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Author/s:

PARTLETT, W;Ip, E

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IS SOCIALIST LAW REALLY DEAD?

WILLIAM PARTLETT* & ERIC C. IP**

This Article argues that the socialist legal system did not die in the late 1980s. Instead, the statist parts of the socialist legal system—drawn from Leninist ideology and the Russian legal tradition—have strongly influenced the law in the People’s Republic of China since the early 1980s. In fact, these Russo-Leninist transplants from the socialist legal system remain resilient in contemporary China. This Article will demonstrate how these Russo-Leninist transplants help create distinctive public law institutions and approaches in China that have been ignored by many scholars. By understanding these particular institutions and approaches, this Article will seek to better understand the possibilities of reforming China’s distinctive formal legal institutions as well as its public law system.

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** Assistant Professor, Faculty of Law, The Chinese University of Hong Kong.

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I. INTRODUCTION

Socialist law—viewed by comparative legal scholars as a novel outshoot from the civil law family—died an unceremonious death in the late 1980s with the collapse of communism and the end of the Cold War.¹ It disappeared from comparative law casebooks and was declared “dead and buried.”² With the rise of global capitalism, comparative law scholars assumed that socialist law systems were transitioning back to the civil law system.³

We should not be so quick, however, to discount the continuing influence of socialist law in the contemporary world. Just as it was declared dead in the 1980s, socialist law institutions and public law conceptions helped serve as the foundations for the restoration of formal legality in post-Mao China, the world’s most populous country and second largest economy.⁴ This process of legal transplantation has continued to shape the Chinese Communist Party’s understanding of China’s “socialist” law system and therefore the path of Chinese legal change.⁵ This Article will isolate three deeply rooted—and non-Western—legal transplants that continue to shape the institutional and public law fundamentals of the

1. William Partlett, *Reclassifying Russian Law: Mechanisms, Outcomes and Solutions for an Overly Politicized Field*, 2 COLUM. J. E. EUR. L. 1, 37–42 (2008).

2. Hein Kötz, *Preface to the Third Edition*, in KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., Oxford Clarendon Press 3d ed. 1998) (1969-1971).

3. Gianmaria Ajani & Ugo Mattei, *Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics*, 19 HASTINGS INT’L & COMP. L. REV. 117, 119 (1995).

4. See *infra* notes 62-76.

5. See generally China Internet Information Center, *The Socialist Legal System With Chinese Characteristics* (Nov. 15, 2013), <http://www.hrichina.org/sites/default/files/pdfs/law/White-Paper-on-Socialist-Legal-System-with-Chinese-Characteristics-en.pdf>. See also Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China’s Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT’L & COMP. L. J. 1 (2010). For more on the importance of legal transplantation in legal change, see Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996) (discussing how the “reception” of outside law is one of the most important sources of legal change).

Chinese legal system: constitutional statism, administrative punishment, and centralized institutional supervision. These transplants help shed new light on some of the distinctive features of the modern Chinese legal system and its possibilities for reform.⁶

The scholarly neglect of the continued influence of socialist law on Chinese law stems from an incomplete understanding of the socialist legal system. Formulated in 1920s and 1930s in the Soviet Union, the socialist legal system is most commonly understood as a system of law linked to an economic system that envisioned public ownership of the means of production and that disappeared in the late 1980s.⁷ The socialist legal system, however, also had important and distinctly non-economic aspects. In particular, its public law elements were a reflection of both Leninist political ideology and the most statist institutions and public law conceptions from the Russian legal tradition.⁸ These “Russo-Leninist” legal approaches and institutions were exported by the Soviet Union in the immediate post-World War II period to the new socialist countries across Eastern Europe and Asia. Even with the collapse of communist economics, these Russo-Leninist institutions and public law concepts have remained influential.

This process of Russo-Leninist transplantation is particularly salient in China. These ideas were first transplanted into 1950s China and then reinvigorated when Deng Xiaoping rehabilitated those trained in the Soviet model in 1950s and asked them to rebuild the Chinese legal system in the early 1980s.⁹ This Article will explain how the current Chinese legal

6. See generally James Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 312, (P. LEGRAND & R. MUNDAY, eds., 2003) (describing how legal transplants are a critical source of legal change).

7. JOHN N. HAZARD, *COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIALIST STATES* 523 (1969) (taking a materialist approach to the socialist legal system by focusing on its economic elements).

8. Cf. David Armitage, *What's the Big Idea? Intellectual History and the Longue Durée*, 38 *HIST. EUR. IDEAS* 493, 497 (2012) (discussing the importance of placing concepts in their historical context).

9. Percy R. Luney, Jr., *Traditions and Foreign Influences: Systems of Law in China and Japan*, 52 *LAW & CONTEMP. PROBS.* 129, 135–36 (1989) (discussing the restoration of 1950s laws and those trained during the 1950s); George Ginsburgs, *Soviet Sources on the Law of the Chinese People's Republic*, 18 *U. TO-*

system still bears these Russo-Leninist influences. From the text of the Chinese Constitution to its law on punishment to its distinctive legal institutions, a Leninist interpretation of the Russian legal tradition became one of key starting points for the construction of modern China's legal system. Particularly given recent efforts to strengthen socialist ideology, this Russo-Leninist influence persists to this day.¹⁰

In so doing, this Article seeks to begin the process of uncovering the significance of an under-researched global transplantation of legal institutions and ideas from Russia to China.¹¹ In doing so, we make no assumption that the post-Mao Chinese legal system resembled the Russian legal tradition in practice. In this Article, we are interested in tracing the "reception" of *formal* law imported from the Soviet socialist tradition.¹² We will therefore point out how China "selectively" adapted the institutions and mindset of the Russian socialist legal tradition to fit Chinese circumstances and culture.¹³

With these caveats in mind, we do argue, however, that this post-Mao reinvigoration of Russo-Leninist legal trans-

RONTO L.J. 179, 181–82 (1968) (mentioning the period of transplantation in the 1950s); Tao-tai Hsia & Wendy I. Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 249, 251–52 (1987) (discussing the "golden age" of collaboration between the Soviet Union and the People's Republic of China). See generally CHINA LEARNS FROM THE SOVIET UNION, 1949-PRESENT (Thomas P. Bernstein & Hua-yu Li eds., 2010) [hereinafter CHINA LEARNS FROM THE SOVIET UNION] (describing the large-scale cooperation between the Soviet Union and China during the 1950s).

10. See Perry Link, *What it Means to Be Chinese: Nationalism and Identity in Xi's China*, FOREIGN AFFAIRS (May/June, 2015), <https://www.foreignaffairs.com/articles/china/2015-04-20/what-it-means-be-chinese> (discussing recent efforts under Xi Jinping to strengthen socialist ideology in China).

11. See William E. Butler, *Russian Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 777, 785 (Jan M. Smits ed., 2d ed. 2012) (describing the influence of Russian law on other legal systems in Asia as "a little-investigated subject which deserves attention").

12. See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998) (describing the interaction of transplanted law in a new system as a "legal irritant").

13. See PITMAN B. POTTER, THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE 6 (2001) (discussing the process of "selective adaptation" of imported law and how the effect of these legal transplants is effected by "the extent to which the norms of the legal regime resonate with existing values.").

plants provides an important—but underexplored—window into understanding both the possibilities and limitations of contemporary Chinese legal formal reform. These transplants help us to understand the formal institutions of the system and therefore to better understand both the “roots and routes” of Chinese law.¹⁴ It also points to a promising research direction that explores the broader context of how the Russo-Leninist elements of the socialist legal system continue to wield immense influence in the legal systems of the post-Soviet successor states, North Korea, Cuba, Vietnam, and Laos—which together with China, make up no less than one quarter of the world’s population.¹⁵

This Article presents its argument in six parts, following this introduction. Part II describes the socialist legal system and its roots in Marxist materialism, Leninist ideology, and the Russian statist legal tradition. Part III illustrates how the socialist legal system was abandoned by comparativists but has retained its influence in the institutions and public law mentality of China’s post-Mao formal legal system. Part IV will describe the influence of the constitutional statism of the Russo-Leninist socialist model on the Chinese legal system. Part V will examine the legacy in Chinese law of the administrative approaches to punishment found in the Russo-Leninist socialist law model. Part VI will examine the persistence of the institutions of centralized supervision taken from the Russo-Leninist socialist legal system in modern China. Part VII will conclude.

II. THE SOCIALIST LEGAL SYSTEM

Comparative law scholarship has traditionally divided law into different legal systems.¹⁶ These systems are best understood as Weberian ideal types—historically rooted “mental constructs” that help serve as a yardstick “around which schol-

14. See PENELOPE (PIP) NICHOLSON, *BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM* 3 (2007) (describing the study of Russian influence on Vietnam legal system as a study of “root and routes”).

15. Other important studies exist in this field. Most importantly, *see id.* (detailing Pip Nicholson’s study of Soviet influence on the Vietnamese court system).

16. See KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 63–67 (TONY WEIR TRANS., CLARENDON PRESS, 1987) (discussing how to organize legal systems).

ars can build and compare their work.”¹⁷ The two most influential legal systems in the world are the common law and civil law systems.¹⁸ The civil law system draws its historical roots from Western Europe and includes an emphasis on inquisitorial trial procedure, comprehensive codes, written evidence, and academic treatise writers in filling the gaps in the law.¹⁹ The civil law system was exported to the rest of the world through empire and example and has become the dominant legal tradition in the world. The second type—the common law system—draws its historical roots from England and shares key similarities “including an adversarial procedure and judge-made law.”²⁰ This common law system was exported to the British colonies and remains in place in these countries.²¹

A. *The Leninist and Historical Bases of the Socialist Legal System*

During the Cold War, most major comparative law theorists added a third legal system to the common law and civil law legal traditions: the socialist legal system. Comparative scholars described socialist law as a legal system grounded first and foremost in Marxist, command-style economics. In particular, most comparativists focused on the legal consequences of a system grounded in Marxist materialist ideology mandating public ownership over the means of production.²² For instance, John Hazard expressed this materialist understanding

17. Partlett, *supra* note 1, at 6.

18. See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 7 (1982).

19. MARY ANN GLENDON, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS, AND CASES ON WESTERN LAW* 52 (3rd ed. 2007) (“When we refer to some of the world’s legal systems with a common name, such as ‘Romanist’, ‘Romano-Germanic’, or ‘civil law’ systems, we are calling attention to the fact that, despite their similarities to other legal systems and despite national differences among themselves, these systems share a distinctive heritage.”).

20. Partlett, *supra* note 1, at 6.

21. PENNY DARBYSHIRE, *DARBYSHIRE ON THE ENGLISH LEGAL SYSTEM* 13 (10th ed. 2011).

22. Marxist theory held that the means of production (what theorists know as “the base”) ultimately determined the nature of the law and legal institutions (known as “the superstructure”). Thus, to build communism required creating an economic system with public ownership over the means of production. Raymond Williams, *Base and Superstructure in Marxist Cultural Theory*, in *MEDIA AND CULTURAL STUDIES: KEYWORKS* 130 (Meenakshi Gigi Durham & Douglas M. Kellner, eds., 2006).

of the socialist legal system when he commented that the “first mark of distinction” of the socialist legal system was “an economic factor . . . evidenced by the degree of involvement of all elements of society and of its institutions in the operation of a fully state-owned and planned economy.”²³ Christopher Osakwe described the system as grounded on the ideas of “national economic planning as the central core of economic development,” and a “less than enthusiastic accommodation of private ownership,” as well as a “doctrinal rejection of the Romanist division of law into public and private law.”²⁴

There is little question that Marxist economic ideology spawned new doctrinal categories and approaches to public law. For instance, the 1922 Civil Code of the Russian Soviet Federated Socialist Republic introduced new concepts like “state ownership.”²⁵ State property and social property became the two highest forms of ownership—higher than private property.²⁶ Furthermore, contract law became largely state-imposed as all firms had to follow the central plan.

A useful typology, however, cannot be derived solely from an analysis of how a specific legal system is underpinned by economics; also important is an analysis of the system’s roots in political ideology, historical institutions and traditions.²⁷ The historical understanding of the socialist legal system is completely missing from its existing descriptions.²⁸ Rene David, for instance, commented on the “weakness of the legal tradition and the idea of law in Russia.”²⁹ In fact, the importance of Russian legal history to the Soviet socialist legal system was downplayed by the Soviet government for ideological reasons. They maintained that the Soviet legal system comprised a separate legal system because it was “administered in the interest of the defense and education of the proletariat as the

23. HAZARD, *supra* note 7, at 523.

24. GLENDON ET AL., *supra* note 18, at 274.

25. ZWEIGERT & KÖTZ, *supra* note 16, at 309.

26. Inga Markovitz, *The Death of Socialist Law?*, 3 ANN. REV. L. SOC. SCI. 233, 239 (2007).

27. Partlett, *supra* note 1, at 49 (discussing the importance of a historical approach to Russian law).

28. *Id.* at 24–30.

