1981: EMBRYONIC BUT INCHOATE DESIGNS FOR A CONSTITUTIONAL COMMITTEE

Author:
Liu Songshan, Professor, East China University of Politics and Law

Translator:
Keith J. Hand*

One part of the history of the design of constitutional supervision systems for the 1982 Constitution that attracts attention is the discussion on establishing a constitutional committee. This committee could not be established in the end. Nevertheless, the term "constitutional committee" has the ability to stir people and make them daydream to such an extent that both contemporaries and later generations have attached unusual importance to that portion of the discussion. Because of this, some historical materials have been continuously revealed. Mr. Xiao Weiyun, who participated in the drafting of the 1982 Constitution, recalls that at the time, "many comrades proposed the establishment of a specialized institution such as a constitutional court, a constitutional committee, or a court to ensure enforcement of the Constitution."[1] Liu Zheng, the former Vice-Secretary of the National People's Congress Standing Committee [hereinafter NPCSC],** has written articles analyzing several different opinions on establishing a committee from the time.[2] In his "History of the Constitution of the People's Republic of China," Mr. Xu Chongde also recorded the exact text of some briefings from the constitutional revision period that reflected various opinions on a constitutional

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** **Translator's Note**. Except where primary source materials are quoted directly, National People's Congress and National People's Congress Standing Committee have been abbreviated in the text of this translation.

committee that were discussed. However, the specific process of designing a constitutional committee, and in particular some important details and background, have not been revealed or analyzed further until now. By following and analyzing these issues, we can provide ourselves with a new and deeper understanding of the true circumstances of those discussions, whether there is actually space for a constitutional committee in China, and the kind of constitutional supervision system that China actually can or should establish.

I. Timing, Designers, and Proposals in Preliminary Discussions on a Constitutional Committee

The 1982 revision of the Constitution, from the approval of the Revision Committee Name List at the third meeting of the Fifth National People's Congress [hereinafter NPC] on September 10, 1980, to the deliberation and adoption of the new Constitution at the fifth meeting of the Fifth NPC on December 4, 1982, lasted nearly two years and three months. At that time, the Committee on Constitutional Revision established a Secretariat that was responsible for concrete work. The Secretariat was formed and commenced work on September 17, 1980. During this period, when were tentative ideas for a constitutional committee proposed, and who developed them? What types of proposals did the designs involve?

According to the recollection of Mr. Xu Chongde, who was a staff member of the Committee on Constitutional Revision Secretariat, the Secretariat drafted a "Constitution Discussion Document" on February 28, 1981. This discussion document included a Chapter 5, which contained six articles and specifically provided content on amending and ensuring enforcement of the Constitution. Later, on the basis of this discussion document, a Third Discussion Document dated April 1, 1981, a Fourth Discussion Document dated April 20, and a Fifth Discussion Document dated May 1 took shape in succession. When the Secretariat was discussing the Third Discussion Document of April 1, two proposals were drawn up for the establishment of an NPC Constitutional Committee. The first proposal was for a constitutional committee equal in status to the NPCSC that would be responsible only to the NPC, report on its work to the NPC, and specifically be responsible for adjudicating constitutional issues. The second proposal was for a constitutional committee lower in status than the NPCSC that would be responsible to the NPC and the NPCSC, report on its work to the NPC and the NPCSC, and assist them in supervising enforcement of the Constitution. After discussion, the majority opinion favored the first proposal.[3] However, Mr. Xu did not provide the actual articles from the First Discussion Document to the Fourth Discussion Document. The author examined the archival records on constitutional revision for that year and did not notice any record on these discussion documents or the corresponding provisions. Because Xu Chongde participated in the concrete work of constitutional

revision at that time, there is no doubt about the objectivity of his recollection. From his recollection, we can formulate three general conclusions. First, regarding timing, the earliest possible time that the idea of a constitutional committee could have been raised was in the discussion document of February 28, and it definitely appeared by the Third Discussion Document of April 1. Second, from the beginning, the constitutional committee was raised for discussion and drawn up by the staff of the Committee on Constitutional Revision Secretariat. It did not originate from the opinion or proposal of a political figure or a political party. (At least, the archival materials we have do not prove that a political figure or political party promoted constitutional committee designs at that time.) Third, from the content above, we can see that when proposals for a constitutional committee were being drawn up, there was controversy over whether the committee should be higher or lower in status than the NPCSC. The subsequent circumstances indicate that the issue of the committee's status was a key issue that directly determined whether the constitutional committee could be established.

In Xu Chongde's recollection above, the "Third Discussion Document" of April 1 contained concrete proposals. But this document only contained two proposals, and the author was fortunate to view an archival record with four proposals for constitutional supervision that were more advanced. Who drafted the four proposals? Records in the archives show that in fact it was Xu Chongde. Unfortunately, the dates of these draft proposals are unclear.

The actual records are as follows:

> The First Proposal: Incorporate the two articles below into Chapter 2, Section I:
>
> Article ___. The National People's Congress Constitutional Committee is the National People's Congress organ that adjudicates major constitutional issues. The National People's Congress Constitutional Committee consists of nine to thirteen members elected by the National People's Congress for the same term as the Congress. The National People's Congress Constitutional Committee is responsible to the National People's Congress and reports on its work to the Congress.
>
> Article ___. The National People's Congress Constitutional Committee exercises the following functions and powers:
>
> (1) to submit laws and decrees that contravene the Constitution to the National People's Congress or National People's Congress Standing Committee for reconsideration;
>
> (2) to rule on the constitutionality of administrative regulations and local regulations;
>
> (3) to review and handle major constitutional violations by central state organs and the leaders of central state organs.

> The Second Proposal: Incorporate the following article into Chapter 2, Section 2:
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> Article ___. The National People's Congress Standing Committee establishes a Constitutional Committee. The Constitutional Committee assists the National People's Congress Standing Committee in supervising enforcement of the Constitution and raises reports and opinions on handling unconstitutional laws, decrees, and other regulations as well as constitutional violations by state organs and the leaders of central state organs.
>
> The Third Proposal: Incorporate the following article into Chapter 2, Section 7:
>
> Article ___. The Supreme People's Procuratorate exercises the authority to supervise the conformity of laws, decrees, and other regulations, as well as the acts of state organs and the leaders of central state organs, to the Constitution.
>
> The Fourth Proposal: Make the Constitutional Committee a special committee (a permanent committee) under the leadership of the NPC and NPCSC and incorporate an article into Chapter 1, Section 1.
>
> Article ___. The National People's Congress establishes a Constitution and Law Committee, a Nationalities Committee, a Planning and Budget Committee, and such other special committees as are necessary. These special committees work under the direction of the National People's Congress Standing Committee when the Congress is not in session.

Of these four proposals, the first and second both relate to the design of a constitutional committee. The nature and status of the constitutional committee are basically the same as those of the designs set out in the "Third Discussion Document" of April 1. The third proposal actually endows the Supreme People's Procuratorate with the function and power of constitutional supervision. The fourth proposal is to establish a "Constitution and Law Committee" as a special committee under the NPC to exercise constitutional supervision authority. Actually, this committee is today's Law Committee.

One thing that merits attention is that to date, even Xu Chongde's own writings have not disclosed this version of the design proposal. Cross referencing with Mr. Xu's recollection, the reasonable time for the drafting of this proposal should be between April 1 and 20, 1981, because the draft retained the two proposals in the "Third Discussion Document" of April 1 and, working from that basis, added two new alternative proposals. Later, comparing the "Fifth Discussion Document" after May and these four proposals, there were additional changes. So, these four proposals should be the proposals in the Fourth Discussion Document of April 20 that Mr. Xu Chongde never disclosed.

There is a problem here. According to Xu Chongde's recollection, there was a "Fifth Discussion Document" of the Committee on Constitutional Revision Secretariat on May 1, but Mr. Xu has not provided the

specific content of this discussion document. The author has discovered an archival record called the "Fifth Discussion Document on the Revised Constitution," but this archival record indicates that it was compiled in June 1981. It does not indicate the drafting date. When we crosscheck Mr. Xu's recollection and this record, there is no question that this is the "Fifth Discussion Document" that he mentioned. Importantly, this is a historical document that merits research, because we can see from the content that consideration and tentative planning for the formation of a constitutional committee was fairly comprehensive. Of course, this "Fifth Discussion Document" also reveals a clear divergence of opinion.

