tend to be harsher if the bills are related to his or her previous department or agency, since such strictness is needed to counter-balance the doubt concerning special ties they may have had with previous colleagues. By institutionally exposing the potentiality of special ties amongst previous colleagues, the regime elevates the cost of collaboration and '*guanxi*' during political bargaining. After all, the sub-committee is a collective institution, with all members engaged in legislative scrutiny. Personal links with supervised government agencies may be more of a liability than an asset. However, unlike some Western democracies, in which one's parliamentary career may be a stepping stone towards executive leadership roles (both in parliamentary and presidential systems), the NPC sub-committee lawmakers are usually near the end of their political careers, although this does not necessitate their compromise and weakness. Instead, it is equally likely that these politicians will be bolder in their exercise of power, since they have almost nothing to lose. In addition, although losing executive power, these cadres would be compensated with more senior status in the Party hierarchy, which forces the corresponding government ministry to give certain reverence.

3.4. The Law Committee and Academic Expertise

Political meritocracy values professional expertise and does not hesitate to blend it into the fabrics of regimes. The NPC entwines academic expertise into its working agencies. The Law Committee, a sub-committee that holds the power to review bills and provides legal counsel, is constituted mainly by former law academics or legal experts within the regime. For example, the current law committee includes the previous President of the Chinese University of Law and Political Science (Xu Xianming, a professor of Jurisprudence with a focus on human rights), the previous head of the Law Institution of China's Academy of Social Science (Xin Chunying, also professor of jurisprudence and translator of Dworkin's '*Taking Rights Seriously*' in China), and the previous Vice Chief Justice of Supreme Court (Su Zelin).⁵⁵³ These members have sufficient professional expertise for their work. Moreover, as an institution, the committee is also empowered by the Legislation Law, stating that all bills should be put together for the law to review it.⁵⁵⁴ The proposal of this principle

552 Ibid

553 See the official website of the NPC, http://www.npc.gov.cn/npc/bmzz/falv/node_1622.htm

554 Article 33, Legislation Law

has incurred controversy since the early 1990s. Departmentalism became the main driving force behind competition for law review and other powers, not only among government departments, but also NPC sub-committee.⁵⁵⁵ The regime does not tolerate the fragmented law-making process that could incur conflict within the law and undermine the quality of the legal system. It was decided, therefore, that all law bills would be reviewed and coordinated by the law committee, and significant levels of academic expertise would be established to secure competency and impartiality. This case again reveals the logic of the PRC's regime, in which ancient traditions concerning meritocracy and the intellectualism of politicians have been used to rely on the establishment of a modern governance.

Academic influence also manifests beyond the functional committee of the NPC. It has become a noticeable pattern that a great controversy in crucial legislation will be first tested in academia, and that heated debates and discussions exist as a prelude for final versions. This is the channel for the ruling party to observe and collect different opinions and claims. It is, of course, hardly a unique law-making model in China, since timely academic feedback in law making is commonly seen worldwide. Nevertheless, the gravity of academic input on law making in China still deserves serious attention, such as the making of property law has demonstrated.⁵⁵⁶

3.5. The Constitutional Review Power of the NPC?

Embodying popular sovereignty, the NPC system has the full nominal legal authority to exercise the power of judicial review. The NPC Standing Committee gradually acquires, though has not actively used, the power of constitutional review. According to the Constitution, the Standing Committee can interpret the Constitution and the law. It can also modify laws that are under exclusive jurisdiction by the NPC plenum. The executive-made rules and local legislation could also be subject to its scrutiny and modification if found violating the constitution or upper-level laws. This pattern is regarded as preferable to a special constitutional court, which was considered 'immature'.⁵⁵⁷ Based on this, the NPC Standing Committee has the role of ensuring the internal coherence and unity of the legal system. This gives it significant power to balance departmentalism and executive arbitrariness. This role has been increasingly emphasised in recent years. The review of 'normative documents' (mainly by means of laws, regulations, and resolutions) has been proposed as an important measure to deepen the reform by the report of the 4th Plenum of the 18th CPC Central Committee. As a main institution that has the competency to execute its job, the NPC Standing Committee (as well as the sub-committees and LAC) has also emphasised that reviewing "normative documents" is a major task to undertake.⁵⁵⁸ 'Normative documents' must be submitted to their respective institutions for record

555 Tanner, *ibid*

556 巩献田. 一部违背宪法和背离社会主义基本原则的《物权法(草案)》——为《宪法》第12条和86年《民法通则》第73条的废除写的公开信[J]. 经济管理文摘, 2006(8):13-16. Gong Xiantian, A Bill violating Constitution and Socialist Fundamental Principles, *Journal of Economic Management*, 2006(8),13-16

557 李鹏. 立法与监督: 李鹏人大日记[M]. 新华出版社, 2006.; Li Peng, *Legislation and Supervision: Diary in the NPC*, Xin Hua Press, 2006. The author was the premier of China(1987-1998) and Chairman of the NPC(1998-2003).

558 <http://npc.people.com.cn/n/2014/1223/c14576-26256439.html>

and review, such as when executive-made rules are drafted for the central government and local legislation, to provide for the NPC Standing Committee.

The power to trigger review of executive-made rules and local legislation is conferred on a wider range of entities. The triggering of such reviews reflects a pluralistic and participatory pattern, which is compatible with the ethos of communist democracy that emphasises a wide range of participation. State institutions such as the central government, central military committee, Supreme Court, Supreme Prosecutorate, and local NPC Standing Committees, could all make formal recommendations that the NPC reviews the relevant rules and legislation. In contrast, the citizens, social organisations, and enterprises should also have the opportunity to provide. However, these parties can only make an ‘application’ rather than institute a formal review as a ‘requirement’. Their application is then being studied by the Standing Committee and then a decision is made to trigger the review or not.⁵⁵⁹ Citizens are increasingly aware of this mechanism and seek to pressure these organizations to trigger the review process, while institutional players within the political establishment remain passive about using this power.

Furthermore, the political report of CCP 19th Plenum has further enhanced this function of the NPC. It provided that the ‘constitutionality review work’ (合宪性审查工作) shall be ‘promoted’ so that the ‘authority of constitution’ can be safeguarded. The concrete mechanisms that run this newly heralded institution are still under discussion and partial implementation, but certain features could be observed as a start. Firstly, the NPC is now trying to use its bureaucracy machinery to carry out the constitutionality review work within the previously discussed mechanism of review of ‘normative documents’ (规范性文件备案审查)⁵⁶⁰. The LAC has regularly attempted to publish typical cases of executive ordinances and local regulations that violate the basic rule of constitution to enforce the integrity of the legal system. Citizen activism has also been emphasised and appreciated. During the current term of the NPC (2012–2017), citizens and social organisations have made 1,527 applications to the LAC regarding the review of specific laws and rules. Secondly, the LAC’s intensification of reviewing work is supposed to be preparation for further institution building for constitutionality review, although the concrete institutional design for it has not been disclosed. The constitutional amendment of 2018 has changed the name from the Law Committee to the Constitution and Law Committee, implying that it will be the key institution in charge of constitutional review. It is obviously a thorny issue that this committee, which is deeply engaged in law-making, might be expected to fairly review the laws that itself makes. There has not been a clear answer to that. Nevertheless, it is still an effective starting point since documents other than NPC-made laws could be more effectively and strictly reviewed under this mechanism.

4. Executive Power: Meritocratic Elements and Power Normalisation

The executive power of the PRC regime may offer an example of how a Leninist system transforms towards the direction of openness and norm-based governance, by re-embracing Chinese tradition and importing modern administrative norms from Western systems. This hybrid process will be discussed in this section.

559 Article 96, Legislation Law

560 http://news.xinhuanet.com/mrdx/2017-12/26/c_136852345.htm

4.1. Institutional Basis of Political Meritocracy

4.1.1 Egalitarian Access to Political Profession

As discussed, the whole political system in China, including both the Party and State institutions, is managed in a unified manner as it is in a Weberian-like bureaucracy. As noticed:

*One of the most important differences between China's civil service and Western civil services is the scope of the civil service. The scope of China's civil service is at once broader and narrower than those in the West. It is broader because the entire state bureaucracy falls into the scope of civil service. As noted above, now there is no division between politicians and careerists. It is narrower because, in line with the desire to develop a more differentiated management framework, cadres working in service units and state enterprises are not included in the civil service.*⁵⁶¹

Therefore, the design regarding the appointment to this unified system is crucial. An equal and merit-based selection would determine whether the privileged few or the commoners have access to political and administrative power.⁵⁶² It strongly shapes the composition of political institutions and influences the legitimacy of the regime. At least in China, this channel for political participation has tremendous social support and approval.⁵⁶³

The civil service reform, which holds Deng's speech concerning the reform of the Party and State leadership as a justification, strengthened the cadre system by introducing young, well-educated professionals.⁵⁶⁴ In 1982, the then Ministry of Labour and personnel (now Ministry of Human Resources and Social Security) issued a resolution that the cadres recruitment in the government and party institutions should be based on examinations. This approach, as the document claims, is a 'merit-based selection'. Later in 1987, the 13th party congress further advocated the civil service system as a core feature of the reform of its political institutions. It has been explicitly stated that the operation of the civil service system should go hand-in-hand with the separation of the Party and State. In this report, it was proposed that there would be two types of civil servants: the political officer (政务公务员) and the professional officer (业务公务员), which was very likely a deliberate imitation of the Western political system.⁵⁶⁵ The former would be those who hold electoral positions and would be subject to term limits, while the latter are tenure-based and focus on examination recruiting. These reforms were abandoned after the change in political climate following 1989. The implications of political neutrality and

561 Lam T, Chan H S. China's new civil service: What the Emperor is wearing and why[J]. Public Administration Review, 1996, 56(5): 479-484.

562 This does not deny the facts that patronage and privileged groups have tremendous influence on Chinese politics. Actually, in all societies, privileged elites in all sectors have more entitled powers. Yet, whether such disparity is institutionalised still makes fundamental difference.

563 As evidenced by the enthusiasm of citizens on this examination, in the most recent examination for central government, 1,48 million people participated. See http://www.chinagwy.org/html/xwsz/zyxw/201610/21_175535.html

564 徐湘林. 后毛时代的精英转换和依附性技术官僚的兴起[J]. 战略与管理, 2001, 6(2); Xu Xianglin, Elite Transformation and the Rise of Dependent Technocracy in Post-Mao Era, Strategy and Management, 2001, 6(2)

565 Political Report of 13th Party Congress

independence, in the careerist branch, have been replaced by a re-emphasis on political loyalty, enforced through the internal mechanisms to sanction undisciplined civil servants besides state laws. However, the significance of a modern civil service system has been institutionally confirmed. In 2005, the unified Civil Service Law was passed by the NPC, marking the complete establishment of the civil service system in China. Nowadays, the examination is unified nationwide and is subjected to strict supervision. All political positions, including those in the government, the NPC, and the CPPCC, along with party apparatus employees, must be recruited by examination based on different requirements of educational level, work experience, party membership, etc.⁵⁶⁶

4.1.2 Performance Assessment for Executive Power

Though its significance merits acknowledgment, the mere fact that using examinations as an entrance for the political profession may not suffice to build a meritocratic system. Conceptualising the PRC regime as a political meritocracy on the PRC's regime is illuminating in some respects – as can be seen in those arguments brought forward by Daniel Bell⁵⁶⁷ - yet whilst this model of the PRC may amount to a promising political theory for further political reform, it is not convincing enough to describe its current reality without exaggeration. Daniel Bell has proposed a vivid example of how a senior leader in a central organisation department is selected, through a set of delicate mechanisms incorporating election, examination, investigation, and so on⁵⁶⁸. Undeniably, this exemplifies similar advancements in this regime, but it is too early to argue that it has replaced or offset all factionalism, patronage, and clientelism. Too much focus on the selection of politicians may blur the true picture of meritocratic elements. The exercise of political powers after the selection of personnel bears no less significance for governance. Both competent and mediocre leaders should face constraints concerning the legality of their actions, their rationality, and whether they are accountable to the public.

Regarding this, performance measurement mechanisms have increasingly functioned as an even more important institution for merit-based governance.⁵⁶⁹ If compared with Western democracies, it may be argued that in the level of governance rather than politics, there may be supervising number of similarities in assessing government performance. For instance, 'the primary methods that have been used by the UK central government to evaluate the performance of local authorities have been: (1) performance indicators; (2) auditing; and (3) inspection. This set of practices has been further reinforced by the programme of Local Public Service Agreements and Comprehensive Performance Assessment (CPA).'⁵⁷⁰

566 Minor exceptions do exist, but are mainly the elite-recruitment system as in universities, aiming at to absorb the political activists in young people. In certain sense, this is still reflection of the legacy of traditional examination system.

567 Bell, Daniel A. *The China model: Political meritocracy and the limits of democracy*. Princeton University Press, 2016.

568 Ibid

569 For general study on the topic, see Zhou Z. Study of Government Performance Management in China: A Historical Review and Critical Assessment [J][J]. *Journal of Public Administration*, 2009, 1: 004.

570 Andrews, Rhys, et al. "External constraints on local service standards: the case of comprehensive performance assessment in English local government." *Public Administration* 83.3 (2005): 639-656.

The PRC regime employs similar mechanisms to assess the performance of governments and politicians at various levels. Among them, the performance indicator has become a main way for the regime to vitalise local governance and select well-performed cadres. Its importance also lies in its clarity and publicity within the regime. It offers a platform for more direct and clear oversight from both state organs and the public. Of course, both positive and negative effects are identified. The later parts of this study will discuss the limits and flaws of such assessment mechanisms.

Indicator-based evaluation, as the main pattern for governance performance assessment, has diversified types. Firstly, there are positive indicators used mainly for economic growth. Growth indicators such as annual GDP growth, tax revenue and investment amounts have been long used as a chief measurement of governance performance at all levels, using a 'the more the better' approach. Within China's power decentralisation framework of 'fiscal federalism',⁵⁷¹ this mechanism has the constitutional function to implement central authority's development policy and decide who gets to be promoted to higher positions. In a regime with a historically burdensome centrally-planned economy, this approach is regarded by economists as part of a crucial reason for unleashing economic vigour on the country and further expanding local powers. Concepts such as political tournaments are used to categorise this institution.⁵⁷² For the Constitutional virtue, this contest-like model of governance performance significantly boosts responsiveness, because the competition between local governments forces them to work hard on economic growth and prevent negative events from happening. Also, this system sets an equal and fair criterion for political promotion, which could help to identify more capable politicians, or equally as capable and opportunistic figures.⁵⁷³ However, it should be noted that impacts are greatly mixed. Many problems have resulted, or at least partially developed, from this approach, such as a nationwide economic bubble, local protectionism, corruption, and so on.

Secondly, there also exist negative indicators that apply to discourage local officials from making certain types of decisions. It is usually termed the 'one vote veto' (一票否决) in China, which signifies the occurrence of a certain prescribed phenomenon or incident that would automatically veto the chance of promotion or trigger disciplinary penalty. Typically, the following matters may be regarded as having strong vetoing effects on the career path of officials. The first is concerned with environmental protection. To tackle environment degradation and enhance supervisorial power of environment regulatory agencies, the PRC regime places environmental indicators, such as the quality indicator of air, the number of environmental incidents, official criticism from higher-level environmental supervisory agencies, and the mass incidents such as 'pleas' (上访) caused by environmental incidents, to assess governance performance. The occurrence of such facts would mean the whole annual work of local governments would be placed on the lower part of the local governance performance rank. Responsible local officials would also receive official criticism and be prevented from accessing the next stage in their career structure. The second area is birth control and the one-child policy (the

571 For instance, see Blanchard, Olivier, and Andrei Shleifer. "Federalism with and without political centralisation: China versus Russia." *IMF staff papers* 48.1 (2001): 171-179.

572 Li-an, Zhou. "Governing China's Local Officials: An Analysis of Promotion Tournament Model [J]." *Economic Research Journal* 7 (2007): 36-50.]

573 Considering the widely existing phenomenon of fake data.

latter has now changed). It is in this area that veto indicators originated in the 1980s and this is perhaps the most notorious use of the practice. As the one-child policy changed, the importance of the birth-control veto also decreased. The third concerns industrial security incidents. Industrial security, especially in mining and other heavy industries, is always under close watch of the regime. The fourth, social stability related issues, is mainly the prevention of ‘shangfang’ (a plea from local people; they usually go to a higher rank of government to expose their controversies with local governments).

Veto indicators are being trialled in various localities. New types of indicators could be invented and added to the list. For instance, in certain regions, the scale of local governments debt is also enlisted as a major veto indicator.

Overall, the truthful reflection of the needs of local governance requires rationalised and systematic development of such an assessment system. The sophistication of the indicator system and absorption of democratic input are two main patterns to improve the system. Most recently, more systematic programmes of measuring have proliferated. The central organisational department is keen to promote a more comprehensive and rationalised indicator system. Rather than relying on simply one or a few indicators, the comprehensive governance performance model includes a wide range of indicators that allocates to its corresponding weight. In employing this model, the performance and capacity of officials are tested against a more balanced criterion. The central organisational department believes this system will elevate governance quality.⁵⁷⁴

Democratic participation also arises in the design of performance indicators. To offer democratic input and enhance supervision in government, local governments have started to use certain ‘participatory assessment’ mechanisms which have similar effects to small-scale advisory referenda.⁵⁷⁵ For instance, in 2003, the Beijing government organised an online assessment of governance performance, open to all citizens. It attracted 141,634 people to provide scoring, a considerable turnover considering people’s limited access to the Internet at that time.⁵⁷⁶ Nonetheless, the results of that survey were not published. A lack of openness deterred participation and credibility. During the following year, the number joining assessment decreased to over 4,000. Though these participatory mechanisms have been used from time to time, there still needs to be a more systematic and institutional adoption for them.

Despite the benefits and progress of such assessment mechanisms, there are also problems and risks. Scholars have insightfully identified the negative effects of veto indicators, arguing that they contribute to the formation of a pattern called a ‘rule of mandates’ instead of the rule of law:⁵⁷⁷

China’s system for maintaining political control of lower level officials relies on well-defined incentives and sanctions designed to uphold party directives (Landry, 2008). Broad party directives, which are separate from and sometimes consistent with

574 Central Organisation Department, *ibid*

575 王锡铤, and 章永乐. "我国行政决策模式之转型——从管理主义模式到参与式治理模式." *法商研究* 5 (2010): 3-12. Wang Xixin, Zhang Yongle, The Transformation of Administrative Decision-making Pattern---from Managerialism to Participatory Governance, *Study on Law and Commerce*, 2010(5),3-12

576 *Ibid*

577 Birney, Mayling. "Decentralisation and veiled corruption under China’s “rule of mandates”." *World Development* 53 (2014): 55-67.

*the public law, are issued at the highest level. Consistently among the highest national priorities are economic development, social stability, and the birth control policy, which are measured by figures such as income per capita, incidences of collective protests, and the population growth rate. At lower levels, more specifics are developed about the exact targets, priorities, reporting requirements, rewards for success, and penalties for failure; these thus vary from area to area.....Some laws and issues are such low priority that there are no targets corresponding to them.*⁵⁷⁸

This institution may cause mixed results:

*With such criteria, at its best, the cadre responsibility system is set up to incentivise a precise but narrow space of accountability. At its worst, it does not incentivise actual accountability but only apparent accountability, since the criteria for evaluation are often not directly visible to higher cadres so data may be easily fudged or made up by lower cadres.*⁵⁷⁹

Acknowledging this problem, the regime seems to further realise that accountability is necessary to enhance the sophistication of this assessment system. Rather than solely relying on the technical sophistication of assessment indicators, it resorts to interactions with legislative power to spur more effective institutional dynamics for supervision. The main approach here is to offer clear and authoritative supervisory channels for legislature, consultative assembly, and the public. The more sophisticated system of indicators has been increasingly entrenched into legislation, in a wholesale or retail manner, as a favoured mechanism for law makers to facilitate enforcement.⁵⁸⁰ It also encourages law makers to embed further details into the bill, to deter it from being compromised during implementation. In the NPC and CPPCC's inquiries, referring to indicators, as well as questioning dubious indicators reported by the government, has become a main measure with which to supervise the government. After all, these indicators reflect a rationalised pattern of government, which means governance quality could be assessed by reasoning and therefore is more easily open to reasonable doubts and reflections.

Governance performance assessment is changing from a management tool to whip the work in a field to an overall normative requirement of government performance, and a bridge for more deliberative executive-legislative interaction. However, being under experimentation with diversified versions in different localities, it is still premature to assert that it will prove a successful institution.

4.2. Normalising Administrative Powers: Legalisation, Transparency, and Participation

Executive power is increasingly normalised by establishing a modern administrative law system modelled on Western laws. In this sense, the Chinese executive apparatus is one hybrid system that is constituted by a traditional meritocratic mechanism, controlled by Leninist discipline and increasingly regulated by a mosaic of west-imported (but also localised) legal rules and principles such as

578 Ibid

579 Ibid

580 See article 68 of the Environmental Protection Law of the PRC,
<http://www.china.org.cn/english/environment/34356.htm>

judicial review, legitimate expectation,⁵⁸¹ information freedom, and due process of law and proportionality, etc. Surely, there is some tension between Western elements and party control. Nevertheless, since these imported laws mainly apply to constrain administrative power rather than party power, they are generally allowed, or even encouraged, by the regime. This section will identify three chief cases to show how executive powers are shaped by such hybridity. Compared with typical legal principles in judicial review, these elements are more directly influential on the actual decision making of executive power.

4.2.1 The Legalised Procedure for Executive Decision Making

Facing the thorny task of maintaining a ruling position, the regime's decision-making process ought to be carefully crafted to maximise the quality of policy-making and satisfy the public. The CCP regime tries to put executive powers into the legal framework of 'scientific and democratic decision-making'.⁵⁸² Penetrating the ideological mist, the term 'scientific' may suggest policy research, professional knowledge, and serious deliberation, while the term 'democratic' indicates the need to include diversified voices via consultation. All these issues and themes are compatible within the meritocratic ethos of the regime and could function as a meaningful stepping-stone to a more in-depth reform.

Guided by such spirit, the executive decision-making procedural has experienced a gradual course of normalisation. At the beginning of the reform era, for example, the importance of law for executive decision making was mainly intended to prevent the disastrous arbitrariness of the Cultural Revolution. The Party initiated the political-legal norms for its rule of law. In 1979, the concept of the 'socialist rule of law' and 'governing the country according to law' first entered the Party's documents.⁵⁸³ In 1982, the modified party constitution stipulated, 'the Party should act within the boundary of constitution and law'. Nevertheless, during a long period, the specific procedure for decision making had been insufficient and vague. Clarity and consistency within the law seemed to be taken for granted, making 'governing according to law' theoretically easy, while the reality was rather messy, particularly regarding the boundary of political powers.

Furthermore, in the 1990s, the concept of 'governing the country according to law' was elevated to a fundamental strategy (基本方略 close to the meaning of the fundamental principle) of the Party.⁵⁸⁴ Being an entrenched principle of the Party,

581 To be noted, transplanting of foreign legal principles is more relied on academic interpretation, rather than explicitly borrowing in legislation. Nevertheless, since the legal texts in China are not uncommonly vague and general, there is considerable space to make use of this approach. For instance, the interpretation on legitimate expectation, see 王锡铤. 行政法上的正当期待保护原则述论[J]. 东方法学, 2009(1):18-27.; Wang Xixin, Xing Zheng Fa Shang De Zheng Dang Qi Dai Bao Hu Yuan Ze Lun Shu, Dong Fang Fa Xue, 2009(1):18-27

582 The main concept for its decision-making norm. For some discussion on the concept, see 王春福. 论科学民主决策的社会利益表达机制[J]. 求实, 2006(4):63-66; Wang Chunfu, On the Channels to Express Social Interests in Scientific and Democratic Decision-making, Qiu Shi, 2006(4),63-66

583 In the 1970 government working report to the NPC,
http://www.gov.cn/test/2006-02/16/content_200759.htm

584 The NPC's official review of this conceptual development,
http://www.npc.gov.cn/npc/xinwen/rdl/fzjs/2014-11/14/content_1886222.htm

marked it as an ideology-like norm. Some ideas, when being promoted to such status, may stop developing and functioning as a hollow ideology, but the rule of law narrative received better treatment. It was further theorised and enriched by the regime whereby a main throng of developments was increasingly categorised as the rule of law for executive decision making.

In 2004, to implement the strategy of governing the country by the rule of law, the State Council issued an important resolution stipulating the practices and institutions for the ‘advancement of law-based administration and building a rule of law government’ (国务院全面推进依法行政实施纲要), instilling a set of guiding principles and theories compatible with modern administrative justice.⁵⁸⁵ Much more flesh was added to the bone, mainly by transplanting modern administrative law rules from the West, which were tailored to suit the requirements of government documents in China. For instance, besides the general requirement that administration should be within the boundary of law (legality), the document also proposed the principle of rationality under the requirement of reasonableness (合理性, which in current judicial practices is increasingly framed as like the principle of proportionality⁵⁸⁶) of administrative action, stipulating that such actions and measures should be necessary and proportionate. If there are various measures to carry out administrative action, the ones that has the least impact on the rights and interests of parties should be chosen. For the actual design of an administrative decision-making process, this document, for the first-time, proposed a clear process of procedure, though with limited details and clarity. Another three elements, public participation expert review (专家论证), and transparency were also incorporated into its decision-making process⁵⁸⁷. Mechanisms such as public hearings, consultation conferences, and information disclosures were developed to be necessary steps of administrative decision making. The requirement of law-compliance assessment, which will later be imposed as a compulsory procedure, was loosely mentioned for major administrative decisions in this document.

Though this document does not provide a coherent and systematic account for the establishment of law-based decision-making procedures, it has brought into place the core constituent elements, which have formed the basis for further developments. The mechanisms for legality and participation will be elaborated and enriched in the

585 Ibid. Official link, http://www.gov.cn/ztl/yfxz/content_374160.htm

586 The exact words the document used to explain the meaning of reasonableness are clearly based on the understanding of proportionality: “合理行政”的要求是：“行使自由裁量权应当符合法律目的，排除不相关因素的干扰；所采取的措施和手段应当必要、适当；行政机关实施行政管理可以采用多种方式实现行政目的的，应当避免采用损害当事人权益的方式。”杨登峰。“从合理原则走向统一的比例原则。”《中国法学》3 (2016): 88-105.; Yang Deng Feng, Cong He Li Yuan Ze Zou Xiang Tong Yi De Bi Li Yuan Ze, Zhong Guo Fa Xue 3(2016):88-105.

587 Arguably, the design expertise consultation in administrative decision-making procedure was under the influence of Chinese scholars’ advocacy of similar practices in US law. For instance, see 王锡铎. 公共决策中的大众、专家与政府---以中国价格决策听证制度为个案的研究视角[J]. 中外法学, 2006, 18(4):462-483.; Wang Xi Xin, Gong Gong Jue Ce Zhong De Da Zhong, Zhuan Jia Yu Zheng Fu---Yi Zhong Guo Jia Ge Jue Ce Ting Zheng Zhi Du Wei Ge An De Yan Jiu Shi Jiao, Zhong Wai Fa Xue, 2006 18(4):462-483

legal norms to follow. Also, being issued by the central government, this document has initiated the system-wide proliferation of local implementing ordinances for implementation. A significant amount of detail has been added. These local experiments have also formed an institutional basis for further enactment of more systematic administrative procedures.⁵⁸⁸

To fuel and guide local implementation, the State Council issued the ‘Resolution on Promoting Law-based Administration in Municipal and County level Government’ [国务院关于加强市县依法行政的意见]⁵⁸⁹ in 2008, which has further developed legal norms on decision-making. Firstly, the mechanism of public hearing has been singled out, with emphasis on the representative. The selection of participants should be shaped by the nature, complexity, and scope of the discussed matter. The name-list of representatives should also be open to the public, alongside the replies and opinions from representatives. Secondly, the law-compliance procedure was also singled out and stipulated as a compulsory procedure for major administrative decisions. The legal affairs office in local government should issue a legality review report for major decisions as a compulsory part of the whole procedure. Law firms could also be hired to conduct this review. Major administrative decisions, following these procedures, should be made in a collective decision-making manner to prevent personal arbitrariness.

In 2010, the State Council issued the third resolution, ‘The Resolution on Strengthening the Establishment of Rule of Law Government’ (国务院关于加强法治政府建设的意见).⁵⁹⁰ It started to form systematic design for administrative decision making. It focused on decision-making procedures for ‘major administrative decisions’. Previous mechanisms were all incorporated into an archetype of six-step compulsory procedures for major administrative decisions, which involved public participation, expert review, risk-assessment, legal compliance review, collective discussion, and collective determination. The legal compliance review was established as a pre-conditional procedure, without which the result would have been illegal, and matters would not have entered the agenda of government meetings or discussions and would, consequently, not have been considered. A new pre-conditional element is risk-assessment, which has been presented in this document with significant details to include public participation, expert consultation, professional review, and so on, for concrete methods of solving the problem. Also, following the line of accountability in previous documents, this resolution continues to emphasise various accountability mechanisms, in particular that offices for legality review and risk assessment must shoulder direct responsibility if policies and decisions go wrong. In the meantime, local experimentation of administrative procedure design continues to thrive. Hunan became the first province to promulgate an independent ordinance of administrative procedure. Under the intensive influence

588 杨寅, 狄馨萍. 我国重大行政决策程序立法实践分析[J]. 法学杂志, 2011, 32(7):34-36.; Yang Yin, Di Xinping, The Analysis on the Legislative Practices of Procedure for Major Administrative Decisions, Journal of Law, 2011, 32(7), 34-36

589 http://www.gov.cn/jzwgk/2008-06/18/content_1020629.htm

590 http://www.gov.cn/jzwgk/2010-11/08/content_1740765.htm

of prestigious law professors in China,⁵⁹¹ its administrative law reform introduced rich details. Participation and transparency were the core elements for the design of decision-making procedures in this regulation. Concrete criteria and procedures for the triggering and operation of public hearings and information disclosure were given, under explicit influence of the ‘due process’ jurisprudence of law within the United States.

So far, the regime has achieved the initial establishment of a legal system for administrative procedure. Based on decades of practice and development in this area, the Party authority started to entrench administrative decision-making procedures into its political theories, forging a crucial part of the overall effort to promote its rule of law. In the fourth session of the 18th plenum of the Party in 2014, the CCP issued the ‘Resolution on Advancement of Rule of Law in an All-round Way’ (关于全面推进依法治国重大问题的决定)⁵⁹². This resolution elevated norm-based decision-making procedures to a strategic level, confirming a five-step process of major administrative decision-making-public participation, expert review, risk assessment, legal compliance review, collective discussion and determination, with transparency as quality ensured and regulated by the government information disclosure ordinance. This has become a binding model for all governmental units. Legal compliance review was again singled out and emphasised, with a requirement of establishing actual working mechanisms for legal compliance for major administrative decisions, mainly by realizing the review power of in-house legal counsel in government.

4.2.2 Participatory Mechanisms

An unavoidable question to deal with when discussing political institutions in China, especially those that may signify progress in governance and participation, is the doubt surrounding formality and authenticity. Such questioning is understandable but requires a greater deal of reflection. As a matter of fact, even in an authoritarian regime, institutions with democratic elements could flourish. As scholars have observed:

The difference is that, in contrast to the developed democracies, the CCP seeks to channel political participation into the domains of administrative decision making, the economy, the judiciary, and – to a very limited extent – a nascent civil society. Let us call this domain ‘governance level’ political participation, reflecting its problem-focused, issue and domain-segmented nature. At the same time, we find little or no development of political participation at what might be called the ‘regime level’; powers of decision have not dispersed to the extent that they produce autonomous public spheres, independent political organisations, independent oversight bodies or oversight through separations of powers. Nor have they produced open-agenda public meetings, citizen initiatives, or – most obviously – multiparty elections. These limited governance-focused empowerments do not add up to regime democratisation. But they do contribute to the overall pattern of authoritarian deliberation by empowering

591 A number of senior professors on constitutional and administrative law were invited to provide advices on the drafting of the regulation. For instance, 应松年. 《湖南省行政程序规定》制定和实施情况的调查报告[J]. 国家行政学院学报, 2009(5):37-40. Ying Songnian, The Making and Implementation of Hunan Administrative Decision-making Procedure, Journal of National Academy of Administration, 2009(5):37-40.