29. RENE DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 152 (1978).

only class which can give the Union, and the world, a classless society.”³⁰

But the socialist legal system was clearly rooted in the Russian legal tradition.³¹ At the center of this Russian tradition were a number of statist legal institutions, including the Tsarist system of state-centered constitutional law, an administrative approach to punishment, and centralized supervisory institutions like the procuracy and court system.³² What became known as the “socialist legal system” drew on these institutions.

Vladimir Lenin provided the ideological basis for the inclusion of these highly statist institutions and public law approaches in the socialist legal system. Writing in *State and Revolution*, Lenin rejected arguments that Marxism required the state to be dismantled; instead, he argued that a Marxist ideology required strengthening the state into a tool that would help realize the dictatorship of the proletariat.³³ Leninism therefore made it imperative that the Soviet Union revitalize the most statist elements of the Russian legal tradition as part of building the “socialist legal system.”³⁴ Joseph Stalin would later confirm this insight, stating that the “Marxist formula” was the “[t]he highest possible development of the power of the state.”³⁵

Two interrelated principles in this Leninist system were most important. First was the concept of vanguardism. Leninism made it clear that law and legal institutions should play an instrumental role in building a strong, dictatorial state that could help the Communist Party serve a “vanguard” role in building a new society. Lenin explained that “law is a political tool” and therefore should be mobilized as a way of building a

30. John N. Hazard, *Soviet Law: An Introduction*, 36 COLUM. L. REV. 1236, 1249 (1936).

31. HAROLD BERMAN, *JUSTICE IN THE USSR: AN INTERPRETATION OF SOVIET LAW* 5 (1963).

32. GLENDON ET AL., *supra* note 18, at 264 (discussing codification in socialist legal systems as part of the civil law tradition of “legislative positivism”).

33. VLADIMIR LENIN, *THE STATE AND REVOLUTION* 7 (Robert Service trans., Penguin 1992) (1917) (discussing his task of “re-establish[ing] Marx’s authentic doctrine on the state”).

34. *Id.* at 88–89 (discussing how “bourgeois law” is necessary to the first stage of capitalism).

35. Hazard, *supra* note 30, at 1266.

new society.³⁶ A key implication of this was that a socialist legal system should emphasize “public order” rather than “individual rights” and that only “universal legal discipline could hold the state together.”³⁷ Thus, in contrast to civil law’s basis in traditional Roman and canon legal principles, this Leninist conception saw law as a tool of contemporary politics.

A second key Leninist principle is democratic centralism. Lenin described democratic centralism as “freedom of discussion” but “unity of action.”³⁸ In this system, courts and judges were the “transmission belts” of Party policy.³⁹ In this centralist approach, law and courts were tools for ensuring unity and promoting control over a large space. In this regard, they were much like other instrumentalities of an administrative state and therefore a tool for national consolidation and centralization. This Leninist “democratic centralism” therefore fundamentally rejected the system of checks and balances in the Western legal systems.⁴⁰

This Leninist ideology in turn 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 centralized system of courts.⁴¹ In the 1930s, this process continued as the leading legal Soviet theorist, Andrei Vyshinskii, argued that law was

36. Vladimir Lenin, *Concerning a Caricature of Marxism and Concerning Imperialist Economism*, 23 SOCHINENIIA 36, 79 (4th ed. 1949).

37. Markovitz, *supra* note 26, at 241.

38. Vladimir Lenin, *Freedom to Criticize and Unity of Action*, in 10 LENIN COLLECTED WORKS 179 (2d ed. 1965).

39. The concept of “transmission belts” was used by Lenin in a 1920 speech (and borrowed from his ongoing fascination with mechanization and focused development). Vladimir Lenin, Speech Delivered at a Joint Meeting of Communist Delegates to the Eighth Congress of Soviets: The Trade Unions, The Present Situation, and Trotsky’s Mistakes (Dec. 30, 1920).

40. See Vladimir Lenin, *What is to be Done?*, in 5 COLLECTED WORKS 347 (Joe Fineberg & George Hanna, trans., Foreign Language Publishing House 1961) (1902), <https://www.marxists.org/archive/lenin/works/1901/witbd/>.

41. GLENDON ET AL., *supra* note 18, at 264 (discussing codification in socialist legal systems as part of the civil law tradition of “legislative positivism”).

necessary to “defend the Soviet state” and “cast down” the bourgeoisie.⁴² Russo-Leninist institutions and public law approaches became critical components of the socialist legal model and its state-led model of development.

B. *Spreading the Socialist Legal System*

In the post-WWII period, Moscow sent tens of thousands of advisors and emissaries to new socialist countries in order to spread this model.⁴³ These emissaries helped the Russo-Leninist elements of the socialist legal system become the model of “socialist law” for “new” revolutionary socialist countries building their legal systems in the post-WWII period.⁴⁴ Soviet legal assistance and the export of the socialist legal system therefore became a part of a “communist law and development” movement that competed with the rival US-led law and development one.⁴⁵

In post-WWII Eastern Europe, the Soviets exported their legal institutions and approaches to the Eastern European countries that fell into their orbit.⁴⁶ In Asia, the Soviet Union supported socialist revolutionaries in China, Vietnam, Laos, and North Korea. Once established, these governments drew heavily on the socialist legal model in constructing their socialist states. None of these newly socialist countries perfectly replicated the Soviet socialist model. But the Soviet model of a “socialist legal system” became the point of departure in the process of building socialism and has shaped the development of law.⁴⁷ This Article will focus on its continuing legacies in China.

42. ANDREI Y. VYSHINSKY, *THE LAW OF THE SOVIET STATE* (Hugh Babb trans.) (1948) 76.

43. Izabella Goikhman, *Soviet-Chinese Academic Interactions in the 1950s: Questioning the “Impact-Response” Approach*, in *CHINA LEARNS FROM THE SOVIET UNION, 1949-PRESENT* 275, 282 (Thomas Bernstein & Hua-yu Li eds., 2010).

44. John Hazard, *Unity and Diversity in Socialist Law*, 30 *LAW & CONTEMP. PROBS.* 270, 283–84 (1965).

45. NICHOLSON, *supra* note 14, at 25.

46. ZWIGERT & KOTZ, *supra* note 16, at 312–13 (discussing how the exception to this was Mongolia, which the Soviet Union helped to set up a socialist legal system in the 1920s).

47. See Alan Uzelac, *Survival of the Third Legal Tradition?*, 49 *SUP. CT. REV.* 377, 378 (2010) (noting the strong link between the Soviet regime and the existence of socialist law).

III. THE END OF THE SOCIALIST LEGAL SYSTEM?

In the 1980s, the socialist legal system faced criticism. In an influential article, John Quigley attacked the “separationists” who supported the concept of the socialist legal system, arguing that many of the concepts that supposedly set the socialist legal system apart were no longer different from the civil law.⁴⁸ Focusing on the economic aspects of socialist law, he argued that public law concepts were replacing private law concepts not just in socialist legal systems but also in non-socialist civil law and common law systems.⁴⁹ For instance, he described how property law had become overlaid with public law.⁵⁰

A couple of years later, communism collapsed in Eastern Europe and the concept of a socialist law family was abandoned altogether. The majority of leading comparative law casebooks no longer included socialist law. Hein Kotz wrote that the socialist legal system was “dead and buried.”⁵¹ Other casebooks simply omitted the category altogether, leaving what one scholar has described as a “black hole.”⁵²

Underlying this “death” was the logic that when market-based capitalism replaced state-centered Marxist economics, the economics-based socialist legal systems would automatically begin “transitioning” back toward the capitalist civil law system. In one of the major casebooks, John Merryman argued that “socialist law was little more than a superstructure of socialist concepts imposed on a civil law foundation” and “with the end of the Soviet empire the superstructure is being rapidly dismantled, and nations once considered ‘lost’ to the European civil law are returning to it.”⁵³

48. John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781, 788–89 (1989) [hereinafter Quigley]. See generally JOHN QUIGLEY, *SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD* (2007).

49. Quigley, *supra* note 48, at 787; see also Markovitz, *supra* note 26, at 243 (Citing as an example of the convergence of the two systems West Germany’s Basic Law, which states that “[o]wnership obligates. Its use should also serve the social weal.”).

50. Quigley, *supra* note 48, at 787.

51. Kötz, *supra* note 2, at v.

52. ZDENEK KÜHN, *THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION?* 293 (2011).

53. JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* vii (1994).

The death of the socialist law family was widely perceived by comparative legal scholars as part of a global “transnational harmonization” of legal systems as capitalism swept the world.⁵⁴ Since the early 1980s, scholars had been arguing that the common law and civil law were increasingly borrowing from one another. Writing before the end of the Cold War, John Merryman described the convergence of the common law and civil law systems.⁵⁵ The collapse of communism in the late 1980s was seen as a continuation of this trend toward legal harmonization and convergence. Gianmaria Ajani speculated that the collapse of socialist law would lead the former socialist bloc countries to join a harmonized “Western legal tradition” in which the traditional boundaries of different legal families “no longer matter.”⁵⁶ Underlying this approach was that the socialist legal systems were going “back to normality.”⁵⁷

As market capitalism spread, there undoubtedly was some convergence, particularly in the areas of private law. Socialist countries abandoned many of the doctrinal concepts that underpinned command-style economies. For instance, as China began to embrace more market-based economic approaches in its creation of a “socialist market economy,” it transformed some of its formal legal provisions, with contract and property law abandoning legal preference for state property.⁵⁸ Furthermore, many socialist countries began to pass laws governing shareholder agreements and corporate governance.

A. *The People’s Republic of China*

Although the end of the Cold War might have led to some convergence in private law, the Leninist political ideology as well as the statist institutions and public law approaches of the socialist legal system did not disappear. Instead, just as the so-

54. See, e.g., Louis Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty First Century: The Accelerating Pace of Common Law and Civil Law Convergence*, 42 TEX. INT’L L.J. 625 (2007).

55. John Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT’L L. 357 (1981).

56. Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 95 (1995).

57. Uzelac, *supra* note 47, at 378.

58. Long Weiqui, *The Market Economy and Regulatory Change, in CHINA’S JOURNEY TOWARD THE RULE OF LAW: LEGAL REFORM, 1978 – 2008* 373 (Cai Dingjian & Wang Chenguang eds., 2010).

cialist legal system was declared dead by comparativists, the Russo-Leninist parts of the socialist legal system remained a critical foreign source of law in the People's Republic of China's (PRC) post-Mao project of rebuilding its *formal* legal system. Certain elements fit the Party's aspirations to create a system of formal law that would centralize and modernize China, whose legal history over the past twenty centuries has been characterized as a hybrid of Confucianism (*rujia*) and Legalism (*fajia*), or "Confucian in outlook, Legalist in substance" (*rubiao fali*).⁵⁹ Originating from the "Warring States" (*zhanguo*) period (approximately 5th century – 221 B.C.), classical Chinese Legalism sought to aggrandize state power through an extremely orderly polity under formal laws.⁶⁰

The basis for this Russo-Leninist influence on China's post-Mao legal development was laid in the early post-founding period of the People's Republic of China (1949-1957). The influence of the Soviet socialist legal model was at a zenith in China during this period.⁶¹ China's Communist leader, Mao Zedong, explained that the "very difficult tasks" that Communist China faced required "seriously study[ing] the advanced experience of Soviet Union."⁶² As a result, a massive project of Soviet assistance was launched, involving "roughly ten thousand" Soviet advisors who came to teach in China.⁶³ The concept of a universal socialist legal system for new communist states was a major area of collaboration in this "golden age" of Sino-Soviet cooperation.⁶⁴ During this period, Chinese legal

59. WERNER MENSKEI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 493, 525 (2d ed. 2006); Shao-Chuan Leng, *The Role of Law in the People's Republic of China as Reflecting Mao Tse-Tung's Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356, 356-358 (1977) (discussing the "competition" of *fa* (positive law) and *li* (moral code) in the Chinese legal tradition).

60. Eric C. Ip, *The Idea of Law in Classical Chinese Legalist Jurisprudence*, 9(4) GLOBAL JURIST 1, 17 (2009).

61. To the extent that the Chinese leadership at one point considered adopting Cyrillic to replace Chinese characters. See Minglang Zhou, *The Fate of the Soviet Model of Multinational State-Building in the People's Republic of China*, in CHINA LEARNS FROM THE SOVIET UNION, *supra* note 9, 484.

62. Thomas P. Bernstein, *Introduction: The Complexities of Learning from the Soviet Union*, in CHINA LEARNS FROM THE SOVIET UNION, *supra* note 9, at 1.