This draft used Chapter 2, Section 3 to provide specifically for a "National People's Congress Constitutional Committee." Using a special section to provide for the Constitutional Committee is unusual because a special section is used to provide for the state institutions in Chapter 2 of this document, including the NPC, NPCSC, State President, and State Council. The Constitutional Committee is included as a first rank state organ after the NPCSC and before the State President and State Council, so its status is evident. Under the heading of Section 1, the discussion document attached the following explanation: "This section is newly added. If it is adopted, then other corresponding articles in this draft should be revised." Next, in this section, from Articles 82 to 86, five articles are used to set out the design of the Constitutional Committee. In brackets under each article, an explanation of the article is attached. The most important is Article 82, which is recorded as follows (the article and alternatives are in Song typeface, while the explanation is in regular script):

Article 82. The National People's Congress Constitutional Committee is the National People's Congress organ that adjudicates constitutional issues.

Explanation:

1. Because in the past, China's enforcement of the Constitution was not ensured as it should be, in this forum's discussion on revising the Constitution, many people suggested that we need to establish a specialized institution to ensure enforcement of the Constitution.

2. Considering foreign institutions for ensuring enforcement of the Constitution, some are the highest organs of state power, such as in the Soviet Union; some are constitutional courts, such as in Yugoslavia and Czechoslovakia; some are supreme courts, such as in the United States; and some are constitutional committees, such as in France.

3. China's current Constitution provides that the National People's Congress supervises enforcement of the Constitution and laws and the National People's Congress Standing Committee interprets the Constitution and laws. This provision is basically the same as the provisions of the current constitutions of the Soviet Union, East Germany, and other countries, with the highest organ of state power and its standing organ responsible for supervising enforcement of the Constitution. The National

People's Congress and, when it is not in session, the National People's Congress Standing Committee, supervises enforcement of the Constitution. From a theoretical perspective, this is entirely possible because the National People's Congress Standing Committee is the National People's Congress standing organ and work organ. However, because the National People's Congress Standing Committee is very busy with legislation and other tasks, we can also consider establishing a specialized institution - the National People's Congress Constitutional Committee – to be responsible for adjudicating major constitutional issues.

4. Regarding the nature of the National People's Congress Constitutional Committee, it is a component part of the highest organ of state power and specifically is responsible for adjudicating constitutional issues. Its status is equal to that of the National People's Congress Standing Committee, and, like the National People's Congress Standing Committee, it is responsible to the National People's Congress and reports to the Congress on its work. But its functions and powers are not as extensive as those of the National People's Congress Standing Committee.

Another proposal is for the National People's Congress to establish a constitutional committee to assist the National People's Congress and National People's Congress Standing Committee in supervising enforcement of the Constitution.

Explanation: Some comrades suggested that since the National People's Congress Standing Committee must have the highest power when the National People's Congress is not in session, it would not be appropriate to establish an organ with a status equal to it. In practice, this kind of organ would have difficulty fulfilling its function. Therefore, the status of the Constitutional Committee should be lower than that of the National People's Congress Standing Committee.

It is worth noting that this explanatory section again raised two proposals for the design of a constitutional committee, and the core issues still related to the nature and status of a constitutional committee. In fact, in connection with this "Fifth Discussion Document," the Committee on Constitutional Revision Secretariat expressly drafted a "Report on Some Issues in Revising the Constitution" that was revised three times. In this document, it raised the issue of a constitutional committee and put forward the two different opinions on the nature, status, and functions and powers of a constitutional committee. "One view is that the status of the Constitutional Committee should be equal to that of the National People's Congress Standing Committee, that it should only be responsible to and report to the National People's Congress, and that it should specifically be responsible for adjudicating constitutional issues. Another view is that the Constitutional Committee should be lower in status than the National People's Congress Standing Committee and should be responsible to and report to the National People's Congress and the National People's Congress Standing Committee. It should assist the National People's Congress and National People's Congress Standing Committee

in supervising enforcement of the Constitution and submit opinions or reports on the constitutionality of laws, decrees, and other regulations. Within the Secretariat, the majority favored the former opinion." The Secretariat's report on the two different opinions verifies Mr. Xu Chongde's recollection of the two different opinions in the "Third Discussion Document" exactly.

Although there was a major difference in the two opinions above, the "Fifth Discussion Document" still set out and explained the following articles:

Article 83. The National People's Congress Constitutional Committee consists of the following members elected by the Congress: a committee chairman, two vice committee chairmen, a secretary, and eleven committee members.

Explanation:

1. With regard to the number of people on the committee, fifteen people are stipulated. Here, consideration was given to the number of people in specialized institutions that safeguard constitutions in foreign countries. For example, the Constitutional Court of Yugoslavia is made up of thirteen justices. There are twelve people on the Constitutional Court of Czechoslovakia, fifteen on the Constitutional Tribunal of Italy, and nine on the French Constitutional Council. Moreover, all prior presidents of the republic are ex officio members of the French Constitutional Council for life. Some comrades also suggested that we consider having a smaller number of people on the Constitutional Committee. For example, we could have nine members. We must choose people with noble character, high prestige, and good health in order to make the Constitutional Committee a genuinely authoritative organ.

2. With regard to the titles of the leaders of the Constitutional Committee, committee chairman and committee vice chairman or chairman and vice chairman will be used.

Article 84. The National People's Congress Constitutional Committee exercises the following functions and powers:

(1) It may submit laws and decrees that do not conform to the Constitution to the National People's Congress or the National People's Congress Standing Committee for deliberation in order to make such laws and decrees consistent with the Constitution.

Explanation:

1. Here, we have consulted Article 384 of the Constitution of Yugoslavia, which provides: "If the Constitutional Court of Yugoslavia finds that a federal, republic, or provincial statute is not in conformity with the Constitution of the Socialist Federal Republic of Yugoslavia, or that a republic or provincial statute conflicts with a federal statute, it shall issue a ruling and submit it to the competent legislative assembly." (Clause 1)

"The competent legislative assembly shall be obliged, within six months of the date that the Constitutional Court of Yugoslavia submits a

ruling, to bring the statute into accord with the Constitution of the Socialist Federal Republic of Yugoslavia or remove the contradiction between the republic or provincial statute and the federal statute." (Clause 2)

2. China's 1978 Constitution provides that the power to interpret the Constitution belongs to the National People's Congress Standing Committee. Some comrades suggested that the power to interpret the Constitution should belong to the Constitutional Committee. Otherwise, it cannot complete the task of adjudicating constitutional issues.

(2) Besides laws and decrees, it has the power to change or annul other regulations that do not conform to the Constitution.

Explanation: Here, we have consulted Article 385 of the Constitution of Yugoslavia, which provides: "If the Constitutional Court of Yugoslavia finds that a rule or enactment of an agency of the social or political community other than a statute, or an autonomous enactment, does not conform to the Constitution of the Socialist Federal Republic of Yugoslavia or conflicts with a federal statute that federal organs are responsible for enforcing, or that the rules or other enactments of federal organs are inconsistent with federal statutes, such rules, enactments, or provisions that are not in conformity with the Federal Constitution or a federal statute or conflict with a federal statute shall be repealed or annulled."

(3) Reviewing and handling the constitutional violations of state organs.

Explanation: Some countries provided for an even broader scope here. For example, the procedural rules of the Supreme Soviet of the Soviet Union provide, "The Presidium of the Supreme Soviet of the Soviet Union reviews issues related to the observance of the Constitution by state organizations, social organizations, and civil servants." (Article 64)

Another proposal: The National People's Congress Constitutional Committee raises opinions or reports on the constitutionality of laws, decrees, and other regulations to the National People's Congress and National People's Congress Standing Committee.

Explanation: Here, we have consulted Article 53 of the Constitution of Romania, which provides:

"To carry out supervision of the constitutionality of laws and preparatory work for the adoption of laws, the Great National Assembly elects a Constitution and Law Committee for its term." (Clause 1)

"The Committee submits reports and opinions on the constitutionality of laws. It also reviews standard orders with legal effect, as well as decisions of the Council of Ministers, in accordance with the work rules of the Great National Assembly." (Clause 3)

The status of Romania's Constitution and Law Committee was roughly equal to that of other special committees.