592 <http://cpc.people.com.cn/n/2014/1029/c64387-25927606.html>

*domain and scope-limited forms of voice, and there exist functioning pockets of democracy constrained by geographical scope, policy, and level of government...*⁵⁹³

A crucial element in administrative decision-making norms is the public hearing. Perhaps in the PRC regime, for both the authority and the society, no other institutional element was once so expected to offer democratic input more than this one. Yet, its actual practice is with diversified patterns, mixed impacts, and complexity.

The Chinese administrative law finds no theoretical or institutional barrier in employing public hearings, since the Constitutional principle of party leadership does not reject consultative and deliberative mechanisms for socialist democracy. This holds true for as long as they accommodate individual participation rather than facilitate organised opposition. The use of public hearing first appeared in the <Price Law> in 1997.⁵⁹⁴ The determination to change the price of public services, such as gas and electricity, should be conducted via public hearing to debate its necessity and feasibility. This rule, like many rules in China, lacks the details to be executed and operated effectively. The law suffers from a problematic execution, such as unfairness in the selection of representatives. Nevertheless, it initiated the proliferation of this mechanism to numerous fields. The Administrative Penalty Law and Administrative License Law both established public hearings as a compulsory procedure before the relevant administrative decision was made. The existence of these procedural elements could enable the public to make judicial challenges to executive power. For instance, when the then Ministry of Railway elevated the railway price during its spring festival (via the approval of the then Committee of National Planning) in 2001, a lawyer challenged the legality of this decision on the basis that it violated procedural justice due to the lack of public hearing. This case forced the Committee of National Planning to provide greater details in implementing public hearing for price change.⁵⁹⁵

The use of public hearings is still far from satisfactory. People have said in jest that public hearings are indeed price-elevating hearings. The selection of social representatives to the hearings are also under enormous controversy. Put into a broader perspective, in recent years it has been proposed that the adoption of public voices should be carried out via various channels. If the very formal procedure of public hearing limits public participation, informal yet effective mechanisms such as deliberation conferences, deliberative polls, online publications, and opinion solicitation should also be mobilised to maximise the input of public voices. Some of these practices have been entrenched as a compulsory part of the paperwork involved in the executive conference for policy-making.

In the broader sense, with such developments of participatory mechanisms, it has been argued that a form of ‘participatory governance’ has taken root in the PRC

593 He B, Warren M E. Authoritarian deliberation: The deliberative turn in Chinese political development[J]. Perspectives on politics, 2011, 9(02): 269-289.]; Public Hearings and Others

594 韦大乐, 于施洋. 略论价格决策听证会制度[J]. 法学杂志, 1998(4):11-12. Wei Dale, Yu Shiyang, On the Public Hearing Mechanism in Determination of Price, Journal of Law, 1998(4):11-12

595 彭宗超. "公共治理视野中的中国听证制度改革." 公共管理评论 1 (2004): 004.] Peng Zongchao, Reform of Public Hearing from the Perspective of Public Governance For the case and ruling, see

http://www.pkulaw.cn/case/pfnl_1970324837054115.html?match=Exact

regime.⁵⁹⁶ It seems that such practices in China are purely pragmatic, in the sense that the government has sought the consensus of the public for administrative decisions, which could, in turn, alleviate the burden of the government to justify their policies in an uni-lateral manner. Therefore, all kinds of participatory mechanisms have proliferated in local governance. For instance,⁵⁹⁷ in the Changsha county of the Hunan Province, some public affairs in the village and community were placed in direct referendum for decisions. In Wenling, a city in Zhejiang Province, the review of the government budget was channelled to public participation. For more than ten years till now, the local people's congress in Wenling organised annual sessions of 'democratic deliberation conference' (民主恳谈会), and have invited people's representatives and direct representatives by lottery to review the government's budget proposal and inquire about corresponding government officers. In addition, as the previous high-level norms have stipulated, the expert review and consultation are also active.

It is difficult to accurately assess the effectiveness and influence of such mechanisms, but close observers have provided positive feedback in some instances. For example:

*The Zeguo Deliberative Poll was scientific in using social science to consult the public; democratic in offering the voice of a random sample, not just the Party cadres; legal in submitting the results to the local People's Congress, which approved them overwhelmingly, before they were implemented.*⁵⁹⁸

It is possible there is some degree of exaggeration here, and other cases may not exhibit this kind of organisational quality. Nevertheless, this still means that such a mechanism could have real effects.

Apart from all these mechanisms, the pervasive influence of the internet and modern media should never be underestimated. The Internet has become the most efficient and vibrant public forum in China. The regime and the Party system, acquire information and feedback directly from the internet. Most executive and party units in the regime have special information office, who are directly responsible for collecting information from the Internet. Most government websites have online channels for people to voice their opinions and complaints.

In summary, these participatory channels during executive decision making are an important reason for the 'authoritarian responsiveness' of the regime. Regularisation and institutionalisation of such responsiveness may function as a catalyst for greater advancement.

4.2.3 Transparency and Openness

Compared with other more direct mechanisms for democratic contestation of government, transparency as a regulatory rule is more likely to be accepted or even endorsed during political transition, since it is an inherent technical quality of effective governance and does not directly challenge the regime. Therefore, in political transition, transparency can function as a crucial way to tame political power:

596 王锡铨, and 章永乐. "我国行政决策模式之转型——从管理主义模式到参与式治理模式." 法商研究 5 (2010): 3-12.] Wang Xixin, Zhang Yongle, The Transformation of the Pattern of Administrative Decision-making---from Managerism to Participatory Governance, Law and Commerce, (2010):3-12

597 Ibid

598 Ibid

*Transparency of information (including ultimately a legal provision for citizens to sue for access to government information), and public involvement in the process of accountability, provide an additional check on wrongdoing. Such transparency and participation deter corruption and favouritism within the agencies of horizontal accountability while assisting them to acquire the information they need to perform their tasks.*⁵⁹⁹

In China, government transparency has been advocated and practiced with a varying degree of effectiveness since the 1990s.⁶⁰⁰ At the beginning, local government ordinances and party documents provided the bulk of legal norms for government transparency, but there were very few applicable legal mechanisms to fulfil disclosure requests. After years of experience and also under enormous social pressure, the regime enacted the first government transparency law in 2007. This Government Information Disclosure Ordinance established a legal regime for transparency with administrative litigation (judicial review in China) as the primary mechanism to implement the right to information. This ordinance adopted a bifurcated arrangement to ensure government transparency. On the one hand, there is compulsory information that the government is legally obliged to publish regularly, such as administrative laws and regulations, government budget and debts, administrative fees (items, legal basis, criteria etc.), administrative license (items, legal basis, criteria etc.), statistical information, organisational structure, and so on. On the other hand, citizens could proactively apply for disclosure of government information. The principle has been set so that information regarding state secrets is unavailable, along with information related to commercial secrets and individual privacy – all of which can only be disclosed by the approval of the relevant party or the overriding necessity of public interest. The government's refusal of disclosure, and inaction of compulsory disclosure, can be litigated in court. Ever since the promulgation of the ordinance, the annual number of information disclosure cases has stably risen in various provinces, with the top two in 2015–2016 reaching 2,257 (Jiangsu)⁶⁰¹ and 2,192 (Beijing).⁶⁰² It is also notable that citizens in developed regions are more active in using this mechanism.

Certainly, there is tension between the government's disclosure work and the public pressure. In judicial cases, the Secrecy Law, Archive Law, and other rules are consistently employed by the government to shirk the responsibility of transparency. Nevertheless, transparency law still poses pressure on executive powers to normalise its decision-making processes and abide by the country's law. Insiders from the State Council have admitted that the worries and concerns over potential informational disclosure litigation have become a major impetus for prudent deliberation and design of policies. There are also mixed effects such that the government, due to the fear of potential disclosure, may only include 'safe' information in official documents.

599 Diamond, Larry. "The rule of law as transition to democracy in China." *Journal of Contemporary China* 12.35 (2003): 319-331.

600 刘恒. 政府信息公开制度[M]. 中国社会科学出版社, 2004. Liu Heng, Government Information Disclosure Institutions, Chinese Social Science Press, 2004.

601 <http://www.jiangsu.gov.cn/jszfxgk/zfxgkzl/gzndbg/201603/t20160330497046.html>

602 <http://zhengwu.beijing.gov.cn/zwzt/2015xxgkn/t1428667.htm>

The focal point of legal controversy over the boundaries of the government's power to hide information may be the issue of 'formulating information'.⁶⁰³ In 2010, the State Council chief office issued a guidance document of interpreting opinion on the implementation of government information disclosure. This guide added the rule that information that is still in the process of formulation alongside information concerning the internal management of the government, may not be disclosed, if the disclosure could cause harm to the public. The government, therefore, acquired a normative basis to exercise discretion over the disclosure of information, and held government meeting briefs, exchanged and discussed inter-agency documents, and so on. This of course caused enormous debate, as well as legal suits. In 2010, the Ministry of Health was sued because of its refusal to disclose the meeting record for the making of the national hygiene standard for milk.⁶⁰⁴ The argument the ministry posited was that the policy was still in its formulative stage. This became a major case for information disclosure in China. The ministry made the point by stating that the meeting brief could potentially harm both the industry and its regulatory policies, as well as cause unnecessary panic among the public.⁶⁰⁵ However, the process in reaching this conclusion could have benefited from being more well-reasoned and participation-friendly. The court ruled against the ministry and ordered it to reply again to the applicant, making this case a hallmark of information disclosure litigation. Growing from this case and many cases like it, academics' and practitioners' discussion on the issue proliferated. It has now been generally agreed, by both those in academia and the judicial system, that formulative information is not a safe harbour for the government.⁶⁰⁶ If the information relates to public interest and has reached a status of being finalised as a single part, even if it has a complex process, it should not be immune simply because it is not the determinative action or policy.

In sum, the development of norms for information transparency and the evolution of jurisprudence could serve as an example of how administrative norms could tame executive powers in decision making and facilitate more fundamental constitutional functions.

5. Executive-legislative Interaction : Boundary of Powers

Constitutional hybridity gives rise to a multicity of institutional elements, which functions as a framework for mutual-collaboration and mutual-checks between executive and legislative power in China. A broad array of working mechanisms for interplay have been in place to guide executive-legislative relations. In the legal domain, influenced by German law, the development of the Chinese version of

603 杨小军. "过程性政府信息的公开与不公开." 国家检察官学院学报 20.2 (2012): 73-78.; Yang Xiaojun, The Disclosure and Closure of Process Information in Government Information, National Academy of Prosecution, 2012, 73-78

604 http://www.pkulaw.cn/case_es/pfnl_1970324845185744.html?match=Exact

605 Shortly before that was the notorious poison milk scandal in China. The government might fear that all relevant information, once disclosed, would be somewhat distorted and cause greater panic. Nevertheless, it is a powerful argument and more transparency would eventually ease, rather than deteriorating social panic.

606 罗文岚, Luo Wenlan. 我国政府过程性信息公开的困局与纾解[J]. 行政与法, 2014(8):12-16; Luo Wenlan, The Deadlock of Process Information Disclosure and Solutions, Administration and Law, 2014(8),12-16

‘Vorbehalt des Gesetzes’ have set clear rules about the boundary between executive and legislative powers, the actual content of which is also transformed to be compatible with a socialist political system.

5.1. Cooperation, Interaction and Working Mechanisms of Law-making

Strengthened by bureaucratisation, the legislature will naturally assert its power, which will lead to adjusted executive-legislative interaction and the development of more concrete mechanisms. In the reform era of the regime, with the factional struggle and personal arbitrariness model, which has gradually faded, law making functions as an alternative, legitimising the mechanism for policies. The competition among different powers naturally propels the normalisation of law-making processes and institutions, since a level-playing field seems to be the only acceptable arrangement for each.

Furthermore, political bargaining of this kind also gives rise to executive-legislative cooperation. Executive powers need the legitimatising function of legislative process, while legislature finds no reason not to assert its power and influence.

The executive branch nowadays has a real motive to move their policy initiatives towards the NPC process, in order to seek a better chance to preserve the initial content of their policies through rounds of struggling with departmentalism. This may need some explanation. The PRC regime has entrenched a power balance; the executive branch has hardly operated by a single will. Instead, the internal decision-making process may be full of competition and fragmentation⁶⁰⁷. Each ministry has its own professional fields and policy agenda, a great deal of which may overlap or even conflict on certain issues. The state council is one of the statutory bodies that could propose law bills to the NPC, yet, a great deal of these bills, as well as administrative regulations, are drafted by relevant departments and reflect their own preferences and interests.⁶⁰⁸ Although in the Legislation Act, the administrative regulations could be drafted and promulgated by the central government itself, the government is starting to rely on formal legislative procedure in the NPC to promote their agenda.⁶⁰⁹ This is also a signal of the NPC’s conscious expansion of power. In both cases, the NPC process will become the procedure through which their will has the ability to materialise. With diversified preferences and interests, the bill from one department always needs the corresponding approval and cooperation from other departments. Therefore, departmentalism becomes a main hindering factor for arbitrary departmental law making. Facing this configuration of veto points, a drafting department or the legal affairs office of the State Council, may have to delete controversial clauses to make it pass in the final review of state council leadership. The department and sometimes the State Council itself have a strong motivation to bring a policy initiative to the NPC’s legislative process, rather than retaining it in the

607 Mertha A. “Fragmented authoritarianism 2.0”: political pluralisation in the Chinese policy process[J]. *The China Quarterly*, 2009, 200: 995-1012. Also, see the case of specific policy, Lema, Adrian, and Kristian Ruby. "Between fragmented authoritarianism and policy coordination: Creating a Chinese market for wind energy." *Energy Policy* 35.7 (2007): 3879-3890.

608 Li-shen Y U. Expression of Interest, Communication of Opinions and Collaboration in Administrative Rule-making Process[J]. *Contemporary Legal Science*, 2004, 2: 002.

609 Ibid. Also, Kong B. China's energy decision-making: becoming more like the United States? [J]. *Journal of Contemporary China*, 2009, 18(62): 789-812.

administrative law-making process. This is because the NPC's coordination of various interest groups, which include governmental departments, relevant party units, social groups, and so on, are sometimes more effective and could easily override the departments' opposition to drafting. The comparative independence, the formal authority of supreme assembly and the seniority of the NPC politicians are factors that, to a certain degree, offset its weakness.

The coordinative nature of executive-legislative relations is mainly embodied by the mutual-participatory mechanisms in the formulation of the Party's legislative agenda. A significant number of concrete mechanisms have gradually been developed, in a 'practice first, legalisation later' manner. In the drafting process of its legislative bills, the NPC and State Council have both engaged with one another. A deliberative conference is a typical way to discuss the issues and policies to be put on a bill, as well as the general principle for them, with more concrete details and technical issues left to the formal deliberative process of the NPC. On a grander level, the traditionally weak NPC system, as the legitimate supreme legislature, is now increasingly claiming its legislative powers with respect to its planning and coordination. It even phrases its function and role as the 'dominance in law-making'.⁶¹⁰ As mentioned previously, the overall annual legislative work plan has become a main working mechanism for the NPC Standing Committee to materialise its agenda. It has been explicitly expressed in party media that the State Council's law-making work should also be incorporated into the general plan of the NPC's annual legislative work. Aiming at coordinating the whole range of law making, the NPC has enriched this legislative planning mechanism and has made it a systematic programme involving extensive opinion solicitation, consultation, investigation, and bargaining⁶¹¹, with not only the executive branch, but all relevant stakeholders.

Apart from its coordinative function, the NPC's system also has certain vetoing power over the executive. The concrete legal mechanisms for exercising vetoing power are as follows. Firstly, the NPC could just play its role of law reviewer and decide whether to approve the government bill or not. The party certainly would like to see the high approval rate of government initiatives, as they are also endorsed by the Party's authority, but as previously mentioned, in a broad range of middle and micro-level policies, the Party, in fact, leaves them to the normal executive-legislative process. There are regular cases in which governmental bills are not approved or forced to modify. These include the Highway Expenditure case, the vetoing of the local government and court's annual working report, the vetoing of government budget, the vetoing of the working report on the implementation of representatives'

610 <http://legal.people.com.cn/n/2014/1211/c188502-26186013.html>

611 Such works are mostly carried out by the LAC

proposal, and so on. An obvious feature is that the exercise of vetoing is more frequently utilised at a local level.⁶¹²

In fact, the actual frequency of such vetoing may have been much higher than people may think, as the flexible coordinative and communicative mechanisms between the executives and legislature could allow them to negotiate before the bills are placed into formal procedures. The substantial bargaining of the bill may have already happened even before the bill had been proposed. A series of examples, observations, and arguments have been proposed regarding this point. For instance:

*[...] most surprising is that not all draft laws which are brought to a formal vote at the NPC actually pass. According to interview sources, there have been at least two occasions on which the NPC Standing Committee has brought a draft law to a vote and has voted it down, thus sending it back for extensive revision before resubmission. Although the official press has noted the Standing Committee's willingness to vote down draft amendments to laws, it has not, so far as I have been able to discover, reported a negative vote on any draft law. It will probably surprise few sinologists that one of the ill-fated drafts was the highly controversial 1986 Enterprise Bankruptcy Law, which was reportedly voted down during its second attempt at passage at the August 1986 Standing Committee session. The second negative vote, surprisingly, occurred just a couple of months after the suppression of the 1989 student movement, when according to these sources, the Standing Committee voted down a highly restrictive draft of the Law on Public Demonstrations drafted and sponsored by the Ministry of Public Security.*⁶¹³

Second, in detail of the previous point, the NPC's Standing Committee and subcommittees have the statutory authority to review and modify government bills. In its concrete procedure rules, certain mechanisms are in favour of the NPC's review and supervision. For instance, the government has always wanted to speed up the passage of its bills and has resorted to compiling multiple issues in one bill. The NPC may discover controversies and, therefore, ask for modifications to be made. The government may always claim that one place of modification should not hinder the

612 田必耀. 解读沅陵县人大否决财政预算报告[J]. 人大建设, 2003(2):10-11. 戚渊. 民主需要论证——沈阳市人大否决案剖析[J]. 法学, 2001(11):9-15. 周绍朋. 政府议案为何遭人大否决[J]. 决策, 2005(2):46-47. 丁爱萍. 人大否决法院工作报告的思考[J]. 楚天主人, 2007(9):31-32. 萧仁武. 南岸人大否决区政府报告 凸显人大“刚性”监督[J]. 公民导刊, 2015(1):27-27. 杨文浩. 人大否决局长任命何时不再是个“意外”[J]. 法治与社会, 2012(3):1-1. Tian Biyao, Interpretation of the NPC Veto on Government Budget Bill in Yuan Ling County, NPC Establishment, 2003(2):10-11, Qi Yuan, Democracy Demands Debate and Justification---Analysis on the Case of the NPC Veto in Shenyang, Journal of Law, 2001(11):9-15; Zhou Shaopeng, Why Government Bills are Vetoed by NPC, Journal of Decision-making, 2005(2):46-47; Ding Aiping, Reflections on NPC Veto of the Courts' Working Report, Chu Tian Zhuren, 2007(9):31-32; Xiao Renwu, Nanan People's Congress Vetoed District Government's Working Report: a Demonstration of the Effectiveness of Supervision, Guidance for Citizens, 2015(7), 27; Yang Wenhao, When Will NPC's Veto on Political Appointment Not Be an "Accident", Rule of Law and Society, 2012(1), 3; The most high-profile case, is the NPC Standing Committee's veto of the central government's bill of modifying the "Highway Law", see Li Peng, <Legislation and Supervision: Li Peng's Diary in the NPC>, Chapter 11; 李鹏, 《立法与监督: 李鹏人大日记》, 第十一章, 新华出版社, 中国民主法制出版社, 2006

613 Tanner, Murray Scot. "The politics of lawmaking in post-Mao China: Institutions, processes, and democratic prospects." *OUP Catalogue* (1999), chapter 5, page 34 of 75

passage of the overall bill or try to break up the bills and pass it along separately. Yet the NPC finds statutory basis in the legislative procedure to defend its power for this modification.⁶¹⁴ It has also been clearly stipulated, by the Party's decision to advance its socialist rule of law, that the NPC's system should use the mechanism to review and vote on one single article of a bill when necessary.⁶¹⁵

Thirdly, a similar kind of parliamentary enquiry session has been under development, exerting similar functions with the use of veto power, in terms of supervising and balancing the government. The so called 'Topical Enquiry' (专题询问) was first proposed in 2010 as a mechanism to improve the supervisory work of the NPC. It has been activated since 2013. The actual form and content is very similar to the typical inquiry in Western parliaments, with government ministers and vice premiers answering questions by representatives in the NPC Standing Committee. The enquiry is broadcast in text (currently) in the NPC's official website. The only problem is that it has not been regularised. Annually, there exist three topical enquiries in the NPC (2014, 2015), with similar frequency in local NPCs. To achieve better results, it should be permanent and regulated.

Fourthly, at a local level, a legislative platform is increasingly used by representatives to supervise and influence local government.⁶¹⁶ This trend even has the potential to carve out a type of political representation within the Party-State reform, that the representatives regard themselves and act as "delegates" and not Burkean trustees or Leninist party agents'.⁶¹⁷ It plays out as an 'extra-legislative variant of pork-barrel politics: parochial activity by delegates to deliver targeted public goods to the geographic constituency'.⁶¹⁸ Such inter-branch activity could force the government to respond to local needs: 'authoritarian parochialism is a congressional design feature and not a flaw. The design is also incentive compatible: there are no losers when congressional delegates place the practical problems and circumstances of ordinary citizens on the local governance's agenda and respond accordingly'.⁶¹⁹

614 Article 41,42, Legislation Law. Also, see 刘风景. 重要条款单独表决的法理与实施[J]. 法学, 2015(7):78-87; Liu Fengjing, The Jurisprudence and Practice of the Singled-out Vote on Important Clauses, Law Research, 2015(7):78-87

615 Official English version:

http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm. Also a case of local authorities implementing this decision, see 易明刚. 一次深入贯彻十八届四中全会精神的立法实践——广东省人大常委会出台《对法规案中个别重要条款单独表决的决定》[J]. 人民之声, 2015(3):21-21; Yi Minggang, A Legislative Practice that Implements the Spirit of Fourth Plenum of 18th Party Congress--- Guangdong People's Congress Standing Committee Promulgates "Decision on Singled-out Vote for Important Clauses in Legislative Bills", Voice of People, 2015(3):21-23

616 Manion, Melanie. "Authoritarian parochialism: Local congressional representation in China." *The China Quarterly* 218 (2014): 311-338.

617 Ibid

618 Ibid

619 Ibid

5.2. The ‘Vorbehalt des Gesetzes’ in China and the Changing Boundary between Executive and Legislative Powers

The ‘Vorbehalt des Gesetzes’ is a German constitutional rule that demarcates the boundaries of executive and legislative power. In recent decades, Chinese law borrowed this principle and built a Chinese version of it, which provides a leeway for the legislature’s growth of power.

The Chinese version of this German law concept has not always been a direction transplant. The first constitution in 1954 was not elaborate on the division of law-making powers, with the NPC having the sole power to change and implement laws⁶²⁰. The 1982 constitution was drafted during a period of a rapid change in politics and legal system. The out-dated norms might fail to accommodate the on-going reform. Expediency rather than formality ought to be a priority for reform to be implemented within the legal system. The simple model of a centralised law-making power in the supreme assembly is, therefore, clumsy and unwise. The 1982 constitution made a power-division arrangement that allocated law-making, or more accurately, norm-making powers to become diversified entities. The NPC and its Standing Committee acquired law-making power. The central government and its departments acquired the power to make rules in accordance with NPC-made laws. Local authorities acquired the power to make local legislation by local people’s congress, on the condition that they did not violate NPC-made laws and executive rules. Thus, a general hierarchy of law making was established.⁶²¹

Nevertheless, a reformative era necessarily featured the frequent break of an existing norm system. The practical need to establish and consolidate policies gave rise to the active and sometimes arbitrary executive law making, which frequently encroached upon a typical legislature’s law-making domain. Also, local experimentation resulted in a wide range of new institutions and new policies, which did not have the proper legal basis and had even been adopted in violation of laws. Unconstrained and chaotic norm-making powers undermined legal certainty and endangered basic rights.

To tackle such problems, in 2000, the PRC regime introduced the Legislation Law, a functionally constitutional document that set the boundary and procedures for various kinds of law-making power. In Articles 8 and 9, the law set the cornerstone rule of separation for law-making powers between the central legislature and other entities:

620 韩大元. 1954 年宪法的历史命运与人民代表大会制度[J]. 法律科学-西北政法学院学报, 2004, 22(5):19-21.

Han Dayuan, The Historical Destiny of 1954 Constitution and People’s Congress System, Law as Science, 2004, 22(5):19-21

621 刘春华. 国务院立法权限若干疑难问题探讨[J]. 中外法学, 1998, 10(5):90-94; Liu Chunhu, Discussion on Legislative Power of State Council, Zhong Wai Fa Xue(Peking University Law Journal), 1998, 10(5):90-94

Article 8

The following affairs shall only be governed by law:

11. affairs concerning State sovereignty;
12. the formation, organisation, functions, and powers of the people's congresses, the people's governments, the people's courts and the people's procuratorates at all levels;
13. the system of regional national autonomy, the system of special administrative region, the system of self-government among people at the grassroots level;
14. criminal offences and their punishment;
15. mandatory measures and penalties involving depriving citizens of their political rights or restriction of the freedom of their person;
16. a requisition of non-State-owned property;
17. a basic civil system;
18. a basic economic system and basic systems of finance, taxation, customs, banking, and foreign trade;
19. systems of litigation and arbitration; and
20. other affairs on which laws must be made by the National People's Congress or its Standing Committee.

Article 9

If laws have not been enacted on the affairs specified in Article 8 of this Law, the National People's Congress or its Standing Committee has the power to decide to authorise the State Council to formulate, according to its actual needs, administrative regulations with respect to those affairs. The exception to this involves criminal offences and their punishment, mandatory measures, and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their people and the judicial system.

Such efforts were initially meant to ensure the clarity and consistency of the whole legal system, which necessarily strike similarities with the German model of 'Vorbehalt des Gesetzes', which is also generally explained by deliberate imitation.⁶²² Under pressure from Chinese legal academia, it has now been predominantly interpreted as emphasising the legislature's inherent legitimacy in law making. A scholarly interpretation of it also favours the connotation of the separation of power and protection of fundamental rights against executive arbitrariness. In contrast, the official concern was more about claiming the authority of central legislation and prevent local legislation from violating its central norms.⁶²³

In any case, the regime's functional need for governance effectively overlaps with the building of the rule of law and constitutionalism. The exclusive jurisdiction

622 For more detailed discussion, 刘连泰. 评我国《立法法》第八条、第九条关于“法律保留”制度[J]. 河南财经政法大学学报, 2003, 18(3):102-107. 蒋剑云. 论法律保留原则[J]. 行政法学研究, 2005(1):61-68. 秦前红. 法律保留功能的时代变迁[J]. 法学评论, 2008. Liu Liantai, Comment on the “Fa Lv Bao Liu” System in Article 8 and 9 of Legislation Law, Journal of Henan Finance ,Law and Politic University, 2003, 18(3):102-107; Jiang Jianyun, On the Principle of Fa Lv Bao Liu, Study on Administrative Law, 2005(1):61-68

623 From the main academic adviser of this law, 应松年. 《立法法》关于法律保留原则的规定[J]. 行政法学研究, 2000(3); Ying Songnian, The Legislation Law's Stipulation of Fa Lv Bao Liu Principle, 2000(3)

of NPC law making is a chief mechanism to defend and expand its power. Section 10 of Article 8 set the reserved powers of the NPC with flexibility and vagueness. The preserved law-making domain of the NPC seemingly has three basic logical principles. The first, the logic of sovereignty and constitutional affairs, including state institutions, local autonomy, and so on. The second, the logic of the rule of law, such as criminalisation, which can, consequently, only be provided by legislature-made law, and the third, and arguably most critical, the logic of rights protection. The constraint on fundamental rights could only be established and regulated by legislature-made law. Recent development has shown the possibility of legislature's self-empowerment via the utilisation of this channel. In 2015, the imposition and contents of tax have been added to the list, changing the lasting practice that the executive power could easily set tax just by executive rules.

Nevertheless, a close reading of texts and other legal-political institutions of China may discover serious tensions in developing a balanced power dynamic with the utilisation of this measure. First, an equally flexible channel is also available with the inclusion of Article 9 and allows for the easy delegation of exclusive law-making powers to executive branches.⁶²⁴ The legislature's passivity is an exceptionally severe problem in China for obvious political reasons. Indeed, there is a clear classification of 'absolute reservation' and 'relative reservation', meaning that the 'the affairs concerning criminal offenses and their punishment, mandatory measures, and penalties involving depriving citizens of their political rights or restricting their freedom, within the judicial system' cannot be delegated, but it is still not enough. The range of fundamental rights that deserve a deliberative and lengthy law-making procedure is definitely broader than crime defining by law and personal freedom.⁶²⁵ In the list within Article 8, the deprivation of non-State-owned property would affect the basic right of property, which should fall under the exclusive domain of legislature. Also, the absolute reservation fails to include matters concerning freedom of expression and other political rights. Such insufficiency may be improved through the approach of expanding the list in Article 8, and therefore have left room and reason for hope.

6. Conclusion

This chapter demonstrates how constitutional hybridity contributes to the developing pattern of constitutional governance in China. It focuses on the legislative and executive branch, as well as the interplay between them. The legislature has been empowered by bureaucratisation and professionalization drawn from the Chinese tradition. Being transformed into a more competent semi-bureaucratic agency, it acquires stronger ability and leverage in aggrandising legislative power and influence, as testified by its increasingly explicit influence in actual law making (the acclaimed 'dominance' in law making) and the recent proposed work of 'constitutionality review'. That is to say, the bureaucracy-building of Chinese tradition could also help to materialize the nominal powers of the legislature, many of which are modelled on western constitutions, such as the mechanism of 'constitutionality review'.

624 Liu Chunhua , *ibid*

625 In comparison, see how the the non-delegation principle in US constitutional interacts with rights, Strobel M H. *Delegation and Individual Rights*[J]. *S. Cal. L. Rev.*, 1982, 56: 1321.

The executive power has been increasingly institutionalized, combining elements from both the Chinese and the western tradition. The Chinese tradition offers basis for a meritocratic bureaucracy, while the western-imported administrative law helps to place legal constraints on such powers and, in so doing, helps render them effective. The government is, to a certain degree, a direct legacy of the ancient meritocratic tradition, with open examination of the civil service as a chief way for political participation and social mobility in modern China. Nevertheless, meritocratic elements alone cannot sufficiently build constitutional governance. Modern administrative laws based on western model play a vital role in normalising executive powers. The three identified cases of government transparency, decision-making procedures and participatory mechanisms have demonstrated that administrative law is playing a crucial constitutional function.

The interplay between executive and legislative branches is also being normalised through mixing legal rules from different traditions, with the Chinese version of 'Vorbehalt des Gesetzes' maintaining the domain of legislative power. In addition, the expanding influence of legislature also brings with it more coordination mechanisms with the government, providing a certain degree of counter-balance to strong executive power.

The next chapter, the second part of this discussion, will further analyse the core structure of this overall constitutional framework and consider the dynamics available to transform the regime and in which direction this transformation should progress. Again, it will be demonstrated that constitutional hybridity is a crucial underlying theme in such institutional development.

Chapter 7

Constitutional Governance in China (2):

Dual-Representation and its Adaption

1. Introduction

The previous chapter discussed how constitutional hybridity can contribute to constitutional governance in the PRC regime by including people within the governing structures. This chapter will examine the legitimacy tension that is generated by this constitutional hybridity. It will show that constitutional hybridity inevitably forges a dual-representational structure, the tensions within which have a fundamental effect on the institutional interplay within the Party-State regime.

A dual-representation structure is a product of the hybridity of orthodox Marxism and Leninism. The regime is constantly under pressure to reconcile the implied popular sovereignty and party's supreme leadership. This is the fundamental setting through which different political institutions interplay. While exercising its de facto supreme leading power, the Party must caution against breaking up the formal structure of popular institutionalised sovereignty. The supposed 'popular' supreme authority conflicts with the parallel and self-ordained supreme leadership of the Party. Many theories and practices are developed to ease such tension and enhance logical coherence within the regime. They will also be discussed and some suggestions will be made. Most of them will be argued as unconvincing because they take the party's representativeness for granted.

Due to the legitimacy tensions triggered by constitutional hybridity, the Party and the whole regime may have two modes to advance constitutional reform: either that the Party plays out its supposed representative function, forging a triangular relation between the Party, legislature and government, or, secondly, there is an attempt to integrate the state system and build an administrative party-state that is subject to a unified legal framework based on existing administrative law, amounting to a type of bureaucratic constitutionalism. In sum, the Party must either empower the state or become the state. Given current social consensus, it is difficult to imagine that the regime could stop or even reverse political reform. A reasonable prospect, as this section will discuss, is that China will achieve a type of 'mixed constitution' through gradual reform, with the Party's ruling position unchallenged in exchange for a more constitutionalised pattern of power-exercise.