63. *Id.*

64. Ginsburgs, *supra* note 9, at 182.

education “was totally under the guidance of Soviet experts.”⁶⁵ A survey of Russian-language Soviet literature on Chinese legal development showed that Soviet and Chinese models were converging at this point.⁶⁶ This mass transfer of legal ideas culminated in China’s 1954 Constitution, a very close copy of the Soviet Union’s 1936 Constitution.⁶⁷

The direct influence of the Russo-Leninist socialist legal system subsided with the Anti-Rightist campaign, the Sino-Soviet split, and the subsequent Cultural Revolution in China. During this period, the Soviet example became a “negative” example and formal, systematized legality was rejected.⁶⁸ Formal legal institutions such as courts and procuracies were dissolved.⁶⁹ For almost twenty years, the PRC adopted a far less systematized and more informal legal approach that “stressed mass mobilization and ‘politics in command.’”⁷⁰

In the wake of Mao’s death, however, his successor Deng Xiaoping and others turned back to formal law as a way of restoring “stability, unity, institutionalization, and economic development.”⁷¹ This new period of legal construction restored the influence of Russo-Leninist approaches to public law. The basis for this post-Mao legal learning was the strongly Soviet-influenced Chinese laws from the golden age period of collaboration in the 1950s.⁷² These influences helped form the basis of the current Chinese public law system, and continue to shape its development today.

65. Fan Gang & Xin Chunying, *The Role of Law and Legal Institutions in Asian Economic Development: The Case of China: Patterns of Change in the Legal System and Socio-Economy* 4 (Harvard Institute for International Development, Development Discussion Paper No. 664, 1988).

66. Ginsburgs, *supra* note 9, at 179–82.

67. SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS 14 (1984).

68. Bernstein, *supra* note 62, at 2 (describing a tract called “[o]n Khrushchev’s Phony Communism and its Historical Lessons for the World”).

69. Susan Finder, *The Supreme People’s Court of the People’s Republic of China*, 7 J. CHINESE L. 145, 146 (1993).

70. Leng, *supra* note 59, at 358.

71. *Id.* at 370.

72. Leng, *supra* note 59, at 373 (describing the growing influence of 1950s formal laws in China after Mao’s death).

B. *Scholarly Commentary*

Most scholars writing about the post-Mao approach to law in China have briefly cited Soviet influence, but have neglected to fully explore the distinctive contribution of the Russo-Leninist socialist legal tradition in the direction of the post-Mao legal reforms.⁷³ The failure to pursue the legacy of this influence is a reflection of a number of factors.

First, many scholars have been too accepting of the formal line of the Chinese Communist Party that post-Mao reforms were following “a Chinese path.”⁷⁴ Scholars have generally agreed, and seen the Soviet influence on PRC law as fleeting or minimal. For example, Pitman Potter argues that the post-Mao approach to law involves a move away from “Leninist discipline” toward a “modality of regulation” which combines the “policy of goals of socialism” with “principles of the pre-Han legalist school of governance.”⁷⁵ Carlos Wing-hung Lo argues that post-Mao law has moved away from the “instrumental concerns” of the Leninist socialist model to a more progressive Chinese model of law as “social regulator.”⁷⁶ These arguments, however, fail to explain how these “new” approaches signal a real break from the Russo-Leninist aspects of socialist law.

Second, the dismissal of the Soviet influence on Chinese law is also a continuation of the mistaken idea that the socialist legal system was primarily based on economics. Under this line of reasoning, China’s move to market economics under Deng represented a rejection of Soviet socialist models and an em-

73. Many briefly point to the Soviet influences on Chinese law, but only fleetingly and without serious follow up. There has been interest in the influence of the Soviet Union on China in other sectors outside of law. In fact, a major conference entitled the “The Soviet Impact on China: Politics, Economics, Society, and Culture” took place at Columbia University. This conference later became a book. See CHINA LEARNS FROM THE SOVIET UNION, *supra* note 9. However, this conference and book neglected to look closely at the role of the Soviet Union in post-Mao Chinese legal construction. A good study of the influence of the Soviet socialist law on Vietnam’s legal system is Pip Nicholson’s *Borrowing Court Systems*. NICHOLSON, *supra* note 14, at 3.

74. CARLOS WING-HUNG LO, CHINA’S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG’S ERA 11 (1995).

75. PITMAN POTTER, FROM LENINIST DISCIPLINE TO SOCIALIST LEGALISM: PENG ZHEN ON LAW AND POLITICAL AUTHORITY IN THE PRC 7 (2003).

76. Carlos Wing-hung Lo, *Socialist Legal Theory in Deng Xiaoping’s China*, 11 COLUM. J. ASIAN L. 469, 485 (1997).

brace of Western law. Wang Chenguang describes how Soviet socialist legal ideas played no role in post-Mao change because it was “totally incompatible with the market economy and the democratic system.”⁷⁷ Chinese legal construction in the 1980s was instead looking for a “new consensus” that was not at all based on that concept.⁷⁸ Long Weiqu describes how China’s creation of a “socialist market economy” and “socialist rule of law” marks a “complete departure from Soviet-style thinking about the law as an ideological tool.”⁷⁹ Wing-hung Lo also accepts this approach, commenting that the post-Mao approach “breaks with the framework of former Soviet jurisprudence.”⁸⁰

Finally, the influence of Russo-Leninism in Chinese law has been downplayed by those who see the Chinese legal system as slowly converging with Western legal systems. Jianfu Chen suggests that contemporary Chinese law “has become less Chinese than ever before” and even goes so far as to assert that it “has become ‘Western.’”⁸¹ Jingjing Liu argues that the rebuilding of China’s legal system has “generally abandoned ideological requirements and embarked on a massive effort of law transplantation from *western* legal systems and internationally recognized practices.”⁸² She concludes that “China’s central government more resembles the parliamentary systems common in Europe.”⁸³ Randall Peerenboom writes that the Chinese Constitution of 1982 is “predominantly Western in origins,” and it is now “abundantly clear” that the Chinese legal system is no longer “Marxist-Leninist” in character.⁸⁴ Albert

77. Wang Chenguang, *From the Rule of Man to the Rule of Law*, in CHINA’S JOURNEY TOWARD THE RULE OF LAW: LEGAL REFORM, 1978–2008 1, 34 (Cai Dingjian & Wang Chenguang eds., 2010).

78. *Id.*

79. Weiqui, *supra* note 58, at 371.

80. WING-HUNG LO, *supra* note 74, at 11.

81. Jianfu Chen, *The Transformation of Chinese Law: From Formal to Substance*, 37 HONG KONG L.J. 689, 736–37 (2007).

82. Jingjing Liu, *Overview of the Chinese Legal System*, 1 CHINA UPDATE (Jan.–Mar. 2013) 1, <http://elr.info/sites/default/files/chinaupdate1.1.pdf> (emphasis added).

83. Jingjing Liu, *China’s Procuratorate in Environmental Civil Enforcement: Practice, Challenges & Implications for China’s Environmental Governance*, 13 VT. J. ENVTL. L. 41, 43 (2011).

84. Randall Peerenboom, *Social Foundations of China’s Living Constitution*, in COMPARATIVE CONSTITUTIONAL DESIGN 138, 159–60, 163 (Tom Ginsburg ed., 2012).

Chen has examined the roots of Soviet influences on the Chinese legal system but he too argues that this influence is now largely outstripped by the influence of “legal globalization.”⁸⁵ He argues that globalization creates pressures for China to “incorporate norms of international law.”⁸⁶ Amidst this globalizing influence, the common law and civil law are seen as having far greater effect on the Chinese legal system. He goes on to argue that the “[s]ocialist family of legal systems hardly exists anymore.”⁸⁷ Finally, Yan Lin and Tom Ginsburg have placed the Chinese constitution within the “American literature on the constitution outside the courts” and have argued that the Constitution is enforced by the Chinese legislature.⁸⁸

C. *Chinese Law with Russo-Leninist Characteristics?*

Our aim in this Article is to argue that the socialist legal system—with its Leninist political ideology and institutions drawn from the Russian legal tradition—has played, and continues to play, a larger role in Chinese public law development than previously acknowledged. No matter the rhetoric, legal reformers in Deng’s China had little choice but to lean heavily on the institutions, texts, and ideas of the Soviet socialist model in the early stages of restoring formal legality in the modern Chinese legal system. This grounding has created underexplored public law legacies that merit attention. In particular, it helps us understand the development of Chinese constitutional and criminal law as well as other distinctive legal institutions.

This is not to say that these Russian and Leninist influences are decisive or determinative. Indeed, Chinese legal reformers adapted elements of the Soviet model to Chinese conditions.⁸⁹ Like any other system, Chinese law blends different

85. Albert H.Y. Chen, *Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law*, in *LAW-MAKING IN THE PEOPLE’S REPUBLIC OF CHINA* 70 (Jan Michiel Otto et al. eds., 2000).

86. *Id.* at 69.

87. *Id.* at 68.

88. Yan Lin & Tom Ginsburg, *Constitutional Interpretation in Law-Making: China’s Invisible Constitutional Enforcement Mechanism*, 63 *AM. J. COMP. L.* 467 (2015).

89. See generally JOHN W. HEAD, *GREAT LEGAL TRADITIONS: CIVIL LAW, COMMON LAW, AND CHINESE LAW IN HISTORICAL AND OPERATIONAL PERSPEC-*

traditions.⁹⁰ Furthermore, in recent years, Chinese reformers have worked to eliminate certain Leninist influences in their legal system. But 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.

IV. CONSTITUTIONAL STATISM

Constitutional law in the West is seen as a form of higher law that seeks to ensure rights-based limitations on the power of government through institutional checks and balances as well as protections for individual rights. Since the end of WWII, this rights-based model has spread to much of the civil law world in continental Europe.⁹¹ The socialist system's approach to constitutional law, however, rejects this rights-based approach.⁹² It instead draws on the most statist elements of the Russian tradition and creates a highly centralized institutional structure that sees law as an instrument of state mobilization.⁹³ This model of constitutional statism continues to play an important role in China's constitutional debates.

A. *Russia's Statist Constitutional Tradition*

Russia has long had a highly statist constitutional tradition. During the imperial period, the dominant constitutional thinkers came from the "statist school" of Russian historiography; constitutional law was known in Russian as "state" law

TIVE (2011) (discussing Chinese law as a product of its Confucianist background).

90. STANLY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 383, 405 (1999) (discussing in part the inherited Maoist legal institutions that survived the reforms).

91. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 85 (2008-2009) (describing how the "new constitutionalism" is based on the precept that "rights and effective rights protection are basic to the democratic legitimacy of the state").

92. See *infra* notes 102-19.

93. See *infra* notes 102-07.

(*gosudarstvennoe pravo*) rather than “constitutional” law (*konstitutsionnoe pravo*).⁹⁴ Consequently, constitutional thinkers saw the state as the “fundamental creative element of history and its motive force.”⁹⁵ The state was the “sole creative element” of history and “the people” were an inert mass shaped by that state.⁹⁶

This statist approach was clearly reflected in Russia’s first written constitution in 1906. This constitution was a top-down reaction by the Tsar to disorder. It provided a way of “maintaining order and authority.”⁹⁷ Although it created some limitations on the power of the Tsar, it remained highly statist. Western ideas of separated powers were rejected: the Russian Fundamental Laws of 1906 stated that “the Russian state is one and indivisible.”⁹⁸ Even the liberal constitutionalists agreed that rights provisions should be entitled “Basic Rights and Obligations of Russian Subjects.”⁹⁹

The Soviet constitutional system drew on these statist ideas. Under the Leninist conception of vanguardism, real power lay with the Communist Party. Constitutions were therefore Party-formulated documents that organized the state in a way that would allow the Party to ensure “socio-economic development.”¹⁰⁰ By the 1977 Soviet Constitution, Marxist goals were downplayed in favor of more nationalist goals. Constitutional vanguardism in this sense saw the constitution as an in-

94. GEOFFREY A. HOSKING, *THE RUSSIAN CONSTITUTIONAL EXPERIMENT: GOVERNMENT AND DUMA, 1907–1914* 1 (1973) (describing how “in Russia the state was always the dominant social institution”); KARE JOHAN MJØR, *REFORMULATING RUSSIA: THE CULTURAL AND INTELLECTUAL HISTORIOGRAPHY OF RUSSIAN FIRST-WAVE EMIGRÉ WRITERS* 78 (2011) (describing how the state school was also known as the juridical school).

95. Gary M. Hamburg, *Inventing the State School of Historians*, in *HISTORIOGRAPHY OF IMPERIAL RUSSIA: THE PROFESSION AND WRITING OF HISTORY IN A MULTINATIONAL STATE* 99 (Thomas Sanders ed., 1999); see also V. E Illeritskii, *O gosudarstvennoi shkole v russkoi istoriografii*, in *VOPROSY ISTORII* NO. 5, 141–59 (1959); see also Vladimir Kitaev, *Gosudarstvennaya shkola v russkoi istoriografii: vremia pereotsenki?*, in *VOPROSY ISTORII* NO. 3 161–64 (1993).