Article 85. The National People's Congress Constitutional Committee exercises its functions and powers until the next National People's Congress elects a new Constitutional Committee.

Explanation: The term of foreign organs that ensure enforcement of constitutions usually is relatively long. For example, the Yugoslav Constitution provides for an eight-year term without renewal; the constitutional decrees of Czechoslovakia provide for a seven-year term with no more than two successive terms by re-election; Italy's Constitution provides for a twelve-year term without successive re-election; France provides for a nine-year term without renewal. The National People's Congress Constitutional Committee is elected by the National People's Congress. Its term should be the same as that of the National People's Congress and re-election and service for another term should not be possible.

Article 86. The National People's Congress Constitutional Committee is responsible to the National People's Congress and reports on its work to the Congress. The National People's Congress has the authority to recall members of the National People's Congress Constitutional Committee.

Another Proposal: The National People's Congress Constitutional Committee is responsible to the National People's Congress and reports on its work to the Congress. When the National People's Congress is not in session, it is responsible to the National People's Congress Standing Committee and reports on its work to the Standing Committee.

Explanation: The two proposals above are closely related to the status of the Constitutional Committee. Like the two proposals for Article 82, there are two proposals on the functions and powers of the Constitutional Committee and the entity the Constitutional Committee is responsible and reports on its work to in the provisions of Articles 84 and 86. Why are there two proposals? There is a cause and effect relationship between the status of the Constitutional Committee and all of this. The different status of the constitutional committees determined their different functions and powers.

These are interesting historical materials that relate to the historical background of that period and even the present, and they inspire deep reflection. But this is not something that must be fully developed in this article.

We should carefully note here that soon afterward, the relevant designs for a constitutional committee took some twists and turns. Namely, within two or three months of the "Fifth Discussion Document" above, in the Secretariat's discussion document of August 3, 1981, the provisions on a constitutional committee were suddenly removed. Moreover, this document, when listing the functions and powers of the NPC, added "supervising enforcement of the Constitution," and, in two clauses in Article 29, stipulated that, "The Constitution is the fundamental law of the state. If laws, decrees, regulations, or decisions adopted by state organs at any level conflict with the Constitution, they are null and void," and "[t]he National People's Congress Standing Committee should review and handle decrees, regulations, and decisions that contravene the Constitution." This provision actually gives the function and power of constitutional

supervision to the NPC and the NPCSC. Why did this change suddenly appear? Did the Secretariat working group think that a constitutional committee was not feasible and change its mind, or did the Secretariat abandon the design of a constitutional committee because some other force enlightened it or interfered?

Interestingly, two months later, on October 31, 1981, the Secretariat again drew up a new document. In it, the function and power of constitutional supervision changed again. This document used a section to provide for the NPC's matters. The third item in Article 7 provided that one of the functions and powers of the NPC was to "supervise the enforcement of the Constitution." However, it also specifically endowed the Constitutional Committee with this function and power.

Articles 10 and 11 contained the following provisions:

Article 10. The National People's Congress Constitutional Committee is the National People's Congress organ that adjudicates major constitutional issues. The National People's Congress elects nine to eleven people to be members of the National People's Congress Constitutional Committee for a term of four years.

Article 11. The National People's Congress Constitutional Committee exercises the following functions and powers:

(1) To submit laws that contravene the Constitution to the National People's Congress for reconsideration;

(2) To exercise the power to rule on the constitutionality of decrees, administrative regulations, and local regulations;

(3) To review and handle major constitutional violations of central state organs and the leaders of central state organs.

Immediately after Article 11, this draft of the revision provided the matters for the Nationalities Committee, the Law Committee, and other special committees. This draft used a separate section to provide for the Constitutional Committee and provided for the Constitutional Committee in juxtaposition to other special committees. What was the intent of revising the Fifth Discussion Document in this way? Furthermore, at the same time it provided for the Constitutional Committee, this document did not provide for the NPC's authority to supervise enforcement of the Constitution,* nor did it provide that the NPCSC had authority to supervise enforcement of the Constitution. This demonstrates that only the Constitutional Committee could exercise this authority. But there were still two major issues with this kind of provision. First, in the end, what would the status of the Constitutional Committee be? Would it be equal in status to the NPCSC, lower in status than the NPCSC but higher in

* **Translator's Note**. On first glance, this sentence appears to be inconsistent with the author's earlier observation that supervising enforcement of the Constitution was included in the list of the NPC's functions and powers. On a closer reading, it seems that the author is trying to point out that the *detailed* provisions on constitutional enforcement focused on the Constitutional Committee and did not include any additional reference to the NPC.

status than ordinary special committees, or equal in status to ordinary special committees? Second, the Constitutional Committee had the authority to review and handle the "major constitutional violations" of central state organs. Did "central state organs" include the NPCSC? These two issues may be summed up in one point. Namely, this revision draft still had not answered the core question of whether the status of the Constitutional Committee was higher or lower than that of the NPCSC.

The subsequent result was predictable. If we take the October 31 document drafted by the Secretariat as a boundary, from that point, the design of the so-called Constitutional Committee suddenly stopped, and there was no mention of it. After this, regardless of whether it was a discussion document of the Committee on Constitutional Revision Secretariat or a discussion document delivered to the general meeting of the Committee on Constitutional Revision, provisions on the Constitutional Committee did not appear in any of them, and the NPC or its Standing Committee was endowed with the function and power of supervising the Constitution.

From the materials above, we can reach three conclusions. First, the primary period for design and drafting of a constitutional committee was prior to July 1981 — in the months of February, March, April, and May. It was raised again on October 31, but it was quickly rejected after that. Second, from beginning to end, the members of the work staff of the Committee on Constitutional Revision Secretariat were the specific drafters and designers of a constitutional committee. Third, from the constant changes to the constitutional committee in the chapters, sections, and articles of several discussion documents, we can clearly sense the great difficulties and twists and turns that the Secretariat experienced. But in the end, the Secretariat still could not find the best proposal. Why? Because there were major controversies over the design from start to finish, and they were difficult to resolve. These controversies seemed to be innate and determined that there could not possibly be any space for a constitutional committee design.

II. Background, Proposers, and the Attitudes of Various Parties

1. The position of the design of a constitutional committee during the two periods of constitutional revision.

Why must we try to verify the time when a constitutional committee was discussed preliminarily and designed? This is quite an important question. It relates to the background of the constitutional revision because the revision of the 1982 Constitution actually was divided into two stages. The first stage started with the establishment of the Committee on Constitutional Revision in September 1980 and ended in mid-July 1981. During this stage, Hu Qiaomu was the Secretary-General of the Committee on Constitutional Revision, and the dynamism of the constitutional

revision discussion was unprecedented. A good deal of the substance of the discussion seems quite bold and even astounds people today. For example, Hu Qiaomu himself, at the first general meeting of the Committee on Constitutional Revision Secretariat on September 17, 1980, raised the tentative idea of reforming the NPC system to make it a bicameral system.[4] Even today, this initial plan seems quite bold. Moreover, during this stage, the discussion touched on whether to divide power between the center and locales, set up a separation of three powers, and write a preamble for the Constitution; whether Marxism-Leninism and Mao Zedong Thought could constitute guiding ideologies; whether to persist in the leadership of the Party; what kind of ethnic autonomy should be practiced; whether to set up an independent judiciary and a system of life tenure for judges; whether to abolish the procuratorate; and other major issues. If so many major and sensitive issues were boldly discussed and considered in this way, why not consider and discuss a constitutional committee? Therefore, given this background, we can see it was not an accident that discussion and consideration of a constitutional committee was raised. At the same time, we should note that while this discussion stage can be characterized as a bold stage of liberated thinking, it can also be characterized as a premature stage that lacked a fundamental consensus, to the point that much of the discussion was seriously disconnected from China's reality.[5] Later practice proved that none of the exceedingly critical viewpoints, excessively bold and idealistic considerations, and radical system designs of this stage were incorporated into the Constitution. So, how do we characterize the discussion and design of a constitutional committee? The author thinks that it was basically an overly idealistic initial plan that did not suit China's concrete national condition, and, of course, was not successful. Taking July 1981 as a boundary in the constitutional revision period, we find that the main discussion and design of a constitutional committee actually took place before July — in the freethinking, boundless stage of February, March, April, May, and June. The re-appearance of a constitutional committee in the September 31 draft will be described later in this article.