Moreover, further political reform of the regime hinges on the playing out of the positive dynamics inspired by mixed institutional elements. In general, elements of Chinese tradition are employed to enhance competence and inclusiveness of the whole political system. The greatest influence from the Western tradition is two-fold. On one hand, principles and rules of modern administrative laws are borrowed to forge legal constraints on powers; on the other hand, reformists are also pushing to activate some functions of the formal representative assembly. Interestingly, such efforts could also find justification in communist tradition, as the people's congress was designed to be the supreme authority of communist regime. Among those

dynamics, the potential constraints that administrative laws may place on party power will be presented as a major one, with the concrete legal reasons and political conditions of it being given and analysed.

2. Inherent Tension of the Party-State: Dual Representational Structure and its Adjustment

2.1 Institutional Tension

A fundamental feature of the Constitutional framework of the party–state is the dual-representational structure.⁶²⁶

This is a product of a combination of Marxism and Leninism. Marxism is inherently compatible with the theory of popular sovereignty,⁶²⁷ though the institutionalisation of such popular sovereignty also gives it certain features of parliamentary sovereignty, an indication of the inherent hybrid nature of the regime. Therefore, in Marxism and communist orthodoxy, there must be a supreme assembly representing the general will of the people.⁶²⁸ In the ultimate form of communism, at least as understood in China, there will not even be the necessity to have state, let alone political parties.

In contrast, Leninism, though inheriting the inherent part of Marxism, proposes and practices the vanguard party as the main institutional vehicle to win revolution and run a country. Being the vanguard of revolutionaries implies a self-ordained type of representativeness.⁶²⁹ Representativeness of the Party may come from the cognition of the laws of history, rather than from any process of election.. Therefore, the internal logic of such representativeness is a form of representation by the knowledge and belief of a set of ‘truth[s]’.⁶³⁰ This vanguard elite political group must strive for the public interests of all people.⁶³¹ In this self-promise-like process, the Party frames its legitimacy by connecting its goal and tasks with people’s interests,

626 At least in the political theory about the polity of the regime.

627 The subtlety of both Marxism and popular sovereignty may offer more implications, but also demands lengthier discussion. It is not the main topic of the research therefore this section will not dig deeper. Hereby it will not raise too much criticism by simply highlighting the generally similar institutional channel to base popular will in both Marxism and popular sovereignty, which both have a great deal of sub-types.

628 Draper, Hal. "Marx on democratic forms of government." *Socialist Register* 11.11 (1974)

629 See the beginning of the CCP Constitution: “The Communist Party of China is the vanguard both of the Chinese working class and of the Chinese people and the Chinese nation. It is the core of leadership for the cause of socialism with Chinese characteristics and represents the development trend of China's advanced productive forces, the orientation of China's advanced culture and the fundamental interests of the overwhelming majority of the Chinese people.” The official translation:

<http://english.cpc.people.com.cn/206972/206981/8188065.html>

630 “Marxism-Leninism brings to light the laws governing the development of the history of human society. Its basic tenets are correct and have tremendous vitality.” Ibid. This mode, as could be easily observed, finds little difficulty to be compatible with the Chinese political tradition that an intellectual-bureaucracy studying and practicing Confucianism functions as the core of state governance. It was no wonder the CCP at birth was mainly a small-scaled party of intellectual elites.

631 Of course, not uncommonly, the scope of people is limited to certain classes.

which are usually to be interpreted under the political theories of the Party.⁶³² The fulfilment of the self-promise, therefore, is particularly crucial in the maintenance of the Party's ruling legitimacy.

Rather than strengthening the Party, this representation model could also weaken the Party tremendously, as the Party's ruling might bear almost no mistakes or even mediocrity. In a very abstract sense, the logic of such representation could be summarised as 'doing the right thing' for the people, while what is 'right' remains unclear. There is usually a distance between what people want and what is 'right' for their interests, not to mention the obvious risk of political manipulation. Therefore, discovering what the public wants and what is right, then coordinating between the two and persuading the people, becomes a core task of the Party.

Further, perhaps more importantly, there is clear potential tension between the Marxist assembly and the Leninist party. Which one represents the people and is the supreme authority? Is the law above the Party or the Party above the law? Or is there a third option? The PRC regime dodges this ultimate question by claiming that the Party should act within the ambit of law. But this principle does not clarify if the Party can arbitrarily change the law to suit its needs. A crucial part of Leninism's asserted legitimacy is his adherence to Marxism, though in practice they differ significantly. Therefore, Leninist Party-State cannot get rid of supreme assembly because it will amount to denying its own legitimacy.⁶³³ Election (at least in formality) is still a major and indispensable part of the state to constitute an assembly.

Now, China is facing this problem. The Chinese constitution clearly states that the NPC is the 'highest organ of state power'.⁶³⁴ What does 'state' power mean? Is there a parallel non-state power, which is likely to be party power? The next article immediately stipulates that 'The National People's Congress and its Standing Committee exercise the legislative power of the State'. What does this expression mean? Why specify legislative power (interestingly, 'of the state') under the supreme state power? Does this also imply that there is a parallel party legislative power? These are all questions directly deriving from the existence of (theoretical) dual-authority.

2.2 Legal Theories to Ease the Tension

For a start, the above-mentioned puzzle may be explained by their logical relations and linguistic understanding in Chinese context. In the PRC constitution, the subordination of 'legislative' power under the 'state power' or 'highest state power' may more likely mean there is a distinct type of 'highest power' above legislative power, though the latter, in a modern context, is often (though not always) equivalent

632 Which include but are not limited to orthodox communist theories, such as in China, the Party's redefinition and re-direction of the goals and tasks of state and party are also part of the guiding theories, as seen in party constitution, *ibid*.

633 For instance, before the official establishment of the PRC, Stalin strongly advised the CCP regime to make a constitution and build a representative assembly. The core reason was that the political consultative conference was not elected by the people, therefore could not supply sufficient legitimacy. See, Shi Zhe, <Memoir: By the Side of Giants in History>, 408, Central Documents and Files Press, 1991; 师哲,《在历史巨人身边:师哲回忆录》,中央文献出版社 1991 年版,第 408 页. The author was the senior interpreter for the Party's leaders.

634 Article 57, PRC Constitution. The official translation:

http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372965.htm

to supreme power, if not necessarily sovereign power. Based on communist orthodox, the highest power can only be exercised by the people. The institutional device to facilitate this is the NPC system and although, linguistically, it could be interpreted as implying parallel party power, the cultural contexts suggest the opposite. In Chinese culture the ‘state’ (国家) is almost equivalent to the aggregation of all political and public domains, while the communist orthodox will not hesitate to subordinate the Party under the general will of the people. Neither leaves any room for a constitutionally consolidated party power. Also, the actual drafting process suggests no such aim.⁶³⁵

The gap between nominal constitutional arrangements and political reality has been acknowledged by the Chinese authority and academia. The account of ‘political leadership’ in the party-state separation still represents the official view of mediating the potential authority tie by incorporating them through a unified procedure. Arguably, this approach is both theoretically and practically wiser than some alternative plans.

There are also academic efforts to spin out more sophisticated theories on this bifurcated authority structure. There are following sub-types.

2.2.1 Theory of the Constituent Power of the Party

The Party’s representation of the people is framed by Chen Duanhong as a type of ‘constituent power’ (制宪权),⁶³⁶ while the NPC stands for the ‘regular representative’ organ after the establishment of its constitution.⁶³⁷ From time to time, the former breaks the norms set by the latter. Then what time exactly? According to Chen,⁶³⁸ it is when the constitution is in serious conflict with national conditions, which necessarily require constitutional changes. In such times, the Party, representative of the people and holder of constituent powers, needs to step out and make appropriate policies to give determinations on the ‘ways of survival’⁶³⁹ of the nation. Problems in such a theory are not difficult to identify. Firstly, it is simply incompatible with historical and political facts. The constituent power, even if assumed as applicable to Chinese contexts, was not exercised in history as this theory argues, so may be disqualified by this excessive mismatch of theory and reality. The RPC regime was founded by the first Political Consultative Conference, which could be legally seen as the constitutional convention that established the regime. During this process, the CCP, like other parties and social groups, were all members of this

635 Han, Ibid

636 A quite appreciated concept in Chinese legal academia. It is directly borrowed from the thoughts of Abbe Sieyes. 陈端洪. 人民既不出场也不缺席 西耶斯的民族制宪权理论解读[J]. 中外法学, 2010 (1): 81-103.; Chen Duanhong, The People is neither Present nor Absent-the Interpretation of National Constituent Power of Sieyes, *Zhong Wai Fa Xue*, 2010(1),81-103

637 刘刚, 政治代表概念的源流——兼论我国宪法的代表结构, 中国法律评论, 2016 (4); Liu Gang, The Origin of Political Representation---on The Structure of Representation of China, *Chinese Law Review*, 2016(4)

638“在常态下, 执政党在宪法和法律下活动, 如同宪定权。当宪法和国情严重冲突时, 执政党便行使制宪权代表机构的权力, 以发布政策的形式对民族的生存方式做出决断。等待条件成熟时, 再建议全国人大修宪或者制定新宪法。由于两个代表机构作出决断之间存在一个时间差, 所以出现了新政策和原有宪法规范不一致, 而新政策有效的局面。” Chen, Ibid

639 Chen, ibid

conference, and had equal votes. In 1954, the first term of NPC convened and promulgated the new constitution. In either case, constituent powers were not exercised solely by the Party, but through a legitimate assembly. So, when and how did this power transfer to the CCP? Chen and other scholars have no direct answers.

Secondly, Chen's explanation of the Party's constitutional status is defined by 'Chinese people under the leadership of CCP' in the preamble of constitution, which is at best an extremely thin account. The constitutional effects of generalised political declaration and historical narrative must be very cautiously assessed. Even if admitting that the CCP has an entrenched role of 'leading the people', as recent constitutional amendment shows, it cannot be deducted that this power of leading is the so-called 'constituent power'. Even the orthodox theory of the Party itself emphasises that the main way of 'political leadership' is by making legal and policy proposals to the NPC to be approved. It is the trustee of the people, rather than mentor of the people.

Thirdly, Chen's theory is directly against the Constitution, which clearly states that all powers, naturally including sovereign power, belongs to Chinese people. This popular sovereignty is institutionalised by the NPC, as the constitution also stipulates.⁶⁴⁰ Besides these mentioned historical, factual, and legal difficulties, this theory also faces a strong moral contestation: what if the CCP makes serious mistakes in exercising such powers? How could it take the corresponding responsibility? No laws and theories could give a clear and well-reasoned answer if this constituent power theory stands, because if a power inheres in an institution, which is, in practice, the supreme authority, no meaningful efforts could be made to seek accountability. If all sovereign powers still rest in the people as exercised through the NPC, there will not be this problem, because, legally speaking, the people made decisions and must take responsibility. The constituent power argument is too likely to allow leeway for the Party to justify arbitrary power, regardless of the original meaning and aim of it. Therefore, it is either illogical or unfeasible. Also, of course, there is possibility that it is both.

2.2.2 Positive Violation of Constitution

During the reformative era, the Party's leadership necessarily involved tremendous controversy, and produced measures that may have violated the constitution. Unconstitutional policies, mainly referring to the reformative measures that were incompatible with the pre-reform constitutional order, such as private ownership, delegated power to government, market economy, etc. are theorised as having the nature of 'positive unconstitutionality', meaning that they can do good to the polity even though they are incompatible with the current (and outdated) legal order.⁶⁴¹ This theory is politically, and practically, quite reasonable, but measured by moral and legal propriety, it can hardly rebalance the dual-authority structure. These policies could be political justified and simple legal technics, such as subsequent approval or constitutional amendments, could be used to confirm and consolidate these policies. However, the tension is still there, especially if the Party starts to make very 'negative' unconstitutional policies. Some regard the current constitutional order based on the 1982 Constitution as a 'constitution of reform', meaning it mandates the

640 Article 2, PRC Constitution.

641 郝铁川. 论良性违宪[J]. 法学研究, 1996 (4): 89-91. Hao Tiechuan, On Positive Constitution-violation, Study of Law, 1996(4):89-91

temporary incoherence within the constitutional order. Though not utterly unreasonable, such a proposition lacks theoretical richness to explain and reconcile the tension. In particular, it contains a seeming internal fallacy. In a purely logical sense, the Constitution cannot mandate and justify unconstitutionality, but under this theory, the meaning of temporary incoherence is so vague that it could easily include a great deal of unconstitutional practices. Indeed, as the previous theory, they could be positive but, again, the problem is that, what if some person or group starts to impose negative ones arbitrarily? If some guess could be allowed, there may be opinions that the internal self-checking institutions within the Party could prevent such things from happening. History seems to show the opposite, such as most famously, the Cultural Revolution suggests.

2.2.3 Party-State Constitutionalism and Constitutional Conventions

Jiang Shigong proposed that a strategic effort ought to be put in place to expand the definition of the constitution, by incorporating the Party's norms, 'constitutional conventions', and political practices.⁶⁴² It has also been proposed that the regime could build a different type of constitutionalism based on the Party's self-regulating norms, the 'Party-State Constitutionalism'.⁶⁴³ It is proposed that in this Party-State Constitutionalism the relations between party and state authority could be smoothly reconciled by a sophisticated web of diversified norms. Such unification of diversified sources of norms may be novel but is quite far-fetched or even ungrounded.

Starting from the factual dimension, it simply does not match the constitutional reality of China. The proposed conventions, even if assumingly based on the right understanding of constitutional conventions, are either non-existent or are of only very limited force, and can be easily abandoned by the Party. The example such articles advocate – the term limits, age limits, composition of political bureau standing committee etc. – are almost all under change or potential change. In addition, even the cognitive basis of such conventions is dubious. Though constitutional conventions could 'crystallised', in Chinese context, it is much easier to identify what has not been crystallised because the formalisation of social rules is a matter of degree.⁶⁴⁴ When the degree is not high enough, far-fetched theorisation cannot change the fact. Since China is still undergoing active political change (either in good or in bad way), very few customary practices have been reasonably crystallised to a degree that would allow us to identify them with confidence and would justify their inclusion in a formal document. Party laws and norms are no exception. As the previous chapter on constitutional evolution of PRC regime has shown, the Party legal system is simply not detailed and coherent enough to be a functioning part of the Constitution. Then, this leaves maybe only one utility of this theory, that it is a prescription that the Party laws should advance to this direction. This may also fail, though with less difficulty.

642 强世功. 中国宪法中的不成文宪法-理解中国宪法的新视角[J]. 开放时代, 2009, 12(8);

Shigong J. Written and unwritten constitutions: A new approach to the study of constitutional government in China[J]. *Modern China*, 2010, 36(1): 12-46 ; 强世功. "党章与宪法: 多元一体法治共和国的建构." *文化纵横* 4 (2015): 18-29.

643 Backer, Larry. "The party as polity, the Communist Party, and the Chinese constitutional state: a theory of state-party constitutionalism." (2009).

644 Barber, Nicholas William. *The constitutional state*. Oxford University Press, 2010.

The efficacy of party laws, if achieved, is certainly a political progress, but when Party laws interplay with the state legal system to form the proposed unified framework of constitutionalism, the same problem regarding the prevailing source of authority, will inevitably re-emerge. What if the different phrases in Party Constitution and State Constitution could be strategically interpreted as having conflicting meanings? This theory offers no solution. Besides all these technical flaws, the language used in such theories are dangerously vague, ideological, and propaganda-tuned. This will harm the preciseness and validity of the theory, because it will be too easily susceptible to abuse. Under Chinese contexts, this fact may be an even stronger rebuttal than technical ones.

2.2.4 Confucian Constitutionalism

The Chinese tradition is also invoked by some scholars to re-shape the Chinese regime. Jiang Qing has proposed a kind of ‘Confucian Constitutionalism’ to re-forge the legitimacy and institutional structure of China.⁶⁴⁵ This account is mostly based on mysterious ancient terms such as ‘wang dao’ (王道, kingly way), so is quite difficult to have open dialogue with mainstream political and legal theories. The core institutional design it exhibits is flawed. Jiang Qing argues that the legitimacy of the Chinese regime should be three-fold, the legitimacy of ‘heaven’ (scholarly interpretation of guiding political spirits), the legitimacy of ‘earth’ (political and cultural tradition of a nation), and the legitimacy of ‘people’ (the expressed will of the people). These fancy terms seem to be dubious, especially as they cannot justify the claimed legitimacy. Jiang Qing’s constitutional framework centres on the ‘three-chamber’ system, a bizarre combination of the chamber of heaven, the chamber of the earth, and the chamber of the people represented by the chamber of Confucian scholars, the chamber of the descendants of the Confucius family, and the chamber of elected representatives of the people. The Confucian scholars are selected in a peer-review-like process, as are the representatives from the Confucius family. It is more like a self-ordained legitimacy of Confucian scholars that is difficult to convince even scholars from other philosophical schools, not to say the general public.

This Confucian Constitutionalism theory clearly imitates a mixed constitution. Nevertheless, the virtue of such a constitution is not a simple mixture, but rather relates to what is to be mixed and how the combination can be smoothly mixed. Jiang Qing’s theory fails to offer a minimum level of procedural propriety in constituting political institutions, therefore could not work.

2.3 An Alternative Political Approach

Some proposals from political scientists, though not aiming to offer a unified constitutional account, may have the potential to reconcile this bifurcated authority: first in constitutional practice and later in the evolution of a more coherent and sober theory, if they could be promoted to shape the idea and action of political actors.

In short, the relations between party representation and NPC representation may have an analogy between political and legal sovereignty. The Party could be an agent of the people, but it can only implement its will (or rather, the people’s will) through the official procedures of the NPC supremacy, to be legitimised. This is also the official understanding of party-state relations (at least for now). In this manner, the operation of a dual-representational structure may give rise to a more inclusive and

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legitimate political system. Certainly, this is only one of many possibilities, though this may be the most practical approach for an orderly and progressive reform.

The typical proposal to play out such positive dynamics of a dual-representational structure is from Pan Wei, a political scientist from Peking University. In his opinion, regarding the reform of party-state relations,⁶⁴⁶ the Party must first be a party, meaning that it is not a closed bureaucracy system simply giving rigid commands, but actively representing the people and channelling their claims. In Pan's idea, the main content of 'politics' should be the organisation and the mobilisation of its people, consistent with the orthodox of the Party. Though, Pan's idea of organising the people is much closer to that of community building and representation work, the goal of which is to boost social capital and channelling (as well as framing) people's views and interests. It is not a perception of a free competition through electoral mechanisms, or, at least, electoral competition is only part of the picture. More crucially, to maintain uncontroversial legitimacy, the Party also ought to 'de-bureaucratise' itself, which amounts to a further escalation of the party-state separation (perhaps, also a political and administration separation).

Like the official account of party-state separation, the government should be re-forged into a 'politically independent' technocracy system, which handles day-to-day administration and proposals of legislative bills. Meanwhile, the NPC should hold effective approval and vetoing power over government bills and be a consultative organ for its supervision. Exercise of any political power should be subject to effective laws, in particular the administrative organ, with which the Party should refrain from interfering. Such a model was summarised by Pan Wei as a 'consultative rule of law'.⁶⁴⁷

This model implicitly blends the Party and State authority into a more integrated process to produce the supreme political authority of the regime, therefore re-conciliating between the two potential conflicting sources of power. By emphasising the Party's representative function as the principle way to rule, it envisages an integrated constitutional process similar to the principle of 'crown-in-parliament'. The underlying spirit is that the Party retains its ruling position but must exercise its power through a constitutionalised process. Unlike the Westminster system, in which absolute monarchy retreats to the function of holding royal assent as a final gate of legislation, in Pan's theory the Party actually plays the role of another chamber of the whole assembly, while the NPC and CPPCC may function more like an upper chamber. It is not an approach to determine a winner between the Party and state, but a way to construct an authority-producing mechanism in which the Party and state institutions each have a part, although the Party's role is undeniably more important.

Pan's proposal could have direct constitutional implications for the transformation of the Party's rule. To effectively represent the people, CCP should change itself from the current over-sized mass party to a true elitist and vanguard

646 潘维, 共和国一甲子探讨中国模式[J]. 开放时代, 2009, 5: 126-139; 潘维. 法治与“民主迷信”[J]. 香港: 香港社会科学出版社有限公司, 2003. 潘维. 法治与未来中国政体[J]. 战略与管理, 1999, 5(4). Panwei, Discussion of Chinese Model after 60th Anniversary of the Republic, Open Times, 2009, 5:126-139; Pan Wei, Rule of Law and Superstition about Democracy, Hong Kong Social Science Publishing Company, 2003; Pan Wei, Rule of Law and Chinese Polity in the Future, Strategy and Management, 1999(4).

647 Ibid

party. This elitist party machinery, by organising and representing the people, should constrain bureaucratic power and secure the Party's rule, therefore having motivation to initiate political reform. Pan never conceals that there exists a link between this idea and Mao's strategy to mobilise the masses against bureaucracy during the Cultural Revolution. He cites Mao's example to argue for the constraint on a bureaucratic system, but also carefully clarifies that this approach, emphasising that it must be carried out under the rule of law to prevent abuse.

A possible motivation for the Party to genuinely implement this representation-orientated approach (and not necessarily reduce its size) is the reduction of political risk that could be achieved by ruling indirectly in most domains. This motivation could even outweigh the fear of reducing its strength by streamlining the Party. Arguably, size-reduction will not necessarily result in the loss of capacity and strength. Contrary arguments are well received.⁶⁴⁸ Also, it seems that numbers of Party membership in China do not translate into actual strength, since many people join the Party simply to obtain technical credentials for jobs or social connections, rather than out of clear political commitment. Therefore, a streamlined party apparatus may not necessarily be opposed by the Party. In fact, it is also aware of the 'fatness' of party organisation and has demanded that Party member recruitment should be strict and cautious, rather than a blind expansion.⁶⁴⁹ In addition, fostering elitist and capable party organisation may not depend solely on reducing its size. It is possible to sophisticate the internal types of party membership, developing a more-refined system for allocating the rights and duties to different types of Party members, just like the differentiation of shareholders in company governance. Hereby, the aim is to demonstrate that this elitist reform approach is not political or impractical and may face fewer barriers than people may think.

This approach may have a noticeable paradox. In reality, the Party has both bureaucratic and representative elements at the same time. Does representative transformation mean the abandoning of permeation of bureaucratic apparatus? Firstly, in practice, the Party of course would not do so. Secondly, the two elements may not be necessarily in conflict. The functional differentiation within the Party may mean more platforms to exercise political powers. To turn a section of the Party into more executive-like agencies and subject to the same set of administrative norms, and to play out more representative functions in other parts, could be conducted concurrently.

To better understand the dynamics and prospect of this approach, a loose analogy could be made with the gradual process through which the monarchies in Western Europe transformed from absolute monarchies to constitutional monarchies, striking balance once again with executive and legislative powers. During a long period, 'the monarch governed [and was] assisted by his ministers, councillors, or advisers, whom he could choose. Whereas the person of the King was inviolable, ministers were "responsible". The French Constitutions of 1830 were prototypical: "The person of the King is inviolable and sacred. To the King belongs the executive power. His

648 For example, see Olson, Mancur. *The logic of collective action*. Vol. 124. Harvard University Press, 2009.

649 For instance, see the argument in CCP official website, <http://dangjian.people.com.cn/n/2012/0921/c349309-19070362.html>

ministers are responsible”⁶⁵⁰. The monarch appoints the government, which must be accountable for the legislature. Or, the legislature elects the government to serve for the rule of the monarch, like in the UK. In either case, there could be a balanced triangular relationship between the three institutions. The ruler or sovereign (monarchical party) would not be directly accountable by other institutions or force, but its exercise of power must be through another formal procedure (be it government or legislature). The picture of the English monarch, which ‘is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness’⁶⁵¹ could be appealing to a ruling party. This would be a trade-off for exercising power with more legal constraints. This example shows that even an autocratic ruler or ruling group may have a genuine motivation to share certain powers, because to hold power may also mean to hold direct responsibility. The institutional structure for sharing such powers could be harnessed to accommodate certain representative functions, therefore setting a meaningful step stone for gradual political reform.

2.4 Why a Dominant Party Would Self-reform

It is reasonable to question the willingness of the PRC regime, in particular the ruling CCP, to initiate or tolerate self-reform. If the Party could dominate by non-liberal institutions and practices, why bother to reform? And even if reform did happen, why not reform to strengthen the Party’s control in a traditional Leninist pattern?

These questions are valuable and demand answers. The following factors may explain that the above-mentioned approach to reform is possible, because it could coincide with the Party’s interests, and the interests of those who are running the Party. To be noticed, this approach signifies a trend towards more rule-based, power-sharing, and participatory politics, and therefore may have rich implications to incorporate a wide range of concrete measures and policies. Some historical evidence from the UK’s gradual constitutional development will be shown in later sections to illustrate such dynamics.

This general approach, which may take diversified patterns in practice, could provide two clear benefits for the Party as whole. Firstly, the Party will enjoy a stronger legitimacy to rule. Currently, it is agreed that the CCP mainly relies on performance legitimacy to rule,⁶⁵² but good performance cannot be ever-lasting. And frankly speaking, even eternal good performance may not suffice to provide sufficient legitimacy of ruling.⁶⁵³ Hence, there is a strong need for the regime to better construct a formally superior type of legitimacy than just economic performance and party ideology. The ‘representing people’ approach championed by Pan can offer not

650 Przeworski A, Asadurian T, Bohlken A T. The origins of parliamentary responsibility[J]. Comparative constitutional design, 2012: 101.

651 From Blackstone, cited from Laski H J. The Responsibility of the State in England. To Roscoe Pound[J]. Harvard Law Review, 1919, 32(5): 447-472.

652 For instance, see Yang, Hongxing, and Dingxin Zhao. "Performance legitimacy, state autonomy and China's economic miracle." *Journal of Contemporary China* 24.91 (2015): 64-82.

653 For more thorough analysis on the composition of PRC regime’s legitimacy, and its limits, see N. W. Barber, ‘Does China Enjoy Greater Legitimacy Than Any Western State?’ UK Const. L. Blog (28th November 2012) (available at <http://ukconstitutionallaw.org>).

only theories but also institutional measures⁶⁵⁴ to shape such legitimacy. Secondly, shielded by such legitimacy and retreating from interfering into day-to-day administration, the Party may get unburdened with unlimited political responsibility, just like a limited-liability company reducing market risk.

In addition, conducting such reform will not undermine the ruling position of the Party, which is perhaps the greatest concern of the Party. Aligning with the people does not mean giving up control over the government and legislature, but rather a strengthening the grip on them. This approach will necessarily require the use of the representative function of the NPC to channel the Party's interpretation of people's will. It is more like creating another centre of power-play alongside the government, but both are currently under the control of the Party. It is a process of further sophistication of power process rather than changing of power-holder. The above-mentioned power of the local NPC to make important decisions, as an example, shows how legislative branches are employed to shape local governance. What is needed to initiate such practices is simply the Party's will.

The Party is not a machine under unified will. It comprised of millions of members and thousands of high-level cadres. For most of them, a certain degree of gradual reform towards more rule-based politics is highly desirable, because first and foremost, it could offer a basic level of personal security, which is usually expected under the rule of law. The waves of anti-corruption campaigns always tighten the nerves of senior cadres in the fear of being arbitrarily sacked under its name. Besides, a more republican model of politics necessarily provides a level playing field for political competition, for both personal progress and the promotion of regional and sectarian interests. These anti-monopoly effects are what may drive the less 'aristocratic' fraction of the Party to welcome, or even push forward, such reforms.

The costs of not reforming may simply be unbearable and give rise to serious risks. Even if we ignore the discontent of the public over the lack of participatory institutions, and the accompanying the political risks it may incur, the internal managerial difficulties within the regime also demands genuine reforms. If the Party does not adapt to such political realities, its governance quality will very likely plummet, even if the common people do not apply pressure. For instance, the mounting debt of local governments in China is not like an unexploded bomb. To solve this problem there must be re-clarification of central-local relations over the use of financial and fiscal resources, as well as the placement of various duties and responsibilities. Such reshuffling of interests may demand an update of distributive and decision-making rules.

In sum, the motivation for reform could be encouraged by the fact that the Party's authority and interests may not be challenged, but instead some problems could be solved. Historical cases can confirm at least the existence of such dynamics. As North and Weingast have insightfully analysed,⁶⁵⁵ the gradual constitutional change in the UK was exactly due to similar driving forces, especially when the monarch accepted the expansion of parliamentary power in exchange for more stable

654 Such as activation and re-orientation of certain party organizations, using the existing corporatist structure like National Work's Union, etc.

655 North, Douglass C., and Barry R. Weingast. "Constitutions and commitment: the evolution of institutions governing public choice in seventeenth-century England." *The journal of economic history* 49.4 (1989): 803-832.

financial provision of executive power and the King's war against France, by less exploitative but more regularised taxation. Also, the 'critical juncture' of the UK's constitutional evolution, the Great Reform Act of 1832, demonstrated how the self-benefit motive of the aristocracy moved them to accept or even advocate expansion of democratic participation.⁶⁵⁶ Democracy can empower any political camp, even if the conservative aristocracy. When the granting of wider suffrage could strengthen their party, they did not obstruct such momentum. It is for the similar reason that certain factions within the PRC regime may try to promote more liberal reform to gain political capital. After all, authoritarian rule may dissatisfy even some of those within the authoritarian system, since power and resources are always disproportionately monopolised by the few. Also, in the events surrounding the Great Reform Act, the factor of religion could not be underestimated. It revealed that distributive matters (seats and other benefits for Catholic groups, for instance) would always be strongly motivated to find a way to engage and re-shape established institutions. The Catholic Emancipation Act in 1829, spurred by the individual event of Daniel O'Connell's election, further paved the way for the catholic influence in the 1832 reform to maximise the Tories' political interests.⁶⁵⁷ Even if the Tories opposed the liberation of Catholic factors in principle, when political situations changed it did not want to lose the chance to self-benefit. It is also noticeable that the 1832 Act was not an extension of franchise, but rather a redistribution of seats through the abolition of corrupt borough seats and the increased representation for newly emerged industrial regions. Even if by internal re-ordering, a reform that is conservative in nature can trigger further waves of institutional progress.⁶⁵⁸ This example shows that gradual political reform is possible and practical, because reform is usually a polycentric process in which diversified interests get intertwined and coordinated. Even the conservative forces may have its motivation to pursue a small step of certain reforms, such as expanding franchise to consolidate their own powers. Accumulation of such small steps may eventually make more substantial achievements.

2.5 Possible Models for Evolution of Party-State Relations

This approach points to more than one possible model of party-state relations. Entrenching the representative party into the constitutional framework, and re-construction of its relations within other components, could take various forms. The boundaries of these different patterns are not clear-cut. The major elements such as representative mechanisms, constitutional rules about power separation, etc., are intertwined in every type, at varying degrees.

Firstly, there could be an 'upper chamber' model. The CCP could focus more on being a quasi-representative institution, by formally institutionalising the existing inclusive mechanisms, such as 'mass line' and 'united front', which could increase the representativeness of the Party. The NPC system remains the constitutionally supreme authority, but the CCP, by all the powers it now enjoys, could easily turn itself, or an appropriate agency within it, into a functionally upper chamber, which enjoys at least veto and supervisory powers over NPC legislation and government. By adding this new holder of power, the leadership of CCP could be assured by being explicitly

656 Cunningham, Hugh. *The challenge of democracy: Britain 1832-1918*. Routledge, 2014. Page 29-36

657 Ibid

658 For instance, see *ibid*, "But now that constitution, by the admission to it of Roman Catholicism had been tampered with: there was a precedent for reform."

legitimised as a part of the formal constitutional framework, with the concrete form of its power transforming from Leninist dominance into a more normalised veto and supervision power. As a trade-off, the role of the NPC may be activated, and more competitive election to participate in the NPC may be allowed.