96. Hamburg, *supra* note 95, at 107–08.

97. Hosking, *supra* note 94, at 8.

98. ANDREAS KAPPELER, *THE RUSSIAN EMPIRE: A MULTI-ETHNIC HISTORY* (Alfred Clayton trans.) 345 (rev. ed. 2013).

99. *Id.*

100. Christopher Osakwe, *The Common Law of Constitutions of the Communist-Party States*, 3 *REV. SOC. L.* 155, 158 (1977).

strument for organizing the state so that it could best be utilized by the Party to promote national development.¹⁰¹

As a consequence, the Soviet constitutional tradition rejected the western conception of formal constitutional checks and balances. Instead, reflecting the Leninist concept of “democratic centralism,” all divisions of the state were to work together; checks and balances would only hinder this goal. This unitary state was merely a means to an end, a battering ram for attaining a “full communist society.”¹⁰²

Institutionally, this centralism envisioned a formal constitutional system wherein all state power is concentrated in the legislature. The legislature—which was divided into two chambers, reflecting the federal makeup of the Soviet Union—was not one you would find in a western European system of parliamentary sovereignty.¹⁰³ The full legislature—which was extremely large—met infrequently. A much smaller body served when the larger body did not meet. This smaller body had the power to issue and interpret laws and orders. This system of legislative supremacy was replicated in the nationally-organized Union Republics as well.¹⁰⁴

This centralism also meant that the Soviet constitutional tradition subordinated the rights of the individual to the state.¹⁰⁵ Soviet constitutions created a number of “obligations and duties” to which all citizens must adhere. At the center of these obligations and duties was the requirement that rights not infringe on the interests of the state or society. The 1977 Soviet Constitution, for instance, stated that the “enjoyment by citizens of their rights and freedoms must not be to the detri-

101. *Id.* at 160–61 (noting that socialist state constitutions were considered hierarchically inferior to the communist party program and were by and large merely codifications of the crucial elements of the party program to serve as a legal platform for political action).

102. *Id.* at 173.

103. *Id.* at 174–78.

104. Christopher Osakwe, *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. PA. L. REV. 1350, 1413 (1979) (discussing the nested system of legislative supremacy in the Soviet constitutional structure).

105. Cf. Henry E. Hale, *Civil Society from Above? Statist and Liberal Models of State-Building in Russia*, 10 *Demokratizatsiya* 306, 309 (2002) (discussing a statist model where civil society and the state are “part of the same organic whole.”).

ment of the interests of society or the state.”¹⁰⁶ It also obliged Soviet citizens to “safeguard the interests of the Soviet state.”¹⁰⁷

Finally, the concept of “socialist law” drew heavily on extreme statist elements of the Russian tradition of law.¹⁰⁸ Law in the Soviet Union was an instrument of the state; law was a management tool that ultimately allowed “the substitution of policy for law.”¹⁰⁹ Andrei Vyshinskii is generally regarded as the leading thinker of this socialist concept of law, and emphasized that law should be “a system of rules expressing the will of the state, and guaranteed by the state’s monopoly of force.”¹¹⁰ Under the Soviet constitutional system, therefore, legal institutions were to instrumentally respond to the goals of the Communist Party.¹¹¹

B. *Chinese Constitutionalism*

This statist Soviet socialist constitutional model played an important role in Chinese legal development.¹¹² During the ferment surrounding the collapse of the imperial Qing dynasty in the early 20th century, two schools of thought emerged on the future of constitutional law in China: the Western school and the Russian school.¹¹³ Sun Yat-Sen—the most influential Chinese constitutional thinker—was drawn to these Russian ideas and helped the “Russian” school of thought become the basis for both the Kuomintang and Communist Party ap-

106. KONSTITUTSIYA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] [hereinafter Soviet Constitution].

107. *Id.* at art. 62.

108. *See id.* at art. 4, (“The Soviet state and all of its bodies function on the basis of socialist law . . .”).

109. John Gillespie, *Changing Concepts of Socialist law in Vietnam*, in *ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF CHINESE AND VIETNAMESE LEGAL REFORM* 45, 47 (John Gillespie & Pip Nicolson eds., 2005) (discussing the transplantation of the Soviet concept of socialist law to Vietnam).

110. GORDON B. SMITH, *THE SOVIET PROCURACY AND THE SUPERVISION OF ADMINISTRATION* 6 (1978).

111. VYSHINSKY, *supra* note 42 at 50 (“Marxism teaches the necessities of using law as one of the means of struggle for socialism.”).

112. *See Ip, supra* note 60, at arts. 2, 17 (describing how classical Chinese legalism, like the Soviet model, sought to aggrandize state power through an extremely orderly polity under formal laws).

113. JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 40–41 (2008).

proach to post-imperial law.¹¹⁴ The extent of these early links could be seen in the creation of Sun Yat-Sen University in Moscow, where a young Deng Xiaoping studied in 1926.¹¹⁵

With the rise to power of the Communists in 1949, many young Chinese students were sent to study in the Soviet Union.¹¹⁶ A large number of Soviet law textbooks and codes were also translated into Chinese. Chinese legal scholars in the 1950s drew heavily on the definition and typology of law developed by Andrei Vyshinsky, a Soviet legal thinker of the 1930s.¹¹⁷ This process of exchange and influence culminated in the PRC's first constitution in 1954, which closely resembled the Soviet Constitution of 1936.¹¹⁸

In the years after 1954, the statist constitutional elements of the socialist model were largely rejected. This rejection culminated in the 1975 Constitution, which fundamentally departed from the Soviet-inspired 1954 Constitution. The 1975 Constitution was much shorter than its predecessor and downgraded the importance of formal legality.¹¹⁹ It included far fewer provisions on the judicial system and instead called for the "mass line" to be applied by judges in trying cases.¹²⁰

In the late 1970s, however, Deng Xiaoping's legal reforms returned to these 1950s-era roots. These reforms began with Deng's 1980 criticism of Maoist lawlessness and his belief that "there must be laws to rely on and to be obeyed, the enforcement of laws must be strict, and the breaking of laws must be punished."¹²¹ This re-embrace of a socialist legal system represented a pragmatic turn toward a more stable set of laws that would allow China to build economic growth and help build a

114. *Id.*

115. MICHAEL DILLON, DENG XIAOPING: A POLITICAL BIOGRAPHY 26–27 (2015).

116. Elizabeth McGuire, "Between Revolutions: Chinese Students in Soviet Institutes, 1948-1966" in CHINA LEARNS FROM THE SOVIET UNION, *supra* note 9, at 361.

117. Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 36 (1989).

118. Chen, *supra* note 85, at 58.

119. ZOU KEYUAN, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW 29 (2006); LENG & CHIU, *supra* note 67, at 20.

120. *Id.*

121. XIAOPING DENG, COLLECTED WORKS OF DENG XIAOPING 146 (1983).

“socialist market economy with Chinese characteristics.”¹²² Although this represented a departure from the state-owned economic doctrines of Marxism, this transformation nevertheless drew heavily on statist political elements found in the socialist model. In fact, the Soviet model of statist constitutionalism once again became the model as Chinese legal reformers returned to the documents of the golden age of Sino-Soviet collaboration in 1950s.

The first post-Mao constitution—passed in 1978—was an attempt at restoring formal legality. It drew heavily on the 1954 Chinese Constitution.¹²³ It rejected the Maoist concept of employing the “mass line” in judicial cases and restored most of the key constitutional structures and concepts that had been adapted from the Soviet model in 1954. The 1982 Constitution of the People’s Republic of China—which is still in place today—has clear roots in the Russo-Leninist ideas of the Soviet model.¹²⁴ The key principles and institutions “replicate[] to a significant extent that of the former USSR.”¹²⁵

First, the formal text of the current Chinese Constitution closely resembles the text of its closest Soviet predecessor: the Soviet Constitution of 1977.¹²⁶ This is most obvious in the preamble and fundamental articles of the Constitution. The preamble in the Chinese Constitution describes the goals to be achieved by the Chinese state in the pursuit of the Party’s vanguard policies.¹²⁷ Furthermore, the most basic provisions of these constitutional orders are almost identical. Article 1 of the Chinese Constitution follows the Soviet model and declares it to be a “socialist state.” Article 2 follows the same formulation of socialist popular sovereignty by declaring in iden-

122. Andreas Lorenz & Wieland Wagner, *Does Communism Work After All?: Part 2: “A Social Market Economy with Chinese Characteristics”*, SPIEGEL ONLINE (Feb. 27, 2007), <http://www.spiegel.de/international/spiegel/red-china-inc-does-communism-work-after-all-a-465007-2.html>.

123. LENG & CHIU, *supra* note 67, at 38.

124. See generally XIANFA art. 35, § 1 (1982) (China). [hereinafter Chinese Constitution].

125. Chen, *supra* note 85, at 58.

126. Compare Chinese Constitution, *supra* note 124 with Soviet Constitution, *supra* note 106.

127. See John N. Hazard, *The Common Core of Marxian Socialist Constitutions*, 19 SAN DIEGO L. REV. 297, 297 (1982) (noting that a programmatic, goal-setting preamble has remained a characteristic feature of Marxian constitutions, including China’s).

tical wording that “All power . . . belongs to the people.” Article 4 of the Soviet Constitution and Article 5 of the Chinese Constitution both describe the supremacy of the “socialist” legal system.

Second, and more importantly, Leninist principles predominate in the Constitution. Article 3 of the Chinese Constitution states that the “state organs” of the People’s Republic of China apply the principle of “democratic centralism.” The Chinese Constitution sets up a system of formal legislative supremacy, concentrating all power in the National People’s Congress (NPC). The Constitution declares the NPC and its permanent body (the Standing Committee) to be “the highest organ of state power.”¹²⁸ Much as in the Soviet socialist model, a smaller body—the Standing Committee—exercises broad power in China, making laws as well as interpreting laws and the PRC Constitution.¹²⁹

Furthermore, the Chinese Constitution goes to great lengths to safeguard the interests of the state. The Chinese Constitution makes it the “sacred duty” of all citizens to “defend the motherland and resist aggression.”¹³⁰ Both constitutions formally place state interests above individual interests. Article 51 of the Chinese Constitution similarly declares that the people cannot infringe on the interests “of the State, of society or the collective” in “exercising their freedoms and rights.”¹³¹

Finally, the statist approach to socialist legality can be found in the Chinese Constitution. The Constitution declares that China will be governed “according to law” and that “the State upholds the uniformity and dignity of the *socialist legal system*.”¹³² The courts are therefore seen as a component part of this centralized state apparatus. The Constitution recognizes the Supreme People’s Court as one of four state institutions, subject to, rather than independent from, the National People’s Congress—officially the “highest organ of state

128. Chinese Constitution *supra* note 124, at art. 57.

129. *Id.* at art. 58; *see also* Sophia Woodman, *Legislative Interpretation by China’s National People’s Congress Standing Committee: A Power with Roots in the Stalinist Conception of Law*, in INTERPRETING HONG KONG’S BASIC LAW: THE STRUGGLE FOR COHERENCE 229, 229 (Hualing Fu et al. eds., 2008).

130. Chinese Constitution *supra* note 124, at art. 52.

131. *Id.* at art. 51.

132. *Id.* at art. 5.

power.”¹³³ The Court is technically the “highest adjudicative organ of the state,” pursuant to Article 127, but this is qualified by Article 128, which makes it answerable to the Congress. The principle of “independent adjudication,” provided by Article 126, gives the people’s courts no right to judge the acts of the Communist Party, whose acquiescence is essential for any sort of judicial independence to be practiced in China.¹³⁴

The Chinese constitutional structure, however, did not completely follow the vision of multinational federalism in the 1977 Soviet Constitution. In particular, the Chinese leadership rejected the concept of a federal state. The Chinese model avoids the use of the word “federal” in the Constitution, and rejects the Soviet form of federalism with a bicameral legislature.¹³⁵ The Chinese Constitution instead creates a unitary state with regional autonomy.

The Russo-Leninist roots of the Chinese Constitution shed light on more recent discussions of constitutionalism and rule of law in China. Indeed, high-level Party officials’ discussions of adherence to the rule of law ultimately come from a highly statist and instrumental view of constitutional law. For instance, in 1997, President Jiang Zemin made the precept “Governing the State according to Law” (*yifa zhiguo*) a basic policy of the Party.¹³⁶ Two years later, the Chinese Constitution was amended with the insertion of a new Article 5 which promises that “the People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.”¹³⁷

This amendment did not, however, suggest a sudden desire to adopt western-style rule of law. Instead, it reflected the Party’s recognition of how important the legal system is as an

133. *See id.* at art. 62.