The second period of constitutional revision was from mid-July 1981 until the end of 1982. During this time, Peng Zhen replaced Hu Qiaomu as Secretary-General of the Committee on Constitutional Revision. Facing a situation in which there were endless disputes and consensus was difficult to reach, Peng Zhen, in the three months of July, August, and September 1981, repeatedly emphasized that the revision of the Constitution must take as its basis the 1954 Constitution and certain resolutions on historical experiences of the Party after the founding of the country, and that a preface and the Four Cardinal Principles must be incorporated into the Constitution. Peng Zhen also specifically emphasized that "the Constitution should not be a controversial issue, we should settle what can be settled," we must "do our best to avoid triggering disputes," and we must start from China's actual situation. In accordance with this view,

consensus was reached on the Constitution, and constitutional revision work proceeded smoothly. And, in this view, by taking the 1954 Constitution as the basis, there was no way to resolve the problem of the relationship between the NPCSC and a constitutional committee within the NPC system. "The Constitution should not be a controversial issue," and a constitutional committee was just such a major controversial issue. So, in reality, discussion on and design of a constitutional committee basically stopped after July 1981.

2. What forces promoted preliminary discussion of a constitutional committee?

From the earlier narrative in this article, we know that actually, the staff members of the Committee on Constitutional Revision Secretariat were the drafters of the concrete designs in various constitutional committee proposals. So, what forces urged them to design and engage in preliminary discussion of these proposals? According to Mr. Xu Chongde's recollection, early on, on September 22, 1980, when some members of the Secretariat discussed constitutional institutions, they believed that they should specifically add a chapter with provisions on ensuring the enforcement of the Constitution. Two weeks later, on the afternoon of October 7, 1980, the Committee on Constitutional Revision Secretariat convened its fourth meeting and tentatively planned to hold a special meeting to discuss some major issues. There were nine issues altogether, and ensuring enforcement of the Constitution was listed as the ninth issue.[6] Later circumstances indicate that these Secretariat designs and plans objectively foreshadowed opinions on revision of the Constitution and discussion of a constitutional committee in the society at large.

So, what happened with the subsequent discussion? An issue particularly worthy of note is whether there was a consistent view in the society's discussion of a constitutional committee. What follows are all of the constitutional revision briefings prior to July 1981 that relate closely to the design of a constitutional committee. (1) On the afternoon of October 14, 1980, the Secretariat held an expert forum on the rights and duties of citizens under the 1978 Constitution. At the meeting, Beijing University's Luo Haocai suggested that a constitutional court should be established to ensure enforcement of the Constitution. (2) As of October 18, 1980, the Committee on Constitutional Revision Secretariat had received 207 letters from the masses, including two letters that contained proposals on strengthening constitutional enforcement. Li Ping of Jiangxi proposed that an article be included in the Constitution to ensure enforcement of the Constitution. Wang Jianbiao of Inner Mongolia proposed that [China] establish a constitutional supervision committee that would be specifically responsible for supervising enforcement of the Constitution and would have the authority to invalidate unconstitutional policies, laws, and decrees. (3) In mid-November 1980, the Constitutional Research Office in the Legal Department of the Shanghai Academy of

Social Sciences put forward twelve proposals for amending the Constitution. They included three ideas for strengthening constitutional supervision: first, establish a constitutional committee as a standing institution under the NPCSC to review whether laws, decrees, and local regulations, as well as administration from the State Council to local governments, contravene the spirit of the Constitution, and to submit reports and opinions for handling the enforcement of the Constitution within the entire country; second, establish a constitutional court; third, have the state establish a supervision committee.* Of the three proposals, the Constitutional Research Office favored establishing a constitutional committee. (4) On January 9 and 10, 1981, the Committee on Constitutional Revision Secretariat invited experts from other locales to come to Beijing for an informal discussion on revision of the Constitution. At the discussion, Pan Nianzhi of the Shanghai Academy of Social Sciences, Zhang Guangbo of Jilin University, Jiang Bikun of the Hebei Institute of Finance and Economics, and Hu Guang of the Southwest University of Politics and Law all suggested that it was necessary to strengthen supervision of the enforcement of the Constitution. Pan Nianzhi proposed establishing a constitutional committee under the NPC. Jiang Bikun proposed establishing a specialized constitutional court. Zhang Guangbo proposed that the NPCSC supervise enforcement of the Constitution and that there was no need to establish a separate constitutional committee. Hu Guang proposed that the NPC and local people's congresses elect and create a specialized system of state supervision organs called the "People's Supervision System" to supervise enforcement of the Constitution. (5) On April 20, 1981, the Law Department of the Legislative Affairs Committee arranged a briefing on major issues and different opinions on revision of the Constitution (raised by various departments in provinces, autonomous regions, centrally administered cities, and the central government). There were seventeen issues and opinions altogether. The final one was on supervising enforcement of the Constitution. Some people proposed adding a chapter on "Supervising Enforcement of the Constitution" to the Constitution. With regard to how enforcement of the Constitution should be supervised, there were four different opinions: first, the NPC or NPCSC should establish a constitutional committee; second, a constitutional court should be established; third, the NPC and NPCSC should have supervision authority, and there is no need to establish a separate constitutional committee; fourth, people's congresses at each level should establish supervision departments. (Unfortunately, this briefing does not indicate whether the opinions were from local and central departments, or whether experts actually raised them.) (6) In June 1981, the China Association of Politics held two academic forums in Beijing on constitutional revision issues. Scholars Li Ling, Wu Jie, Cheng Xiaohe, Tang

* **Translator's Note.** The Chinese term here is 监察委员会. This institution should not be confused with an NPC constitutional supervision committee.

Shouyao, and others proposed establishing a constitutional committee or a constitutional court to adjudicate constitutional cases.

Based on all of the records the author reviewed, prior to July 1981, it is not clear that any important state organ, party, or leader raised specific opinions on the constitutional supervision system and, in particular, on a constitutional committee. Mr. Xu Chongde's "Constitutional History of China" disclosed some of the contents of the materials above in the form of an integrated briefing.[7] But Mr. Xu did not disclose additional information. At the very least, this shows that it was primarily the forces above that were emphasizing constitutional supervision systems at the time. But there is a problem here. Namely, in the briefings arranged by the Law Department of the Legislative Affairs Commission on April 20 (which Xu Chongde did not disclose), who raised the four different opinions on constitutional supervision? Was it the various departments of the provinces, autonomous areas, centrally administered municipalities, and the central government or some part of that group? Actually, with a bit more analysis, we find that the letters of the masses and the activities of the forums that were recorded in the previous four briefings were all prior to April 20, 1981. The proposals on constitutional supervision in the April 20 briefings are basically the same in substance as the opinions in the letters from the masses and experts above. In particular, suggestions on the four proposals for constitutional supervision in the briefing are nearly identical to the expert opinions in the two forums on January 9 and 10. Therefore, until new materials are discovered, we can infer that the four suggestions on constitutional supervision mentioned in the April 20 briefing were in fact primarily the suggestions of a few experts.

With this, we can in the main reach the following conclusions. First, at the time, calls for strengthening constitutional supervision were in fact limited and were not universal. Second, the requests to strengthen constitutional supervision were primarily from the scholarly world, namely constitutional law scholars and political science scholars. With regard to the society at large, there were only two letters from the masses with corresponding proposals. Third, with regard to the measures and methods for strengthening constitutional supervision, opinions actually differed. Establishing a constitutional committee was not the only consistent opinion, and it is even difficult to say that it was the dominant opinion.

So, who put proposals for a constitutional committee in motion? Speaking objectively, credit probably should be given to colleagues of the Committee on Constitutional Revision Secretariat. It was these people who, on the basis of the summaries of corresponding opinions, tried to add their own aspirations and promote the establishment of a constitutional committee.