Secondly, the majority party model CCP may not project itself into the formal constitutional system but rely more on the formal structure of the NPC to direct and supervise the government, like a parliamentary majority party. There is strong motivation for the Party to do this, even if not for the promotion of political reform. Internal party competition will fuel the strategic empowerment of the formal state institution by different factions. Gone are the days when party leader(s) could have personal powers beyond institutional limits. However strong a leader wants to be, he or she must exercise powers via the web of established institutions and forms, which means there is a limit to their strength. A subtler implication is that these formal structures are not a formality, but are actual mechanisms that could constrain, delay, and compromise the centralized party leadership, just like the so-called phenomenon of 'lazy governance' in China has shown. Therefore, to have stronger control over these procedures, a core of which is the NPC law-making structure, is necessary even for a political strong man. From the perspective of other factions, more formalised and normalised methods of politics may mean more chances and fairer rules. Competition via state constitutional framework could ease the cruelty of the political struggle, by achieving a more peaceful transfer of power. Safety is always a prioritised goal of people, and sometimes more so for politicians.

Moreover, following this line, the party also needs to supervise and control the government. The existing and ever-developing working mechanisms of the NPC could be effectively used by the Party for this purpose. For instance, the Legislation Law confers with power to trigger the legality review on executive regulations and local ordinances with the general public, although their application must be first reviewed by the NPC Standing Committee (in practice the LAC) and subsequently for determination. Between the years 2008 and 2012, the Standing Committee received 361 applications, 335 of which were from individual citizens.⁶⁵⁹ Whether the NPC, or the Party, chooses to further activate this channel is subject to political contingency and strategy, but such a channel does exist and could be used.

Thirdly, the Party may not use either legislature nor executives as an institutional basis for ruling, but function as a neutral coordinator between them. The inclusive mechanisms of the Party may serve to put pressure not only on the government, but also the legislature, although, in theory, the NPC should be a supreme representative organ. This may be an attractive approach for the Party, either for radical or gradual reform. Its ruling position could be strengthened, rather than weakened, because by playing out its supposedly representative function it could gain more direct support from the public. This model is still different than the previously discussed upper-chamber model. In this model, the Party will not entrench itself into formal decision-making procedures but will sit above it as an arbiter. Of course, it is also possible to institutionalise this arbiter function. Details could be designed in various ways, but the basic dynamics underneath are the same.

As a matter of fact, this logic is understood within the regime and may be employed (consciously or unconsciously) to supervise the government. For instance,

659 褚宸舸,全国人大常委会法工委职能之商榷,中国法律评论 2007.1; Chu Cheng, Discussion on the Function and Duty of LAC of the NPC Standing Committee, China Law Review, 2007.1

the only case of the local NPC's recall of the government leader, a deputy-governor in Hunan's Province, was found to be involved in a corruption scandal and was consequently voted by the Hunan NPC in 1989. In the recall bill, a main fault of the deputy-governor was his 'violating the spirit of central authority', which demonstrated the discontent from party authority. The People's Daily even issued a front-page commentary to hail this event, with the title of 'Long Live the People' (人民万岁).⁶⁶⁰ Nevertheless, it is important to note the significance of this case and further note that it ought not be exaggerated. Similar events have not re-occurred so far, but it could indeed show that that dynamic does exist and furthermore, the Party may want to play a coordinative role in its executive and legislative branches.

Fourthly, there may arise a model of bureaucratic constitutionalism, with the Party and State further integrating through rounds of reform, streamlining and being subject to more constitutional rules. The dual-representational nature of the regime suggests the ambiguous role of the Party. Although playing the representative function is a possible long-term choice for the Party, it is politically and technically more likely that the Party will simply strengthen its control on the whole state apparatus. In such a scenario, with appropriate manoeuvres, the Party could merge with the state and become more formally an entrenched part of the whole state system. In this approach, constitutional formality may match functional reality. The administrative laws and rules established to regulate the state system could extend to party power. Moreover, without the state as institutional shield for direct political responsibility, the Party will have far less room for making mistakes or even mediocrity, which may force it to embrace more technical qualities of modern governance. When achieving them, it has already been transformed. If not, collapse seems to be a doomed fate.

Of course, these models do not exclude other possibilities and they could merge into each other. More radical changes, ultra-conservative consolidation, and chaotic collapse are all possible. Nevertheless, it will be argued that they could provide channels to promote gradual political reform, to the commonly seen chaos and turmoil in democratisation. Subsequent sections will explain why these models are possible and how they could benefit gradual reform by identifying the main institutional dynamics in the PRC regime to facilitate such change.

3. Constitutional Hybridity and Dynamics for Further Reform

Currently, there is a myriad of institutional dynamics that could be employed to adjust and develop the dual-representational structure into the above-mentioned models, within both the Party and state apparatus. It is constitutional hybridity that generates such dynamics. Among them, the following are particularly important.

3.1 Party Power being Normalised by State Law

The development of Chinese administrative laws is a process of learning and transplanting from Western laws, as has been briefly demonstrated. Such legal transplants have been supported by the Party to ensure good governance and legal order. What may not be anticipated, is that state laws will, in turn, transform party power, by shaping the style and content of party laws, and even by bringing the Party under strict legal regulations such as administrative litigation. State laws and Party laws are both crucial instruments for the effective governance and stable order of the regime. Therefore, the Party has a strong incentive to ensure the basic level of

660 <http://news.china.com/history/all/11025807/20140609/18549562.html>

propriety of the legal system. It is this need that brings the Party into a dilemma, when it finds that administrative laws could, in turn, shape party power.

3.1.1 Party Law Transformed and Replaced by Administrative Law

In the pre-reform era, the main content of many party laws were generally party orders. The reform age demanded the Party to adapt itself to new political, social, and economic realities, which correspondingly required the change of Party laws. During this process, Party laws not uncommonly adopted a great deal of administrative rules into their content. Given the sheer amount of Party laws and the annoying incoherence within that system, it is technically difficult to extract a complete set of patterns of such influence, but certain high-profile Party laws are good cases to show this dynamic.

Firstly, the Party's information disclosure ordinance is, to a great degree, modelled on the OGI regulation. Government transparency has been a long-lasting endeavour starting from the 1990s.⁶⁶¹ At the beginning, it was an effort to discipline both the Party and state,⁶⁶² but China's entry into the WTO raised the issue of complying with global standards of governance, hence government transparency was further elevated as a crucial objective.⁶⁶³ The regime deliberately transplanted modern laws regarding government transparency to formulate its own laws about government information disclosure. The OGI laws, as discussed in previous chapter, also function as a predecessor for updated Party laws on the same issue, since the practice of OGI laws have accumulated a significant amount of experience.

In 2017, the Party issued its first systematic law on information disclosure of party affairs.⁶⁶⁴ The basic structure of the whole document, and the scope and list of disclosure issues, are similar to OGI. The principle of mandatory disclosure is echoed. It stipulates that the Party organisations' implementation of general party policies and information about their leading of social economic developments, should be mandatorily open to the public, save those about party and state's secrets and what, according to law and regulations, should not be disclosed. Besides mandatory disclosure, there are also discretionary disclosures. The range of information, subject to the discretionary disclosure of relevant party agencies, is also partially modelled on the counterpart of OGI ordinance. The Party ordinance also requires the establishment of an information disclosure catalogue to facilitate the public's access and request of information, which is a practice firstly adopted by OGI ordinance. The pattern of governance performance assessment also influences this Party ordinance, demanding the work of the Party information disclosure be included into the working report to the superior Party authority, as an indicator of the Party organisation's performance.

Secondly, the disciplinary function of the Party is gradually being transferred to the new National Supervision Commission, which is carried out using new supervisory laws to replace disciplinary party laws.

The recent establishment of the National Supervision Commission (NSC), as an independent (supposedly) state disciplinary organ like the ICAC in Hong Kong,

661 The concept of government transparency was first proposed by the political report of 14th Plenum of CCP in 1992. 郭向丽. "中国政府信息公开的历史发展及其意义浅析." *法制与社会* 2 (2009).

662 In 1996, the Central Discipline and Supervision Committee issued the resolution that government transparency should be implemented.

663 郭向丽. "中国政府信息公开的历史发展及其意义浅析." *法制与社会* 2 (2009).

664 http://www.xinhuanet.com/2017-12/25/c_1122164920.htm

demonstrates this dynamic of party powers being normalised by relocating certain functions into the state system, even amidst the undeniable assertion of party power in the recent periods. A very telling point to highlight this political implication may be the recent appointment of President Xi Jinping's close ally, Yang Xiaodu, as its head, rather than the expected arrangement of letting the leader of the Party disciplinary committee taking this position. Nominally, Yang is the vice secretary general of the Party disciplinary committee, therefore subordinate to the chief. Yet, a more sensible deduction would be that Xi has used this state inspection agency to take over the power of the Party disciplinary committee, to avoid its self-aggrandisement into a type of Gestapo which might threaten his own power. Strategies for political struggles are the concern of this research. This case demonstrates that normalizing power by transporting party power to state institutions, can be facilitated by a powerful leader to suit personal interests. This is not an occasional leeway but amounts to an institutionalised mechanism that will be utilised continuously. The existence of such a dynamic is mainly a result of the hybrid nature of the PRC regime. No matter how dominant the Party power could be, the rationale of the regime determines that the state system will always remain a source of legitimation and authority. Therefore, to capitalise this asset will always remain a vibrant political tactic, effectively, though unintentionally, boosting the balance between state and party power.

The National Supervision Law, the legal framework under which the NSC will carry out its work, contains a wide range of quasi-legal mechanisms that are modelled on criminal procedures, as most explicitly demonstrated using Liuzhi (留置) to replace Shuanggui (双规). Previously, the main mechanism to hold suspects in custody, 'shuanggui', means to control suspects in confined places and for a defined time. It is not a part of state law, but a process established by disciplinary ordinance of the Party, therefore is highly vague and easily abused. In contrast, according to the newly made National Supervision Law, Liuzhi is directly modelled on the detention in criminal procedures and contains similar protection about the suspects' rights, such as the limit on detention time, the right to consult a lawyer, and the right to contact family. Firstly, the triggering conditions of Liuzhi are very strict and law-based.⁶⁶⁵ It should only be used when there is specific evidence showing a suspect's involvement in duty crimes such as corruption, bribery, and neglect of duty, and the supervisory commission needs to investigate further, facing either of the following scenarios: a. facts about the case are very complicated; b. the suspects may flee or commit suicide; c. there are danger of forgery, destruction, transfer, and concealment of relevant evidences; d. other situations that may hinder the investigation.⁶⁶⁶ Secondly, the time and manner of such detentions are also further detailed compared with Shuanggui. The period of detention should not be longer than three months but could be extended once with the official approval of superior supervision commission. Within 24 hours after the detention starts, the family of suspects must be informed. If the suspect is later found guilty by the court and sentenced to imprisonment, the period of detention should be calculated into the overall sentence.⁶⁶⁷

The use of 'Liuzhi' is certainly not the only mechanism that serves as a normative constraint on political discretion, of either party or state agencies. The whole set of National Supervision Law is a progress of institutionalising disciplinary

665 Article 22, National Supervision Law.

666 Ibid

667 Ibid.

powers within the regime. Other examples include Article 33, which requires that the collection and use of evidence in supervisory work should apply the same standard regarding evidence as stipulated in Criminal Litigation Law. Previously, the Party disciplinary committee is immune from criminal procedure laws and is not subject to such strict regulatory rules regarding evidence.

Thirdly, in the Party laws regulating decision making or imposing mass line policies, participatory mechanisms in administrative procedures often imitate and transplant the usual mechanisms in administrative procedures, such as public hearing, political consultation, etc. For instance, the ‘Principles about Intra-party Political Life in New Situation’ (关于新形势下党内政治生活的若干准则) requires that the ‘opinion investigation’ (民意调查) as a major way to build the connectivity between the Party and the people.⁶⁶⁸

Fourthly, the Party deliberately uses administrative law mechanisms to guide the behaviour of government agencies, therefore incorporating administrative law into a party law system. For instance, the ‘Notification from Central Disciplinary Committee Chief Office and Ministry of Supervision Chief Office on Improving the Work of Administrative Reconsideration and Administrative Litigation’ (中共中央纪委办公厅、监察部办公厅关于加强行政复议、行政应诉工作的通知) has demanded administrative agencies to faithfully enforce Administrative Reconsideration Law and put this task into disciplinary supervision.⁶⁶⁹

3.2.2. Administrative Litigation on the Party

The judicial review of political parties is a thorny, yet significant, issue in democratic and non-democratic regimes alike. As crucial institutional medium, political parties inevitably wield public powers from time to time, even in managing their internal affairs. Therefore, a judicial review of them seems to be based on sensible legal and political reasoning, which has been acknowledged widely.⁶⁷⁰ There are also similar dynamics in the PRC regime.

In mainstream cases, it is technically unlikely that party agencies will be brought under administrative litigation (the Chinese version of judicial review but not constitutional review), since the Administrative Litigation Law has explicitly restricted the range of plaintiffs to typical ‘administrative’ apparatus, engaging with ‘concrete administrative action’.

Nevertheless, the inherent tension within the party-state system leaves leeway when aided by strategic and flexible interpretation, to allow administrative litigation procedures to be applied to party authority. In this manner, the Party’s unyielding control and penetration over executive systems also indicates that it must face the same web of legal regulation, just like when a giant snake devours a human being, it will exhibit the shape of a human.

The ALL in China restricts the legal standing of administrative litigation mostly to typical administrative agencies conducting ‘concrete administrative actions’ (which,

668 http://www.xinhuanet.com/politics/2016-11/02/c_1119838382.htm

669 <http://cpc.people.com.cn/GB/64162/71380/102565/182146/11002136.html>

670 For instance, the case of Canada

<http://policyoptions.irpp.org/magazines/february-2018/judicial-reviews-of-political-party-decisions/>;
Nigeria, The Internal Affairs of Political Parties and Judicial Review in Nigeria: The Way Forward;
America, Scharpf, Fritz W. "Judicial Review and the Political Question: A Functional Analysis." *The Yale Law Journal* 75.4 (1966): 517-597

in a very general sense, is to exclude law-making and rule-making activities). In 2014, the ALL was modified and Article 2 of ALL expanded the scope of legal standing to be sued. It provided that those organisations that are conferred power by laws, regulations, and ordinances could also be sued when they exercise such powers and conduct ‘administrative actions’.⁶⁷¹

The Party’s self-defining role as both the leadership of the regime and a non-state political party brings it under the ambit of such legal rules. The basic logic is described in the following. Firstly, it is beyond doubt that a great deal of party agencies within the regime can exercise *de facto* administrative power and carry out concrete administrative action, since most administrative agencies are controlled by the Party cells within it. The Party’s constitution has recognised the Party’s administrative powers, though not directly. In Articles 19, 25, and 32, it states that the central and local party authorities discuss important issues and make decisions, and lead ‘works in relevant regions’, etc. Such decisions and works, in the Party-State of China, inevitably evolve a broad array of administrative affairs. Secondly, a great deal of state laws, ranging from constitution to government regulations, have recognised the Party’s role as ‘leadership’. In practice, not uncommonly, exercising such leadership powers are not merely focused on purely political issues, but engaging quite straightforward and detailed administrative issues, especially in local authorities. It could be interpreted that state laws in principle endorse the Party’s exercise of administrative power, amounting to a form of delegation or allocation of power. For instance, in the most recent constitutional modification, the PRC constitution has recognised the leadership of the CCP is the essential feature of socialist regime in China, therefore entrenching it into the fabric of the state. In many laws and ordinances, the Party’s relevance is actively iterated. For instance, in the newly made National Supervision Law, it seems to be claimed as a principle that the Party’s leadership on supervisory works should be upheld.⁶⁷² Also, the Civil Service Law explicitly states that the principle that ‘party manages cadres’ should be upheld.⁶⁷³ Such articles, if flexibly explained, amount to a recognition of the Party’s role in a wide range of administrative actions, such as making concrete administrative decisions and day-to-day management of relevant works. In short, the constitution and laws have conferred power on the CCP, or approved its power to, lead the country, which inevitably engages making decisions for administrative organs. Thirdly, if the Party regards itself as a part of the state, logically speaking, it must accept the constraints of administrative laws. Therefore, the Party, either in its capacity of exercising *de facto* administrative power, or as a non-state organizations, could be described as having qualified legal standing in administrative litigation. Fourthly, even if such logical deduction is difficult to implement in practice, there is still possible leeway to bring in the Party, which is to treat the Party as a third party or to summon a relevant party agency to provide necessary evidence in administrative litigation. After all, the very substantive connectivity between party power and administrative apparatus is difficult to be completely severed in legal practices.

These are not merely theoretical discussions. Some of these dynamics have already taken place in legal practice. Though the number of relevant cases is surely not high, it indicates the existence and relativity of such dynamics. Firstly, there are

671 Article 2, Administrative Litigation Law

672 Article 2, National Supervision Law

673 Article 4, Civil Service Law

clear cases showing that the local party committee could be defensive when sued for a criminal act.⁶⁷⁴ In this case, a township party committee ignored political and legal procedures and organised local people to cut down state-owned forests for sale. The higher-level procuratorate agency issued an official opinion regarding this case, approving that it could be sued for criminal liability.⁶⁷⁵ It seems to be a sensible legal strategy to circumvent the thorny issue of an imposing administrative penalty on a party cell and resort to criminal law (which was, of course, also violated by such scrupulous action) to bring justice. If the logic could be pushed further, so that a party agency could be effectively sued for breaking criminal law, then it is closer to bringing it within the regulation of administrative law. On many occasions a party cell is the real decision-making agency, while the administrative branch functioning acts as the implementing organ for it. Without doubt, the Party is the *de facto* power wielder. There has also been explicit opinion of local court that the Party organisation could also be sued in civil procedure, out of a case regarding alleged slander by a local party committee.⁶⁷⁶

Secondly, on certain matters, cases have been emerging that challenge the party's immunity from administrative litigation. The first is village election. There have arisen several cases in which local township party committees directly dismissed the elected village committee director.⁶⁷⁷ The local party committee surely did not have such powers. One plaintiff, in these cases, sued the shell of the Party committee, the local government, and had his problem solved through mediation conducted by the local court. Nevertheless, the court also ruled that the decision of the local party committee was invalid and therefore ineffective.⁶⁷⁸ This case indicated a possible pattern for squeezing party power into the cage of administrative law, that is to use the latter to draw the line for party power. Whenever a party agency wields power directly, therefore overlooking the necessary procedure in government apparatus, such action could be sued and declared invalid, since the Party agency is not a proper organ exercising the relevant administrative power. The party agency, of course, could re-make its decision, but must do so through government procedures, which means the government could be sued and must be subject to denser legal regulation of administrative laws.

The second is on the recruitment of the civil service. Since the *de facto* decision making and personnel management power have always been retained in the hands of the Party's organisation departments, legal disputes regarding the result of recruitment, such as anti-discrimination appeal, questioning of procedural propriety, etc. could easily lead to examining the role of relevant party organisation departments. Typical cases have occurred in different regions, showing the potentiality of making a high-profile type of case in administrative law. For instance, in 2009, a woman named Wangying sued Tongshan county organisation department in Jiangsu province, because she was denied the job after passing all her exams, interviews, and

674 <http://news.sina.com.cn/c/2002-04-19/0550551380.html>

675 Ibid

676 广东省高级人民法院关于基层党委可否作为民事诉讼主体问题的批复 (2006年8月16日 粤高法民一复字[2006]3号)

677 姬亚平. 论行政诉讼对党组织的监督[J]. 上海政法学院学报(法治论丛), 2010,

25(2):103-109. ; Ji Yaping, Lun Xing Zheng Su Song Dui Dang Zu Zhi De Jian Du, Shang Hai Zheng Fa Xue Yuan Xue Bao (Fa Zhi Lun Cong), 2010.

678 Ibid

background checks, just because she was found to have had a pre-marital child. The Personnel Bureau of Tongshan (under the *de facto* leadership of the organisation department) claimed this violated the Birth Control Ordinance, therefore failed the criteria of recruitment. Putting aside the anti-discrimination issues in this case, the organisation department's *de facto* decision-making role was quite clear. Though the local court finally ruled that it could not be sued, this case arose wide social attention and academic discussion.⁶⁷⁹ In a similar case in Xi'an, a candidate succeeded in an open recruitment for a vice bureau chief position but was again denied the post. He sued the local Chang'an district government, which interestingly kicked the ball to the upper level organisation department, because this open recruitment programme was managed by it.⁶⁸⁰ Although this case could not finally enter into the litigation process, it shows that the motivation of escaping responsibility may also force state agencies to push party agencies to the frontline. In addition, to a lesser degree of solid reference, there was also personal blogger claiming that in his (or her) personal case in Nanning, capital city of Guangxi province, Nanning court actually affirmed that an organisation department could be sued, but due to political pressure, the court made a compromise by putting the organisation department as the third party in the litigation process.⁶⁸¹

Of course, the activism of this pattern is highly contingent on political factors, but it does exist. Strategically, it is more sensible to apply this approach at a local level. Party agencies at the central level were better not engaged or such sensitive issues may trigger an unnecessary overreaction of party power.

3.2 The Activation of the NPC Function

The function of the NPC, as stipulated by constitution and laws, can be activated to a higher degree. Such momentum has already emerged, while others are still waiting.

The election of the people's representative has always attempted to boost real democratic participation. The most influential example is the staggering, yet unyielding, development of the 'jointly recommended candidates'.⁶⁸² The PRC's electoral law approves that the co-recommendation by ten voters could elect a candidate, as well as the recommendation by the parties⁶⁸³ and mass organisations. Since the early 1980s, activism revolving around this right has survived with great difficulty. In 1980, the students and scholars of Peking University actively participated in their constituency via a joint-recommended channel to gain candidacy, which triggered attention and imitation nationwide. The second round of the rise of this activism was upon the beginning of the 21st century, when the new-middle-class

679 <http://edu.sina.com.cn/official/2010-11-11/0948274596.shtml>

680 <http://www.chinalawedu.com/new/201311/yishuanghao2013110820493061308735.shtml>

681 http://www.360doc.com/content/13/0923/11/2263758_316437576.shtml

682 “联名候选人”, other term for it also include “independent candidate”, which is disapproved by NPC since it is not an accurate legal term to describe it, and “self-recommended candidates”, which strictly speaking is also inaccurate about the process but is widely used without raising political sensitiveness. The essence of it is the independently participating candidates, who are not nominated by the Party.

683 Including the CCP and the “democratic parties”. See Article 29, “Electoral Law of the National People's Congress and Local People's Congresses of the People's Republic of China”, “Political parties and people's organisations may either jointly or separately recommend candidates for deputies. A joint group of at least ten voters or deputies may also recommend candidates.”

and better-educated generation emerged from the market economy, exhibited a desire to engage in political participation. In the special administrative region for reform in the city of Shenzhen, there were four notable cases of jointly recommended candidates who had won the final election over Party recommended candidates.⁶⁸⁴ The regime provided a mild and inclusive reaction to such a phenomenon. As the commentary on People's Daily (the official newspaper of the CCP and the regime) advocated, 'there should be more self-recommended candidates'.⁶⁸⁵ At least, at that time, the regime viewed it as proof of its socialist democracy. Similarly, among the social movement using this channel for political participation, there was also a clear guiding awareness that candidates should focus on concrete governance issues related to local people's interests,⁶⁸⁶ rather than challenging the current regime, to work out a possible approach of incremental progress. The most famous of those jointly-recommended representatives in a local people's congress of the Hubei province became a well-known public figure for his limited yet significant achievement in his job, such as protesting the state's problematic public construction programme and helping public school teachers secure the salaries they deserved.⁶⁸⁷

There is an array of dormant powers of the NPC according to the Constitution. The texts of the PRC constitution have retained effective mechanisms for the NPC to exercise its powers, even though as a type of formality, but as repeated many times, they can be activated. Among them, the following could be directly used to re-forge party-state relations. Firstly, according to the constitution, the senior state leaders and government ministers could be removed by NPC session (a 'quasi-parliamentary responsibility'). Secondly, as already analysed, the constitutional review power of the NPC is also a significant institutional instrument to assert the NPC's will and policies. Thirdly, the legislative investigation of the NPC, as both implied by its nature and provided by a concrete article, has never been actively used.⁶⁸⁸ Fourthly, a similarly structured power is the local NPC's power to determine 'major issues' within its jurisdiction.⁶⁸⁹ The actual content of 'major issues' is vague enough for the local NPCs to expand their influence. Interestingly, the same power is not provided by articles delineating the central NPC and standing committee's power. A highly possible concern over this gap may be exactly the tension within a dual-representation structure, since unlimited power of NPC may override the government and party power, which have been the most substantive power in the PRC regime. Also, this arrangement may complicate the division of labour between the executive and

684 See, 邹平学. 完善人民代表选举产生机制的若干思考——为纪念人大制度 50 周年而作[J]. 法学评论, 2005, 1(1): 18-22; Zou Xueping, Reflection on the Improvement of Election of People's Representatives---for the 50th Anniversary of the NPC system, Legal Commentary, 20015,1,18-22; 浦兴祖. “独立候选人”现象辨析[J]. 探索与争鸣, 2012 (3): 20-25. Pu Xingzu, Analysis on the Phenomenon of “Independent Candidate”, Exploration and Debate, 2012(3):20-25

685 Ibid, Zou Xueping

686 In close connection, notice the previous mentioning of local representative's port barrel politics, see Manion, Melanie. "Authoritarian parochialism: Local congressional representation in China." *The China Quarterly* 218 (2014): 311-338.

687 See the report in a magazine with official background, <http://www.nfcmag.com/article/1583.html>.

688 Article 71, PRC Constitution.

689 Article 104, PRC Constitution

legislative branch, enabling the latter to interfere scrupulously into the domain of the former.

3.3. 'Return to Politics' for (part of) the Party?

For the Party's own institutional development, the 'return to politics' approach is embodied by the changing pattern of a party organ's work. The 'political leadership' of the Party means that it should retreat from doing the government's administrative work. After conceding governing work to the government, what should the Party do? According to the Party's theory and action, the obvious answer is to do the real 'political work' (as posited with Pan's theory) and connect with people by channelling their voices, concerns, and interests, which necessarily suggests criticising and remedying the wrongs of the present government.

A crucial event, which may mark the awareness of this approach, is the Party's 'Mass Organisation Work Conference', which was in 2015.⁶⁹⁰ This conference stressed the importance of the Party's connection with its people. The pervasive failures of the bureaucracy within its party apparatus, in particular, the mass organisations, such as the Youth League and the Worker Federation, was fiercely warned and criticised. Observations may generally focus on signalling the sacking of the Youth League faction, since the Youth League has suffered the heaviest stroke. This is of course a crucial reason, but the actual way to reform the Communist Youth League also has strong institutional implications. It showed the Party's awareness of the 'return to politics' approach, even if there may be a hidden agenda beneath it.

The Communist Youth League (CYL) has been a reservoir of political elites for the CCP. For a long period, it has been mainly regarded as a stepping-stone to a fast-track political career, but supposedly, it should be an institution focusing on connecting with and organising the young people of China, just like youth organisations in Western parties. However, with the whole system being seriously bureaucratised, the CYL has almost become a closed door and a privileged bureaucracy. In recent years, according to observers, the CYL has been sacked because of factional struggle. However, the actual method of its sacking related to the focus on its original function, rather than it being simply disabled. In a speech given at a conference, the current CCP leader, Xi, criticised the CYL as being a high paraplegia. This was used as a description to note that local and grassroots CYL systems failed to implement their political duty by connecting with the youth, while upper level management was obsessed with ritualism and ladder-climbing.⁶⁹¹ The reform of the CCP therefore naturally engaged the restoration of its core political work. At all levels, the CYL now does more 'mass work' in the Party, such as organising youth activities, learning about their needs, and connecting with other institutions to work out schemes to help them.⁶⁹² For instance, local CYL has been praised for its work in participating in and helping build financial programmes for small loans for young start-ups, in which it could coordinate local governments and banks to facilitate the programme.

690 Official report, http://news.xinhuanet.com/english/2015-07/08/c_134391004.htm

691 http://news.mingpao.com/pns/dailynews/web_tc/article/20160308/s00013/1457373541096

692 See official report, <http://qnzz.youth.cn/gzdt/>

4. Conclusion

These two chapters on PRC polity show how the entrenched constitutional hybridity of different traditions has fundamentally shaped the constitutional structure of China. Elements from different traditions interplay with each other, resulting in complex institutional landscape. This process echoes the dynamics of constitutional hybridity identified in chapter 2. Constitutional hybridity within the PRC polity performs the function of underpinning inclusive institutions, improve governance capacity and also balancing different powers. Nonetheless, constitutional hybridity also brings about serious legitimacy tensions. The concrete ways of interaction between different traditions are as following. The above-mentioned effects could all be observed.

First, the internal tensions within the Marx-Leninist Models is a result of constitutional hybridity and calls for legal and political solution by further playing out the functions of hybrid elements. Marxism and Leninism are two different theories with sometimes conflicting emphasis, as discussed in this chapter. Their mixture may generate internal tensions. The main legal theories that attempt to reconcile between their parallel accounts of representation are not convincing, as has been demonstrated in this chapter. A common weakness is that they take the representativeness of the party for granted. Even being the *de facto* dominant power, the party still needs to establish its purported representativeness by more effective institutional measures, such as genuinely allowing the legislature to fulfil its functions by presenting the party's policies to the legislature for real democratic approval. These legal theories also err in misunderstanding a set of crucial constitutional concepts such as constitutional conventions, especially in Jiang Shigong's work. Jiang and other like-minded scholars misread what politics means in the term of "political constitutionalism". In its original contexts in UK, what is "political" in "political constitutionalism" is already highly constitutional, while in China the same precondition does not exist. Chen Duanhong thought the core principle in Chinese political constitutionalism is party's leadership. But this principle has not been elaborated and normalized to the same level of parliamentary sovereignty as in the UK, which has already contained elements like democratic mandate, political representation and normalized law-making procedures.

Alternatively, a more explicitly political model may be more suitable for providing this structure with coherency and efficacy, transforming the regime into a more inclusive and legitimate system. The Party's focus on its 'political' role could be beneficial to the Party, which is perhaps the most important dynamic for working out gradual political reform. This chapter also envisages possible patterns of party-state relations following reform-oriented logic and has identified the current institutional dynamics that could aid this process.

Second, the mixture of Leninist, Chinese, and western traditions has given rise to normalizing effects on both party and state powers. The institutional analysis in this chapter shows how tensions arise in dual-representation structure and how they can be eased by creating more balanced relations within the party-state to promote gradual political change. The incorporation of Leninist party control, traditional meritocracy, and modern legal mechanisms is both the driving force and new starting condition of reform. It is the exact mixture of such elements that offer the legitimacy and coordinative rules of the regime. Many of these elements are already parts of its own political theory. For instance, the building of modern administrative system has been elevated to the guiding principle of promoting "rule of law". Therefore, the Party

cannot abandon such hybridity lightly. It is more likely that the regime will reform by playing out different traditions and striking a balance between them.

The party which follows a Leninist model relies on a Chinese meritocratic bureaucracy to deliver governance, but it also needs to regulate this bureaucracy. Therefore, western administrative laws have been imported to partly suit this task and become a leeway to shape the party power, even considering the recent assertion of the Party's dominance. Party laws frequently emulate administrative laws because they are the most convenient and practical materials to learn from, therefore embedding a similar set of rules championed by the administrative system. More importantly, as has been analysed in detail, if the Party reaches out too much, it would immediately face the constraints of administrative laws as it often acts through the bureaucratic system, there is, then, the overlooked possibility of bringing administrative litigation (judicial review) on party power. The party's obscure legal status, as either being treated as a social organization or an entrenched political organization ruling the polity, could both lead to administrative litigation under the most recent laws. In this sense, the institutional and legal infrastructure of the state system has determined that in day-to-day governance, there is a limit to the Party's self-expansion.

Third, western elements are retained to maintain the formality of Marxist institutions, but they can be effectively mobilized to improve power balance between different institutions. The election of NPC representatives and NPC's exercise of its inherent powers are typical examples of such dynamics. As shown in this chapter, to test and expand the boundaries of competitive election for NPC representatives has been an enduring method for public participation. Usually when the candidates deliberately dilute the political implications of their participation and claim to focus on just specific constituency issues, they will be tolerated to a certain degree, as the cases mentioned in this chapter have demonstrated. This chapter and the previous one also discuss how the nominal powers of NPC could be materialized during gradual institutional development. The recent promotion of "constitutionality review" is a vivid example of how the NPC could be an institutional platform for playing out the liberal functions of western tradition in this polity. The idea and practice of constitutionality review is clearly under the influence of western constitutional model, since there are no such precedents in communist model. Combined with the communist legacy that could be mobilized to empower the legislature as the supreme representative assembly, such as the vague power of making crucial decisions, it is possible that constitutional hybridity could be a dynamic that helps to create more momentum for gradual political change.

