

CHAPTER 11

CHINESE LEGAL DEVELOPMENTS 2011–2018

The last ten chapters of this book were completed in early 2011, and it is the purpose of this last chapter to bring the story of Chinese law up-to-date by summarising the major developments since then in the constitutional system, legal institutions, substantive law and procedural law. As Xi Jinping assumed power as China's paramount leader at the 18th National Congress of the Communist Party of China (CPC) in November 2012, most of the developments outlined in this chapter reflect the legal policy of the Xi Jinping era. The following sections of this chapter are designed to correspond to the previous chapters, so that readers can use this chapter as a supplement to each relevant chapter.¹ We shall first consider major developments in the constitutional and government system, and then turn to the legal institutions of the courts and legal profession. Finally, significant developments in procedural and substantive law will be highlighted.

Constitution and Government: Constitutional Doctrines and State Structure²

Constitutional amendment of 2018

The first amendment to the PRC Constitution since 2004 was adopted by the National People's Congress on 11 March 2018. This was the fifth amendment of the 1982 Constitution. The amendment gave constitutional recognition to 'Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era' (習近平新時代中國特色社會主義思想) which, together with the 'scientific concept of development',³ was written into the Preamble of the Constitution. Other amendments to the Preamble also reflected Xi's Thought.

1 This chapter draws on the author's previous writings, including 'China's long march towards Rule of Law or China's turn against law?' (2016) 4 Chinese Journal of Comparative Law 1–35; 'Constitutions, constitutionalism and the case of modern China' (August 27, 2017), University of Hong Kong Faculty of Law Research Paper No. 2017/023, <<https://ssrn.com/abstract=3027562>> (last visited 18 October 2018).

2 See chapter 4 above.

3 The 'scientific concept of development' was introduced by Hu Jintao, CPC General Secretary in 2002–2012. Hu succeeded Jiang Zeming (who developed the idea of the 'three represents') and was in turn succeeded by Xi Jinping.

‘Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era’ refers to Xi’s comprehensive platform, vision and strategies for China’s ‘socialist modernisation’, which were first codified and given this title in his report as CPC General Secretary to the 19th National Congress of the CPC in October 2017. Xi’s vision is that China would become a ‘society of moderate prosperity’ (*xiaokang* 小康) by the year 2020; ‘socialist modernisation’ would be realised by the year 2035; and by 2050 China would become a ‘modernised and strong socialist state that is wealthy, democratic, highly civilised, harmonious and beautiful’.

One important element of the 2018 constitutional amendment is the incorporation of the doctrine of Party leadership into Article 1 of the Constitution. Before the 2018 amendment to the 1982 Constitution, Party leadership was only touched upon in the Preamble of the Constitution.⁴ The 2018 amendment states in the amended Article 1 that CPC leadership ‘is the most essential characteristic of Socialism with Chinese Characteristics’. However, there is still no constitutional definition of the meaning, scope or implications of CPC leadership in State affairs.

Four other major aspects of the 2018 amendment may be outlined as follows.

(1) The amendment of Article 79 has removed the two-term limit on the offices of President (*zhuxi* 主席) and Vice-President of the PRC State. Although the President enjoys few real powers under the PRC Constitution relative to the Premier of the State Council, CPC General Secretary Xi Jinping and his two predecessors — Hu Jintao and Jiang Zemin — have each held the office of the President of the State. There is therefore an emerging constitutional convention that the General Secretary of the Party occupies the office of President of the PRC State (as well as Chairman of the Central Military Commission of the Party and of the State). The official explanation⁵ of the amendment of Article 79 pointed out that the Constitution of the CPC does not provide for any limit on the number of (five-year) terms that the General Secretary may serve;⁶ it was therefore argued that similarly there should be no term limit on the President, so that a General Secretary who serves a third term may also serve a third term as President. From this perspective, the constitutional amendment brought the term limit rule (ie the absence thereof) on the President of the State in line with that on the CPC

4 There is however no doubt that the principle of Party leadership is a core element of China’s ‘living constitution’. See, eg, Xin He, ‘The Party’s leadership as a living constitution in China’ (2012) 42 *Hong Kong Law Journal* 73-93; Jianfu Chen, ‘Out of the shadows and back to the future: CPC and law in China’ (2016) 24(2) *Asia Pacific Law Review* 176–201.