In addition to Mr. Xu Chongde's specific effort to draft proposals, another important figure that should not be ignored is Mr. Wang Shuwen of the Constitutional Law Society. Wang Shuwen had great authority at the time. He was a member of the Secretariat work staff, and there is

no doubt that he was an ardent supporter of a constitutional committee. Presently, there is no documentary evidence to prove that he expended effort on this at the time. However, Xu Chongde's recollection proves Wang's enthusiasm [for establishing a constitutional committee] in a different respect. In 1983, only a year after the Constitution was adopted, Wang Shuwen and twenty-nine other NPC delegates collectively signed a motion to the Sixth NPC and proposed that the highest organ of state power establish a constitutional committee. (Of course, there was no reply.)[8] And ten years after the 1982 Constitution was put into effect, Wang Shuwen wrote a commemorative essay calling for the establishment of a constitutional committee under the NPC. This is sufficient to show that he diligently sought a constitutional committee.[9]

3. The Attitudes of Major Political Figures

The establishment of a constitutional system cannot be separated from the attitudes of major political figures. This has always been China's reality. First, let's take a look at the attitude of Hu Qiaomu, the Secretary-General in the first stage. Hu Qiaomu adopted a completely open posture in handling discussion of the content of the Constitution and had a special preference for implementing a "bicameral system." But in all of the materials reviewed, the author did not find that Hu Qiaomu expressed even a brief view on a constitutional committee when he served as Secretary-General. On February 27, 1982, about six months after he stepped down as Secretary-General, Hu Qiaomu gave a long speech on revision of the Constitution to the second general meeting of the Committee on Constitutional Revision. He reflected on, summarized, and explained many aspects of the constitutional revision. The scope was broad and addressed people's democracy, democratic centralism, the functions and powers of NPCSC and the State Council, the State President, special committees, autonomous areas, people's autonomous organizations at the grassroots level, as well as citizen rights and duties, immunity for NPC delegates and their right to offer resolutions and request explanations, and other topics. But from start to finish, he just did not refer to the issue of constitutional supervision and certainly did not mention a constitutional committee.[10] This situation is worthy of attention. There are many possible ways to interpret Hu Qiaomu's lack of reference to a constitutional committee. But at the very least, it demonstrates that in his eyes, this was not a major issue that needed to be explained, or there was no room to discuss the issue of establishing a constitutional committee.

Let's return to Deng Xiaoping and Hu Yaobang. Their attitude on the question of establishing a constitutional committee absolutely was key. On March 21, 1981, when the Secretariat was focused on discussing and designing a constitutional committee, Deng Xiaoping discussed several of his opinions on revising the Constitution with Wu Lingxi. Deng Xiaoping expressed opinions on the State President, the Supreme State Conference, a "bicameral system", and the components of the economy,

but he did not discuss constitutional supervision or a constitutional committee. Of course, it is possible that he did not attach importance to the issue, so this does not imply that he opposed it. However, Mr. Liu Zheng, in an article that reveals the history of the issue of establishing a constitutional committee, wrote the following after setting out the various opinions on a constitutional committee discussed by the Secretariat on April 8 and 18, 1981: "Later, the proposal for establishing a constitutional committee was reported up. Deng Xiaoping and other comrades did not support it and thought that this kind of institution would be hard to set up. So it was shelved. In the Draft of the Revised Constitution that was submitted in 1982, there were no provisions on the establishment of a constitutional committee."[11] Where did Mr. Liu Zheng's explanation come from? When was a constitutional committee proposed, and who reported the proposal to Deng Xiaoping? When, and on what occasion, did Deng Xiaoping make his views known? Liu Zheng did not clarify this.

When the Constitution was amended in 1982, the Politburo and the [Party] Secretariat held ten special discussions. Unfortunately, to this day, these archival records have not been released. However, corresponding materials confirm some of the circumstances at that time. Mr. Gu Angran worked at Peng Zhen's side for a long time and participated in the entire process of revising the 1982 Constitution. He had very detailed notes and records on Peng Zhen's activities.[12] According to his written records, on the afternoon of October 9, 1982, Peng Zhen and Hu Sheng, Wang Hanbin, Zhang Youyu, Gong Yuzhi, Xiang Chunyi, and Gu Angran discussed constitutional revision issues. Peng Zhen discussed five issues, including employee representative conferences and the terms of state leaders. The third issue was the constitutional committee. Peng Zhen said, "Xiaoping said that he does not want to set up a constitutional committee. Xiaoping said very firmly that it should not be done." Peng Zhen also said: "When the Politburo met, I said to Yaobang: In the past, I've considered it. Xiaoping said it is better not to do it. Yaobang said: My view is also that it should not be done." According to Liu Zheng's statement, it seems as if Deng declared his position before 1982 — that is, in 1981. However, in all of the constitutional revision activities from 1981 to 1982, Peng Zhen discussed constitutional revisions with the Secretariat or with the staffers at his side nearly once every few days. If Deng Xiaoping expressed this opinion in 1981, or even early in 1982, why did Peng Zhen not disclose it until October 9, 1982? Actually, the details here are not crucial. What is important is that Gu Angran's record of Deng's opinion on this matter verifies Mr. Liu Zheng's explanation and vice versa. What is certain is that Deng Xiaoping did not approve of establishing a constitutional committee, and his disapproval was very firm. Hu Yaobang also did not support the establishment of this committee.

What, then, was Peng Zhen's attitude? Without a doubt, his position had decisive influence. But what did he do? According to Gu Angran's notes, from February 18, 1981, until the final time a constitutional

committee appeared in a discussion document on October 31, as described above, Peng Zhen participated in more than seventy-two events related to revision of the Constitution. On many different occasions he gave speeches, drafted and gave the Center reports, and participated in discussions, the contents of which touched on the preamble of the Constitution, the general principles, the economic system, the Four Persists, the principles and strategy for revising the Constitution, the state system, the political system, the rights and duties of citizens, the "bicameral system," ethnic affairs, the special committee duties of the standing committee, the division of power between the center and locales, separation of government administration and commune management, whether or not to abolish the procuratorate, and other topics. However, among these numerous and complicated issues, Peng Zhen never once raised the issue of a constitutional committee. Even in his discussions and exchanges every few days with staffers at hand, he did not once discuss the constitutional committee. In mid-July, Peng Zhen replaced Hu Qiaomu as Secretary-General of the Committee on Constitutional Revision. Soon afterward, on the 22nd and 23rd, he heard successive reports from Deputy Secretary-Generals Hu Sheng and Wang Hanbin on the discussions on revision of the Constitution that had taken place in the prior period. When they discussed the issue of bicameralism and whether or not there should be a preamble, Peng Zhen interrupted and asked questions many times. But when they specifically gave a report on the issue of a constitutional committee, Peng Zhen did not utter a word.

Did Peng Zhen not understand the circumstances surrounding the Secretariat's design of a constitutional committee? Certainly, that is not the case. In 1979, when Peng Zhen had just returned to Beijing, Deng Xiaoping suggested that Peng Zhen take charge of the revision of the Constitution. Although Peng Zhen was not the Secretary-General of the Committee on Constitutional Revision during the first stage, the Committee established two vice chairpersons. One was Song Qingling, and the other was Peng Zhen. This kind of arrangement obviously meant that he was responsible for the concrete and comprehensive work of the Committee on Constitutional Revision. Moreover, Vice Chairman Peng Zhen definitely was not a vice chairman in name only. Early on, he consistently, with every word and phrase, and with great energy, thought about and researched the content of the constitutional revisions.

The Secretariat certainly transmitted to Peng Zhen the constitutional discussion documents that Mr. Xu Chongde recalled. According to Gu Angran's records, on the afternoon of May 3, 1981, Peng Zhen convened Wang Hanbin, Gu Ming, Zou Yu, Yang Jingyu, Wu Xinyu, and others in the Great Hall of the People to study several issues on revision of the Constitution. He specifically stated, "The Secretariat has amended the draft five times, and we still need one more." This demonstrates that Peng Zhen had already seen the Fifth Discussion Document, which

contained a representative design for a constitutional committee. So, why did he not express an opinion on the constitutional committee?