134. YAO CHEN, *THE GOVERNMENT STRUCTURE OF CONTEMPORARY CHINA* 226 (2005).

135. Zhou, *supra* note 104, at 477.

136. ANN E. KENT, *CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE* 202 (1999).

137. Amendment to Chinese Constitution Adopted at the Second Session of the Ninth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on March 15, 1999, http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381953.htm.

instrument for continued economic development.¹³⁸ There was no official repudiation of Mao Zedong's position that legal institutions are inherently "violent" instruments to be deployed against the enemies of the proletariat and its allies,¹³⁹ in light of the Constitution's conservation of the "Four Cardinal Principles": Keeping to the Socialist Path, Upholding the People's Democratic Dictatorship, Upholding the Leadership of the Chinese Communist Party, and loyalty to Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and the 'Three Represents' of Jiang Zemin.¹⁴⁰ The post-Mao Chinese Party leadership continues to see "democratic centralism" as the pivotal constitutional principle,¹⁴¹ the upshot being that the National People's Congress, among other organs of state power, remains a body whose main responsibility is to learn about the leadership's law and policies rather than initiating those laws and policies themselves.¹⁴²

More recent discussions of constitutionalism have continued this approach. In October 2014, the Chinese Communist Party affirmed it must "administer the State according to the Constitution" (*yixian zhiguo*).¹⁴³ This pronouncement raised hopes amongst some influential commentators that "constitutional governance" would finally come to China. For instance, on January 4, 2013, a major Chinese intellectual posted a manifesto about the Constitution being the "consensus for political structural reform."¹⁴⁴ He discussed how constitutional governance must mean that the constitution "guarant[ees] human rights and restrain[s] government power."¹⁴⁵

138. Peerenboom, *supra* note 84, at 147.

139. Yu, *supra* note 117, at 30.

140. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 72 (4th ed. 2011).

141. Chinese Constitution *supra* note 124, at art. 3.

142. SUJIAN GUO, CHINESE POLITICS AND GOVERNMENT: POWER, IDEOLOGY, AND ORGANIZATION 196 (2013).

143. Laura Zhou & Cary Huang, *Communist Party Pledges Greater Role for Constitution, Rights in Fourth Plenum*, SOUTH CHINA MORNING POST (Oct. 24, 2014), <http://www.scmp.com/news/china/article/1623286/communist-party-pledges-greater-role-constitution-rights-fourth-plenum>.

144. Yanhuang Chunqiu, *The Constitution is the Consensus for Political Structural Reform*, CHINA COPYRIGHT AND MEDIA (Jan. 4, 2013), <https://chinacopyrightandmedia.wordpress.com/2013/01/04/constitutional-governance-is-the-consensus-for-political-structural-reform/>.

145. *Id.*

This post, however, was immediately censored, demonstrating that this interpretation was clearly not the meant by the Party. In its place, the Party posited the concept of the “Chinese dream of the great rejuvenation of the Chinese nation.”¹⁴⁶ This concept ultimately rejects the idea of constitutionalism as a limitation on government power or as establishing individual freedom. Instead, it reflects the vanguardist principle that the Constitution is a tool for the Party’s continued attempt to advance China’s resurgence. Underpinning this idea is the notion that the “successes that have been reached so far are deemed to be largely due to the enlightened leadership of the Chinese Communist Party.”¹⁴⁷ Thus, constitutionalism in modern China remains a way for the Party to “lead the people in executing the Constitution and the law.”¹⁴⁸

V. ADMINISTRATIVE PUNISHMENT

The law of punishment regulates the relationship between the state and the individual. Most civil law countries regulate state punishment primarily through formalized criminal law and criminal procedure codes which include safeguards for individual rights.¹⁴⁹ The socialist legal system, by contrast, draws on a Russian tradition that allowed the state to punish people through both criminal and administrative procedures. Underpinned by the Party’s vanguard need to educate the people and enforce ideological purity, the Russo-Leninist socialist model therefore included wide latitude for a more flexible administrative approach to punishment. This system of administrative punishment has played an important role in the Chinese system of punishment from 1980 to today.

146. Rogier Creemers, *The Constitutionalism Debate in China*, UK CONSTITUTIONAL LAW ASSOCIATION (June 22, 2013), <http://ukconstitutionallaw.org/2013/06/22/rogier-creemers-the-constitutionalism-debate-in-china>.

147. *Id.*

148. Jinping Xi, Speech to the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China: An Explanation About the Decision of the Central Committee of the Chinese Communist Party on Several Major Problems in Relation to Comprehensively Promoting Governing the State in Accordance with Law (Oct. 28, 2014).

149. ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* 3 (2013) (discussing the procedural protections on criminal law protections that have developed in Western law).

A. *Soviet System of Punishment*

Punishment in the Russian tradition has always been multifaceted. On one hand, the late nineteenth century saw a growing move toward codification.¹⁵⁰ This code followed the European model while simultaneously allowing criminal prosecution by analogy—prosecution for a crime that was highly similar to a crime listed in the Code.¹⁵¹ At the same time, however, a series of imperial Russian laws provided for expedited administrative punishment for specified anti-state crimes. This administrative punishment included detention, exile, and forced work regimes.¹⁵²

The Soviets drew on the most extreme elements of this Russian tradition of punishment in setting up a new socialist criminal law system. The first Soviet Criminal Code drew heavily on the previous Tsarist Code, mixing these provisions with stringent punishment for enemies of the state.¹⁵³ It also included a provision allowing for prosecution by analogy, stating “if there is no direct mention of particular types of offenses, such offenses are to be punished in accordance with those articles of the code which concern crimes most similar to those committed.”¹⁵⁴ For instance, counterrevolutionary crimes drew on the principle of analogy in that any action which could be linked to counterrevolution was criminal.¹⁵⁵

Soviet socialist law also expanded the use of expedited administrative punishment for anti-state crimes such as treason.¹⁵⁶ The deployment of administrative punishment had a distinct ideological component, as administrative methods were seen as a way for the Party to educate the people.¹⁵⁷ The flexibility of administrative procedure was also used to enforce purity in the most important institution in the socialist legal

150. N. S. Timasheff, *The Impact of the Penal Law of Imperial Russia on Soviet Penal Law*, 12 AM. SLAV. & E. EUR. REV. 441, 441–42 (1953).

151. *Id.* at 448.

152. Jonathan Daly, *Political Crime in Late Imperial Russia*, 74 J. MOD. HIST. 62, 78–80 (2002).

153. Timasheff, *supra* note 150, at 448–49.

154. *Id.* at 448.

155. *Id.* at 460.

156. PETER H. SOLOMON, JR., SOVIET CRIMINAL JUSTICE UNDER STALIN 29 (1996).

157. Alice Ehr-Soon Tay & Eugene Kamenka, *Marxism, Socialism and the Theory of Law*, 23 COLUM. J. TRANSNAT'L L. 217, 237 (1985).

system: the Communist party.¹⁵⁸ In 1921, the Soviets created a Central Control Commission (CCC) that policed Party members completely outside of the normal criminal justice system.¹⁵⁹ This system of extra-judicial party control featured a parallel system of Party courts with no procedural protections that determined whether someone should be expelled from the Party and later tried in the criminal courts.¹⁶⁰

B. *Chinese System of Punishment*

The formal law of Chinese punishment drew heavily on this Russo-Leninist socialist model. China's first-ever criminal procedure and criminal law codes—passed exactly thirty years after founding in 1979—were closely modeled on Soviet criminal codes.¹⁶¹ This is apparent from the text of the codes themselves as well as “interviews with Chinese jurists.”¹⁶² This influence can be found in two places. First, the drafters of these laws drew heavily on 1950s laws produced under the tutelage of Soviet experts. Second, the drafters were influenced by the Russian Republic Criminal Code of 1960.¹⁶³

The first clear similarity can be found in the organization: the Criminal Procedure laws follow the civil law tradition and begin with a “general part” section.¹⁶⁴ In the Criminal Law Code, the definitions of crime and criminal responsibility do not differ significantly from the 1960 Russian Criminal Law Code. Furthermore, the 1979 Chinese Criminal Code included the borrowed Russian concept of prosecution by analogy.¹⁶⁵

158. See generally Lawrence R. Sullivan, *The Role of the Control Organs in the Chinese Communist Party, 1977-1983*, 24 *ASIAN SURV.* 597 (1984).

159. Paul Cocks, *The Rationalization of Party Control*, in *CHANGE IN COMMUNIST SYSTEMS* 153, 156 (Chalmers Johnson ed., 1970).

160. Christopher Osakwe, *Prerogativism in Modern Soviet Law: Criminal Procedure*, 23 *COLUM. J. TRANSNAT'L L.* 331, 346 (1985) (discussing how Party members can face “comradely criticism, public censure, comradely warning, admonition, reprimand . . . and expulsion”).

161. Jianfu Chen, *supra* note 81, at 704; Harold J. Berman et al., *A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure*, 73 *J. CRIM. L. & CRIMINOLOGY* 238, 239 (1982).

162. Berman et al, *supra* note 161, at 238.

163. *Id.*

164. *Id.*

165. The application of the criminal law by analogy also has roots in the Chinese legal system. See Jianfu Chen, *A Criminal Justice System for a New Mil-*

Chinese legal drafters also drew on the statist elements of the criminal law model. Article 2 of the PRC Criminal Code defines the purpose of the criminal justice system as first and foremost to “defend national security, the political power of the people’s democratic dictatorship, and the socialist system.” It also creates a number of crimes that resemble counterrevolutionary activity. Article 103 makes it an offense to “organize, plot, or act to split the country or undermine national unification.” Article 106 makes it an offense to collude with a foreign institution, organization, or individual to commit crimes under Articles 103 and 105. Following the Soviet lead, Socialist criminal law was primarily understood as a “mere supplement to Party policies” dealing with the State’s political enemies, who are equated to criminals.¹⁶⁶ In a similar vein, the criminal law presumes criminals, normally understood, to be class enemies,¹⁶⁷ subject to deprivation of political and property rights.¹⁶⁸

Subsequent reforms have not moved significantly away from this statist approach. Despite amendments to the Criminal Law and the Criminal Procedure Law in the 1990s, precepts like the presumption of innocence, proof beyond a reasonable doubt, the inadmissibility of hearsay and of confessions secured by torture remain “muted” in the Chinese legal system.¹⁶⁹ Article 12 of China’s Criminal Procedure Law 1996 provides that no person shall be found guilty in the absence of a court judgment, yet Article 155 allows the judge to interrogate defendants who lack the right to remain silent; the law itself is silent as to which party bears the burden of proof.¹⁷⁰ Hence, in practice, defendants are presumed guilty unless they produce an exoneration, in a context in which defense lawyers are constrained in collecting evidence to challenge the case constructed by the procuracy. Amendments that eliminated a widespread and notorious mode of indefinite police deten-

lenium?, in CHINA’S LEGAL REFORMS AND THEIR POLITICAL LIMITS 77, 99–100 (Eduard B. Vermeer & Ingrid d’Hooghe eds., 2002).

166. CHEN, *supra* note 140, at 308.

167. PITMAN B. POTTER, CHINA’S LEGAL SYSTEM 76 (2013).

168. Criminal Law of the People’s Republic of China, art. 34 (1979) [hereinafter Chinese Criminal Law].

169. MICHAEL MCCONVILLE ET AL., CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL INQUIRY 213 (2011).

170. *Id.*

tion, called “shelter and investigation,” have been counter-vailed by others that eased arrest and pre-arrest detention by law enforcement agencies.¹⁷¹

Following the principle of vanguardism, the Chinese legal system has also employed administrative law sanctions to supplement the criminal law system. In fact, this approach reflects the idea of a gradual movement toward a system where administrative justice would replace criminal law in combating crime and regulating society. Under this form of administrative justice, different types of sanctions could be used including “fines, limitation of freedom through limited house arrest after work . . . and obligatory unpaid work after regular working hours.”¹⁷² For instance, administrative detention could be handed out by a single judge for fifteen days in a summary procedure without any right of appeal.¹⁷³

In fact, what might be regarded as a “crime” in other jurisdictions is often labeled as an administrative offence under China’s regime of administrative punishment.¹⁷⁴ The most recent manifestation of this can be found in the Public Security Administration Punishment Law (PSAPL) of 2005, under which a person convicted of an offence may still be deprived of personal liberty by administrators, not judges.¹⁷⁵ Specifically, the PSAPL empowers public security agencies to punish “serious” conduct contrary to the public order—interpreted loosely—by way of fifteen days of administrative detention.¹⁷⁶ And what might be treated as a “civil wrong,” contrary to civil and administrative rules in other jurisdictions, can and frequently lead to administrative punishment that deprives persons of their liberty, licenses, or property without a trial.¹⁷⁷ Bureaucrats imposing administrative penalties deny offenders vir-

171. TONY SAICH, *GOVERNANCE AND POLITICS OF CHINA* 167 (3rd ed. 2011).

172. Peter H. Solomon, Jr., *Criminalization and Decriminalization in Soviet Criminal Policy*, in *PERSPECTIVES ON SOVIET LAW FOR THE 1980s* 123, 164 (F.J.M. Feldbrugge & William B. Simons eds., 1982).