5 Xuan Li, ‘An important institutional arrangement to secure the long-term stability of the Party and the State’, *Renmin ribao*, 1 March 2018, p3 (in Chinese); Wang Chen’s speech to the NPC on 5 March 2018 explaining the proposed constitutional amendments.

6 Hu Jintao served two terms and Jiang Zemin served two terms in addition to the remainder of his predecessor’s (Zhao Ziyang) term. Before the 2018 constitutional amendment, it was assumed that the CCP had adopted an ‘unwritten norm’ or convention that the General Secretary would only serve two terms.

General Secretary. This amendment was apparently intended to pave the way for Xi Jinping to continue as both General Secretary and President after his second term in these capacities expires in 2022 and 2023 respectively.

(2) The 2018 constitutional amendment has added a new Section 7 ('Supervisory Commissions') to Chapter 3 ('State Organs') of the Constitution. This is a major reform of the structure of PRC state organs, which originally consisted of the National People's Congress (NPC) as the supreme organ of state power, under which there were the State Council, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) — the leading members of all three of which are appointed by and accountable to the NPC; the same structure was replicated at provincial and other local levels.⁷ The 2018 amendment establishes a fourth state organ appointable by and responsible to the NPC, which is the National Supervisory Commission (國家監察委員會), with supervisory commissions under it at provincial and other local levels.⁸ The principal rationale for the creation of this new organ is to combat and investigate corruption among Party cadres, public servants and State employees more effectively, given that anti-corruption has been one of Xi Jinping's key policies.⁹ The National Supervisory Commission (NSC) merges and incorporates into itself several existing agencies engaged in anti-corruption work and supervision of State functionaries and Party cadres, including the anti-corruption unit of the SPP, the Ministry of Supervision under the State Council, as well as the National Bureau of Corruption Prevention. The NSC engages in *heshu bangong* (合署辦公) with the CPC's Central Commission for Disciplinary Inspection (CCDI),¹⁰ which means they operate as 'one work organ with two different names' ('一套工作機構, 兩個機關名稱').¹¹

7 See the text of the 1982 Constitution.

8 At the same time as adopting the constitutional amendment, the NPC also enacted the Supervision Law (*jiancha fa* 監察法), which regulates the organization, functions and powers of the National Supervisory Commission and the various local levels of supervisory commissions under it.

9 See Hualing Fu, 'Wielding the sword: President Xi's new anti-corruption campaign', in Susan Rose-Ackerman and Paul Lagunes (eds), *Greed, Corruption, and the Modern State* (Edward Elgar, 2016) 134–160; Hualing Fu, 'China's striking anticorruption adventure: A political journey toward the Rule of Law?' in Weitseng Chen (ed), *The Beijing Consensus? How China has Changed Western Ideas of Law and Economic Development* (Cambridge U Press, 2017) 249–274.

10 See Ling Li, 'The rise of the Discipline and Inspection Commission, 1927–2012: Anticorruption investigation and decision-making in the Chinese Communist Party' (2016) 42(5) *Modern China* 447–482.

11 See <www.ccdi.gov.cn/special/zmsjd/zm19da_zm19da/201802/t20180202_163176.html> (visited 18 October 2018). The CCDI and NSC share a common website, with the CCDI being the first named institution: <www.ccdi.gov.cn/>. As of 2018, there is very substantial overlapping of the leading members of the CCDI and the NSC, with one of the Deputy Secretaries of the CCDI being the Director of the NSC; and all the Deputy Directors of the NSC are also Deputy Secretaries of the CCDI; the Secretary (head) of the CCDI is Zhao Leji — one of the 7-member CCP Politburo Standing Committee led by Xi: see <[https://baike.baidu.com/item/%E4%B8%AD%](https://baike.baidu.com/item/%E4%B8%AD%AD)>