A circumstance worth noting is that when Peng Zhen emphasized some of the principles for amending the Constitution in the many discussions of July, August, and September described above, the movement for a constitutional committee actually was inconsistent with Peng Zhen's thinking. As stated above, in the discussion document of August 3 that followed the "Fifth Discussion Document," the constitutional committee disappeared. But in the October 31 draft, it appeared again. How could the constitutional committee appear again? Did Peng Zhen advocate for it or was it the idea of the Secretariat staff? We have no way to know. However, we can confirm that up to this time, Peng Zhen did not have a clear-cut negative attitude toward a constitutional committee. Because if Peng Zhen opposed a constitutional committee, the Secretariat staff members could not have reinserted this content into the discussion document.

So, what shaped Peng Zhen's attitude? According to Gu Angran's records, we can look at some of Peng Zhen's subsequent activities. On the afternoon of November 2, two days after a constitutional committee was again incorporated into the discussion document of October 31, Peng Zhen discussed constitutional revision issues at Yuquanshan with Zhang Youyu, Hu Sheng, Xiang Chunyi, and Gu Angran. He told them that he had already "sought out Comrade Xiaoping for discussion" and "also had exchanged views with some senior leaders." What did Peng Zhen discuss with Deng Xiaoping and the senior leaders? The main issues were how to write the "Four Persists," whether there should be a high level of democracy or a high level of centralism, the relationship between democracy and dictatorship, ethnic issues, labor rights, the communication of secrets, and the need for important language in the Constitution to be concise but comprehensive. Importantly, Peng Zhen expressed his own clear opinion on all of these issues. Obviously, Peng Zhen did not discuss a constitutional committee with Deng Xiaoping and the senior leaders at that time. Why did they not discuss it? A rational inference is that at the time, Peng Zhen still had not formed his own opinion on a constitutional committee. This is consistent with Peng Zhen's personality and work style. On the evenings of November 4 and 6, Peng Zhen and Wang Hanbin, Gu Ming, Gong Yuzhi, Lu Zhizhao, and Gu Angran specifically discussed the issue of the preamble to the Constitution and expressed their distinct attitudes. On this occasion, Peng Zhen did not discuss a constitutional committee. But on November 10, the situation changed. On this evening, Peng Zhen was in Building No. 2 at Yuquanshan "and discussed several issues related to a constitutional committee with Gu Angran." In Gu Angran's record of Peng Zhen's comprehensive activities in 1981, this is the only time that he discussed a constitutional committee, and he discussed it only with Gu Angran. This demonstrates that at the time, Peng Zhen had already attached importance to the issue. Why did he discuss

it only with Gu Angran? Did Peng Zhen want to understand more of the background, details, and other circumstances driving the issue? Moreover, four days after Peng Zhen specifically discussed a constitutional committee with Gu Angran, in the constitutional discussion documents of November 14, 17, and 21, the design for a constitutional committee was canceled and replaced with NPCSC supervision of the enforcement of the Constitution. The rational inference that can be drawn here is that Peng Zhen clearly expressed his disapproval of including a constitutional committee at this time.

There is additional valuable historical data here. (Unfortunately, due to the rush and carelessness of the author, the source of this historical information was not noted.) It is said that the Secretariat, when considering the members of foreign constitutional committees, discovered that all of the foreign constitutional committees were comprised of retired heads of state and other individuals of noble character and high prestige. If China wanted to establish a constitutional committee, who would the members be? On this point, Peng Zhen had profound misgivings. He said, "Chairman Mao and Premier Zhou are gone. Comrade Xiaoping is still a member of the Politburo Standing Committee and cannot take part. Hua Guofeng also cannot take part. The issue of the composition of the committee is not easy to resolve. Our situation is not the same as that in foreign countries." When, and under what circumstances, did Peng Zhen say this? The author has had difficulty verifying this point. For the moment, we can regard it as hearsay that has significant historical value and leave it for an expert to verify in the future.

According to Gu Angran's records, on December 19, 1981, Peng Zhen transmitted a "Report on Several Issues in the Draft of the Revised Constitution" to Deng Xiaoping, Hu Yaobang, and Party Central. On December 23, Peng Zhen supplemented and amended this report and again transmitted it to Party Central. So, did Peng Zhen touch on a constitutional committee in his report? From the author's examination of the archival records, the report that Peng Zhen submitted to Party Central on the 19th contained sixteen issues in total, but it did not touch on a constitutional committee or constitutional supervision. Unfortunately, perhaps due to the author's oversight in searching the archives, or due to incomplete records complied for that year, the author was not able to view the original proof of Peng Zhen's report on the 23rd. However, in his notebook, Gu Angran made a complete copy of a report Peng Zhen submitted to Party Central around the end of 1981 or early 1982. This is precious material. The report states that revision of the Constitution is currently being carried out in a focused manner. "There were several major problems that we felt uncertain about. So we reported up to Party Central." The report listed ten issues and included a constitutional committee as the third issue. It states, "In view of the lessons of the Cultural Revolution, many comrades suggested that there must be a special organ to take care of major constitutional violations. We studied the

constitutions of many countries, and they all have institutions to handle constitutional violations. The draft preliminarily provides for the establishment of a permanent constitutional committee under the National People's Congress and National People's Congress Standing Committee to review major constitutional violations, raise proposals, and allow the National People's Congress and National People's Congress Standing Committee to adjudicate and decide." Is this record of Gu Angran the report that Peng Zhen gave to Party Central on December 23?

Taking the beginning and end of the time period and the logical development of events together, the author believes that we can basically confirm that it is. And, from this report of Peng Zhen, we can make a rational inference. Namely, after Peng Zhen understood and analyzed the situation, he realized that there were serious obstacles to including a constitutional committee, but he clearly agreed on the importance of reforming the constitutional supervision system and making an effort on this issue. Therefore, he treated the constitutional committee as a "major issue" that was "unsettled" and reported it to Party Central. As such, we have the explanation that "Comrade Deng Xiaoping did not support it" in Liu Zheng's article [discussed] above.

4. Background on the Period that Is Worthy of Attention

The narrative and analysis above indicate that the main reason a constitutional committee could not succeed was that there was no way to resolve whether its status should be higher or lower than that of the NPCSC. But in all likelihood, that was far from the only problem. At the very least, the following important background points are worthy of attention and research. (1) From the 1954 Constitution to the 1975 and 1978 Constitutions, although there were provisions on NPC supervision of enforcement of the Constitution, in the end, constitutional supervision had not evolved into a concrete legal practice. There was no corresponding experience. Otherwise, Liu Shaoqi would not have been overthrown without any constitutional supervision process when he was the State President. Two or three years after promulgation of the 1978 Constitution, in the absence of foundational experience, one can imagine the difficulty of establishing an entirely new constitutional supervision system. (2) On June 27, 1981, at the time the Committee on Constitutional Revision Secretariat engaged in preliminary discussion of the design of a constitutional committee, the Central Committee of the Communist Party of China issued a "Resolution on Several Issues in the History of Our Party Since the Founding of the People's Republic of China." This [resolution] stated, "We must consolidate the people's democratic dictatorship, perfect the Constitution and the law of the state, and make them a force that all people must strictly abide by and cannot infringe upon."[13*] This

* **Translator's Note**. The Chinese title of the resolution is "关于建国 以来党的若干历史问题的决议." The original Chinese text of the article appears to contain an error, as it omits the character 党 from the title of this resolution.

statement is easily understood as a demand and a basis for strengthening constitutional supervision. However, the resolution on several historical issues was in fact first and foremost a political resolution. On the basis of this political resolution, we could not necessarily infer that we had to establish a certain kind of constitutional supervision system within a certain timeframe. (3) The 1982 Constitution was formulated only a few years after the end of the Cultural Revolution. At that time, there were still some very complicated factors in the political and social situation. Although the Cultural Revolution had already ended and the voices for strengthening construction of democracy and the legal system were getting louder each day, who could also say that the end of the Cultural Revolution necessarily meant that the authority of the Constitution had changed and become supreme? (4) Actually, the revision of the Constitution that began in 1980 was equivalent to the formulation of a new Constitution. The content of the revision covered the state system, the political system, and the structure of state institutions, as well as concrete citizen rights and duties. There were just too many issues. A constitutional committee was important, but in the entire system of state institutions, even though it was necessary to set it up, it could only be an organization under the NPC. In the context of this complicated and expansive background, it was not a major issue that had core significance and had to be resolved. (5) There is an important characteristic in the formulation of the 1982 Constitution. Namely, the focus of attention was on constructing and perfecting various systems. Or, we can say that this constitution-making activity involved setting up systems. While importance was attached to supervising enforcement after confirming the systems, this obviously did not occupy the same important position as setting up the systems themselves. Otherwise, in the execution of the Constitution and the law, there would not have been several decades of widespread criticism of the negative phenomenon of "having laws that are not followed, having laws that are not strictly enforced, and not pursuing violations of the law." In light of this background, the difficulty of bringing a constitutional committee into existence can be imagined.