Fourth, the Chinese tradition, including elements of both Confucian meritocracy and Daoist dynamism, has been utilized to deliver effective governance, therefore also indirectly creating paths of reform. This chapter and the previous one both discussed how the revival of Chinese meritocratic bureaucracy helped to stabilize the regime and improve governance performance. Also, perhaps more importantly, the open-gate nature of bureaucracy and cadre system functions to legitimize the regime, at least in the understanding of the public.⁶⁹³ The morality elements in governance performance assessment, as exemplified by the oversight of the private lives of bureaucrats in recent years, also exhibits the continuing legacy of Confucian requirement on the characters of political professionals. The Daoist influence is explicit in the diffusion

693 Xu Xianglin, *ibid.*

of political and economic power to different institutions during the process of party-state separation and decentralization of power to local governments. As only briefly mentioned due to the scope of this thesis, the “political tournament” model is widely regarded as an institutional source of China’s socio-economic growth.⁶⁹⁴ As also been discussed this and last chapters, the actual decision-making process of PRC polity features division of labours in horizontal manner, especially the interaction between government technocracy and the more active legislature. This is also a reflection of Daoist influence on how to achieve better governance results by thriving different initiatives and let them compete and evolve. The Daoist teaching is also highly meaningful in helping people to understand the current status and future of China. Daoism doubts radical and scrupulous change. The approach of gradual political change (“cooking a small fish”, as interpreted in chapter 3) is still a wise way to guide China through the murky waters of political transformation. Combining all the institutional dynamics analysed in this chapter, it is possible that this route could lead to a Chinese version of ‘mixed constitution’, which is arguably a very desirable achievement of constitutional evolution. There are of course also events that may disappoint people. But in Daoist thinking what goes against the fundamental “Dao” cannot last and is doom to fail. It is the natural evolution process that could gradually rebalance human activities. What China needs to do may be exactly to create advantageous conditions for such process, rather than letting any camp to dominate this process.

694 Jianxiong, Liu. "An Analysis on Chinese Political Tournament [J]." *Journal of Public Management* 3 (2008): 006.

Hong Kong: Constitutional Hybridity, Governance Deadlock and Failure of Political Bargaining

1. Introduction

This chapter will discuss the how the constitutional hybridity of parliamentary, presidential, Chinese and colonial elements shape the bizarre composition of agenda-setting and veto power in Hong Kong, which leads to the failure of constructive political bargaining and effective decision-making. First, it will review the intellectual origins and historical development of Hong Kong's constitutional framework, to lay a descriptive foundation for its current problems. Second, a general description of executive-legislative structure in Hong Kong will be given. Third, various institutional and legal reasons will be pinpointed to demonstrate how the present pathologies of Hong Kong executive-legislative relations are caused, as well as their implications for democratic governance. What will also be proposed is that the current problem could be solved by flexibly interpreting relevant articles to re-set these hybrid elements. Fourth, a concluding section will summarize the major points of this chapter.

2. Historical and Intellectual Origin of Executive-Legislative Relations in Basic Law

In appearance, the constitution within Hong Kong, the Basic Law (BL) favours a strong executive. Such an arrangement is termed "executive dominance (行政主导)", by Chinese government as a constitutional principle⁶⁹⁵ for Hong Kong.

Yet, the drafters of BL might misinterpret what constitutes "dominance" of executive power. The true strength of a ruling power must be a mixture of at least both persuasive and coercive power. The Hong Kong version of "executive dominance" may focus too much on the "hard-core" of power, especially coercive powers like forbidding legislative proposals and forcing through government bills by different voting rules. In addition, the BL might have used a simplified term with an over-strong tone to stress the importance of this "dominance", partly due to its unfamiliarity with modern constitutional rhetoric, while a great deal of institutions conducive for constructive political bargaining are correspondingly missed.

Therefore, the Hong Kong system demonstrated a peculiar combination of both over-strength and under-strength of executive power. Its purpose of heavily empowering the executive is reflected in its absolute control of agenda-setting powers, mainly the content-control powers. But on the other side, the Hong Kong executive finds few institutional devices to aid it in shaping bargaining results with the legislature and unlock bargaining impasse.

The design of Hong Kong's constitutional framework also showed clear historical connection with various traditions and models that were discussed in previous chapters. This is a crucial source of Hong Kong's constitutional hybridity, the implications of which are still of paramount significance in the further constitutional development of Hong Kong. By mixing Chinese, colonial and western

695 Wu Bangguo, the then president of National People's Congress, officially declared this in a talk in 2007, see http://news.xinhuanet.com/politics/2007-06/06/content_6205144.htm

elements the BL envisaged a somewhat non-partisan democracy (in the supposed complete version), which retains the technocratic and meritocratic ethos.

2. 1 The Formulation of the Term of Executive Dominance

The idea of "executive dominance" is not a clearly expressed principle. Rather, it is a hidden spirit that gradually emerged from Hong Kong's political development. The main concern for executive dominance, as already mentioned, is to give the necessary degree of self-government to Hong Kong while in the meantime ensure necessary control from sovereign.

In designing Hong Kong's political system, the roles and functions of executive and legislature were at the core. In the Basic Law Drafting committee's report to the National People's Congress in 1986,⁶⁹⁶ some committee members supported executive dominance, while others supported legislative dominance, which in fact means a parliamentary system. Yet few of them had elaborated on the exact meaning of the "dominance" of one branch. The drafting committee envisaged a strong executive, but might not have elaborated on how it should work, in particular when in conflicts with the legislature.⁶⁹⁷ In their conclusion, the drafting committee agreed in principle to adopt a pattern of separation of powers, so as to ensure there is both mutual checks and cooperation between the executive and legislative branches in Hong Kong.⁶⁹⁸

But in 1987, when Deng Xiaoping met the committee members, he made it clear that the current political system of Hong Kong would not be a blind copy of Western systems, and the separation of powers should not be the sole criteria used in assessing the degree of democracy.⁶⁹⁹ Ever since that declaration, the rhetoric of "separation of powers" has been eliminated to avoid ideological implications, although institutional design did not alter much. In the final report to the NPC upon the submission of BL draft, the chairman of the drafting committee explained that the E-L relationship in Hong Kong should be "mutual checks and mutual cooperation."⁷⁰⁰

Until then, the term "executive dominance" had not emerged in any official or academic documents; although even a rough reading of BL could lead to an impression of there being a strong executive. However, things changed in the early 1990s, when the last governor of colonial Hong Kong accelerated the pace of democratic reform. Direct election of LegCo was introduced and the institution became more active, sometimes even jeopardizing the governor's power to control policy process.⁷⁰¹ This move was interpreted by Beijing as being a strategy to foster

696 See 李浩然《香港基本法起草过程概览》,香港三联书店,2012,489-512 ;Haoran Li, Overview of the Drafting of Hong Kong's Basic Law, Hong Kong Sanlian Press, 2012, 489-512 . This is a collection of all the legislative documents of BL's drafting. For the documents of E-L institutions, see 489-734.

697 Ibid, 512

698 The Drafting Committee's Final Report to the National People's Congress, http://www.npc.gov.cn/wxzl/gongbao/1990-03/28/content_1479211.htm

699 See Deng Xiaoping's talk to the drafting committee, official online version of Deng's Collected Works: <http://cpc.people.com.cn/GB/64184/64185/66612/4488735.html>

700Haoran Li, *ibid*

701Ma, Ngok.*Political development in Hong Kong: state, political society, and civil society*. Vol. 1. Hong Kong University Press, 2007.,103

pro-UK politicians so as to retain influence on Hong Kong after 1997.⁷⁰² Perhaps in response to this situation, the concept of executive dominance was proposed to clarify and direct the constitutional structure of Hong Kong after 1997. The first appearance of this concept occurred between 1997 and 1998, when three prominent constitutional law professors in China, who were also members of the drafting committee, all published articles to promote this term as key to understanding the guiding spirit of the design of political institution in BL. Among them, Professor Xu Chongde used a different term: CE responsibility system,⁷⁰³ to emphasize the responsibility that CE shoulders. Such an emphasis on the responsibility of CE echoes the Confucian tradition of paternalistic responsibility for the people. Though this term appeared very different in an English context, in Chinese, the context shares the same spirit with executive dominance and maybe, more accurately, reflects the true intentions of BL.

In 2007, the NPC officially announced "executive dominance" as the "greatest feature of Hong Kong's political system."⁷⁰⁴ In China's Constitution, the National People's Congress is the "highest organ of state power"⁷⁰⁵ and exercises legislative power. Its function and status could be compared to parliamentary supremacy in the UK. Therefore, its interpretation had the legitimate power to establish this principle.

2. 2 Constitutional Hybridity in Executive Dominance

2.2.1 The Colonial Legacy

First, the colonial governing structure was reserved, to offer certain degree of inclusiveness, plus the eventual democratic election.

It was believed that to replace the UK governor by an elected local chief-executive, who would also be responsible to the central authority, was a convenient and effective pattern for designing Hong Kong's political system. In the colonial regime, an authoritative governor led both the executive and legislative branch.⁷⁰⁶ The legislative bureau was constituted by the appointment from the governor, who was also the chairman of it. In this way, the governor could have firm control of the political agenda. It was generally agreed that Beijing wished the CE to be just like the colonial governor, so that the central government could effectively seek accountability to the CE, both on the governance of Hong Kong and on the upholding of sovereignty.⁷⁰⁷

The colonial manoeuvre of gradually sharing power with local elites was imitated by BL. The executive council, which was originally a consultative institution serving the governor was basically inherited by BL without substantial change. The Chief Executive has the discretion in choosing council members. It is an institutional device for the CE build collaboration with other political and social elites. Though, in practice after 1997, the actual influence of CE has been significantly marginalized. Even the mediatory function between government and legislature could not be

702 Ibid

703许崇德. "香港特别行政区行政长官的法律地位." *法学杂志* 4 (1997): 3-4; Xu Chongde, The Legal Status of Chief Executive in Hong Kong, *Journal of Law* 4 (1997), 3-3

704 Wu Bangguo, *ibid*

705 Article 57, Constitution of People's Republic of China(PRC)

706 Ma, Ngok, *ibid*

707 Haoran Li, *ibid*, 589

effectively played out due to political considerations under such hybrid and chaotic system.

2.2.2 Combining Parliamentary and Presidential Elements

Second, to make the CE powerful and effective, the BL chose to put CE in the agenda-setting structure characteristic of parliamentarism, in which the CE and government would control exclusively legislative agenda and push them through votes.

This set of agenda-setting powers was also the main manifestation of BL and its academic interpretations for “executive dominance”, regardless of whether they are aware of the inherent logical conflicts that failed it later. The Chinese government's claim of “executive dominance”, though sounds like an effort to forge a strong and authoritative government, is in fact an unconscious overstatement of the common arrangement of executive agenda-setting. Yet, as will be showed later, without sufficient partisan support (as is found in parliamentarism) and institutional tie to manoeuvre legislative power (as is found in presidential system), the CE cannot be dominant and can only be weak. Being in a similar position as a president, the bifurcated authority of CE and legislature determines that the CE had better govern through delicate bargaining process. Sadly, the BL missed this part due to its imagination of a powerful “parliamentary” CE. This is one main reason for the puzzle of how a supposed-to-be strong government fails in governing.

2.2.3 Vision of a Non-partisan Democracy

The roles and functions of political parties were deliberately omitted in the Basic Law, as a result of the anti-factionalism tradition of Chinese regime. The BL envisaged a democracy (eventually) without active partisan elements. Of course, the political rights conferred by the BL include the right to organize party and participate in politics. Yet, in the constitutional framework party is not supposed to be a crucial dynamic to shape politics, which is quite contrary to the general practice in matured democracies. One key reason behind this choice, of course, was quite realpolitik, that the Chinese authority did not want a viable party system to mobilize and empower potential opposition, which was considered as being maliciously supported by foreign forces aiming to overturn the regime. Nevertheless, there were also historical, institutional and intellectual factors to this decision.

First, both Beijing and the general Hong Kong public wished to retain a somewhat technocratic and politically-neutral governing pattern, therefore were not unhappy with the marginalization of competitive party system. The colonial governance of Hong Kong was considered to be quite successful for the vitality of its economy. Its professional (civil service system) and elitist (industrial elites absorbed by consultation mechanisms) composition also fitted into the intuitive appreciation of meritocracy by Chinese culture. Hong Kong society, consisted mainly by emigrants from mainland seeking for better and peaceful life, was highly commercial-oriented and self-chose to keep a safe distance from “politics”, at least in the pre-handover era. For many Hong Kong people, competitive party system and the vision of active democratic “politics” accompanying it would break up the certainty of market-oriented liberal (though not democratic) order under colonial rule and bring in uncertainties of policy-orientation, such as the “devil” of welfarist and populist policies, therefore a little bit risky. The disastrous situation of Mainland during Cultural Revolution set an alarming example of the result of too much “politics”. The technicality and efficiency of the colonial regime, under the generally

non-intervention policy, provided rule of law and liberty, though not democracy. This gift of history was cherished by Hong Kong people and they were not keen to set a novel path from it. These factors altogether shaped a pragmatic mind-set which had been entrenched into Hong Kong culture. At the time of drafting, its influence should not be underestimated.

Second, even Hong Kong representatives in the drafting committee worried about the radicalizing effects of party politics, which reflected quite obvious influence from the Chinese tradition. Confucius viewed factionalism as being fuelled by evil purpose of self-interests. The Hong Kong representatives had the experiences of modern politics such as in the metropolitan of British Empire, therefore would not reject parties in this ancient and moralistic manner. Yet, even accepting the legitimate purpose behind party activities, they were still worried about fierce partisan competition would distort good social ethos and unleash some types of evil forces in people's heart. The Hong Kong representatives in the drafting process expressly disfavoured partisan elements because it might undermine the elitist quality and ethos of Hong Kong governance by channelling grassroots radicals and political opportunists into the governing apparatus.

Third, from a perspective of historical institutionalism, Hong Kong at time did not have a set of professional political groups, therefore lacking of the necessary human resources to run a complete party system. In most periods of time, the colonial regime had no interest in, or need for, local politicians. The size of Hong Kong and the immigrant mentality (flee from disorder, always ready to flee again) of Hong Kong people meant that commerce was the primary concern in Hong Kong, not politics⁷⁰⁸. Therefore, a technocracy system plus a sound-minded governor would be just competent to rule this colony and make it soar up in the then economic trend of Asian miracles, by simply *laissez-faire* governance. The governing resource colonists relied on, besides the local elites, was the civil service system, which trained and promoted administrative calibre, rather than political activists. In the drafting process and, to a certain degree, even until present times, there had been a shortage of well-trained political professionals in Hong Kong. The human resources for active partisan politics were not in place. It was no wonder that most of the Hong Kong representatives in the drafting process, even though many joined political parties later, were not at that time passionate about entrenching the role of political parties in the BL. In the 1990s, the last governor of Hong Kong initiated larger-scale democratic reform such as direct election of legislature members, etc, which offered a channel for party activities. This move was interpreted by the Chinese authority as with a hidden agenda of fostering anti-Beijing forces. The direct result was a more cautious and preventative attitude toward parties in the post-handover years.

Fourth, another indirect reason was CCP's self-restraint of not making formal appearance in Hong Kong politics⁷⁰⁹. An important practical consideration from the Chinese authority, was that adhering to "one country, two systems" arrangement would not allow the formal appearance of CCP in Hong Kong. Central-local relations among Beijing and Hong Kong should be dealt with totally through state institutions.

708 Noticeably, the cultural revolution also had serious impact in Hong Kong. The radical leftist campaign in Hong Kong was sparked and expanded. Yet, it escalated into appalling violence such as car-bomb. The fact that they were denounced by the common Hong Kong people showed that the whole society had a sense of politics-proof sobriety.

709 谭慧珠 http://www.guancha.cn/politics/2017_06_10_412579_1.shtml

If CCP cannot directly engage in Hong Kong, then to reduce possible threats of active opposition parties, it had better to forge a non-partisan political system as a whole.

3.Executive and Legislature in Hong Kong

In Hong Kong, the Chief Executive (CE) is the head of the region and also of the government. It is supposed to be responsible to both the central government and Hong Kong. The eventual fully democratic election (on universal suffrage) of CE, is a major commitment of CE and an embodiment of Hong Kong's high-degree of self-government. The Legislative Council (LegCo) is the unicameral legislature but with two constituencies: the geographical constituency and the functional constituency, which actually functions as a sub-chamber for various business, industrial and sectors . It is more like a professional representation. The former has been constituted by direct elections using proportional representation, while the latter is being elected with varying rules in different industrial sectors.

3.1 Executive⁷¹⁰

3.1.1 Structure

The Hong Kong government has three major departments, Chief Secretary for Administration, Department of Finance and Department of Justice, each consisting of several functional bureaus. Some independent agencies are directly responsible to the CE, such as the famous Independent Commission Against Corruption (ICAC). ⁷¹¹ This basic framework was the direct legacy of colonial regime.

The CE will eventually be elected by one person one vote rule, as stipulated by the BL. Currently, however, the office is still being elected through a two-phase nomination-election process. A nomination committee of 1,200 members, which should have "broad representativeness" first nominates several candidates by vote. The committee aims to be effectively inclusive, containing four constituencies covering most industrial and social sectors. A quota system is used to determine the seats of each sector. Then a similarly constituted election committee will vote a CE from the nominated candidates. In 2015, under the political guidance of National People's Congress, the Hong Kong government proposed the bill of modifying CE election rule to the legislature, applying for a fuller democratic election of CE in 2017, with the candidates being nominated by nomination committee but be elected by universal suffrage rather than an election committee. Such electoral arrangement is of course still quite advantageous to Beijing's control through the nomination committee. Yet it could still be a reasonable starting point to greater democratic reform, but the Hong Kong LegCo voted it down in 2015. Therefore, in 2017 the CE had to be elected using the old rules.

Though acknowledged as the head of government, the CE could not guarantee structural control of the bureaucracy in the beginning. In 1997, the whole colonial bureaucracy system was retained, with only some UK officials leaving the country. Under colonial rule, a permanent bureaucracy gradually became an effective channel to absorb the Chinese political elites. The civil service has permanent positions that

710 For a systematic analysis on Hong Kong's executive branch, see Ngok Ma, Ibid, chapter 2, the Post-colonial State

711 The Official Organization Chart of Hong Kong government,
<http://www.gov.hk/en/about/govdirectory/govchart/>

are shielded from political pressure.⁷¹² People in these positions sometimes regard themselves as having more legitimacy to rule, both from historical continuity and BL's clauses to empower the government to "formulate and implement policies,"⁷¹³ which overlaps with CE's power to "decide on government policies and to issue executive orders."⁷¹⁴ Traditionally, the Chief Secretary (CS) of the government was regarded as a prime-minister-like role, reporting to kingly colonial governors. Conflicts between CEs and CSs inevitably emerged during the first term, which led to the introduction of POAS (Principle Officials Accountability System) reform that imposed politically appointed ministers to lead governmental departments, aiming to build "team CE."⁷¹⁵ The POAS was regarded as establishing ministerial responsibility, the logic of which is inherently parliamentary, since in typical parliamentary system ministers are also members of legislature and are accountable to it. Though the unity of the executive branch has been strengthened after the reform, POAS also facilitated the LegCo's use of unconstitutional parliamentary practice to contain the government, especially by the no confidence vote on government ministers.

3.1.2 Powers

In many ways, the office of CE resembles both presidential and parliamentary institutions and has considerable powers to determine and promote policy agenda.

First, according to BL, the CE will eventually be elected by universal suffrage.⁷¹⁶ This, when it eventually happens, will provide the CE with a significant popular mandate.⁷¹⁷

Second, the CE has a broad array of institutional advantages to set policy agenda.⁷¹⁸ The almost exclusive policy jurisdiction of the government is exceptional in typical presidential-like systems. Public expenditure, political structure and the operation of the government are reserved to government bills.⁷¹⁹ Private bills relating to government policies must receive written consent from the CE.⁷²⁰ During the legislative process, government bills should be discussed and voted on with priority and their passage threshold is significantly lower than private bills.⁷²¹

712 Ma, Ngok, *ibid*

713 Article 62, Basic Law

714 Article 48, Basic Law

715 For the Official introduction, see http://www.cmab.gov.hk/en/press/press_53.htm

716 Article 45, Basic Law. There are of course controversies about the election. According to Basic Law, a candidate for CE election needs to be nominated by a nomination committee, the composition of which, as the latest decision of China's National People's Congress decide, will resemble the composition of election committee in 2012. The nomination committee will have 1200 representatives in it from four constituencies, which encompass a wide range of professions and social groups from business elites, labor to Hong Kong's representative to National People's Congress. The committee is in fact an electoral college. In the 2017 election on universal suffrage, a committee constituted as such will act to nominate 2-3 candidates for the competition for CE office.

717 *Ibid*

718 Article 48, Clause 4, Basic Law.

719 *Ibid*, Article 74

720 *Ibid*

721 Article 2, Annex 2, Basic Law

Third, the CE has powers to defend executive agenda. The power to veto LegCo-passed bills is supposed to help CE control legislation in the final stage.⁷²² The veto could be overridden by 2/3 majority of LegCo. Under this situation, the CE has the final counter-balance device to dissolve LegCo and call for a new election. If the CE refuses to sign the bills passed again by the new LegCo, he must resign.⁷²³ Another triggering situation of dissolution is the failed passage of important government bills, such as the budget bill.⁷²⁴ Dissolution of LegCo has not happened to date. As early as in the draft process, there were voices against the dissolution of LegCo, since it is incompatible with the separate popular mandate of both CE and the LegCo.⁷²⁵

3.1.3 Personnel

The CE is required to be non-partisan by the Election Ordinance.⁷²⁶ It is from this fact that people may argue that the lack of partisan support in legislature is the core reason for Hong Kong's current governance gridlock. But the understanding of the CE's non-partisan nature seems to be a mistaken simplification of the legal rules. Though being the original wish of Beijing and many Hong Kong elites, the non-partisan requirement is not fixed into the legal apparatus and should be flexibly understood.

At the constitutional level, the BL does not refer to political parties. When it was drafted in the late 1980s, the development of political parties in Hong Kong was still in its embryonic stage. Therefore, it is not a constitutional rule that party politicians cannot be the CE. The rule about the CE's non-partisan requirement comes from the Chief Executive Election Ordinance. By nature, it is a local ordinance to implement BL's design of the CE's election. The BL establishes that the CE will eventually be elected on universal suffrage through a gradual and balanced process.⁷²⁷ The design of tangible electoral rules in each CE election was left to Hong Kong. The government will conduct wide public consultation, based on which a proposal of electoral rule will be submitted to LegCo for scrutiny. When it is passed, the arrangement will be codified as the Chief Executive Election Ordinance. In each election after the first one, new rules will be added to the Ordinance.⁷²⁸

Moreover, the non-partisan requirement of CE is not a ban on partisan candidates. It reads that:⁷²⁹

"(1) A person declared under section 28 as elected at an election shall, within 7 working days after the declaration-

(a) publicly make a statutory declaration to the effect that he is not a member of any political party; and

722 Article 48, Basic Law

723 Article 52, Basic Law

724 Ibid

725 Haoran Li, *ibid*, 508-530

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http://www.legislation.gov.hk/blis_ind.nsf/WebView?OpenAgent&vwpg=CurAllEngDoc*566*0*566#566

727 Article 45, Basic Law

728 The first CE election was held before Hong Kong's return, by the Preparation Committee of HKSAR. After that, every CE election has been based on the Ordinance.

729 Section 31, Clause 1, Chief Executive Election Ordinance, *ibid*

(b) lodge with the Returning Officer a written undertaking to the effect that he will not, if appointed as the Chief Executive-

(i) become a member of any political party; or

(ii) do any act that has the effect of subjecting himself to the discipline of any political party, during his term of office as the Chief Executive."

The meaning of the clauses is clearly that the elected CE should not be bound by partisan interests during the term, rather than explicitly forbidding party politicians to run for CE, therefore there remains leeway. Textually interpreted, previously party politicians, once elected, could meet this requirement by giving up party membership. Interpreted with another clause, which requires that the elected CE, if a LegCo member, needs to give up the seat, it could be deduced that by publicly quitting from party membership, a party politician could still compete for the position of CE. A more flexible understanding of the partisan clause is also embraced by the politicians of Hong Kong. They hope that by building partisan support for the CE in legislature the current governance impasse in Hong Kong can be alleviated.⁷³⁰ However, as we shall see, partisan support is far from a cure of Hong Kong's governability problems.

3.2 Legislature⁷³¹

3.2.1 Structure

The Hong Kong LegCo is a unicameral assembly with 70 seats divided evenly into two internal constituencies: the geographical constituency and the functional constituency. The legislators in the two groups have the same powers and duties. Private bills need a simple majority in both constituencies to pass, while government bills only need a simple majority in the whole legislature⁷³², making the LegCo a quasi-bicameral institution in practice. Traditionally, the functional constituency is pro-government.

The geographical constituency is directly elected using proportional representation. There are five districts all together in Hong Kong. They will return 35 lawmakers to the LegCo. The functional constituency contains another 35 seats. Elections of functional constituency varied in specific industries. The rules are quite messy and subject to some criticisms of opaqueness and manipulation.

The committee system in LegCo is uncomplicated. Since LegCo is not a main bill-drafter, there is no vast committee system. Unlike the case of lawmakers in Taiwan, discussed in the next chapter, lawmakers in Hong Kong do not have special government subsidies to hire legal and policy assistants. There are only three standing committees in LegCo: the Financial Committee, the Public Accounts Committee and the Committee on Members' Interests. Among these committees, the Financial Committee, which deals with the scrutiny of government's budget bill, is most likely the most crucial one.⁷³³ With the exception of the President of LegCo, all lawmakers are members of the Financial Committee. Under the three standing committees, there

730 See, the interview of the current president of Legco, Jasper Tsang Yok-sing, <http://www.master-insight.com/content/article/3873>

731 http://www.legco.gov.hk/general/english/intro/about_lc.htm

732 Article 2, Annex 2, Basic Law

733 Ibid, 209

are 18 sub-committees covering specific domains. Executive officials are inquired both in plenary session and committee meetings.⁷³⁴

3.2.2 Power

Obviously, based on the previous discussion, the agenda setting power of LegCo is significantly restrained. Legislators can only propose bills irrelevant to public expenditure, political structure, and government operation, which in fact almost entirely forbids the lawmakers from propose private bills. Law-makers' bills in Hong Kong thus are rarely proposed and passed.⁷³⁵

Nevertheless, LegCo members have other ways to influence policy agenda in the legislative process. First, amendments have become a regular measure for legislators to influence legislative agenda. BL does not specify whether amendments should be treated as part of a bill or as an independent category of legislative proposal. Making full use of this vagueness, legislators propose amendments on government bills to issue voice or make protest. Sometimes, an opposition camp uses amendments as a filibustering⁷³⁶ tactic. In 2015's budget bill, the opposition proposed more than 3000 amendments to the original bill.⁷³⁷ Second, LegCo members can propose motions to initiate public debate and discussion about issues.⁷³⁸ It is the power that is necessary for a deliberative assembly. But, again, it may be looked upon as filibustering to obstruct a bill.

3.2.3 Personnel

The main features of Hong Kong's legislature members would be their diversified and novice backgrounds. The history of Hong Kong's representative politics is short (originating mostly since the 1980s) that no "career politician" in the true sense may be fostered. The main forces that occupy Hong Kong's legislature are former senior bureaucrats, social activists (both left and right), business elites, successful barristers, union representatives, etc. So far, the newer generations of legislative politicians are already growing. The parties in Hong Kong all make efforts to attract and train young elites. Nevertheless, in the near term, it is still the reality that LegCo is not a highly professionalized legislature compared with many Western countries.⁷³⁹ There is, for understandable reasons, a quite blurred line between parliamentary and street politics. Many opposition legislators in LegCo, especially those were formerly political activists, tend to adopt the same strategy of street politics, such as radical protests or even violence, which could from time to time paralyze the proceedings of LegCo.⁷⁴⁰

734 Ibid

735 Ma Ngok, *ibid*

736 The LegCo's internal procedure has been modified just at the end of 2017, to disallow filibustering. The practical effects of this change still need longer period of observation.

737 See the record of Legco,

<http://www.legco.gov.hk/yr14-15/english/bc/b201502251/general/b201502251.htm>

738 <http://www.legco.gov.hk/general/english/counmtg/yr12-16/motions.htm>

739 朱世海. 香港政党研究[M]// 时事出版社, 2011; Zhu Shihai, Hong Kong Political Parties Study, Shishi Press, 2011, Chapter 2

740 For instance, the famous radical legislator, "long hair" Leung Kwok Hung, is the leading protester in Legco. He was a leftist activist in colonial era. For more of his history, see http://www.guancha.cn/local/2014_06_11_236607.shtml

3.3 Relevant Institutions

First, a major source of complexity of Hong Kong constitutional order is the central authority above Hong Kong. The central government (State Council) and the National People's Congress (NPC) both have institutional powers to determine Hong Kong's constitutional affairs, such as the appointment of the elected CE and the decision to remove the impeached CE. Nevertheless, most of these powers are passive and limited, aimed to ensure the integrity of sovereignty instead of interfering in Hong Kong's domestic affairs. Therefore, institutionally, the influence of the central government in the executive-legislative interaction of Hong Kong is indirect.

The second is the judicial power. The judiciary of Hong Kong is independent, enjoying the power of final adjudication which is highly exceptional for a local system of a unitary state.⁷⁴¹ It exerted great influences over by judicial review. Generally, it holds the doctrine of legislative supremacy and deference with respect to the democratic mandate⁷⁴². But sometimes it also overrides legislative and executive decisions by invoking a higher normative rule, such as BL or human rights bill. Not uncommonly, oppositions apply for judicial review as a political weapon, over controversies in the legislation of important policies. This has even become a regular strategy in Hong Kong politics and the court has to explicitly remind the politicians that judicial review should not be abused. Hong Kong courts (rightly) exhibit certain degree of pro-liberal inclination and some rulings quite frustrate the government. The most controversial adjudication was the attempt to establish the power of Hong Kong court to interpret the true meaning of Acts of National People's congress, which was obviously conflicting the constitutional logic of PRC regime and was finally forced to compromise. Besides these controversies, generally Hong Kong courts have been well received as highly professional and competent.

4. Explaining Constitutional Deadlocks: Institutional Dimension

The wish of BL to build a strong government has not translated into political reality. Quite the contrary, E-L relations are highly confrontational, which gradually leads Hong Kong into a lasting governance crisis. One crucial reason for this is the institutional discord caused by constitutional hybridity, discussed above. The BL modelled several ad hoc archetypes,⁷⁴³ but did not achieve the necessary coherence between the elements. The political system is "neither parliamentary fish nor presidential fowl" and "the executive, the bureaucracy and the legislature (which is divided within itself) each pursue their own agendas, punctuated by occasional skirmishes on the boundaries of their domains and by subterranean campaigns to extend their jurisdictions."⁷⁴⁴

In Hong Kong, constitutional hybridity causes institutional discords in four ways. First, the incompatibility of different institutions results in either structures that do not work or conflicts. Second, the constitutional transplant is unsystematic and thus may miss the necessary supporting mechanisms in original systems. Third, hybridity could bring redundancy, which means certain institutions could be non-functioning from the

741 Article 80-96, Basic Law

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743 Haoran Li, *ibid*

744 Scott I. The Disarticulation of Hong Kong's Post-Handover Political System[J]. *China Journal*, 2000, (43).

very beginning, their existence creating puzzlement and confusion. Fourth, institutions bring their own rationale. With parallel or competing logics, institutions may deform and develop new features. Though this could also be a source of innovation, without necessary constitutional rules it usually just exacerbates political chaos. Hong Kong suffers from all these symptoms with varying degrees. Altogether, these institutions offer effective channel for inclusiveness, but fail to set up appropriate framework for constructive political bargaining, which further undermines governance responsiveness.

4.1 Governance Failure in Hong Kong

Governance failure in Hong Kong may prompt people to raise concerns about the relations between governability and constitutionalism. Hong Kong is in a transformational era, facing the pressure of economic restructuring and political transition. The competence of the political system to steadily produce quality policies and decisions is important. Nevertheless, the reality seems not to be optimistic.