173. Harold J. Berman, *Introduction to SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 1, 10* (Harold J. Berman & James W. Spindler trans., 1966).

174. Margaret K. Lewis, *Criminal Law Pays: Penal Law’s Contribution to China’s Economic Development*, 47 *VAND. J. TRANSNAT’L L.* 371, 390–91 (2014).

175. SAICH, *supra* note 171, at 168.

176. Public Security Administration Punishment Law of the People’s Republic of China, art. 26 (2005).

177. CHEN, *supra* note 140, at 279–80.

tually all of the procedural protections—such as certainty of sentencing—they might enjoy under the formal criminal justice system.¹⁷⁸

Underlying this practice is the presumption of the Chinese legal system that criminal law is relevant only to “severe”, rather than “general” or “ordinary” unlawful acts; the distinction of civil and criminal law is, in many ways, blurred.¹⁷⁹ The use of administrative law as a form of punishment is seen as a “second line of defence” in a strategy of crime prevention.¹⁸⁰ The line between criminal and administrative activity is determined not by law but through administrative regulations.¹⁸¹ Campaigns against crime often draw on both administrative and criminal law tools. Sarah Biddulph describes how police operations frequently combine both administrative regulations from the Ministry of Public Security as well as formal criminal penalties.¹⁸²

This approach has shown remarkable resilience. In November 2013, public security agencies stopped the use of the “reeducation through labor” system (*laojiao*), which detained such political enemies as pro-democracy dissidents, religious groups, and minority activists for up to four years without any judicial involvement.¹⁸³ Yet, administrative forms of re-educative punishment remain: Re-education through labor techniques are now increasingly being replaced by stints in administrative detention.¹⁸⁴ For instance, a plethora of “legal education” centers, “legal study classes” and “community correction” units have emerged, whereby detainees can be held for periods substantially longer than fifteen days without prior judicial

178. POTTER, *supra* note 167, at 76.

179. CHEN, *supra* note 140, at 279–80.

180. SARAH BIDDULPH, *LEGAL REFORM AND ADMINISTRATIVE DETENTION POWERS IN CHINA* 120 (2012).

181. *Id.* at 122.

182. *Id.* at 140.

183. Jacques Delisle, *China's Legal System*, in *POLITICS IN CHINA: AN INTRODUCTION* 224, 239 (William A. Joseph ed., 2d ed. 2014).

184. See Verna Yu, *How China is Using Criminal Detention in Place of Re-education Through Labour*, *SOUTH CHINA MORNING POST* (Apr. 21, 2014), <http://www.scmp.com/news/china/article/1492192/china-using-criminal-detention-place-re-education-through-labour>; Fu Hualing, *Book Review: Sarah Biddulph, Legal Reform and Administrative Detention Powers in China*, *CHINA PERSPECTIVES* (Dec. 1, 2008), <http://chinaperspectives.revues.org/4758> (describing how police are increasingly relying on intermediary punishment).

authorization.¹⁸⁵ Law enforcement agencies often derive substantial income from heavy administrative fines so as to compensate the relative reduction of government funding.¹⁸⁶ Attempts to reform administrative remedies have not yielded lasting changes to the actual system.¹⁸⁷

Finally, it is not just administrative punishment that was part of the Chinese “flexible” approach to punishment. As in the Soviet socialist legal system, the Chinese Communist Party (CCP) itself operates a separate legal system of punishment for Party members. The CCP is the largest political party in the world, with a membership of 86.7 million as of 2014,¹⁸⁸ larger than the entire population of France or the United Kingdom. This massive Party organization in turn maintains a “quasi-criminal justice system” for Party members, which plays a very prominent role in politicized cases,¹⁸⁹ and the Party’s “life-or-death struggle against corruption.”¹⁹⁰

This system of party punishment had its roots in the post-Mao era. In 1978, Deng Xiaoping drew on the socialist model and established a Central Commission for Discipline Inspection (CCDI) (*zhongjiwei*), in order to enforce party discipline and root out the “radical left.”¹⁹¹ The CCDI, assisted by local disciplinary inspection commissions, is at the forefront of enforcing Party discipline in this separate system.¹⁹² This body has two main instruments to retaliate against misbehaving

185. Margaret K. Lewis & Jerome A. Cohen, *How Taiwan’s Constitutional Court Reined in Police Power: Lessons for the People’s Republic of China*, 37 *FORDHAM INT’L L.J.* 863, 919 (2014).

186. See Hualing Fu & D.W. Choy, *Administrative Detention of Prostitutes: The Legal Aspects*, in 22 *THE SPRINGER SERIES ON DEMOGRAPHIC METHODS AND POPULATION ANALYSIS* 189, 195 (J.D. Tucker & D.L. Poston eds., 2009).

187. Sarah Biddulph, *Mapping Legal Change in the Context of Reforms to Chinese Police Powers*, in *ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM* 212, 213 (John Gillespie & Pip Nicholson eds., 2005) (discussing how reforms to administrative detention have not been as effective as other reforms).

188. *China’s Communist Party Reports First New Member Drop in Decade*, *BLOOMBERG NEWS* (June 30, 2014), <http://www.bloomberg.com/news/articles/2014-06-30/china-s-communist-party-reports-first-new-member-drop-in-decade>.

189. Lewis, *supra* note 174, at 441–42.

190. Ting Gong, *The Party Discipline Inspection in China: Its Evolving Trajectory and Embedded Dilemmas*, 49 *CRIME, L. & SOC. CHANGE* 139, 139 (2008).

191. Sullivan, *supra* note 158, at 610.

192. Gong, *supra* note 190, at 139–41.

members. The first mechanism draws on the Soviet model and allows the revocation of membership and official positions (*shuangkai*).¹⁹³ The second mechanism was added in 1994 and is a Chinese adaptation of the Soviet socialist model.¹⁹⁴ It empowers formal detention for an unspecified length of time (*shuanggui*). Senior Party officials like Bo Xilai, a former Party chief of the Chongqing municipality and minister of commerce and Zhoi Yongkang, previously a member of the Party's ultra-elitist Politburo Standing Committee, have been subject to the *shuanggui* procedure after being ousted from office.¹⁹⁵

This system has remained an important aspect of Chinese punishment. Xi Jinping has made extensive use of this quasi-legal system in his anti-corruption campaign, which punished more than 180,000 officials for disciplinary issues, along with around 160,000 in 2012 and 140,000 in 2011.¹⁹⁶ Party punishments usually take precedence over criminal sanctions imposed by the legal system, with the latter supplementing and reinforcing the former. Out of the abovementioned 180,000 officials, about 150,000 were subjected solely to internal Party sanctions; only the remainder, 30,000, received both Party and criminal sanctions.¹⁹⁷ This system of *shuanggui* has become a regularized extralegal measure enabling the Party to deal with corrupt or dissenting political officials more decisively and effectively, without needing to go through the ordinary legal process.¹⁹⁸

VI. CENTRALIZED SUPERVISION

In Western legal systems, legal supervision is largely carried out through the interaction of separated powers. For in-

193. Margaret Lewis, *Legal Systems in China*, in THE ROUTLEDGE HANDBOOK OF CHINESE CRIMINOLOGY 51, 60 (Liquon Cao et al. eds., 2014).

194. Flora Sapio, *Shuanggui and Extralegal Detention in China*, 22 CHINA INFO. 7, 12–13 (2008).

195. Donald Clarke, *The Bo Xilai Trial and China's Rule of Law: Same Old, Same Old*, THE ATLANTIC (Aug. 21, 2013), <http://www.theatlantic.com/china/archive/2013/08/the-bo-xilai-trial-and-chinas-rule-of-law-same-old-same-old/278868/> (describing how Bo Xilai was held for months in shanggui detention).

196. Samson Yuen, *Disciplining the Party: Xi Jinping's anti-Corruption Campaign and its Limits*, CHINA PERSPECTIVES 2014/3, at 42.

197. *Id.*

198. Sapio, *supra* note 194, at 24–25.

stance, in civil law countries, courts supervise the legality of legislation and executive orders while the executive and legislative branches supervise each other through a system of political checks and balances.¹⁹⁹ The Soviet socialist system, by contrast, drew on the Russian tradition, which featured centralized bureaucratic bodies as the key institutions of supervision (*nadzor*).²⁰⁰ This supervisory characteristic is most obvious in two distinctive institutions of the Russo-Leninist socialist legal system: the procuracy and the Supreme Court. These institutions became important mechanisms for enforcing one-Party Leninist control and therefore featured in both the Soviet Union and the contemporary Chinese legal system.

A. *Procuracy*

The procuracy was borrowed from Sweden by the Russian Tsar Peter I, in 1722, as part of his attempt to increase the power of the Russian state.²⁰¹ In the Russian context, this institution was a pseudo-military organization, and developed into the eyes and ears of the Tsar.²⁰² It therefore became a critical centralized institution allowing the Tsar to monitor the growing administrative responsibilities of the Tsarist government.

After the Bolshevik Revolution, the procuracy was abolished. It was reinstated, however, in 1922, in order to ensure democratic centralism, under the tutelage of the Party, in a rapidly growing Soviet bureaucracy.²⁰³ It then developed into a powerful organization, which existed “at the hub of all legal activity.”²⁰⁴ Procurators were ranked hierarchically into eleven, military-type classifications.²⁰⁵ Each procurator was ac-

199. Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L. J. 449 (1991). Constitutional courts are increasingly influential in civil law jurisdictions as well. JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDEMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 37 (3d ed. 2007).

200. David Christian, *The Supervisory Function in Russian and Soviet History*, 41 SLAVIC REV. 73, 77 (1982).

201. SMITH, *supra* note 110, at 4.

202. *Id.* at 14.

203. *Id.* at 6.

204. *Id.* at 4.

205. *Id.* at 14.

countable to the procurator at the next highest level.²⁰⁶ The procuracy served two key roles. First, it performed the same functions a prosecutor's office would in a civil law system: prosecute and investigate crime.²⁰⁷ Second, it played an additional supervisory role by keeping watch "over the entire system of administration."²⁰⁸ In this second role, the procuracy enjoyed pseudo-judicial powers, including the ability to appeal civil cases and resolve complaints from individual citizens.

1. *Chinese Procuracy*

The Chinese legal system subsequently borrowed this institution of supervision. In fact, the procuracy is a critical institution in the current Chinese legal system and remains an important institutional factor in the success or failure of any reforms.

The Procuracy was first introduced into China in 1932, in what was then called the Chinese Soviet Republic.²⁰⁹ In 1949, it was officially introduced into the entire People's Republic of China, and was given powers of supervision as well as prosecution.²¹⁰ In 1954, a comprehensive law was passed enabling the National People's Congress to govern its activities.²¹¹ The procuracy was abolished in the early 1970s, as part of Mao's break with the Soviet Union and the attack on formal law.²¹²

The Procuracy was later restored in China, in 1978, at the beginning of Deng's legal reforms.²¹³ This procuracy took as its starting point the 1954 Law on the Procuracy, which was closely based on the Soviet model.²¹⁴ This law establishes a top-down hierarchy organized under the Supreme People's Procuracy (SPP). The SPP presides over China's more than 3,600 procuracies. These procuracies are organized at four levels: together, they discharge the functions of investigation,

206. *Id.* at 15.

207. *Id.* at 18.

208. Christian, *supra* note 200, at 76.

209. Hiroshi Oda, *The Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law: the Experience of East Asian States*, 61 TUL. L. REV. 1339, 1341 (1987).

210. *Id.* at 1342.