In summarizing the background and various circumstances above, we find that in the process of formulating the 1982 Constitution, the constitutional committee was actually a proposal that lacked the prerequisites to emerge. The reality was that this proposal could not be formally included in the deliberation draft of the three general meetings of the Committee on Constitutional Revision or the deliberation draft of the April 1982 meeting of the NPCSC, not to mention the draft that was transmitted to the NPC for discussion after the Standing Committee meeting. We can say that, during the process of amending the Constitution in 1981, the constitutional committee was the Committee on Constitutional Revision Secretariat's embryonic but inchoate design, or we can say that it was no more than an undeveloped idea in the process of amending the Constitution.

III. Discussion in 1982 and the Response of Peng Zhen and Hu Sheng

The proposal for a constitutional committee was abandoned, but what organ would exercise the function and power of constitutional supervision? From the removal of the constitutional committee in constitutional discussion documents after October 31, 1981, until before the discussion of the draft Constitution by the people in April 1982, according to the Secretariat's design, the NPCSC was endowed with the function and power of constitutional supervision. The NPC did not have this function and power.[14] For example, the constitutional discussion documents of November 14, 17, and 21, 1981 were amended successively, and in them, the function and power of supervising enforcement of the Constitution belonged to the NPCSC. Even the April 3, 5, 8, 17 and 21, 1982 drafts that were revised five times by the Committee on Constitutional Revision Secretariat, and the NPCSC deliberation draft that followed soon afterward, merely provided that the NPCSC supervises enforcement of the Constitution. The NPC did not yet have this function and power [in the draft]. Article 65 of the Draft of the Revised Constitution that was sent to the people for discussion still retained the provision for Standing Committee supervision of enforcement of the Constitution.

However, when the people began discussing the Draft of the Revised Constitution in May, this provision was disputed again. To put it more clearly, the different opinions on the NPCSC supervising enforcement of the Constitution were strong and widespread, and they started to form during the people's discussion of the Constitution. Nearly half of the provinces and cities, including Shanghai, Tianjin, Sichuan, Hunan, Jiangsu, Shanxi, Guangxi, Jilin, Hebei, Shandong, Liaoning, Guangdong, Yunnan, Inner Mongolia, Henan, and others, raised opinions on the issue of constitutional supervision. Some proposed adding another chapter to the Constitution that specifically provided for interpretation, supervision, and revision of the Constitution and in particular resolved the issues of enforcement of the Constitution, the handling of constitutional violations, and related procedural issues. More than a few people proposed establishing a specialized and authoritative institution to supervise implementation of the Constitution. This institution could be called a "Constitutional Protection Committee," a "Constitutional Supervision Committee," a "Constitutional Court," an "Administrative Court," or something else. Some others proposed that a special committee be established under the NPCSC to supervise implementation of the Constitution. Still others proposed that the NPCSC authorize the Supreme People's Procuratorate to investigate and handle constitutional cases and, at the same time, establish a specialized tribunal within the people's courts to adjudicate constitutional incidents and constitutional violations. Interestingly, the Ningxia Hui Autonomous Region suggested establishing a Supreme Constitutional Court for the whole country and branch courts in provinces, autonomous regions, and centrally administered

municipalities, to supervise enforcement of the Constitution and handle constitutional cases and related issues.

Some central departments, units, and democratic parties also raised different opinions on the NPCSC supervising enforcement of the Constitution. For example, the Ministry of Health proposed establishing an authoritative supervision institution that would be responsible for supervising, urging, and examining enforcement of the Constitution to prevent the re-occurrence of the Cultural Revolution phenomenon of tossing the Constitution aside in practice. Red Flag Magazine asked: Who will supervise enforcement of the Constitution? We must add provisions. We should establish a specialized institution for constitutional issues. It must be an authoritative institution equal to the NPCSC that is responsible for deliberating on the constitutionality of laws and decrees promulgated by the NPCSC. The Ministry of Electricity and Industry suggested that the state should establish a Constitutional Examination Committee. The Democratic Progressive Party Central Committee proposed that the NPCSC establish a Constitutional Supervision and Examination Committee or a "Discipline and Inspection Committee" at the central level and in each province and autonomous region to supervise enforcement of the Constitution, publicize and uphold the dignity of the Constitution, investigate and handle constitutional incidents, and, from an organizational standpoint, ensure that the Constitution is enforced to the letter.

Even for those who agreed with Article 65 of the Draft of the Revised Constitution, which provided for NPCSC supervision of enforcement of the Constitution, some locales thought that the provisions were too general and would be difficult to implement in practice. For example, Jilin suggested that the manner in which the NPCSC supervises the Constitution should be clarified, especially the organ that will specifically accept and hear charges of constitutional violations. Tianjin suggested that it was not enough to provide only that the NPCSC "supervises enforcement of the Constitution" and that there should be concrete provisions on the method, procedure, and especially the work of handling constitutional violations.

And, with regard to the provision that authority to supervise enforcement of the Constitution only belongs to the NPCSC, Beijing suggested that this function and power should also belong to the NPC.

Obviously, many aspects of stipulating that the NPCSC supervises enforcement of the Constitution generated pervasive differences of opinion. These opinions were continuously reported up to Peng Zhen in July and August and attracted his special attention. Should the NPCSC supervise, or should a specialized institution be established to supervise? Peng Zhen reflected on it. According to Gu Angran's records, on September 2, 4, 9, 10, and 14, 1982, Peng Zhen and the principal responsible parties at the Committee on Constitutional Revision Secretariat held five discussions and expressed opinions on many constitutional revision issues. One of the important issues was a constitutional committee.

With regard to the view that a constitutional committee or constitutional court be established, "we must consider it and raise it as an important issue." Peng Zhen even suggested that, with regard to the NPCSC or another specialized institution supervising enforcement of the Constitution, we can raise two proposals to weigh and study. But at the same time, he once again emphasized that constitutional supervision primarily relied on one billion people, and that "even if we want to establish a constitutional committee, we must still establish it under the NPC and NPCSC. The NPC must be unified, not fragmented." These opinions of Peng Zhen indicate that he again was hesitant to establish a constitutional committee. If we think of Deng Xiaoping's negative attitude toward a constitutional committee that Peng Zhen conveyed on October 9, 1982, is it possible that from mid-September to early October, Peng Zhen specifically communicated with Deng Xiaoping on the issue of a constitutional committee? Or, after Peng Zhen reported the issue of a constitutional committee to Party Central in late 1981 and Deng Xiaoping did not agree, did Peng Zhen again communicate with Deng Xiaoping on a constitutional committee ten months later, and did Deng Xiaoping again "very firmly say it shouldn't be done"?

Regardless, a constitutional committee could not be included in the Draft of the Revised Constitution again. This shows that, after Peng Zhen's hesitation and reflection, or after communicating and reaching a consensus with Deng Xiaoping, this proposal was firmly rejected. Therefore, both the September 15 and 25 revisions of the Draft of the Revised Constitution still provided that the NPCSC supervises enforcement of the Constitution. But not long afterward, the revision of the 27th, in addition to providing for the Standing Committee's supervision function and power, also provided that the NPC had the function and power of supervising enforcement of the Constitution. We should say that adding NPC supervision of enforcement of the Constitution was also a major change. And Peng Zhen may have raised an opinion on this addition because later, when he spoke at a meeting of the Presidium of the Fifth NPC, he specifically emphasized that the NPC and the NPCSC both exercise the power to supervise enforcement of the Constitution.

In late November and early December 1982, the fifth meeting of the Fifth NPC started to deliberate on the Draft of the Revised Constitution. During the meeting, the issue of constitutional supervision was raised again. Some delegates expressed deep concern about and raised opinions on whether the Constitution could be well-enforced and how constitutional violations would be sanctioned in practice. The Tibet delegation suggested that it was very difficult to tell whether the Constitution could really be implemented after adoption.