The most remarkable symptom of the governance failure in Hong Kong is the surprisingly lower-than-normal legislative success rate.⁷⁴⁵ Usually, in stable democracies, the legislative success rates in parliamentary systems is around 70%-80%, or even higher, when the majority of the ruling party in Congress is dominant. For presidential systems, the rate is comparatively lower, but still could reach nearly 70%. In a time when the president's party controls Congress, the rate can also soar to over 80%.⁷⁴⁶ But in Hong Kong, although the BL tried building a president-like CE, the executive's legislative success is stumbling. According to the available data, During the 15 years after 1997, the average legislative success rate is just about 40%⁷⁴⁷. Scholars generally agreed this as a major symptom of Hong Kong's

745 See Fong, B. C. H. (2014). Executive-legislative disconnection in post-colonial Hong Kong: The dysfunction of the HKSAR's executive-dominant system, 1997-2012. *China Perspectives*, 2014(1), 5-14. The legislative success rate for each legislative year is calculated according to the following steps. Firstly, ascertaining the number of bills proposed by the HKSAR Government during a particular legislative year by conducting a content analysis of the Chief Executive's Policy Address (including the Policy Agenda and relevant Legislative Council panel papers) and the Legislative Programme provided by the HKSAR government to the Legislative Council. A policy statement will be counted as "Government bills proposed" if the HKSAR government expressed a clear plan to introduce such a bill into the Legislative Council. Secondly, tracing the status of each government bills proposed in the respective legislative year. If a government bill was tabled in that legislative year as originally proposed in the Policy Address and/or Legislative Programme, it will be counted as "Government bills tabled" and further action will be taken to trace whether the bill was finally passed by the Legislative Council (if it is checked that the government bill was finally passed by the Legislative Council within its four-year term, it will be counted as "Government bills passed"; Otherwise, it will be counted as "Government bills not passed"). If a government bill was not tabled in that legislative year as originally proposed in the Policy Address and/or Legislative Programme, it will be counted as "Government bills shelved or postponed." Thirdly, on the basis of the information gathered, the "Legislative success rate" and "Percentage of government bills shelved and postponed" for that legislative year will be calculated.

746 Ibid

747 That is from 1997 to 2012. The post-2012 years witnessed escalating political confrontation, therefore, the average legislative success rate cannot possibly be improved.

governance failure.⁷⁴⁸ Many important executive initiatives are boycotted, such as the high-speed railway program, the annual budget bill and the recent bill of CE election on universal suffrage.⁷⁴⁹

What is more revealing is the high rate of government bills being shelved or postponed, with a peak of 57.69% in 2005-2006 and a bottom of 23.68% in 2002-2003⁷⁵⁰. Together with data from other years, this means that on average, the government withdraws 40% of its legislative proposals, which implies an even lower legislative success rate since the government may choose to withdraw bills when sensed the dim prospect of passage in legislature. Logically, it may suggest incapable and messy government preparation work. But the technical calibre of the Hong Kong government had been established under colonial regime, and given the highly-developed status of Hong Kong, it makes more sense to focus on the change of institutional dynamics to account for such law-making failure.

For the past decade, Hong Kong has been trapped in political struggle and has missed many chances for economic, social and political development. Though the city is still ranked as the most liberal economy in the world⁷⁵¹, its actual competitiveness has fallen out of top 3 of the world and also been surpassed by Singapore in Asia.⁷⁵² In particular, its slow advancement in social welfare and impasse of domestic politics is criticized as dragging it down.⁷⁵³

4.2 Structured Confrontation and Paralysis of Political Bargaining

As discussed, in western political systems, effective governing mainly depends on two patterns: the coordinative pattern of constructive political bargaining and the partisan control of power fusion. Hong Kong's political system fails both due to constitutional hybridity. Some necessary institutions are missing, some are distorted. The basic structure and rule may determine that Hong Kong's political system cannot function along the parliamentary logic. But on the other side, the distorted agenda-veto power structure also determines currently it cannot reasonably function effectively under presidential pattern.

4.2.1 Paradox of Basic Institutional Structure

In Hong Kong, the institutional structure for political bargaining is paradoxical. The rules about E-L interactions in BL are a mixture of presidential and parliamentary elements. Members of drafting committee had active discussion about their supposed-to-be functions,⁷⁵⁴ but neglected to consider how the elements would interact in reality. Such ignorance leads to structural confrontation between the executive and legislative powers.

748 Ibid. See also, Ma, Ngok, and Chi-keung Choy. "The Impact of Electoral Rule Change on Party Campaign Strategy Hong Kong as a Case Study." *Party Politics* 9.3 (2003): 347-367, and the research report from a major think tank <http://www.synergynet.org.hk/pr/>

749 Ibid

750 Fong, B.C.H, *ibid*.

751 Index of Economic Freedom, Heritage Foundation, <http://www.heritage.org/index/Explore.aspx>

752 Ibid

753 <http://www.weforum.org/reports/global-competitiveness-report-2014-2015>

754 For instance, many of them stressed the need to ensure CE's role as chief legislator but did not go deeper to discuss how this could be done within legislative process with the legislature being elected rather than appointed like in colonial era. Li Haoran, *Ibid*.

The presidential CE faces a parliamentary model of agenda-setting, which means CE and government almost monopolize legislative proposal power and need to see them through the whole law-making process. Lacking initiative powers, the legislators are incentivised to employ anti-government tactics since it is the only way to show their performance; it is almost the only role they have. Meanwhile, this also makes the mutual balance and cooperation between the CE and LegCo difficult. In such a unilateral process that CE tries to impose its initiatives on legislators, constructive political bargaining is quite unlikely to take root because allocation of leverage is severely biased and actors are structurally motivated towards confrontation. Even the pro-Beijing and pro-CE camp find a dilemma in showing their support to executive policies. Even if the government bills are popular, if they approve the bill they run the risk of being cynically (but maybe with a great deal of sense) perceived as being only a rubber stamp. Therefore, in many occasions, they are deterred from actively supporting the executive power. Absent effective partisan basis, the CE simply cannot secure the institutional strength as in the typical parliamentary law-making model.

In this case, to find a way out, could the CE achieve the minimum level of governing effectiveness through the presidential model of coordinative bargaining? The answer seems to be negative as well. The veto power of CE cannot have the supposed "check and balance" or "divide and rule" function on LegCo, since the executive power simply does not need to veto their own initiatives. This also makes the veto power of CE a redundant one which may only serve to give the illusion of exceptional executive strength. In the drafting process, only one committee member pointed out this problem, which did not receive sufficient attention.⁷⁵⁵

4.3.2 Ambiguous Role of Political Parties

As is clear, the basic presidential structure forbids the institutional practice of a parliamentary governance. What may be more important, is the ambiguous role of political parties also makes the operation of the whole system chaotic.

As discussed, the BL tried to marginalize the role of political parties. But it also had to face the reality that political parties do exist and act in Hong Kong. Therefore, the actual constitutional design envisaged different roles of political parties for the executive and legislative branch. For the executive, the Confucian tradition of anti-factionalism was imposed and the Office of CE is open only to non-partisan figures; on the other hand, the legislature runs with typical western perception of party politics. Though the deliberate subordination of political parties was indeed expected in the legislature,⁷⁵⁶ there was no institutional design to achieve that. On the contrary, the adoption of the electoral rule of proportional representation(PR)⁷⁵⁷ encourages proliferation and fragmentation of political parties, resulting in multiple partisan veto players in the LegCo.⁷⁵⁸ The disparity of party's role in executive and legislature gives rise to an under-supported CE and a fragmented LegCo, as well as the confrontations between the two.

⁷⁵⁵ Haoran Li, *ibid*, 565

⁷⁵⁶ Haoran Li, *ibid*

⁷⁵⁷ Ma, Ngok, and Chi-keung Choy, *ibid*; Also, Ngok Ma, *ibid*

⁷⁵⁸ *Ibid*

The non-partisan requirement for CE was based on both *realpolitik*⁷⁵⁹ and cultural considerations. Chapter one has discussed how anti-factionalism functions as a crucial political principle in Confucianism. This is the main cultural reason that Chinese political philosophy is reluctant to accommodate the typical western party politics.⁷⁶⁰ The same reluctance informed the Basic Law. The BL did not mention anything about how political parties should work. The drafting committee members in their discussions agreed that the CE should represent the general interests of Hong Kong citizens, and be responsible to the central government and Hong Kong.⁷⁶¹ To fulfil such duties, the CE should be institutionally detached from factionalism, which was regarded as what party politics would inevitably bring about.⁷⁶² What concerned the drafters was that CE should not be captured by partisan interests, or in a more frank way, the office of CE cannot be taken by opposition parties, rather than the government being supported by parties in LegCo.⁷⁶³

On the other hand, proportional representation(PR) was borrowed from parliamentary systems for the LegCo election, which is viewed as a core reason for the chaotic party system.⁷⁶⁴ Beijing's hidden purpose in so doing was to protect the then minority pro-Beijing parties.⁷⁶⁵ The PR system which became popular in the late 20th century in European parliamentary states caught its attention.⁷⁶⁶ It could maximize the pro-Beijing parties' seats, with the perfect politically correct justification of accommodating diversified interests in the society. Nevertheless, PR also lead to proliferation and fragmentation of political parties. Under this system, the threshold of winning elections is significantly lower than in the simple majority system, which means that minority and radical political parties have a greater chance to enter LegCo. Perhaps more importantly, PR makes radicalization a good strategy to survive and thrive for small and new parties, also because a comparatively small number of votes could secure a seat. This is why the opposition camp, which used to be quite united, is now facing serious threat of civil war. The radical oppositions robustly attack the mainstream pan-democrat. Splits and internal conflicts of political parties have become a usual phenomenon in Hong Kong.⁷⁶⁷ In comparative politics, the fragmentizing effect of proportional representation is still under discussion. There are successful democracies with proportional representation, such as the Netherlands. Nevertheless, in the case of Hong Kong, it is widely agreed that the PR system does encourage the emergence of small and radical parties, which will not change with the advent of a CE with fuller popular mandate.⁷⁶⁸ As political scientists have observed,

759 To prevent the pro-UK democrats to seize power, as they had established a party at that time, see Ma Ngok, *ibid*, chapter 2

760 Confucius, *ibid*

761 Article 43, BL. For the legislative record of this article, see Haoran Li, *ibid*,

762 *Ibid*

763 Haoran Li, *ibid*, 577

764 Haoran Li, *ibid*

765 Ma, Ngok, and Chi-keung Choy, *ibid*

766 *Ibid*

767 Ma, Ngok, and Chi-keung Choy, *ibid*

768 *Ibid*

PR is one crucial reason for fragmentation and also radicalization of the political parties.⁷⁶⁹

Overall, the different understanding of political party's role in designing the executive and legislative branch resulted in a rootless CE and too many partisan veto points in the legislature. In this case, neither the non-partisan CE nor the unstable parties in legislature can effectively promote their agenda, nor can they facilitate effective political bargaining, since both are deprived of necessary leverage and incentives. The CE cannot command legislative majority or use veto power to coordinate law-making priorities, while the legislative power is structurally fragmented and confrontation becoming the most rewarding way to deliver political performance as to show the constituents.

Nevertheless, it will be a too giant step to make in claiming "the marginalization of political parties" as the "overriding factor that contributes to the dysfunction of the executive-dominant system after 1997."⁷⁷⁰ The simple reason is that, given the fragmented party system, even a partisan CE may not be able to secure majority support in LegCo. The LegCo, which does not have real initiative power, could not shoulder the duty of agenda-setting either. In the face of this, the institutional measures for agenda-setting is worth of more attention, as will be discussed next.

4.3.3 Incomplete Transplant of Agenda-setting Measures

The drafting of BL seemed to be a strategy-oriented rather than coherence-oriented process. Concrete institutions were borrowed ad hoc to suit the political needs of different camps, without reflecting on the actual institutional dynamics created.⁷⁷¹

First, Hong Kong used the parliamentary pattern for policy-making, conferring agenda-setting powers to the executive branch. But for a long time there were simply not enough supporting mechanisms of parliamentary practices to make this system work effectively, which at least includes the time-table control measures like guillotine motion and programme orders.⁷⁷² Just at the end of 2017, having being plagued by this problem since its creation, the LegCo finally passed the reform proposals of its internal procedures, adding mechanisms such as a guillotine rule, so as to effectively constrain the abuse of its procedures. Before this, the BL did not place adequate and necessary (in pure technical but not political sense) institutional measures to aid the CE and government in legislative proceedings.⁷⁷³ The executive

769 For instance, see Monroe, Burt L., and Amanda G. Rose. "Electoral systems and unimagined consequences: Partisan effects of districted proportional representation." *American Journal of Political Science* (2002): 67-89, which not only reviews how PR triggers fragmentation but also studies how it influences the types and styles of parties.

770 Ibid

771 Haoran Li, *ibid*

772 For the meaning and function of programme order, see the official explanation of UK parliament, <https://www.parliament.uk/site-information/glossary/programme-motion/>

773 There may be two, but both are ineffective. First, as mentioned, government bills enjoy priority, which does not strengthen the executive when almost all bills are from executive. Second, the CE could ask the president of Legco to convene a special Legco meeting. But the CE has never used this power.

loses control after the bills are tabled for legislative scrutiny.⁷⁷⁴ The vacuum of institutional agenda-control in legislative process is an important reason for the government's vulnerability in front of filibustering and other boycotting measures in LegCo. For instance, the government's budget bill has been filibustered by opposing legislators with thousands of amendments for several years, yet the CE has no measures to advance its proceeding and has to ask for temporary appropriation for the running of government.⁷⁷⁵

Second, institutions for breaking E-L gridlocks are also disabled by hybridity and incompatibility. The most prominent one is CE's power to dissolve the LegCo. The adoption of this standard parliamentary institution caused controversy in the drafting process. Proponents claimed its function in balancing legislative arbitrariness, while the opponents criticized that it would give too much power to CE.⁷⁷⁶ More importantly, as some committee members wisely pointed out, the equal electoral legitimacy of both CE (eventually) and LegCo made CE's dissolution power difficult to justify.⁷⁷⁷ The same controversy also extended to the proposal of LegCo using vote of confidence to change CE and government. Both are hard to be implemented in a presidential-like system where executive and legislature has separate origin and the head of government and head of state (in Hong Kong's case, head of the region) is unified. Finally, the dissolution power was reserved while confidence vote was ruled out. The drafters thought this arrangement could aid "executive dominance". Yet the reality shows that this expected function cannot be achieved. The CE has never dared to use dissolution power after 1997, since the democratic legitimacy for doing so seems questionable.

4.3 A Way Out : Article 74 of Basic Law and Delegated Bill-proposal Power

Is the structural gridlock in Hong Kong's constitutional framework a deadlock? It does not have to be so. As analysed, a fundamental root of Hong Kong's governance failure is the difficulty of finding compromises between the executive and legislative branch, because in Hong Kong E-L interaction cannot operate in either parliamentary or presidential way. Therefore, logically speaking, if they could compete and cooperate in either presidential or parliamentary fashion, rather than the status quo of being struck in between, then the paralysis of decision-making could be effectively ameliorated.

Given the strong rejection of the prospect of dissenting party taking the post of CE, it is reasonable to conclude that a parliamentary model of E-L interaction is very difficult to be forged. Also, the fragmented party system in Hong Kong is a barrier to forming a clear and competent legislative coalition for all political camps. Hence, this leaves the presidential model as an alternative plan.

The presidential model of a chief executive using veto powers to coordinate parliamentary factions and build policy coalition have not been achieved in Hong Kong because neither the executive nor legislative powers have enough interests in

774 The president of the Legco has vaguely defined power to uphold legislative order. But no systematic rules focus on defending filibustering. See, Internal Rules of Legoc, Article 36-43, <http://www.legco.gov.hk/general/english/procedur/content/parth.htm#36>

775 See the letter from Financial Secretary to the president of LegCo, <http://www.legco.gov.hk/yr14-15/english/bc/b201502251/papers/b201502251-let20150422-e.pdf>

776 Hoaran Li, *ibid*, 582

777 *Ibid*

getting engaged with such political bargaining. The CE and government can offer very little to lure the lawmakers to cooperate, while the lawmakers can reap almost no benefits in not boycotting government bills. The resolution of this problem should not be through threatening the lawmakers, but rather to give them an incentive to work with the CE.

The reason is simple, one cannot bargain with people who have nothing to lose. But if the lawmakers can have real power to make legislative proposals, their motivation will change and they will have the need of CE's cooperation to let their bills pass. Effective bill-proposal power will be a more fruitful way of making a lawmaker's political career by pro-actively serving the public, compared with sticking to boycott the government. In particular, since in Hong Kong's legislature the monopoly of resources by the older generation has been reported to obstruct the ladder of mobility for the younger generation⁷⁷⁸, such a new channel of career-building would have real appeal to many junior lawmakers, especially considering that even some in opposition camp are keen in seeking a governmental post.⁷⁷⁹

Is there a legally feasible way to establish such mechanisms? The answer is positive. Just like in many democracies the legislature has authorized the government to exercise delegate law-making power, the executives empower in Hong Kong also have solid legal basis to proactively authorize the lawmakers to initiate wide range of bills, therefore re-forging a interactive law-making pattern as a presidential system. The article 74 of Basic Law provides that:

"Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced."

The mechanism of written consent of the CE to approve private bills has long been underestimated by academic studies. It seems to be taken for granted that it is a mere formality and that, in practice, Beijing will never allow it to function due to political considerations. From a legal perspective, the existence of such consent should be interpreted as giving the CE the power to proactively authorize lawmakers to make such bills, because the article does not forbid that the CE cannot invite them to make proposals and supplement a written consent as a necessary procedural propriety. To forbid such practice is in conflict with how politics works and should work. The term that "bills relating to government policies" should be understood as a very general realm that has certain overlapping with the three categories reserved for government bills in the same article: public expenditure, political structure and operation of the government. Because, if the article intends to make these as absolute reservation, it will need to choose more precise and detailed expression in the written consent sentence. Nevertheless, its choice of the term of government policies implies that lawmakers can make such bills on the condition of government consent. This mechanism seems to be the most hopeful one to motivate a constructive type of E-L interaction, especially compared with other "executive dominance" institutions.

778 <http://beijingspring.com/bj2/2010/c8/xw/lagx/20151013170646.htm>

779 <https://www.boxun.com/news/gb/taiwan/2017/06/201706222333.shtml>

The next question is why government would proactively delegate bill-proposing rights to lawmakers and the possible effects of such a practice. The proposition should be attractive to the government as it will have clear benefits and only minor and controllable risks. Overall, this mechanism will benefit not only the government, but both executive and legislative power, by strongly guiding both sides to cooperate rather than confronting. First, this “carrot” could effectively enable the government to build policy coalitions by rewarding certain policy-making power over less sensitive issues such as welfare policies to those lawmakers who wish to cooperate. Previously the executive power had no formal institution to do so. There will be lawmakers, from all political camps, who would like to gain political capital by more directly participating in actual policy-making. Both sides will then have real motivations to negotiate and compromise. Second, the CE has veto power, therefore could effectively control the risk of bills from lawmakers hijacking executive power. Moreover, it is CE’s decision to authorize any given lawmaker, therefore he or she can choose those that could be trusted from the very beginning. Third, this is not only a chance for pro-Beijing camp lawmakers, but for the opposition camp as well. In the opposition, the mild faction has different agenda with the radicals. Many of them want to get involved with policy-making because this is a more direct way to serve the constituents. Fourth, it will not lightly become a spoil system for the government to build its patronage, because the chance of bill-writing is far removed from benefits of corruption. To achieve credits the lawmakers and government should both deliver high-quality bills satisfy the legislative majority and the public. It is still a merit-based process and therefore is a fair competition. Fifth, if the government could seek cooperation and support from legislature, it will also be more willing to get engaged with dialogue, interaction and compromise.

In general, this mechanism could be relied to marginalize extremists at both ends of political spectrum and cultivate a kind of middle-way political atmosphere. Of course, whether the government could use it successfully depends on its political wisdom, yet the potential for such dynamics does exist. The inclination to achieve political moderation is the normative attitude of this mechanism. It will take a great deal of boldness to champion the approach of Hong Kong’s constitutional development as challenging Beijing’s bottom line in issues like independence. A wiser and nobler way is to try to moderate radicalism of both camps and encourage negotiation and compromise. This seems to be in the best interest for both local Hong Kong people and Chinese people as whole. What are further needed for this mechanism are technical details like imposition of legal rule like *Delegatus Non Potest Delegare*. Due to limit on length, this section will not discuss more details as such.

5. Explaining Executive-Legislative Pathologies: Legal Dimension

Such volatile executive-legislative relations in Hong Kong give rise to a broad range of legal issues, which contest and develop the boundary and nature of both institutions. Vagueness and controversy have understandably become the main themes of their interactions. LegCo and the executive have a different understanding about the nature and effect of legal rules, which sometimes results in confrontation and gridlock.

5. 1 Parliamentary Supremacy and Parliamentary Practice

Perhaps due to the familiarity with UK's political system, the Hong Kong LegCo sometimes may self-give a Westminster-like role,⁷⁸⁰ which may cause certain conflicts with the executive power following the presidential model in BL. But on the other side, it is unwise to regard elements like legislative supremacy, parliamentary accountability, and parliamentary privilege as defining factors in forging E-L relations. Their influences are certainly not marginal. But it needs to be admitted that such factors are not inherently different as in both parliamentary and presidential systems in ordinary occasions. In a presidential system, the legislature also obtains supreme authority in its allocated realm, and is also the proper organ to supervise executive power and seek responsibility. Not to mention that, rights and privileges of lawmakers in most modern democracies are rightly similar. Therefore, it is indeed that, like scholar's arguments "parliamentary law in general and the doctrine of legislative supremacy in particular reinforce, rather than defeat, the pre-eminence of the Chief Executive in Council within the legislative process" and "the full potential of Hong Kong's British-descended *lex et consuetudo parliamenti* in promoting effective lawmaking remains largely untapped in spite of the persistent gridlocks and tensions between the Legislative Council and the government since 1995"⁷⁸¹, though it is the legal-political dynamics that could shape E-L relations, rather than pure technical legal issues. Also, there are certainly noticeable legal issues in parliamentary law that become nuances to the executive power, therefore the argument that parliamentary law reinforces the CE seems to be unconvincing. The main issues with real political significance in parliamentary law, must be those closely related to actual institutional practices.

During the handover, Hong Kong's "*lex et consuetudo parliamenti*" was not weakened since the powers and privileges of the legislators were retained by the LegCo Power and Privilege Ordinance and the Internal Rules of LegCo, which passed the scrutiny of the National People's Congress as not violating BL.⁷⁸² Also, end of colonial rule means that the elected legislature obtained more independence and legitimacy in exercising power.

BL vested the lawmaking power, though not much initiative power, to the LegCo. Yet LegCo may be unsatisfied with this arrangement and strive to expand the boundary of this power with an implied self-identity as speaking for the "sovereignty" of Hong Kong in an omnipotent manner. The main demonstration of such an anomaly is the active illegal initiatives from legislators, in particular the "motion of no confidence". Ever since the early years of post-1997 system, legislators had been using motion of no confidence to denounce the CE and other ministers.⁷⁸³ The logic of confidence vote is sensible only in parliamentary system or system with prominent parliamentary features. The government(cabinet) is from the legislature and needs to have the majority support to work. Therefore, the passage of confidence vote is

780 For more discussion, see Ip, Eric C. "Mapping Parliamentary Law and Practice in Hong Kong." *The Chinese Journal of Comparative Law* (2014): cxu005.

781 Ip, Eric, *Ibid*.

782 *Ibid*

783 For the active use of this measure, see

<http://search.legco.gov.hk/LegCoWeb/Search.aspx?lang=tc&searchtype=simple&keyword=motion%20of%20no%20confidence%20>

usually followed by the resignation of executive leader and new election to produce the new leader. Yet, the BL established a presidential-like system, in which confidence vote does not have institutional basis, not to mention that BL explicitly denies LegCo's power of confidence vote.⁷⁸⁴ Eventually CE will be elected on universal suffrage, therefore the LegCo's withdraw of confidence cannot eradicate CE's democratic basis to rule. Nevertheless, it should also be reflected that, the intertwining of parliamentary and presidential elements elsewhere, such as CE's dissolution of LegCo, may fairly imply the possibility of legislature's adoption of confidence vote. The strategic consolidation of executive power by combining parliamentary practice cannot deny the legislature's employment of similar measures. Another factor that may encourage the use of this is the POAS reform that was modelled on ministerial responsibility, a parliamentary mechanism that may mislead the legislators to deem they have the power to seek accountability and remove the ministers.

Another manifestation of LegCo's self-aggrandizement is the active use of legislative investigation power. Article 73 of BL, after listing the nine powers LegCo can exercise (such as scrutinize bills and approve public expenditures), states that if necessary, during the exercise of these powers, LegCo could summon "persons concerned to testify or give evidence." This power was designed to be auxiliary power in lawmaking. But the LegCo has sometimes shown a tendency to use it as an initiative power to participate in politics, like a legislature in a parliamentary system. For instance, in 1998 the chaotic opening of Hong Kong's new airport caused public dissatisfaction. The government and the Airport Authority (the regulative agency over the airport issues) both started investigation. The LegCo also initiated its own investigation and intended to seek accountability from the Airport Authority.⁷⁸⁵ The government protested for the sake of separation of powers and waste of public resources. But this was just the beginning. The LegCo had been using this power to compete in or even set political agenda.⁷⁸⁶ The BL's ambiguous requirement of executive accountability to LegCo was also cited as justification.⁷⁸⁷

5.2 The Meaning of "Law" and Separation of Powers

A basic pattern of executive-legislative interaction in Hong Kong is that both try to expand their powers by interpreting the meaning and scope of law. It is a result of the vaguely defined concepts like "law," "legal" and "according to law" in BL and the lack of clear rules to define the scope of executive and legislative powers

The first issue that triggered social attention is the nature of executive order. The CE has the power to "decide on government policies and to issue executive orders."⁷⁸⁸ As discussed in Chapter 1, executive order could be used to unlock some E-L difficulties and test public opinions. Nevertheless, the effort to leverage this mechanism suffered from legal frustration, at least partly due to the insufficient attention on legal subtlety when using this instrument.

784 BL does not confer this power to Legco. The drafting discussion clearly showed that most committee members refuse to give Legco this power, see Haoran Li, *ibid*, 573

785 See the official report, <http://www.legco.gov.hk/yr98-99/chinese/sc/sc01/papers/chapter2.doc>

786 朱孔武. 香港立法会调查权的法理探析[J]. 政治与法律, 2009:62-68; Zhu Kongwu, the Legal Analysis of Investigation Power of Hong Kong LegCo, *Politics and Law*, 2009:62-68

787 *Ibid*

788 Article 48, BL

In 2005, CE Donald Tsang Yam-kuenun issued an executive order authorizing law enforcement agencies to conduct covert surveillance in accordance with the internal procedure of approval set by this Order.⁷⁸⁹ A legislator challenged it by judicial review on the point that the necessary restriction of fundamental rights must be carried out by legislature-passed law. This point makes sense. The BL does allow law enforcement to use covert surveillance for public security and anti-crime. However, it must be conducted in accordance with legal procedures. The executive's defence was trapped by a paradox. On the one hand, it claimed that the internal approval procedure within the government counted as a legal procedure. On the other hand, it refused to admit that the Order had legislative effect, or else the Order would be ruled unconstitutional immediately due to encroachment on LegCo's power. The executive held that the Order was only for the regulation of internal behaviour of the law enforcement unit. The court recognized this but denied the Order could set legal procedure. Moreover, since BL clearly stated that basic rights of Hong Kong citizens cannot be restricted unless prescribed by law the defence of the executive will fail anyway.⁷⁹⁰

Nevertheless, an implicit constraint was imposed on the use of the executive order in this case. The Order was only binding within the executive branch. But the court went on to claim in its adjudication that the nature of the mechanism of an executive order is only for "regulating the internal conduct of law enforcement agencies"⁷⁹¹ and could not be used further. Though BL did not offer a detailed explanation of the content and nature of executive order, it could logically be deduced that it is a mechanism for policy-establishment rather than merely internal regulation. Article 48 empowers the CE to "decide on government policies and to issue executive orders." It would be strange to read it as vesting two respective powers, deciding policy and regulating the executive branch, to the CE, because the latter is self-evident in making the CE the head of executive branch. A sensible, or maybe the only sensible understanding, should be that the executive order is a constitutional mechanism to implement government policy. No matter how flexible an interpretation can be, it shall not bypass its function about policy implementation. The mistake of the court's explanation may hinder the executive order's legitimate application in setting policies. The concern about its potential abuse could be eased, since the exclusive lawmaking power of the LegCo stipulated by BL⁷⁹² can ensure that executive order does not encroach upon the legislative power. Also, the Hong Kong bill of rights and the independent and vigilant judiciary of Hong Kong form a strong guaranty of liberty-protection.

789 The background for this case is that, for a long time, Hong Kong did not have a legislation regulating the necessary covert surveillance on private communication for the purpose of national security and anti-crime, which itself might be a result of inconsiderate agenda-design by the government. This vacancy caused obstacle for the law enforcement unit. Therefore, some legal procedures were needed to regulate covert surveillance.

790 LEUNG KWOK HUNG AND ANOTHER v. CHIEF EXECUTIVE OF THE HKSAR [2006] HKCA 166; CACV 73/2006 (10

May2006)<http://www.hkii.hk/cgi-bin/sinodisp/eng/hk/cases/hkca/2006/166.html?stem=&synonyms=&query=Leung%20Kwok%20Hung%20chief%20executive>

791 Ibid

792 Article 66, Basic Law

The second issue is the Hong Kong version of "legislative veto."⁷⁹³ The BL does not have direct clauses explaining delegated rule making, but such practices are inevitable in modern times. In Hong Kong, delegating subordinated rules to the executive branch is very common. It is on this point that some struggles over control occur. The LegCo holds the view that it is the sole lawmaking body according to BL, and claims control over subordinate rulemaking by subsequent supervision, modification and abolishment. The executive does not challenge this authority, but insists that some executive action should not be explained as of legislative nature, thus falling under LegCo's jurisdiction. In the similar *Chadha* case,⁷⁹⁴ the US Supreme Court held that legislative veto was unconstitutional, since the "presentment clause"⁷⁹⁵ and bicameral structure⁷⁹⁶ deny the validity of the unilateral veto by one chamber of a bi-cameral legislature. The same could be argued in Hong Kong, since the basic constitutional structure of Hong Kong and the US have similarities. .

There are already events illuminating this issue, such as in an ordinance about setting up suburban public parks, particularly a clause authorizing the CE to decide the scope of parks. In 2010, the CE used that power to squeeze out some space for expanding waste landfills.⁷⁹⁷ It was opposed by some legislators. In response, the legislators initiated a motion, just as analyzed above, to abolish the order of CE and it was eventually passed, the validity of which was strongly denied by the government. The Secretary of Justice declared that the government has discretion conveyed by the original ordinance.⁷⁹⁸ The legislators argued the order was in fact delegated rulemaking power, thus should be subject to the approval of LegCo. To avoid constitutional crisis, the government ultimately compromised and did not resort to constitutional review.

The right and wrong in this specific case are of secondary concern. The major concern for our purposes is the drawing of the boundary between executive and legislative power. To effectively draw a proper line, the entire constitutional structure should be considered. Also, the nature of LegCo's action should be discussed. If LegCo regards the order as that of legislative effect, then in order to abolish it by a successful resolution, that resolution must also qualify as "law." Otherwise, if a law could be repealed by extra-legal measures, the stability of the legal system may be in crisis. The process of enacting law is regulated by BL, with the CE having the final power to review the Act and choose whether to use veto power. By unilaterally vetoing the order, the LegCo either encroach upon the executive power--if the nature

793 For the similar and famous case in US, see *INS v. Chadha*, 462 U.S. 919 (1983)

794 *Ibid*

795 That for an act to be valid, it must be presented to the president for approval. Article 7, US Constitution.

796 Article 1, 7, US Constitution.

797 Country Parks (Designation) (Consolidation) (Amendment) Order 2010

798 The Interpretation and General Clauses Ordinance (Cap 1) states that the Legco may by resolution or the other authority may by order amend the whole or part of the subsidiary legislation. However, Cap 1 also states that the statutory legislation can only be amended in the same manner by and in which it was made. As a result, although the Legislative Council is provided the power to amend the subsidiary legislation in any manner, it must be consistent with the power to make the original legislation. It also implies that the Legislative Council does not have the power to repeal the subsidiary legislation if the legislation is not inconsistent with the provisions of any Ordinance

of the order is executive action, or violate the legislative procedure--if the order is of legislative nature.