211. NICHOLSON, *supra* note 14, at 177 n.14.

212. Oda, *supra* note 209, at 1346.

213. *Id.*

214. LENG & CHIU, *supra* note 67, at 69.

approval of arrest, prosecution, and legal supervision.²¹⁵ In this multi-level structure, the Chinese rejected the Soviet concept of “vertical leadership” where each procuracy office is responsible *only* to higher organs of power. Instead, the Chinese procuracy was organized under a system of “dual leadership,” making each office accountable to local leadership as well as its hierarchical superior.²¹⁶

The Chinese procuracy plays an important role in the Chinese legal system. It has vast supervisory reach that combines the powers exercised by prosecutors, police, and the court in western systems. Generally, procurators give approval for police arrests, superintend investigations, and make prosecutorial decisions. The Criminal Procedure Law gives the Chinese procuracy the power to directly investigate crimes of embezzlement, bribery, and dereliction committed by state agencies,²¹⁷ and to approve police arrests independently from the courts.²¹⁸ The Procuracy also has what would be classed as judicial powers in a western system, supervising alleged violations of civil and corruption laws by officials.²¹⁹ It also has pseudo-judicial powers to protest against an erroneous court judgment on its own initiative,²²⁰ or on the request of a party to the case.²²¹ This power allows procurators at all levels to second-guess the decisions of the corresponding courts in criminal, civil, and administrative cases,²²² outside the ordinary appellate system.²²³ The protest system is different from, and additional to, the ordinary appellate system, under which a Chinese court may have to retry the case according to the Civil Procedure Law.²²⁴ The fact that the Procuracy is not usually a party to a civil and administrative case does not alter this

215. YUWEN LI, *THE JUDICIAL SYSTEM AND REFORM IN POST-MAO CHINA: STUMBLING TOWARDS JUSTICE* 59 (2014).

216. LENG & CHIU, *supra* note 67, at 69.

217. Criminal Procedure Law of the People's Republic of China, art. 18 (1979) [hereinafter Chinese Criminal Procedure Law].

218. *Id.* at art. 3.

219. CHEN, *supra* note 140, at 212.

220. Chinese Criminal Procedure Law, *supra* note 217, at art. 181.

221. *Id.* at art. 182.

222. CHEN, *supra* note 140, at 213.

223. *Chiyu Banking Corporation Limited v Chan Tin Kwun* [1996] 2 HKLR 395, 399 (High Court of Justice of Hong Kong).

224. *Id.* at 399.

fact. This underscores the wide-ranging influence of the Procuracy throughout the entire justice process.

For this reason, the procuracy is a body of equal status to the courts. In fact, since 1949, Chinese courts have always been grouped together with the police and the procuracy, and named as one entity: the *gongjianfa*.²²⁵ The *gongjianfa* literally means police-procuracy-court, and the sequential order of these institutions in this rubric seems to suggest their relative importance in the eyes of the Party. Personnel transfer and job rotation between them at the central level is common. Chief Justice Xiao Yang, President of the Supreme People's Court between 1998 and 2008, was a former Vice-President of the SPP. Cao Jianming, the incumbent President of the SPP, was a Vice President of the Supreme People's Court before his current appointment in 2008.²²⁶

Furthermore, the procuracy has emerged as the eyes and ears of the Party in political matters. Article 129 of the Chinese Constitution designates procuracies as state organs of "legal supervision," which, according to Article 131, should function independently from "any administrative organ, public organization or individual." The procuracy, however, is the tool of the Party: it cannot enforce its recommendations or sanctions against government agencies without the consent of Party officials.²²⁷ In a 2007 speech delivered to senior procurators, then-President Hu Jintao stressed that political-legal work must develop in accordance with the Chinese socialist cause; serve the state; safeguard the rule of the Party; defend national security; protect the interests of the people; and ensure social stability.²²⁸

This institution also exercises what Western observers would perceive as judicial powers. For instance, in the 1980s, only the procuracy could review administrative violations; the courts could not review allegations of administrative law viola-

225. Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, 113 AM. J. SOC. 352, 359 (2007); Sida Liu, *The Shape of Chinese Law*, 1 PEKING U. L.J. 415, 423 (2014).

226. Eric C. Ip, *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 COLUM. J. ASIAN L. 367, 383 (2011).

227. CHEN, *supra* note 140, at 215.

228. Ip, *supra* note 226, at 380.

tions.²²⁹ Furthermore, the SPP itself may issue binding Judicial Interpretations on points of statutory law in the absence of litigation. Interpretations typically rework statutory principles by detailing vague provisions, excluding certain statutorily permissible claims, and offering new grounds for judicial decision-making not found in the primary legislation.²³⁰ Judicial Interpretations issued by the SPP are of equal status to the Supreme People's Court, meaning that the Supreme People's Court has no power to overrule a conflicting Interpretation propounded by the Supreme People's Procuratorate.²³¹ The Standing Committee of the National People's Congress is the only body competent to resolve any differences between the two.²³²

Political differences between the Court and the Procuracy have induced recurring institutional disputes. At the local level, procurators have been able to exploit judges' fear of criticism to gain persistent deference from the latter.²³³ The procuracy is also heavily involved in the superintendence and retrial of civil and economic cases (as opposed to criminal ones), which now constitute no less than eighty percent of all cases retried, due to its intervention.²³⁴ The Supreme People's Court and the Supreme People's Procuratorate have expressed discontent with each other's practice of interpreting laws.²³⁵

229. Oda, *supra* note 209, at 1347 (discussing the principle of five major rejections).

230. Nicholas C. Howson, *Judicial Independence and Company Law in the Shanghai People's Courts, 1992–2008*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 134, 150 (Randall Peerenboom ed., 2010).

231. Ping Yu & Seth Gurgel, *Stare Decisis in China? The Newly Enacted Guiding Case System*, in READING THE LEGAL CASE: CROSS-CURRENTS BETWEEN LAW AND THE HUMANITIES 150 (Marco Wan ed., 2012).

232. See Chinese Constitution *supra* note 217, at art. 67(6).

233. Benjamin L. Liebman, *Leniency in Chinese Criminal Law? Everyday Justice in Henan*, 33 BERKELEY J. INT'L L. 153, 157 (2015).

234. Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 69, 84 (Randall Peerenboom ed., 2010).

235. Randall Peerenboom, "Courts as Legislators: Supreme People's Court Interpretations and Procedural Reforms," The Foundation for Law, Justice and Society (2007), at 3-4, <http://www.fljs.org/content/courts-legislators-supreme-people%E2%80%99s-court-interpretations-and-procedural-reforms>.

B. Court System

Imperial Russia drew heavily on continental Europe's civil law court procedure. Its court system therefore included the familiar civil law practices of inquisitorial procedure, short judicial opinions, and the focus on documentary rather than written evidence.²³⁶ The institutional *structure* of the court system, however, was far more centralized than in any civil law country. This centralization reflected a need to supervise the vast and frequently contradictory Russian legal system. The key centralized supervisory body—called the Senate, fulfilling both legislative and judicial roles—reflected the centuries-old Russian practice of “supervision over the central and provincial government of the empire.”²³⁷ Organized like a bureaucracy, this body exercised broad powers to issue guiding explanations on broad points of law and to centralize law practice.²³⁸

The Soviet socialist system drew on both Imperial Russia's civil law procedure and its highly centralized institutional organization. Following the Leninist principles of vanguardism and democratic centralism, courts were seen as extensions of Party control. Thus, all courts were institutionally subordinated to a powerful Supreme Court with vast power to control the work of lower courts and “articulate judicial policy.”²³⁹ The Court exercised power through “guiding explanations” that were grounded in an abstract analysis of judicial practice.²⁴⁰ These directives were obligatory for lower court judges and fulfilled the role that the Senate had before in both clarifying the vast array of conflicting Soviet laws and directives and ensuring centralization. The Supreme Court could also operate as a court of first instance for politically sensitive prosecutions.²⁴¹

236. Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICTORIA U. WELLINGTON L. REV. 817, 833 (2001) (setting forth common practices of civil law systems).

237. See Natasha Assa, *How Arbitrary Was Tsarist Administrative Justice? The Case of the Zemstvos Petitions to the Imperial Ruling Senate, 1866-1916*, 24 LAW & HIST. REV. 1, 40 (2006) (defining the Senate's centuries' old tradition of *nadzor* relied on in zemstvos cases).

238. See *id.* at 13.

239. Peter H. Solomon Jr., *The U.S.S.R. Supreme Court: History, Role, and Future Prospects*, 38 AM. J. COMP. L. 127, 127 (1990).

240. *Id.* at 132.

241. *Id.* at 134.

The Supreme Court Chairman had huge powers over the judges in his court, ultimately controlling important benefits like salaries and housing.

1. *Chinese Court System: Supreme People's Court*

China has organized its judicial system along these Russo-Leninist lines. Much as with the procuracy, the distinctive nature of this institution has not faded away. Instead, it continues to play an important role in the development and reformation of the Chinese legal system.

This influence is clear from the early Deng period. One of the principal inspirations for the new 1979 Organic Law of the People's Courts—still in effect today—was the 1954 law on the Chinese court system.²⁴² This law stated that, like Soviet courts, Chinese courts were centralized supervisory institutions entrusted with the responsibility to promote the Party's ideology and agenda. Article 3 of the Organic Law of the People's Courts obliges judges to “ensure the smooth progress of the Socialist revolution and Socialist construction in the country . . . [and] educate citizens in loyalty to their socialist motherland and voluntary observance of the Constitution and laws.”²⁴³

Much as in the Soviet socialist system, this 1979 Law on Courts also grants the SPC the power to promulgate “explanations on questions concerning specific applications of laws and decrees in judicial procedure.”²⁴⁴ These judicial explanations are legally binding rulings, which are not case judgments but are instead abstract decrees and replies.²⁴⁵ Interpretations therefore offer new ways for judicial decision-making not found in the primary legislation.²⁴⁶ In some cases, these “ex-

242. LENG & CHIU, *supra* note 67, at 62.

243. The Organic Law of the People's Courts of the People's Republic of China art 3. Quoted from Di Jiang, *Judicial Reform in China: New Regulations for a Lay Assessor System*, 9 PAC. RIM. L & POL. J 569, 570 n. 8 (2000)

244. LENG & CHIU, *supra* note 67, at 63.

245. Sup. People's Ct. of the People's Republic of China [Sup. People's Ct.] June 6, 1997, *Several Regulations for Judicial Interpretation*, Judicial Distribution [1997] No. 15 (repealed); Sup. People's Ct. Mar. 9, 2007, *Regulations on the Work of Judicial Interpretations*, Judicial Distribution [2007] No. 12.

246. Howson, *supra* note 230, at 150.

planations” are longer and more detailed than the original statutes.²⁴⁷

The SPC continues to use its power of abstract explanation of the law to guide lower courts in interpreting cases involving “insufficiently detailed, missing, or obsolete” laws of all kinds.²⁴⁸ Suggesting the bureaucratic nature of this supervision, these interpretations are drafted by subcommittee in the court and then released to selected governmental officials and academics for opinions.²⁴⁹ Once a consensus is reached, they are issued as “administrative documents” which include numbers indicating the issuing office and conforming with bureaucratic practice.²⁵⁰ These explanations in turn become an important source of law for lower court judges in resolving cases.²⁵¹ Through them the SPC has created for itself “the widest possible power of legal interpretation among all other courts in the world,” and has become “[China’s] third lawmaking organization after the National People’s Congress and the State Council.”²⁵²

With these powers, the SPC has become a tool of political centralization as well. The Chinese State, notwithstanding its Constitution’s insistence on unitarism and centralization, has witnessed the development of a form of de facto “federalism” since the 1980s,²⁵³ with the devolution of resources and decision-making authority to local authorities to speed up economic reform.²⁵⁴ Although the central government retains control over the military, the ideological General Line, major provincial appointments, and important financial and natural resources, provincial leaders increasingly dominate the re-

247. Finder, *supra* note 69, at 168.

248. *Id.* at 165. The Court has issued opinions on a wide range of law, including civil law, criminal law, administrative litigation, economic contract, and so on. *Id.* at 167.

249. *Id.* at 169.

250. *Id.* at 166.

251. *Id.* at 170.

252. WEIGUO WANG, JUDICIAL INTERPRETATIONS ON CIVIL AND BUSINESS LAW OF THE SUPREME PEOPLE’S COURT 23 (2010) (Chinese).

253. Barry R. Weingast, *The Economic Role of Political Institutions: Market-preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 21–22 (1995).

254. Barry J. Naughton & Dali L. Yang, *Holding China Together: Introduction*, in *HOLDING CHINA TOGETHER: DIVERSITY AND NATIONAL INTEGRATION IN THE POST-DENG ERA* 1, 1 (Barry J. Naughton & Dali L. Yang eds., 2004).

mainder: the regular appointment of cadres, the provincial budget, local salary levels, and those legislative enactments that most affect the daily lives of ordinary people.²⁵⁵ Decentralization means that policymaking is now more determined by continuous interactions between disjointed levels of bureaucracy than the unilateral decisions of a centralized party.²⁵⁶ It has, however, given local officials ways to deflect central commands,²⁵⁷ for instance, by imposing excessive tax burdens and abusively confiscating land using the excuse of “growth at any cost.”²⁵⁸ They often simultaneously act on the frontlines of local commercial and foreign direct investments, and serve economic actors as criminal collaborators.²⁵⁹ This, in turn, has unleashed rampant corruption at the local level, and incited local officials to join criminal activities,²⁶⁰ which altogether poses a direct threat towards the Party-state’s survival in the long run.²⁶¹ Furthermore, most of China’s courts, especially at the lowest levels, rely on local agencies for their salaries and fringe benefits; employ unqualified judges; and are subject to frequent interference from local administrators.