Three delegates, Hunan's Wang Sitang, the Ministry of Geology's Sun Daguang, and Shanghai's Liu Kui, said that the Constitution did not put forward concrete guarantee measures and that content and provisions on preventing violations of the Constitution should be added.

Delegate Hu Jiwei also thought that the Constitution should provide that violating the Constitution is the most serious criminal act, that people's representatives at all levels can bring charges against any organization or individual that violates the Constitution, and that handling cases of constitutional violations and impeaching cadres that violate the Constitution should be included in the functions and powers of both the NPC and the NPCSC. Tianjin delegate Zhang Chuyang proposed adding a chapter that specifically addressed supervision and enforcement of the Constitution and included provisions on supervision principles, content, methods, and procedures. [He proposed that] there must be specific provisions to resolve violations of the Constitution by central or local state organs. In particular, the Constitution must provide supervision methods for violations of the Constitution by state leaders, such as transmission to the NPC for handling. He also proposed that the state establish a constitutional court, or that it establish a special institution to supervise enforcement of the Constitution, such as a Constitutional Enforcement and Supervision Committee, in order to guarantee enforcement of the Constitution in practice.

On the morning of November 30, delegates again discussed the issue of constitutional supervision. Guangdong's Wu Juetian and Du Changtian, Heilongjiang's Fang Dazhong, Cong Chen, Han Xingsheng, Ni Wei, and other delegates proposed adding a committee to supervise enforcement of the Constitution. Zhang Liufeng, Director of the Beijing No. 2 Service Bureau, also suggested that a specialized organ to guarantee enforcement of the Constitution should be established, that the NPCSC is not a judicial organ, and that the Constitution could not be implemented with only the NPCSC supervision.

However, the numerous different opinions raised by various delegates on this matter were not adopted by the small working group on constitutional revision. Confronted with many delegates and even delegations raising different opinions, including the multitude of different opinions raised during the earlier discussion by the people, it is very unusual that no action was taken in the constitutional revision.

But Peng Zhen attached great importance to the opinions raised during the delegate deliberations. He arranged for Hu Sheng to specifically report on and explain the constitutional revision situation to the second meeting of the Presidium of the fifth meeting of the Fifth NPC. Peng Zhen and Hu Sheng both participated in the meeting, and Peng Zheng frequently interrupted Hu Sheng's report. The speeches by the two men contained 14,000 words. Two thousand three hundred words related to the issue of constitutional supervision, so we can see that they attached importance to the issue.

With regard to a constitutional committee, Hu Sheng said, "On establishing a specialized institution, if we consult foreign experience, it is done this way. Some countries establish a constitutional court or a constitutional committee." Peng Zhen immediately interrupted and said,

"Only some foreign countries have them." Hu Sheng continued, saying, "Correct. Only some foreign countries have them. The Soviet Union does not. We can also consider the experience of capitalist countries, but what is the task of these institutions? For example, the task of France's Constitutional Council is to supervise the legality of presidential elections and the constitutionality of each type of law. Another example is Italy's Constitutional Committee, which also supervises conflicts between national laws and local laws and the Constitution. Therefore, for a specialized institution to guarantee all provisions in a state constitution, from all major state matters to the rights and freedoms of all citizens, is impossible."

On the suitability of the type of institution that China could establish to guarantee enforcement of the Constitution, Hu Sheng said, "In practice, it can only be the National People's Congress Standing Committee. In China, it is not possible to establish an organ with higher authority than the National People's Congress Standing Committee.* Therefore, at present, our Constitution provides that the National People's Congress Standing Committee is responsible for supervising enforcement of the Constitution."

After Hu Sheng finished his report, Peng Zhen specifically presented additional thoughts on two issues, and one of them was constitutional supervision. He said, "Should we create an authoritative organ to supervise enforcement of the Constitution? Some foreign countries have constitutional committees and some have grand justices. The United States and Pakistan have grand justices. Should we also adopt this form? This problem was repeatedly considered during the drafting process. Everyone is concerned that it could be like the Cultural Revolution, when the 1954 Constitution was tossed aside. In practice, regardless of the kind of organ was set up at that time, would it have resolved this issue? It is not likely." Soon afterward, Peng Zhen again emphasized the necessity of having the NPC and its Standing Committee supervise the Constitution. "I'm afraid that it is very difficult to imagine setting up an organ with higher authority and prestige than the National People's Congress Standing Committee to handle this matter."

Thirty years later, do Peng Zhen and Hu Sheng's explanations for why it was not appropriate for China to establish a constitutional committee still have practical significance? Were there other reasons a constitutional committee was not established? Why did Deng Xiaoping and Hu Yaobang not agree to establish this institution? Hu Sheng said, "For a specialized institution to guarantee all provisions in a state constitution, from all major state matters to the rights and freedoms of all citizens, is impossible." So, how should we settle the scope of constitutional supervision? Now, or in the foreseeable future, can we again "imagine setting up an organization with higher authority and prestige than the National

* **Translator's Note**. The National People's Congress meeting in its plenary session is the supreme organ of state power. Certainly, Hu Sheng was referring to organs other than the NPC here.

People's Congress Standing Committee" to handle the matter of constitutional supervision? Peng Zhen said that during the Cultural Revolution, the Constitution was tossed aside, but regardless of the type of organ that was set up at that time, it likely would not have resolved the issue. Today, even though the Cultural Revolution has been over for more than thirty years, if we set up an institution like a constitutional committee, would it really resolve constitutional issues? And so on and so on. These issues are all worthy of profound reflection.

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Notes

* **Translator's Note.** The editors of the *Pacific Basin Law Journal* have converted the translation of the endnotes into *Bluebook* format. This conversion resulted in the deletion of some repetitive information in the endnotes.

1. *See* Xiao Weiyun, On the Constitution 537-38 (Beijing University Press 2004).

2. Liu Zheng, Historical Footprints of the People's Congress System 234 (China Democracy and Law Press 2008).

3. *See* Xu Chongde, History of the Constitution of the People's Republic of China 609-11 (Fujian People's Press 2003).

4. Mr. Xu Chongde has already revealed this. *See id.* at 563.

5. In fact, because there were disputes on many fundamental issues in this period, Party Central had to postpone the adoption of the Draft of the Revised Constitution, which was originally scheduled for the fourth meeting of the Fifth National People's Congress in 1981, to the fifth meeting of the Fifth National People's Congress in 1982.

6. Xu, *supra* note 3, at 566 et seq.

7. *Id.* at 575 et seq.

8. *Id.* at 886. However, Mr. Xu Chongde's recollection may be incorrect. According to the record in the *Selected Works of Wang Shuwen*, Wang was a representative in the Eighth and Ninth People's Congresses and not in the Sixth People's Congress. *See* Selected Works of Wang Shuwen 1 (Law Press, 2003).

9. *See id.* at 157-68.

10. *See* Collected Works of Hu Qiaomu, Vol. 2, 510-20 (People's Press 1993).

11. Liu, *supra* note 2, at 235.

12. Gu Angran, former Chairman of the NPCSC Legislative Affairs Commission and Vice-Chairman of the Law Committee, witnessed China's legislation from 1954 until the beginning of the 21st century and worked at Peng Zhen's side for a long time.

13. Party Cent. Comm. Document Research Dep't Editor, Since the Third Plenum, Vol. 2, 842 (People's Press 1982).

14. Why did they only discuss endowing the NPCSC with the function and power of supervising the Constitution and not the NPC at the same time? The author has not seen an explanation in any existing historical documents. However, in linking up the background at the time, it seems that we can think about it this way. First, the time the NPC is in session is very short, and, when it is in session, it has many tasks, so it is difficult to competently carry out the ongoing work of supervising the Constitution. Second, the prior constitutions had endowed the NPC with the function and power of constitutional supervision, but on the whole it did not play a concrete role. Second [sic], the important part of perfecting the People's Congress system and amending the Constitution was to expand the functions and powers of the NPCSC. Therefore, given this background, we can understand the Secretariat endowing the NPCSC with the function and power of constitutional supervision.