6. Conclusion

This chapter has explained how the intertwining of different constitutional traditions leads to constitutional dysfunction and governance failure in Hong Kong. The central point of the chapter is the mix of the presidential and parliamentary in the Hong Kong Basic Law is a crucial institutional source of Hong Kong's political deadlocks. Echoing the themes set by chapter 2, this chapter shows how constitutional hybridity in Hong Kong creates clash and causes constitutional dysfunction. The Basic Law tries to blend different institutional elements to fulfil its supposed commitment of democracy. However, it fails to work out a smooth pattern to coordinate these elements, in particular that the structure of political bargaining in executive-legislative relations motivates confrontation rather than negotiation and moderation.

In a nutshell, the political system of Hong Kong could be summarized as a presidential Chief Executive slotted into a parliamentary law-making structure, under which situation neither the effectiveness of ideal parliamentary decision-making (fusion of powers) nor the delicate balance of ideal presidential decision-making (separation of powers) can be achieved. Meanwhile, the Chinese tradition of opposition to political factionalism, combined with the political incentives to head off opposition, prompted the Basic Law to establish the office of Chief Executive on a non-partisan basis. The parliamentary practice of proportional representation was also used to deliberately prevent a powerful majority party from coming into place. Under this framework, as shown in this chapter, is the diversified types of institutional dysfunction because of such hybridity. The institutional conflicts between parliamentary agenda-setting pattern and presidential responsibility pattern means that the legislature is structurally motivated to confront the government, because this is the only way they can demonstrate effectiveness. The institutions lack the supplementary mechanisms of parliamentary decision-making, resulting from the hasty mixing of presidential and parliamentary elements, means that the CE and government do not have sufficient institutional power to advance policy-making. The institutional redundancy of the intimidating but ineffective powers of CE, such as veto power and legislature dissolution powers, creates the erroneous image of a dominant CE but conceals the real problem of lack of effective bargaining mechanisms. The institutional distortion deriving from such hybridity, features both executive and legislature's hostile assertion of their own interests based on opportunistic interpretation of constitutional rules and institutions, such as vote of confidence in Hong Kong legislature

The bitter result is that the CE can neither effectively "dominate" the executive nor the legislature, because they cannot secure partisan support, nor can they engage in constructive political bargaining, because legislators have no power of initiative and so have very little to gain from negotiation. Instead, the legislature is structurally motivated to boycott the government as the safest and most convenient political strategy. Under such circumstances, the Hong Kong Basic Law cannot break gridlock effectively. The institutions designed for this task are deformed or dysfunctional, due to the institutional conflict, redundancy, and distortion that constitutional hybridity causes. This is a crucial institutional source of Hong Kong's governance problems and deadlocks in political development.

A feasible way to solve this problem, as elaborated in this chapter, is to reconcile the two clashing traditions by flexibly interpreting Article 74 of Basic Law and create balanced relations between executive and legislative branch. Article 74 embeds a kind of “delegated bill-proposal” power, which could be a political instrument for the CE to share power with the legislature and forge a practical pattern of constructive political bargaining, in which the establishment of a certain policy requires the approval of both executive and legislative powers, therefore prompting them to negotiate and compromise. This is a legally acceptable and politically positive way to alleviate the tensions of Hong Kong politics and constrain fanaticism of all political camps.

Other constitutional traditions also have resonance in Hong Kong’s constitutional development, especially the Chinese tradition of constraining competitive party politics. Of course, to rule out competitive party system in Hong Kong is first and foremost a realpolitik consideration aiming to ensure Beijing’s control. Nonetheless, the actual institutional design and rationale accompanying them also reflect deep-rooted cultural and philosophical differences. The CE is explicitly designed to be apolitical in that this office should go beyond factional struggles and act in accordance with the common interests of Hong Kong people and Chinese people as a whole. Though technically partisan affiliation would not be a unresolvable problem for a candidate to run for CE, the fact that all CEs so far are either from business circle or civil service system to a certain degree indicates Chinese government’s caution in bringing in partisan factors to the office of CE. The underlying reluctance to effectuate party politics also result in the fragmentation of party system, due to the adoption of proportional representation to constrain the size and strength of competing political parties, as already testified by empirical studies cited in this chapter.

In addition, the functional constituency in Hong Kong legislature also reflects the PRC polity’s usual practice in exerting political control and building political coalitions. It is very similar with the quota system used in PRC political institutions to collaborate with social elites. The veto powers given to this de facto second chamber suggest Beijing’s intention to firmly control Hong Kong’s legislative power.

The legal dimension of E-L competition has also been discussed in this chapter. Under the above-mentioned institutional structure, the two branches both strive to push the boundary of their powers. The LegCo self-modelled on the parliamentary sovereignty of UK to exercise initiative powers, as exemplified by the use of confidence vote and investigation power. The executive defends its norm-producing power in executive order and delegated rulemaking, yet is seriously constrained by the LegCo.

In sum, Hong Kong institutional dysfunction is to a great degree result of ill-designed constitutional hybridity. The way out of woods is to re-arrange the ad hoc elements and re-forge a constructive pattern for political bargaining, as has been analysed and discussed in this chapter. The other institutional distortion and legal disputes could all be alleviated if a more positive mode of politics could be achieved.

Chapter 9 Constitutional Hybridity and Underperformance of Democracy in Taiwan

1. Introduction

This chapter will discuss the how the constitutional hybridity of Western, Chinese and communist elements shape the weak agenda-setting and excessive veto playing in Taiwan. First, it will review the intellectual origins and historical development of Taiwan's constitution, to lay a descriptive foundation for its current problems. Second, a general description of executive-legislative structure in Taiwan will be given. Third, various institutional and legal reasons will be pinpointed to demonstrate how the present pathologies of Taiwan's executive-legislative relations are caused, as well as their implications for democratic governance. Fourth, a concluding section will summarize the major points of this chapter.

2. Origins of the Constitutional Structure of Executive-Legislative Relations in Taiwan

The current Taiwan regime, the Republic of China (ROC), had been the official government of China before 1949. It was founded in 1912 as a democratic republic. The founding father, Sun Yat-sen, was the first president but soon lost power to warlords. Therefore, his constitutional theory could not be implemented until his party, the National People's Party, commonly known as Kuomintang (KMT), finally became the ruling party with its own revolutionary army in the late 1920s. Sun died in 1925. In his later years, he cooperated with the Soviet Union and transformed KMT into a Leninist party, with an organizational structure and culture modelled on Leninist ideologies, discussed in the first chapter. Chiang Kai-shek, a KMT military commander, succeeded Sun as the party boss and dominated the regime until he died in Taiwan in 1975.⁷⁹⁹

2.1 Intellectual Origins of ROC Constitution

As discussed in chapter 5, ROC regime was successor of the Qing dynasty and the first republic in Chinese history. Sun Zhongshan, the founding father of ROC had been advocating republican revolution long before the collapse of Qing. The ROC Constitution is based on Sun Yat-sen's theory of "five power constitution,"⁸⁰⁰ which

799 For more of this history, see 张同新, *中国国民党史纲*, 第二编, 人民出版社, 2012; Zhang Tongxin, *Outline of Kuomintang's History*, Second Volume, People's Press, 2012

800 The idea of Sun on constitutional design had been developing. Thus, the materials that demonstrate his thoughts are various. For his general theory of "Five Power Constitution", see 孙文《国父全书》《五权宪法》,《民权主义》,《三民主义与中国前途》,《建国大纲》,中华学术院, 1974. Sun Wen, <Complete Works of Founding Father Sun Wen>, <Five Power Constitution>, <People's Rights>, <The Three Principles of People and China's Future>, <Program for the Construction of National Government>. Chinese Academy, 1974. For the brief introduction on the historical development of Sun's theory, see 司徒一, 《五权宪法政体架构辨析》, 黄花岗杂志, 第四十五期, 2013, Yi Situ, <Analysis on the Political Institution in Five Power Constitution>, Huanghuagang Magazine, Vol 45, 2013

was a mixture of presidential model of power separation, Westminster model of a supreme assembly, and some functional institutions drawn from the Chinese tradition. During the drafting of the 1947 constitution, also discussed earlier in this thesis, the chief drafter and constitutional scholar, Zhang Junmai, tried to constrain the KMT by blending into this system the parliamentary mode of E-L relations.⁸⁰¹ Therefore, the Taiwan Constitution exhibits a significant degree of hybridity, hybridity which planted the seeds for institutional discord during democratization. Each of these influences will be considered in turn below.

The "Fiver Power Constitution" was the principal theory guiding KMT's constitutional design. Initially, Sun's exposition of this theory was modelled on a democratic system based on western pattern of party politics. Nevertheless, KMT's later transformation into a Leninist Party twisted this system in practice.

At the first sight, the "five power constitution" theory seems to be an expansion of the classic tripartite structure of the separation of powers.⁸⁰² Besides the typical three branches, it adds new institutions; the Examination Yuan⁸⁰³ and Supervision Yuan to deal with the civil service examination and inter-branch supervision, which resemble the examination system and censor offices in ancient China. But Sun thought this horizontal structure was still incomplete. The mutual checks between equal-level institutions, in his mind, always degenerated into factional struggles. His solution still exhibited a strong belief in hierarchy, following the Chinese tradition. To transcend factionalism and resort to the general will of the people, Sun envisaged a highest-level National Assembly(NA),⁸⁰⁴ which could elect and remove officials of the five branches, supervise them and interfere with their mutual conflicts. Also, this assembly could initiate and repeal laws, and amend the constitution. Sun claimed the power of the NA is the real "ruling power" of the people, while the lower-level five branches exercised only administrative power. Even the legislature was regarded as a technocratic-like functional agency, since NA is the true or ultimate representative of the people.

Sun modelled the five power structure on the western political systems, but it fails to offer a clear and coherent logic in designing institutional framework, in particular the relations between executive and legislative powers. The "effective part", to borrow Bagehot's term, seems to be especially vague. To a certain degree, in actual political system designed from this theory, each institution is severely compromised or twisted to suit political expediency, therefore resulting in a malfunctioned hybridity system.

The initial role of the president in Sun's early-period though, was exactly like the US president, being the supreme leader of executive power but also on a constitutionally equal footing with the other branches. Later due to political need---that a newly born modern China required strong man to maintain political order and promote modernization--- Sun Wen and KMT elevated the constitutionals

801 For the life and academics of Zhang, see 郑大华. *张君勱传*. Vol. 1. 中华书局, 1997.,95-100 页, DahuaZheng, <Zhang Junmai>, ZhongHua Book Company, 1997, page 95-100

802 Sun, *ibid*

803 In Taiwan, "Yuan" means Council. The executive council and legislative council in Taiwan will be referred to as Executive Yuan (EY) and Legislative Yuan later(LY).

804 NA representatives should be directly elected by local constituencies, Sun, *ibid*

status of presidency into the head and guardian of the state⁸⁰⁵, and later in 1936 even into a kind of “super presidentialism”. The president was finally transformed into a quasi-kind of “elected” King in China. All other branches were under the command of presidency. The government⁸⁰⁶ became subordinate to the presidency. Rather than being accountable to legislature, as the usual practice of western systems, it was designed to be accountable to the president. In theory, the NA was still the supreme authority. Yet in reality, it was not a permanent organ and convened every three years. During the emergent times of Japanese invasion the normal constitution was suspended and China was placed under military rule. The NA was, in this period, naturally little more than a formality. Under super-presidency, the central administration also needed a prime minister to manage day-to-day governance. The structure of dual-executive was therefore gradually formed.

The Legislative Yuan (LY) was not a representative institution at the initial stage of the theory, but a professional law-making agency under NA, just like the decree drafting department in ancient China. In the post-Sun period, KMT further constrained the power of legislature, requiring that its legislation and resolutions must first be approved by the Executive Yuan, and were subjected to the reconsideration of the president.

Yet, none of these changes were as central to facilitating to the dominance of KMT as its self-transformation into a Leninist party.⁸⁰⁷ Party-State structure therefore had long been in place before the success of communist revolution. KMT invited Soviet senior cadres to act as consultants and re-design the party’s organizational structure, as well as setting out a theory for constitutional development⁸⁰⁸ in the 1920s, with the hope to strengthen its ability to win the revolution by creating its own army.⁸⁰⁹ It is through this nexus that the communist tradition become intertwined with the transplanted western constitutional framework in the early 20th century China. The implementation of “five power constitution”, which was initially designed to be based on western-like party system⁸¹⁰, was bizarrely underpinned and shaped by a quasi-Leninist party of KMT.

805 This period of history was quite messy. After the founding ROC regime in 1912, Sun, who had to recognize the power and popular support of Yuan Shi Kai, a Marshall and chancellor of Qing, stepped down as the temporary president and witnessed Yuan’s rise to the first president of modern China. Then to replace Yuan again, he resorted to a wide range of opportunistic and illegal moves, such as forcing a highly flawed and unfair temporary constitution through the temporary legislature to cripple Yuan’s power as legitimate president, or even wage wars against the lawful central government from Guangdong province. During this process, in the campaigns and wars, Sun and his party would usually put up constitutional proposals in preparation for the coming victory, which had never come during his life time. In these proposals, he had already changed the role of president to a more authoritarian function.

806 Called executive council in Taiwan.

807王奇生. 党员、党权与党争[M]// 华文出版社, 2010:2-2; Wang Qisheng, The Organization Pattern of Kuomintang, Huawen Press, 2010, chapter 1

808 That the full degree of democracy should be achieved in a gradual process. Three stages are necessary, the military-governance(军政), the training and practicing stage (训政), then the eventual achievement of “constitutionalism”(宪政)

809 Ibid

810 Ibid

First, the party-state system was established with party as a ruling part of the state. Sun used to admire the competitive party system of western countries, aiming to rule the country by winning executive and legislative elections.⁸¹¹ KMT in its early age was only a weak and loosely organized party. The success of Bolshevik enlightened him as to the power of organization. KMT then copied most of the organizational structure of Soviet Communist Party. The new constitution of KMT in 1924 was, to considerable degree, a direct translation of that of the Soviet party.⁸¹² The Leninist model of the revolutionary party as a machinery that ruled the country was faithfully practiced by KMT after this point. Compared with the previous constitutions, this new guiding document emphasized the importance of discipline and included more sophisticated yet stronger protocols governing the recruitment and management of party members. Nevertheless, in practice, as historians have shown, the strength of party organization was more formal than substantive. The core force ruling KMT was a mixture of republican revolutionaries, capitalists mainly connected with Zhejiang province, and local land owners. It advocated social welfare policies but was never as revolutionary as the later CCP which rigorously struggled to redistributed land to poor peasants. Such hybrid social basis determined that KMT was not willing or able to install party dominance in local or even provincial level of politics, because this may harm the interests of landowner and capitalist group. Local elites were relied on to rule, rather than local party cells. It was even reported that the local party organs were so idle that cadres demanded to be transferred to government posts.⁸¹³

Second, the strong party control of the Leninist tradition, the Chinese tradition of strong national leader, and Sun's rejection of party competition in parliamentary system, together resulted in an inclination to aggrandize executive power. The US presidential system had always been a prototype for Sun's theory.⁸¹⁴ After the Leninist reforms, KMT needed a nexus to transmit the will of party to the state system and a presidency-like national leader was a good way to do so. Also, he acknowledged that the Chinese people are most likely to accept an emperor-like state leader who possesses clear and supreme political authority.⁸¹⁵ The Western idea of separation of powers, according to him, would not manifest a clear highest authority to rule, a lack of which was regarded in Chinese tradition as causing rampant factionalism and unhealthy political struggle. Therefore, a strong executive leader, the position of which needed to be taken by the leader of the party, was chosen as an institutional pattern for the party to rule.

Third, the idea of a supreme representative authority of the people (the NA) in five power constitution, was found compatible with the ultimate control of the party and functioned as another nexus for the party to control the state. A Leninist party always claims to represent the people. This self-given legitimacy facilitated the party's control of the NA since their representativeness overlapped. Under the Party-State, NA was only slightly better than rubber stamp of the ruling party. The KMT always obtained a strong majority in the NA used it as a stronghold to monopolize power and

811 Ibid

812 Ibid

813 Wang Qisheng,ibid

814 See 孙发锋. "孙中山的总统制思想探析." *常熟理工学院学报* 24.7 (2010): 104-109; Sun Fafeng, the Idea of Presidentialism of Sun Yat-sun, Changshu College journal, 2010

815 Ibid

obstruct democratization. However, it also needs to be noticed that the degree of dominance, penetration and regulation of KMT was much weaker than the later communist regime. The legislature and NA were still used by some dissents to issue voices or make protests.

2. 2 Constitutional Development in Taiwan under Authoritarian Rule

In Taiwan, the Party-State continued. Soon, the already paralysed ROC Constitution was suspended. The "Temporary Provisions Effective during the Period of National Mobilization for Suppression of the Communist Rebellion (TPESCR)" started to function as a legal source of authoritarian rule.⁸¹⁶ However, the constitutional structure did not stop developing. Even under authoritarian rule, the constitution continued to function as a coordinator among political forces and necessary formality.⁸¹⁷ Constitutional practices during this period exerted great influence even after democratization. The strong control of the party machine masked the inherent institutional discords of the constitution, which emerged upon democratization.

2.2.1 Change of Executive Power

The executive power was strengthened by TPESCR. First, the term limits on the president and vice president were abolished.⁸¹⁸ Second, it gave the presidency the power of emergency decree without subsequent legislative ratification.⁸¹⁹ In this manner, the president can legislate on whatever subject he wants. Another power conferred to the presidency was the power to establish institutions needed to tackle "communist rebellion."⁸²⁰ It was by this power that Chiang set up the National Security Committee, which regulated almost everything under authoritarian rule. This very pattern of acquiring power by establishing new agencies, was a frequently used pattern in both PRC and ROC regime. After democratization, the National Security Commission was entrenched into the new constitutional system, becoming a main institution for the presidency to control policy-making.

2.2.2 Local election and Future Opposition in Legislature

At the local level, the KMT opened electoral positions to trade for the support of local Taiwanese elites⁸²¹ Since the local-level institutions had little impact on policy-making at the central level, KMT found the gesture to be of little threat. After all, this local channel of electoral participation was also a way for KMT to recruit and train young politicians. Nevertheless, the constitutional influence of local elections went beyond the authoritarian era. First, they provided a large number of future politicians for the opposition camp. Many future opposition political figures emerged

816 Zhang Tongxin, *ibid*

817 See, Ginsburg, Tom, and Alberto Simpser, eds. *Constitutions in authoritarian regimes*. Cambridge University Press, 2013.

818 Article 3, TPESCR

819 Article 1, TPESCR

820 Article 5, TPESCR

821 For Taiwan's local election in this period, see 林佳龙：“地方选举与国民党政权的市场化”[A]，陈明通、郑永年主编《两岸基层选举与政治社会变迁》[M]，台北：月旦出版社1998年版．陈明通：《派系政治与台湾政治变迁》[M]，台北：月旦出版社1995年版．晓峰：《台湾民主运动40年》[M]，台北：自立晚报社1987年版．

from local elections. Second, they planted the seed of factional and localism pathology of Taiwan's legislative politics. KMT acquiescently allowed local clans and landlords (many of whom had later become business tycoons) to offer patronage to candidates. Even for KMT, the need to cooperate with these local elites was desperate. Many local elites were absorbed into KMT, but their loyalty and obedience were not strong.⁸²² Local forces do not rely on the party machine to win seats. Their representatives in the legislature are naturally more concerned with strengthening their local connections rather than debating policies in the legislature. Consequently, both KMT and the opposition parties suffer from disobedience and fragmentation in legislature.

2.3 Democratization and Constitutional Amendments

The democratization of Taiwan was a fairly successful one featuring the ruler's compromise and self-reform. The son of Chiang Kai-shek, Jiang Jingguo, was the key figure behind this success. Nevertheless, he passed away after the initial steps of democratic reform in 1988., leaving a vacancy of power in KMT. The subsequent reforms, especially the constitutional amendments, were greatly influenced by the manipulation of both camps to maximize their interests.

2.3.1 Jiang Jingguo and Taiwan's democratization

Chiang Kai-shek, the long-time KMT boss, died in 1975. His son Jiang Jingguo, succeeded him as the president. His attitude towards democratic opposition was not suppressive. Being aware of the inevitable trend, he began to make preparations, like enhancing communications with the opposition camp, long before the reform process started.⁸²³

Besides, several other political-economic and international factors also impelled political reforms in Taiwan.⁸²⁴ First, economic success produced a blossoming middle class who demanded democratic participation. Second, the opposition forces became more organized and active in local elections and social protest, demanding more power. Third, the US and Japan established diplomatic relations with PRC, which caused a legitimacy crisis for the KMT regime. Meanwhile, on the other side of the coin, economic success raised social support for the KMT government, building its confidence for reform. Local elections also trained KMT politicians in preparation for the forthcoming electoral competition. The risks and benefits had been carefully calculated. KMT was actually confident in opening democratic competition. Official reforms started by the acquiescence on the establishment of Taiwan's first opposition party, the Democratic Progress Party (DPP), in 1986. Party democracy was in fact allowed in the nominal ROC Constitution (though not the Party-State reality) since people had the right of association and participation in politics.⁸²⁵ Therefore, the nominal constitution became a leverage used by the democratic force in political reform. This was a reflection of the tensions between the different ideological elements of the constitution. The formality of nominal democratic institutions, such as

822 Ibid

823 About Jiang's attitudes towards democratization, see the article by his secretary, Song Chuyu, who later became a senior KMT leader, 宋楚瑜,《贴身随侍十四年, 亲历蒋经国改革之路》, <http://history.people.com.cn/GB/198307/13119792.html>

824 Zhang Tongxin,ibid

825 Article 14, ROC Constitution

election for national assembly and legislative council, is gradually allowed to be activated, since the KMT needed to collaborate with the local clans and legislative seats were their rewards for cooperation. But this process also witnessed the rise of democratic dissidents using this channel to participate in politics. In 1987, the TPESCR was abolished. Soon after that, a modified People's Organization Act recognized the opposition party's legitimacy. Censorship on media was also abolished in the same year. At this point, a not-so-fastidious assessment would indicate that the democratization of Taiwan had achieved some success.

Jiang Jingguo passed away in 1988, causing the KMT to split. The successor of Jiang was the then Vice President, Li Denghui, who is a local Taiwanese. The other camp of KMT consisted of mostly Mainland politicians. They did not trust Li and accepted his leadership only reluctantly.⁸²⁶ Meanwhile, the oppositions grew their strength and called for more power. It was under these intense circumstances that Taiwan's Constitutional Amendments started.

2.3.2 Messy Constitutional Amendments⁸²⁷

Upon the initiation of Constitutional Amendments, the general feature of Taiwan's ROC Constitutional structure was like this: a nearly formal presidency, whose powers were checked both by the wide countersigning power of EC and approval of LC; mutual veto power between EC and LC; National Assembly electing president, president nominating premier by the consent of LC. The Constitutional Amendment should be debated and passed in the National Assembly. The dual-executive system posed a conundrum for institutional choice: which institution should take the leading role in governing after democratization?

The first stage of constitutional reform was to base the presidency on direct popular mandate. For strategic reasons, as a local Taiwanese, Li would have better odds in a direct election rather than the hostile NA. Thus, he strived to promote direct presidential elections. As a trade-off, the NA, as was controlled by the traditional force of KMT, acquired some powers of authorization on political appointments and started to make policy suggestions.

In the second stage, the E-L structure started to intimate the semi-presidentialism of France, since the presidency elected on universal suffrage, which was a hailed achievement of democratization, called for empowerment to rule. For that reason, KMT sent delegate to France to observe and study from semi-presidentialism⁸²⁸ and intended to transplant it to Taiwan.⁸²⁹ In this round of constitutional amendments, the presidential power was greatly enhanced by acquiring full power to appoint a premier without legislative consent. This means that executive branch will be more independent against legislative power. Moreover, the National Security Council was entrenched in the constitution, with the premier being a member of it and taking orders from president. On the other side, there were also influential compromises

826 Ibid

827 For more historical details, see 刘凌斌, "试论台湾历次“修宪”的原因及影响," *现代台湾研究* 3 (2007): 27-31.

828 The semi-presidentialism system in France featured a strong presidency with wide agenda-setting powers, as discussed in chapter one.

829 See a report from the government think tank of Taiwan, <http://old.npf.org.tw/monthly/00202/theme-039.htm>

made in exchange for the support of DDP. Recognizing the consolidated power of president to appoint the premier, the LY claimed in return the power of a confidence vote to remove the Premier. Also, the executive veto power was undermined after the overriding threshold in LC was diminished to one-half. Nevertheless, as will be discussed later, the inherent institutional discords in ROC Constitution still rendered the whole system problematic. Compromise and negotiation are inherent and positive features of democratic transformation. Nevertheless, if such compromises become too unprincipled that the internal logics of constitutional framework are disproportionately twisted, it may create more problems than solutions.

The third stage was mainly about the abolishment of National Assembly. The NA became more and more unnecessary and its self-benefiting efforts became increasingly annoying to the Taiwanese people. Ultimately, it was abolished. The constitutional powers started to be exercised by the people through referendum. But the legacy of NA still haunts Taiwan even today. The mechanism of referendum has always been at centre of controversy. Though it is no doubt a symbol of democracy, in practice it is highly susceptible to unregulated opportunism. The Referendum Law in Taiwan places quite few cautionary mechanisms to constrain such risks. Quite contrarily, the most recent modification of Referendum Law in the end of 2017 even lowered the voter's age, threshold of agenda-setting and passage (could be as low as 25 %). The political motive to capitalize mass mobilization is so obvious that the threshold is much lower than nearly most democracies.

The outline of constitutional amendments is demonstrated in the following table:

Table 1: Constitutional Amendments in Taiwan: E-L Structures and Powers

	National Assembly	Presidency	Executive Council	Legislative Yuan
Pre-democratization: Formal presidency; Dualistic executive EC-LC mutual veto; NA with real power;	Non-permanent Organ, Elect /recall president Amend constitution Initiative Referendum; Approval on important political appointments	Head of State Commander of army Promulgate laws, issue mandates, countersigned by EC Nominate premier, approved by LC; Emergency measure: determined by EC, subsequent approval of LC	Determine polices Propose bills Send LC resolution back for reconsideration; Accept LC's override or premier resign; Inquired by LC	Approve nomination of premier; Pass laws; Propose bills; Require EC to alter policies; Override EC's reconsideration request by 2/3; Inquire EC
Stage 1: Direct election of presidency; Dualistic executive continued	Became permanent organ Lose election and recall power; Gain consent power on the appointment of Examination and Judicial Department; Gain policy suggestion power to president	Direct Election; Appointing members of Supervision department; No need of Executive Council's countersign in political appointment	Lose countersign power to presidential appointment and other issues	Unchanged
Stage 2: Presidential power expanded; EC's double responsibility established	Approval on LC's impeachment bill on president;	National Security Council entrenched; Appoint premier	Premier appointed by president; Premier as member of National	Vote of Confidence; Impeachment on President; 1/2 could

		without any constraint; Dissolve LC, after LC's vote of confidence on EC	Security Council; Premier resign after LC's confidence bill passed, yet could ask president to dissolve LC; Veto override threshold in LC diminished to 1/1	override EC's veto, previously 2/3
Stage 3: National Assembly abolished; Five powers structure became de facto three powers	Abolished ; Constitutional amendment be passed by referendum Referendum Act allows people to use direct ruling power;	Unchanged	Unchanged	Gain the approval power on political appointment from NA

3. Current Executive-Legislative Structure in Taiwan

Presently, Taiwan has a President who acts as the head of state, a Premier who acts as the head of government, and a typical unicameral legislature.

3.1 Executive

3.1.1 Structure

The president is the head of state. This capacity has certain auxiliary agencies, the most important of which is the National Security Council. It is the sole institution in charge of security policies, which could be a very wide and flexible field by skilful legal interpretation. The council is completely controlled by the president. The premier and relevant ministers are all members of this council and take orders from it. Although it is classified as an "advisory agency" on national security issues, it exerts far more influence on policy-making.⁸³⁰

The government, the Executive Yuan(EY), currently has 12 ministries and some other committees, agencies and commissions. The major platform for policy-making is the executive conference, the participants of which include the premier, ministers

830 For more, see 王茹. "台湾“宪政”变迁中的“国安会”与“总统”权力." *台湾研究集刊* 2 (2004): 52-59. Wang Ru, The National Security Council and the Presidential Power in Taiwan during Constitutional Development, *Journal of Taiwan Studies* 2(2004),52-59

and other relevant personnel. It is summoned and presided over by the premier. The presidency has no institutional influence over the executive conference.⁸³¹

3.1.2 Powers

Officially, the president does not have power over the domestic political agenda. The ROC Constitution seems to recognize the exclusive power of the Executive Yuan in domestic issues by claiming it as "the highest organ of administration"⁸³² and placed the executive conference under the leadership of the Premier.⁸³³ But practically, the President-appointed Premier usually will carry out the President's policy agenda. However, this connection is more political than institutional. It caused detachment between the proposer and the implementer of policy agenda. Institutionally, the President can only affect concrete policy-making by calling referendums, issuing emergency decrees, and managing the National Security Council.

The EC has become the chief legislator in Taiwan by proposing most of the bills. It also has constitutional power to defend itself by vetoing the legislature's resolution, but the power possessed by the legislature of overriding (1/2 majority) makes it nearly an atrophied power.⁸³⁴ Similar to the veto power is the power to ask the president to dissolve the legislature after a vote of no confidence.⁸³⁵ This is a reactive power that neither the president nor the premier can proactively initiate to break executive-legislative gridlock. The legislature can initiate and pass confidence vote by quite moderate threshold (1/3 and 1/2 respectively). After confidence vote is passed, the president can decide whether to dissolve legislature by consultation with the chairman of legislature.

3.1.3 Personnel

The basic constitutional structure of ROC regime in Taiwan has a wide range of constitutional implications, among which the phenomenon of "outsider politics" is particularly influential on the functioning of executive power. Whilst the presidency has always been occupied by political leaders of major parties, the premier is frequently appointed from outside the inner circle of party politics. Social elites such as military generals and university professors have been appointed as premiers. The reason may not be to introduce the versatility of expertise, but rather to ensure the control of the President. As mentioned, the premier is not determined by legislative election. He or she does not have solid institutional basis like in parliamentary system, but only the favouring of president. Meanwhile, the ROC constitution also requires the premier to directly shoulder responsibility to the legislature, as the mechanism of confidence vote has shown. The result is that a premier will usually have rather passive and cautious governing style, which will be discussed with more details in later section.

831 ROC Constitution, *ibid*

832 Article 53, ROC Constitution

833 Article 58, *ibid*

834 Article 3, Additional Articles of ROC Constitution

835 Article 2, Additional Articles of ROC Constitution

3.2 Legislature

3.2.1 Structure

Taiwan now has a purely unicameral legislature after the NA was abolished.⁸³⁶ The Legislative Yuan has 113 lawmakers, all directly elected, from two forms of constituencies. Seventy-three seats are elected in local constituencies by first-past-the-post rule. Thirty-four seats are elected in the whole Taiwan as a grand constituency by proportional representation, with citizens voting for the party-list rather than individual candidates. The remaining six seats are reserved for the aboriginal ethnical minorities. The legislature contains eight committees, whose functions correspond with the major functions of the executive departments. Learning from the US, the LY subsidizes lawmakers to hire personal assistants, so as to enhance law-drafting competence. Nevertheless, it has been observed that this public subsidy has been used to benefit the personal connections, such as relatives and friends, of lawmakers.⁸³⁷

3.2.2 Powers

First, unlike Hong Kong, discussed in the previous chapter, the Taiwanese legislature has real and effective agenda-setting power. Lawmakers not only review and approve bills, but also make their own initiatives, the scope of which receive no particular restrictions compared with government bills, except the limitation on budget bills and budget amendments.⁸³⁸ Besides, the legislature also has final approval power on presidential actions in diplomacy, war and emergency. Second, the legislature enjoys approval power over political appointments of the other three Yuans and the general attorney. Third, the legislature actively exercises their power to supervise the executive by inquiry, legislative investigation, impeachment and no confidence vote.⁸³⁹ Nevertheless, besides the unusual measure of impeachment, the supervisory power of the legislature hardly reaches the presidency. Finally, there is a very controversial stipulation about the legislature's power to "decide by resolution.....critical national issues",⁸⁴⁰ the intellectual origin of which can be traced back to the communist tradition, as mentioned in the first chapter. This seeming miscellaneous clause may be interpreted as giving omnipotent power to the legislature, thus encroaching upon the power of the other branches.

3.2.3 Personnel

The LY is comprised of mainly professional party politicians. Many of them are from either the local elections during authoritarian rule or street activists during democratization. Some are KMT party cadres that adapt themselves to this new rule of politics. A unique and crucial role is the President of LY, who is supposed to uphold legislative order.