The Party has therefore sought to use the Supreme People’s Court to tighten control over provincial high courts in recent years.²⁶² For instance, the Supreme People’s Court has increasingly encouraged lower courts to exercise their *de facto* power of reviewing local laws with a view to combating corruption and abuses of power. In 1987, the Court instructed local courts that “[i]f some local laws are found to contravene the Constitution, primary legislations, and administrative regulations, they should be *reported* to the people’s congress of the

255. Murray Scot Tanner & Eric Green, *Principals and Secret Agents: Central Versus Local Control over Policing and Obstacles to ‘Rule of Law’*, in CHINA’S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 653, 658, 660, 664 (Donald C. Clarke ed., 2008).

256. FRANK N. PIEKE, *THE GOOD COMMUNIST: ELITE TRAINING AND STATE BUILDING IN TODAY’S CHINA* 179 (2009).

257. C. FRED BERGSTEN ET AL., *CHINA’S RISE: CHALLENGES AND OPPORTUNITIES* 78 (2008).

258. *Id.* at 79.

259. KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 321 (2d ed. 2004).

260. SAICH, *supra* note 171, at 132.

261. Andrea Boltho & Christopher Allsopp, *The Assessment: Trade and Policy*, 3 OXFORD REVIEW OF ECONOMIC POLICY I (1987).

262. Ip, *supra* note 226, at 415–17.

province and its standing committee.”²⁶³ The word “*reporting*” is a legal term of art in China, which “signal[s] a demand that courts refrain from giving force to acts they have found to be unconstitutional or illegal.”²⁶⁴

The Supreme People’s Court has since intervened to correct local legal abuses. In 1993, the Court rendered “inapplicable in the judicial process”²⁶⁵ a Fujian Province regulation that granted provincial authorities arbitrary powers to seize fishing vessels. In 1994, the Court reinforced the prevailing position that whenever local courts encounter regional laws inconsistent with national, ones they are bound to implement the latter over and against the former.²⁶⁶ In 1995, the Court restrained the Sichuan government’s powers to manage highways by declaring Article 5 of the provincial congress’s Public Roads Management Ordinance “inapplicable.”²⁶⁷ In 1996, the Court forbid the police of Hohhot, Inner Mongolia Autonomous Region, from confiscating scrap metal for their own profits.²⁶⁸ In 1997, the Supreme People’s Court Administrative Tribunal invalidated portions of a regulation from Baotou, Inner Mongolia Autonomous Region, because it was “not supported by national laws and administrative regulations.”²⁶⁹ Finally, in line with the centralization agenda, the Court ruled in 1999 that local regulations, which too often privilege vested

263. Sup. People’s Ct. 1987, Notification on Strengthening Economic Adjudication; *see also* NANPING LIU, JUDICIAL INTERPRETATION IN CHINA 246 (1997).

264. LIU, *supra* note 263, at 284.

265. Sup. People’s Ct. Mar. 1, 1993, Reply on the Solution to the Inconsistencies between Local Regulations, Administrative Regulations and Laws in the Course of Administrative Adjudication.

266. Sup. People’s Ct. Jan. 13, 1994, Reply on the Situations in which there were Inadequate Laws for the People’s Courts to Rely on during the Course of Administrative Adjudication.

267. Sup. People’s Ct. Jan. 15, 1995, Reply on the Application of Law Related to the Public Roads Management Organization.

268. Sup. People’s Ct. Admin. Tribunal Sept. 23, 1996, Reply on the Effectiveness of the Hohhot City Provisional Measures for the Management of Used Metals.

269. *See* Sup. People’s Ct. Admin. Tribunal June 2, 1997, Reply on the Baotou City People’s Government General Office’s Measures on the Transfer of Baotou City Public Transport System Operation Rights.

local interests, should no longer function as legal bases for rescinding contracts.²⁷⁰

In 2002, the Central People's Government historically permitted authorized persons whose rights have been violated by labor or social security agencies to apply for judicial review *in addition to* the more prevalent and government-friendly administrative reconsideration procedure.²⁷¹ One year later, after seeking the opinions of the Supreme People's Court, the Government resolved to allow aggrieved citizens whose houses have been demolished by administrative agencies to apply for administrative reconsideration *or* judicial review rather than judicial review only *after* administrative reconsideration.²⁷² This is an important decision on the part of the Central Government to use the courts powers to enforce central policy against powerful local agencies whose unpopular mandatory demolition actions have given rise to much public discontent and social unrest.

Starting from 2007, the SPC began to "recentralize" authority to review and approval all capital punishment sentences returned by provincial courts.²⁷³ This move was largely motivated by the public controversies caused by incompetent local courts in issuing large numbers of faulty capital punishment sentences. The SPC intervention led to a drop of ten percent in the number of death sentences in the first five months of 2007 compared to the same period the year before.²⁷⁴ In 2008, the SPC ruled that whenever lower courts foresee that the fair administration of justice may be compromised, they shall take the initiative to petition the senior

270. Sup. People's Ct. Dec. 19, 1999, Interpretation on Several Problems Related to the Application of the Contract Law (1).

271. See generally THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, WHITE PAPER ON LABOR AND SOCIAL SECURITY IN CHINA (2002).

272. Legal Office, State Council of the People's Republic of China, Opinions on the Construction Office's Application for Advice on whether Superior Housing Demolition Management Departments' Demolition Decision over that of Inferior Housing Demolition Management Agencies is subject to the Jurisdiction of Administrative Reconsideration (2003).

273. See generally Susan Trevaskes, *China's Death Penalty: The Supreme People's Court, the Suspended Death Sentence and the Politics of Penal Reform*, 53 BRIT. J. CRIMINOLOGY 482 (2013).

274. Ronald C. Keith & Zhiqiu Lin, *Judicial Interpretation of China's Supreme People's Court as "Secondary Law" with Special Reference to Criminal Law*, 23 CHINA INFO. 223, 248 (2009).

courts to take jurisdiction.²⁷⁵ In the same year, the SPC commanded that courts have to fight against “local protectionism” by *reporting* local legislative and administrative acts whenever they obstruct the implementation of judicial decisions, and that they shall supply the competent CCP disciplinary body with evidence to undercut local administrative malfeasance.²⁷⁶

In 2009, the SPC gave provincial high courts the authority to rectify improper dismissals by lower courts of judicial review applications,²⁷⁷ and deepen their superintendence of lower courts’ case filing so as to eliminate barriers to administrative claimants bringing cases through “the adjudication of appeals and petitions, acceptance of complaints, assessment of cases, inspection of specific issues, exchange of information, and other policies.”²⁷⁸ From 2011 to 2012, the SPC released its first “guiding cases” which purport to function as decisional models guiding the activity of the local courts in similar situations, thereby providing for heightened adjudicative consistency across provinces under the centralized leadership of the Court, and by extension, the political center, rather than local bureaucrats.²⁷⁹

The Russo-Leninist view of courts also helps us understand China’s policies towards its two autonomous Special Administrative Regions: Hong Kong and Macau. Both jurisdictions are former Western European colonies and capitalist enclaves administered separately from mainland China under the principle of “One China, Two Systems,” which enabled them to retain a large measure of internal, as well as external self rule. In July 2008, Xi Jinping, while still Vice President, stated that “there should be mutual understanding and sup-

275. Sup. People’s Ct. Jan. 14, 2008, Notification on the Precautious Implementation of the Regulations on Several Questions in relation to the Jurisdiction of Administrative Cases, [2008] No. 7.

276. See Sup. People’s Ct. Dec. 3, 2008, Notification on Protecting National Financial Security and the Coordination of Whole-Population Sustainable Economic Development through Judicial Safeguards and Legal Services.

277. Sup. People’s Ct. June 26, 2009, Several Opinions on Improving Administrative Adjudication Work under the Present Circumstances, Judicial Distribution, [2009] No. 38.

278. Sup. People’s Ct. Nov. 9, 2009, Opinions on Protecting the Litigation Rights of Administrative Claimants, Judicial Distribution [2009] No. 54.

279. See generally Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People’s Court*, 217 CHINA Q. 121 (2014).

port amongst the Executive, the Legislature and the Judiciary.”²⁸⁰ In December 2009, Wu Bangguo, chairman of the Standing Committee of the National People’s Congress, went so far as to insist that Macau’s supposedly independent law courts must “uphold the authority of the Chief Executive” and “provide whole-hearted support to the work of the Chief Executive.”²⁸¹

More significantly, in June 2014, the Central People’s Government released a White Paper which asserted that “judges of the courts at different levels and other judicial personnel, have on their shoulders the responsibility of correctly understanding and implementing the Basic Law, of safeguarding the country’s sovereignty, security and development interests, and of ensuring the long-term prosperity and stability of Hong Kong” for the sake of “displaying sovereignty, ensuring loyalty to the country by the mainstay of Hong Kong administrators and helping them to subject to oversight by the central government and Hong Kong society.”²⁸²

The White Paper essentially argued that the common law courts of Hong Kong, though not forming part of the Chinese People’s Courts’ hierarchy, should still be obliged to ensure that the political and social consequences of their judgments are fully compatible with the interests of the Chinese Central People’s Government. Consistent with Socialist notions of legal interpretation in the mainland, the drafters of the White Paper appeared to believe that, regardless of the Special Administrative Region’s separate jurisdictional status as part of the common law world, the Chinese State must retain absolute monopoly over the “correct” or “accurate” meaning of the law, over any contrary independent judgment that Hong Kong judges might have. These ideas are all reminiscent of the Len-

280. Ambrose Leung & Fanny W. Y. Fung, *Xi Tells Tsang to “Govern Sensibly,”* SOUTH CHINA MORNING POST (July 8, 2008), <http://www.scmp.com/article/644514/xi-tells-tsang-govern-sensibly>.

281. See Wu Bangguo, Chairman, Standing Committee of the National People’s Congress, Address at the Symposium marking the 10th Anniversary of the Basic Law of the Macao Special Administrative Region (Dec. 4, 2009).

282. INFORMATION OFFICE, STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, WHITE PAPER ON THE PRACTICE OF THE “ONE COUNTRY, TWO SYSTEMS” POLICY IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION 46–47 (2014).

inist vision of courts and judges as transmission belts of the State.²⁸³

VII. CONCLUSION

The socialist legal system—with its basis in Leninist political ideology and Russia's most statist legal institutions—served as a powerful model for legal reform in early post-Mao China and continues to shape its development today. This transfer of non-western legal ideas suggests that it is not only western-inspired norms—aided by nongovernmental organizations—that play an important role in the development of formal Chinese law. Instead, the Russo-Leninist ideas embedded in the socialist legal system have played and continue to play an important role in the development of China's legal system.

The continuing influence of Russian legal ideas and institutions in China, however, is not meant to suggest any kind of predetermined behavior in China. Instead, these ideas are “global scripts” that ultimately must “coordinate and interact with a number of other, often non-state or hybrid, systems of knowledge.”²⁸⁴ What this transfer does suggest is that as long as Leninist ideology remains robust in China, the Russian-inspired institutions, norms, and practices in the socialist legal model will continue to exert a powerful influence over the development of Chinese law, as well as those states that look to China as a successful example of legal reform.²⁸⁵ In particular, the statist, administrative, and supervisory fundamentals of the socialist legal system will continue to be “sticky” and consolidate into hard-to-reform elements of the Chinese legal system.

The argument therefore yields a few tentative conclusions. First, it cautions against arguments that assert that increased legal formality will always leads to convergence with Western legal models. Second, and relatedly, the resistance to westernization in the Chinese legal system is not purely based on indigenous Chinese values—it has as its foundation a powerful Leninist ideology and the Russian legal institutions that

283. ERIC C. IP, *LAW AND JUSTICE IN HONG KONG* 164–167 (2014).

284. Gillespie & Nicholson, *supra* note 109, at 11.

285. Much of the discussion of legal transplants and the transfer of legal ideas comes with the assumption that legal transplants are the result of transnational convergence to Western norms. *Id.*

came with it. This Article therefore demonstrates some of the limitations on legal reform in China and helps explain the failure of Western legal reforms to take root.

In closing, this Article represents the beginning of a much larger project of understanding this transfer of non-Western legal ideas to Asia through the Russian-inspired socialist legal model. This socialist legal model also played an important role in many other legal systems across Asia, including Vietnam, North Korea, Laos, Mongolia, and the former Soviet republics in Central Asia.²⁸⁶ Looking at the non-Western concepts of socialist law in these contexts will help further advance our understanding of the possibilities and limitations on legal reform across the Asian countries that were once part of the Communist bloc.

286. There has been recent interest that the socialist legal system has a continuing legacy in Eastern Europe as well. *See, e.g.,* Uzelac, *supra* note 47.