836 For the basic structure and power of Legislative Council, see its official website, http://www.ly.gov.tw/02_introduce/ly_introduce.jsp

837 See media analysis <http://www.ccw.org.tw/p/14855>

838 Article 70, ROC constitution

839 About the powers of the legislative Yuan, see Article 62-73, ROC Constitution

840 Article 63, ROC constitution

3.3 Relevant Institutions

3.3.1 Party system

Currently there are two major parties in Taiwan, the KMT and the DDP, forming two political camps. The basic distinction is that the former sticks to a one China policy (by the regime of ROC rather than PRC), while the latter advocates for Taiwan's independence. There are also small parties supporting each side. As discussed, the parties in Taiwan all suffer from weaknesses of internal coordination. Besides the historical reasons, the electoral system⁸⁴¹ of Taiwan also weakens party discipline and control over local factions.

3.3.2 Referendum

As a result of rounds of constitutional amendments, now the constitution in Taiwan empowers the people to initiate, approve and veto policies and laws, including Constitutional Amendments.⁸⁴² It could be used by the president to bypass legislative process and impose his or her own policy agenda. Concrete procedures were established by the Referendum Law in 2004. There are three ways to initiate a referendum.⁸⁴³ First, a group of citizens (no less than 0.5% of the total registered voters for the most recent presidential election) can initiate a referendum. Second, the legislature can send bills involving "important policies" to referendum. Third, when the President deems that the state is under external threat, which will pose the risk of sovereignty change, he or she could initiate a referendum on national security issues. So far, there have been 12 referendum bills that have been proposed, covering a wide range of issues⁸⁴⁴ All of these proposals either failed in format or were vetoed because less than 50% of Taiwanese voters participated in the process. As will be analyzed later, most of them were used as political tools by the president to set agenda unilaterally.

3.3.3 Supreme Court

The Supreme Court of Taiwan has a passive ability to break executive-legislative deadlock by constitutional explanation. The justices are appointed by the President, upon the consent of legislature. Nevertheless, their term is not permanent, but eight years, and they cannot be reappointed consecutively.⁸⁴⁵ Both the executive and the legislature can apply for constitutional explanation on disputed clauses.⁸⁴⁶ The Supreme Court tends to explain constitutional issues in a highly cautious manner, always attempting not to take clear side.

841 Which will be explained in coming section.

842 Article 2, Referendum Law

843 Article 9,10,16,17, *ibid*

844 See "Statistics of Referendum ", Central Committee of Election of ROC,
http://bulletin.cec.gov.tw/Communique_QueryResult.aspx?ID=2

845 Article 5, Amendment of ROC Constitution

846 *Ibid*

4. Explaining Executive-Legislative Pathologies: Institutional Dimension

The governance system of Taiwan suffered from pathologies caused by constitutional hybridity of parliamentary, presidential and some legacy of Leninist elements. Chinese tradition also has had implicit influences. This section will show that the unclear authority and responsibility in agenda-setting resulted in an ineffective and unconstructive executive branch, while the disproportionate veto playing mechanisms in legislature deteriorate the ineffectiveness of policy-making. These institutional pathologies result from the tensions brought about through the constitutional hybridity of institutions drawn from different traditions

4. 1 Poor Governance of Taiwan

Policy-making in Taiwan suffers from inefficiency and indecisiveness. The average legislative success rate in Taiwan is only about 50%, far lower than the normal success rate in both typical presidential and parliamentary systems.⁸⁴⁷ Moreover, the major and prioritized government bills receive a more pessimistic passage rate. Only slightly over 10% of these bills are passed in Congress.⁸⁴⁸ While the executive sometimes accuses the legislature of obstructing policy-making, the legislature could also equally argue that many government bills are carelessly drafted and insufficiently consulted. Even the pro-government think tank admitted this fact. The media claims that congressional efficiency in Taiwan is the "lowest" in Asian Democracies.⁸⁴⁹

The impasse of policy-making harms Taiwan. Important economic policies cannot be settled. A typical example is the policy to build more nuclear plants. It has been at the centre of controversy for more than a decade, and there is still no consensus on a clear direction. Perhaps worse, political deadlocks make public affairs hysterically politicized. For instance, in the Sun Flower movement against economic treaties with Mainland China, university students occupied the Legislative Yuan. But when journalists asked about their concrete opinions on the treaty, more than half of the interviewees said they did not know the exact content of the treaty but only heard that it was bad for Taiwan.⁸⁵⁰

In this type of political atmosphere, it is no wonder that anyone in the capacity of the President of Taiwan has always found it difficult to govern effectively.⁸⁵¹ The constitutional arrangements in Taiwan make the government vulnerable in the face of politicized obstruction.

847周育仁,《强化行政与立法部门沟通协调机制之研究》,国家发展委员会,
<http://www.ndc.gov.tw/m1.aspx?sNo=0058926>; Yunren Zhou, <Research on Executive-Legislative Communication and Coordination Mechanisms>, National Development Council. The council is the official think tank of ROC government.

848 Ibid

849 Ibid

850 <http://www.storm.mg/article/22685>

851Copper, John F. "Taiwan's failed president." *Asian Affairs: An American Review* 34.4 (2008): 179-192.

4.2 Divided Government and Gridlock-breaking

"Divided government," meaning the executive and legislature are occupied by different and competing parties, is inevitable in a system with separately elected president and legislature.⁸⁵² But this may not be the real problem, which should be the insufficient and ineffective mechanisms for effective political bargaining and deadlock-breaking,

E-L confrontations are frequent in Taiwan. In 2000, Taiwan witnessed the first divided government. Chen-Shui Bian, the leader of the major opposition party, the Democratic Progress Party (DPP), won 39.3% of the vote and became ROC's President. However, this victory was largely attributed to a split in the KMT. Two senior politicians of the KMT competed with each other in the presidential election and, as a result, split the pro-KMT votes, winning 58% of votes in total but both failing to secure enough votes for an individual win.⁸⁵³ Meanwhile, the KMT held a predominant majority in LY. In the congressional election the following year, the pro-KMT coalition still occupied the majority in the LY.

In the face of a divided government, this new democratic regime was carefully trying ways to build stable and effective governance. Chen at the beginning was not so confident as to defy the legislative majority. It seemed that he decided to show deference to legislative majority, appointing a non-mainstream KMT politician as premier. But he quickly replaced him with a DDP member, thus killing the possibility that a constitutional convention of basing executive power on legislative majority could be forged. During his two terms of eight years, Chen changed Premiers five times. All of them were from the DDP, while in Congress the DDP was constantly in the minority. Of course, a minority Premier could not effectively govern. From the very beginning, the administration of Chen Shuibian had featured weak policy capability and frequent conflicts with Congress, some of which amounted to constitutional gridlocks, such as the nuclear plant policy that will be discussed later.

Such gridlocks are hard to break under the ROC Constitution, which combines some interactive measures that are ad hoc from both the presidential and parliamentary systems, but may fail to combine them both constructively. For instance, the parliamentary practices of confidence vote and legislature dissolution do not work effectively in breaking deadlocks when an elected President can just unilaterally appoint a new premier,⁸⁵⁴ while the lawmakers may face the risk of failure in a re-election. This measure was seldom used sincerely (sometimes used only to make a symbolic threat against the government). Also, the veto power of the Executive Yuan, which was supposed to help forge balances between the two branches, is atrophied after the 1997 Constitutional Amendment that lowered the overriding threshold from two-thirds to one-half. This easy override may encourage legislators to challenge the executive rather than engage in constructive bargaining towards mutual-compromise. These odd mismatches between purpose and motivation help to explain why political deadlocks are hard to be untangled, and also why they emerge in the first place.

4.3 Separation of Executive Power and Ambiguous Accountability

The dual-executive structure in Taiwan undermines the unity and effectiveness of the agenda-setting power and leads to ambiguous accountability. In a nutshell, the

852 Shugart and Carey, *ibid*

853 See the official election statistics, <http://web.cec.gov.tw/ezfiles/0/1000/img/2/2000.pdf>

854 Article 3, Additional Articles of ROC Constitution

President owes policy promises to the people through direct election, yet has no real constitutional power when making policies. The Premier has been conferred with the main policy-making powers, yet he or she is often caught in a dilemma between presidential control and legislative accountability, therefore structurally incentivised to be rather passive in governing, not to mention that premier could also be a scapegoat in the political struggle due to such constitutional design.

The President is expected by society to be a dominant leader for the democratic mandate. Yet, the presidency is not equipped with sufficient powers. First, the Premier's loyalty to the President is only on an individual rather than institutional basis. Disobedience is not uncommon. Second, even if the Premier obeys the President, the divided executive and presidency's institutional detachment to policy-making naturally leads to uncoordinated opinions and information asymmetry. For instance, the previous President Ma opposed his Premier's proposition on the policy of labour salary. He expressed his opinion by publicly supporting the labour minister, who also dissented with the Premier on this issue.⁸⁵⁵ The authority of the Premier was therefore seriously harmed. Third, the President is more apt to be politics-oriented while the Premier is more technocratic-like. But the President, who is better-equipped in marketing policies to the legislature, is not constitutionally empowered to do so. There is no unilateral mechanism, like presidential proclamation in the US, to call for public support either. On the other hand, even if President supports the Premier's policy propositions, the political consideration may force him or her to keep a distance or sometimes even criticizing gesture, so as to capitalize popular reaction for electoral benefit. But this strategy again sacrifices the Premier.⁸⁵⁶ Under such institutional framework, executive unity, policy coherence and governance efficiency are always sacrificed for political opportunism. While to a certain degree this is an inherent phenomenon in every polity, the degree in Taiwan is especially high, not to mention there is very few specialized mechanism to restrict the impact of such problems.

Lacking real instruments, the president often resorts to extra-procedure political means to circumvent normal executive-legislative proceedings. First, the powers of the National Security Council may be manipulated to influence certain policies. This is done first by bold interpretation of security powers, thus raising serious rule of law concerns.⁸⁵⁷ Also, the president can use security issues as leverage to influence other policies. Second, the president may establish informal coordinative platforms like the joint meeting of president, premier, legislature president and party leaders (in Taiwan the president is not necessarily the leader of his or her party).⁸⁵⁸ However, these meetings are neither transparent nor effective, as decisions from an informal institution are not binding. Empirical studies have shown that the president's

855 For the examples, see 蔡荣祥, 陈宏铭,《總統國會制的一致政府與憲政運作：以馬英九總統第一任任期為例》,东吴政治学报, Vol 30, No.4, RongxiangCai, Hongming Chen,<Unified Government and Constitutional Operation in President-Parliamentarism during the First Term of President Ma Ying-jeou in Taiwan>,

856 蔡荣祥, 陈宏铭, ibid

857 Such as making decisions about the ban on import of US beef in the Council, and asked the ministry of foreign affairs to announce it,

<http://www.boxun.com/news/gb/taiwan/2012/03/201203040120.shtml>

858 周育仁, Yuren Zhou, ibid.

coordination efforts in such platforms do not make a difference to the passage of bills.⁸⁵⁹ Third, the president may bypass the premier and give direct orders on policy making to ministers, or issue very concrete directions to the cabinet. However, this may raise concerns of encroachment upon the cabinet's power. As already analysed, constitutionally speaking, the president of ROC does not have direct power to command the bureaucracy.

Under such circumstances, it is difficult to identify the appropriate office to shoulder executive accountability. The premier may self-check as a puppet, while the president may evade responsibility by making the premier a scapegoat, which only confirms premier's worry. After all, the president's power to appoint a new premier is not restricted. For instance:

"during the early stages of Ma's presidency, he thought the 'functional division of power' was the appropriate formula between the president and the premier. Ma then carved out the bulk of state affairs for the prime minister to take charge, while constrained himself to security matters.....This resulted in an uproar from the people who did not know why they had elected a president who constrained himself and left everything to a prime minister whom none had expected to be in that position when Ma was elected."⁸⁶⁰

Under such circumstances, the legislature is also unable to hold the President accountable. The vote of no confidence can only replace the Premier. The President could easily appoint a new Premier and stay secure, according to the ROC Constitution, as mentioned above.

4.4 Negative Agenda Control and Party Caucus Negotiation

The Taiwanese government does not have the usual institutional agenda-setting advantages, such as an exclusive policy jurisdiction or timetable-control measures. But this shortage is mitigated by timetable-control rule that each legislator's speech duration needs to be pre-determined by the President of the Legislative Yuan, thereby eliminating the threat of filibustering (but not able to regulate violence).⁸⁶¹ Generally, Taiwan's legislative procedure is very even-keeled for any side. The reason for this may be the early origins of the ROC Constitution. It seems to be a trend that constitutional agenda-setting mechanisms are a recent institutional creation after WW2, such as in the Constitution of Germany and the Fifth Republic of France. Upon the drafting of ROC constitution, such models had not emerged and thus could not be copied.

On the other side, legislators in Taiwan, unlike Hong Kong lawmakers, have the power to initiate bills. Yet empirical studies show that their positive legislation proposals are only a minor share in the overall legislative output.⁸⁶² The government remains the major bill-proposer. An exceptional influx of private bills can be

859 Ibid

860 Yu-Shan Wu and Jung-Hsiang Tsai, Taiwan: Democratic Consolidation under President-Parliamentarism, in Robert Professor Elgie, Sophia Moestrup, and Yu-Shan Professor Wu. *Semi-presidentialism and Democracy*. Palgrave Macmillan, 2011, page 183-185

861 <http://www.chinanews.com/hb/2010/08-26/2493538.shtml>

862 陈宏铭,《半总统制下总统的法案推动与立法影响力:马英九总统执政时期研究》,《東吳政治學報》/2012/第三十卷第二期/頁1-70; Hongming Chen, Presidential Promotion and Influence on Legislation: the Ma Yingjiu Presidency, *Dongwu Political Science Journal*, 2012, Vol 30, No 2, 1-70

witnessed at the end of a parliamentary term, when politicians have the urgent need to maximize electoral advantage by introducing and publicizing their initiatives.⁸⁶³

Nevertheless, it is not true that there is no agenda-control mechanism in Taiwan. Though positive agenda-setting mechanisms are weak, negative agenda-control mechanisms do exist. The main platform for this action is through the procedure committee of the Legislative Yuan.⁸⁶⁴ The committee is comprised of members according to the proportion of seats in each party. It could be used to obstruct government's bills by voting to eliminate or suspend a bill. Unless the executive party can ensure a stable and predominant majority in the committee, it may always face the danger of bills being suspended. Moreover, the committees in LY all have two chairmen, usually one from the majority party and one from the main opposition party.⁸⁶⁵ They fulfil the duty of chairman in turn, which means obstructing the agenda of their opposition in turn. A new term of the legislature will not inherit remaining bills from the last one, with the suspended bills being erased totally. This is the reason why many government bills are kept out of legislative agenda before debate and vote.⁸⁶⁶

For bills entering into the legislative agenda, the mechanism of "party caucus negotiation" could be a special veto playing mechanism, which equips the minority with disproportionate veto playing power. It is an imitation of the "party group (Fraktion)" mechanism in Germany.⁸⁶⁷ The parties are allowed to establish a caucus in the legislature with a minimum requirement of three seats.⁸⁶⁸ This negotiation can be easily initiated in three ways. After first reading, the president of the legislature could send the bills to negotiation upon the request of parties. Also, in plenary session a minimum amount of ten legislators' proposal could send a bill to negotiation. Lastly, committees could decide to send bills to negotiation when there are heavy disputes. Bills under party caucus negotiation are decided by one caucus one vote rule, by unanimous rule. This disproportionately amplifies the veto playing power of minority legislators, and undermines the democratic representativeness as shown by popular votes. The astonishingly low threshold to form a party caucus, plus the unanimous decision-making rule, enables each party, regardless of seats, to become a strong veto player. Empirical studies show that party caucus negotiation, which was supposed to be an exceptional measure to discuss controversial bills, has undermined the normal legislative process and become a predominant mechanism for legislation.⁸⁶⁹ A small number of legislators could use that to paralyze a widely-supported initiative. The

863 Ibid

864 邱访义, 李志伟, 《立法院消极议程控制的逻辑与经验分析: 1993-2011》, 東吳政治學報 /2013/第三十一卷第四期/頁 1-70 ;Qiu and Li, The Logic and Experience of Negative Agenda-control in Legislative Yuan:1993-2011, Dongwu Political Science Journal, 2013, Vol 31, No 4, 1-70

865 Ibid

866 Ibid

867杨昆福. "台湾“立法院”党团协商制度研究." (2012).

868 Chapter 12, The Operation of Legislative Yuan Law,
<http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0020058>

869 Matsumoto, Mitsutoyo. "Policymaking in Taiwan's Semi-Presidentialism: A Case Study of the Economic Cooperation Framework Agreement (ECFA)." *Journal of Contemporary East Asia Studies* 4.2 (2015): 37-65.; Huang, Shih-hao. "How Formal Parliamentary Negotiation Affects Policy-Making: Evidence from Taiwan." *Parliamentary Affairs* (2018).

delay and indecisiveness in party caucus negotiation is a major reason for legislative inefficiency in Taiwan.⁸⁷⁰ In contrast, its German prototype, the "Council of Elders (Altestenrat)" consists of delegates from party groups in proportion to the size of each party in Parliament and they make decisions by majority rule⁸⁷¹, thus replicating the representative structure of the whole legislature, without twisting democratic mandate.

4. 5 The Influence of Electoral System

Taiwan's legislative election produces too many partisan veto players and weakens party discipline. For a long period after democratization, Taiwan adopted the system of a single non-transferable vote (Known as SNTV). This means that in a legislative election, each voter casts one vote for one candidate in a multi-candidate race for multiple offices. Posts are filled by the candidates with the most votes. Thus, in a three-seat constituency, the three candidates receiving the largest numbers of votes would win office.⁸⁷²

This system is similar in nature to Hong Kong's electoral system of proportional representation which encourages radicalism and extremism. Under such a system, one candidate does not need a large number of votes to be elected; a group of loyal supporters is enough to win a seat. On the other side, unlike Hong Kong's election in which candidates are nominated in a party's list, under SNTV candidates do not need to first enter into his or her own party's list. Even though recently this system has been reformed, its negative effects could not be eliminated immediately: First, intra-party competition is still as fierce as inter-party competition, which leads to the boom of factionalism. The lower threshold and cost of elections means a lesser degree of help or approval from the whole party machine, and thus, weaker party discipline. Second, local patronage still dominates elections. Legislators and local elites collaborate to maximize rent-seeking, as already mentioned. The special interests groups impede consensus on national agenda.

5. Explaining Executive-Legislative Pathologies: Legal Dimension

5. 1 Popular Sovereignty and Referendum Act

The principle of popular sovereignty in Taiwan's original constitution, a legacy from previous constitutional hybridity, did not end with the abolishment of the National Assembly in 2005. Its sovereign-like power, as discussed above, was supposed to be transferred to the whole of people by the Referendum Law. Meanwhile, the still hybrid system in Taiwan seems to show that a "parliamentary sovereignty"-like principle may better establish clear political accountability.

The referendum mechanism discussed above echoes Linz's observation that presidents may use plebiscites to gain arbitrary power in deciding national agenda.⁸⁷³ The referendum law gives special advantages to the president in initiating a

870 Ibid, 323

871 See its official website, https://www.bundestag.de/htdocs_e/bundestag/elders

872 Ibid, Central Election Committee

873 Linz, ibid

referendum. First, the pure citizen initiative is in fact the façade of party initiative,⁸⁷⁴ since parties are most effective in organizing and mobilizing people. Second, the legislature could initiate a referendum, but has to use referendum to put a final decision in a concrete bill that is difficult to achieve consensus in legislative process. Third, the president can initiate a referendum and such presidential initiative has few constraints. No prior procedural conditions are imposed. The only requirement is a joint decision by the cabinet, which is also under the control of president. No coordination and organization costs exist compared with citizen initiative. The only constraint is a vague condition of "external risk that may lead to change of sovereignty."⁸⁷⁵ Nevertheless, this clause could easily be interpreted to encompass a referendum issue, especially for a regime like ROC in Taiwan that is overshadowed by the increasing regional and global influences of PRC.

The first referendum in Taiwan, the "3.20 Referendum" is a vivid case depicting how the president pushed the limits of referendum power. In 2004, Chen proposed a referendum about purchasing US missiles to strengthen Taiwan's defence against PRC China. He set the referendum in the next presidential Election Day, to maximize his electoral advantage. The justification of the need of this referendum was that PRC China had missiles targeting Taiwan; thus, this situation was creating a danger of "change of sovereignty." But many find this explanation far-fetched since strategic weapon installation is far from being an immediate threat. If that were the case, many countries are under constant mutual-threat on sovereignty in this era of military build-up. After all, professional issue like military strategy is also not suitable for popular decision. Opponents criticized Chen for manipulating this mechanism to achieve his hidden agenda of electoral campaign, while proponents claimed that the president has discretion to make political judgments about national security, which is out of the jurisdiction of law.⁸⁷⁶ Though the referendum was ultimately vetoed because voter turnout was too low, the method Chen used was a demonstration of unchecked presidential power, especially considering the strict conditions on referendum initiation by the other two measures.

Previously, the threshold of 50% voter turnout for the referendum may curb the abuse of the referendum process, but it cannot curb the corresponding effects of over-politicization and over-mobilization. Taiwan parties increasingly use referendum proposals as propaganda for their personal political goals, since they will not be voted upon anyway and no one will be embarrassed. This undermines deliberative democracy by stirring people's emotions with over-simplified expressions and polarized perspectives of inherently complicated policy issues.

Just in 2017, the Referendum Law was further modified, the theme of which was exactly loosening institutional constraints on the use of referendum. First, the age limit of voter was reduced from 21 to 18. Second, the threshold of popular triggering decreased from 5% of voters in last general election to 1.5 %. Third, the final passage thresh was reduced from 50% to 25%, as long as concurring vote is more than dissenting vote. According to this new set of rules, in theory as few as 1/8 of voters could win a referendum and make decisions on highly important policies.

874 Besides the presidential initiative of Chen in 2004, all other referendum bills were proposed by parties in the name of citizen initiative.

875 Ibid, Referendum Act, Article 17

876<http://news.eastday.com/eastday/news/xwzxzt/node5085/node10104/node10114/node10116/userobject1ai57024.html>

5. 2. The nature of law: the Nuclear Plant Case

Taiwan is notably influenced by German law. Vorbehalt des Gesetzes is a permeating principle in administrative law.⁸⁷⁷ Administrative action needs to have a legal basis from legislation. At the constitutional level, the controversy is about the scope and effects of law.

The most prominent example is the constitutional deadlock that occurred over the "4th Nuclear Plant Budget."⁸⁷⁸ The facts surrounding this issue are not complicated. Chen ran his presidential campaign with a promise of denuclearization. However, before the campaign, the KMT-dominated legislature had already passed the budget for the 4th Nuclear Plant of Taiwan to ensure power supply. After taking office, Chen strived to terminate this construction and a constitutional crisis arose. The legislature, controlled by KMT, was furious about Chen's decision and reacted fiercely. It initiated an impeachment proceeding against Chen. Also, a resolution was passed to restart the construction, which was criticized as encroaching into the domain of the executive power. In return, the DPP reiterated its determination and threatened with a referendum on this issue. Finally, the executive asked the Supreme Court for an interpretation of constitution.⁸⁷⁹

The issues at stake include, but are not limited to the following: the nature of the budget act, the separation of powers between the executive and legislative, the dispute resolution between the executive and legislative, etc. The court's interpretation was more of a cautious reconciliation rather than a clear determination. It recognized that the budget bill is comparable in form to a statute. But its nature is "law of measures (Massnahmegesetz)",⁸⁸⁰ "in light of its differences from an ordinary statutory bill in terms of contents, regulatory target, and resolution process."⁸⁸¹ The budgeting system is a constitutional mechanism for the executive to realize its policy goals. Therefore, the government inevitably has "flexibility of budget execution." It could exercise discretion to reduce budgetary expenses on issues that are within the domain of the executive function and power. But for "a major policy change that involves the withholding of a statutory budget, based upon the constitutional purpose that the Executive Yuan shall be responsible to the Legislative Yuan, and in respect of the right of the Legislative Yuan to participate in the decision-making process regarding critical national issues, in accordance with Article 3 of the Amendment of the Constitution," the executive does not have this discretion. Its change of policy and budget expenses must be submitted to the legislature for consent.

The court suggests that the government seek the approval from the legislature by asking the LY to reconsider the issue. If rejected by a second vote, the Premier can resign and ask the President to dissolve the LY and hold a new election. Eventually, the executive and the legislature (which in fact means DPP and KMT) reached a

877 陈新民. 德国基本法对台湾公法学的影响[J]. 中德法学论坛, 2009; Chen Xinmin, The Influence of German Basic Law on Taiwan's Public Law, Sino-German Law Forum, 2009

878 See J.Y. Interpretation No.520,

http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=520

879 Ibid

880 Generally, this term means the normative rules that initiated by the executive to help implementing policies, but need the form of legislation, such as the budget bill. See Maurer, Allgemeines Verwaltungsrecht, Chapter 4.

881 Ibid

temporary agreement and the Premier announced that the construction of the 4th plant would be resumed.

The root institutional cause of this crisis, besides the highly obvious political motive behind each side, is exactly constitutional hybridity. As discussed in the Hong Kong chapter, constitutional hybridity could result in serious institutional incompatibility and distortion. The ambivalent nature of ROC constitutional model does not offer a clear guidance on E-L relations, be it interactive model of US presidentialism, or the fusion of powers model of Westminster system. Even compared with other semi-presidential systems, the ROC constitution is still exceptionally vulnerable in the face of E-L gridlocks. Both branch could assert its decisions as authoritative. The direct election of president no doubt give huge democratic mandate to it, while the legislature, given those interactive mechanisms enabling it to override executive dominance, could also self-regard as a true representative of the people. The confidence vote and dissolution of legislature cannot work with due effectiveness simply because source of government power is not legislative authorization therefore even a new election to fresh democratic mandate could not forge a clear and effective governing force. It has long been suggested that this hybrid system could not work smoothly and a constitutional amendment to fine-tune inherent institutional logic is highly necessary, either to move to presidentialism or parliamentarism.

6. Conclusion

The political system of Taiwan is profoundly shaped by a blend of different constitutional traditions. The manners and effects of such hybridity are compatible with the main themes identified in chapter two on the general dynamics triggered by constitutional hybridity, such as the regime inclusiveness, legitimacy tensions, governance building and political opportunism.

First, a Leninist ruling party could employ formal democratic institutions to perform inclusive function, but the regime was also transformed by this mixture. The KMT not only used formal constitutional framework to offer formality of legitimacy, but also gradually opened certain electoral gates to collaborate with local clans. This was a strategy of sharing power with other social forces. The notorious “black money politics” in Taiwan are deep-rooted in this historical origin. As discussed in this chapter, election partially became a method of political spoils system in Taiwan, especially in the 1970s. The legacy of this practice still haunts Taiwan today, though the inner working of how political parties and local forces (clans or even mafias) made deals cannot be known in full detail, the references in this chapter indicates that it is general a social consensus that such influence indeed exists. This shows how constitutional hybridity, if not complying with decent principles, may distort even democratic traditions, and Taiwan is certainly not the only case showing this dynamic.⁸⁸² But on the other side, such hybridity of Leninist control and democratic formality could also trigger leeway for democratic transition. It is exactly using the channel of local elections that the first generations of democrats in Taiwan earned their reputation and political capital. Noticeably, as is also mentioned briefly in this

882 For instance, see Hadiz, Vedi R. "The rise of neo-Third Worldism? The Indonesian trajectory and the consolidation of illiberal democracy." *Third World Quarterly* 25.1 (2004): 55-71.

chapter, younger generation of KMT politicians also deliberately used electoral channel for self-promotion, which echoes the proposition put in chapter 2 and chapter 7 that even within authoritarian traditions internal competition could be harnessed as a positive dynamic for political reform.

The Leninist tradition of centralized power control also has resonance even after democratization. The case of National Security Council is an example of how the presidency strategically used a coordinative institution to circumvent the formal powers of government and legislature. As discussed in this chapter, its origin was to facilitate the KMT's substantial control on policy-making over the whole state apparatus. Even after democratization, this institution is still used to strengthen the centralized power of the presidency. This pattern of power play is highly similar with the rise of leading group mechanism in People's Republic of China, especially in recent times. This similarity demonstrates that both the PRC and ROC polities are, to a certain degree, under the influence of the Leninist tradition.

Second, after democratization in 1988, the clash between parliamentary and presidential logics resulted in ambiguous political responsibility and ineffective law-making procedures, a result of legitimacy conflicts between the two modes of constitutional design. Rounds of constitutional amendments all featured intense negotiation and compromise, the result of which was a highly hybrid political system. As analyzed, neither the presidency nor the cabinet government led by a prime minister could be fully expected to exercise decisive leadership. There are serious discussions going on in Taiwan all the time that the whole constitutional framework should be reformed to become either pure presidential or parliamentary system. This suggestion makes sense. It is only once there is an effective governing force effective that the lines of political responsibility become clear. The dual-executive structure that twisted executive-legislative relations had resulted in non-effective governance, which is particularly dangerous for transitional polity because it usually is both a product and a catalyst for irresponsible political opportunism, as shown in the Taiwan case. Worse still, when there is not effective governing force, it is also technically difficult to identify responsibility, since each camp or institution could easily deny their role in reaching the final decision, amounting to a negative cycle.

This ambiguity of authority also leads to serious legal disputes and constitutional crisis. As the section of legal analysis has shown, within the constitutional framework of Taiwan the use of referendum and the president's power to abolish major policies passed by legislature have already caused massive controversies. The rise of the referendum mechanism, besides being partly due to the opportunistic political consideration to expand personal powers, is also a reflection of the reluctance of politicians to shoulder direct political responsibility. Therefore, they sometimes choose to give up their representative role and ask the people to make decisions, so as to be free from accountability. The 4th Nuclear Plant case shows that constitutional hybridity in Taiwan has led to inherent vagueness of the boundary and nature of powers, that even the supreme court could not give a clear-cut judgement from pure legal perspective.

The law-making mechanisms within legislature is also plagued by the unhealthy compromise through constitutional hybridity. The transplant of German party group negotiation mechanism cannot play out its supposed function because its major decision-making rule is changed from majority rule to unanimous vote, an arrangement that make meaningless the democratic representativeness of each party

formulated from elections. This excessive veto power of even smallest legislative parties is a crucial reason for the ineffectiveness of policy-making in Taiwan.

Third, though the Chinese tradition is not at the forefront of the forging of major institutional structures, it permeates into many aspects of the exercise of executive and legislative powers, thus amounting to a crucial element within constitutional hybridity.. The anti-partisan spirit of Chinese tradition hardly died out, even in a democratic Taiwan. As this chapter has observed, the elected executive leaders and legislative representatives exhibited clearly different mind-sets and strategies from the typical individualism-based perception of competitive party politics. Executive leaders and lawmakers almost always use non-partisan or even non-individualist terms to make their argument. For instance, it was recorded that during the discussion of the constitutional amendment towards semi-presidentialism in 1996, a rationale that the then president Li Denghui offered to ease the concern that expanding presidential power (appointing prime minister without legislative consent) may endanger democracy was exactly that he would represent the common will and common interests of Taiwan people.⁸⁸³ Similarly, when Ma Yingjiu was in office of presidency (2008-2016), the vision of “all people president”(全民总统) he put up may also reflect the Chinese tradition of pursuing moral authority beyond partisan basis, besides the realpolitik consideration to capitalize on his high popularity and circumvent opposition from both his and other parties. The anti-partisan tradition from time to time has been utilized by politicians as a tactic to facilitate their power. In addition, the meritocratic orientation of Chinese tradition can also be felt in Taiwan. As analysed in this chapter, the president often appoints outsiders to serve as prime ministers, many of whom are former scholars. The academic credential of Taiwan presidents is also exceptionally high, among the four presidents after democratization, three have doctoral degrees from famous universities in the west. Li Denghui had a PhD of economics from Cornell. Ma Yingjiu had a JSD from Yale. Cai Yingwen graduated from LSE with PhD on political science. With all these being said, power centralization remains a strongest Chinese tradition and other elements could be deliberately employed to serve this purpose. As reviewed and analysed in the sections of constitutional amendments, the relevant political actor’s hidden motif of power expansion was always disguised and justified by these Confucian values. This fact is compatible with the proposition in chapter two that constitutional hybridity is structure that is more susceptible to grow political opportunism.

883 Ling, Lily HM, and Chih-yu Shih. "Confucianism with a liberal face: the meaning of democratic politics in postcolonial Taiwan." *The Review of politics* 60.1 (1998): 55-82.

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