



Chinese Law

Meng

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Key Features of Chinese Law

- Culturally:

Heritage of traditional Chinese culture (before 1912)

- Politically:

Influence from the **Soviet** Law (since 1949)

- Legally:

Member of the legal family of continental Civil Law

Particularly, modern Chinese law (since 1980s) learned experience from the German and French legal systems

China's Legal History

- ❖ Chinese Law encompasses both the legal history of China :
 1. prior to the foundation of the People's Republic of China in 1949
 - A. ROC period 1912 – 1949
 - B. the imperial China period before 1912
 2. and the law of that country today .
- ❖ The heritage of traditional Chinese legal culture established in imperial China period still has influence on the modern Chinese law today through the traditional ethic value and moral rules.

Law in imperial China (before 1912)

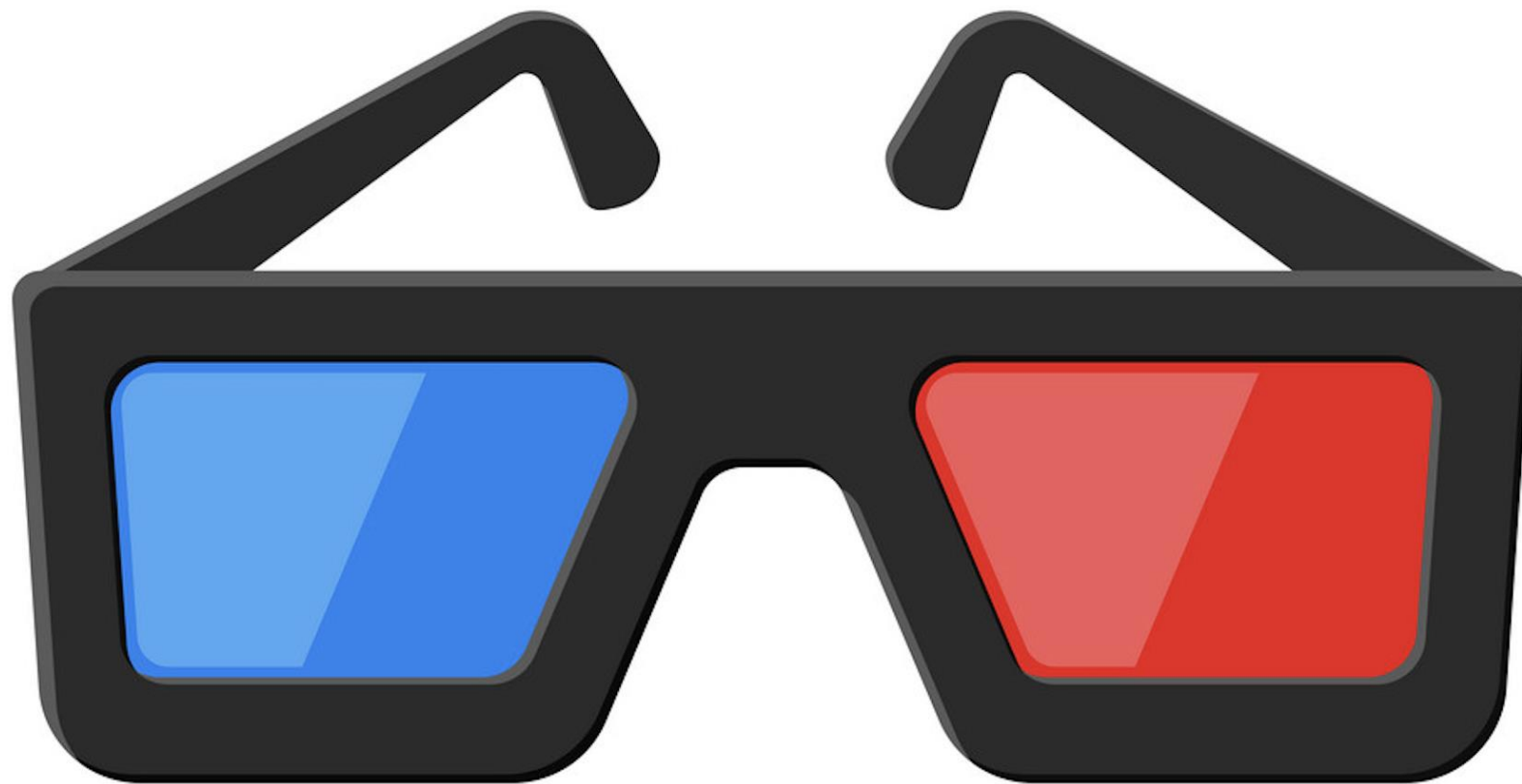
- ❖ “Confucianization of law”: principles of ethical value and moral rules
- ❖ Confucianism – the thought of Confucius as transcribed by his disciples and elaborated over the centuries – is central to an understanding of pre-20th-century Chinese law.



“Grand Master Kong”, his Latinized name: Confucius (551–479 BCE)

Law in imperial China (before 1912)

- ❖ there was little formal law (particularly, civil law and private law) in China prior to the 20th century
- ❖ What did exist was overwhelmingly criminal law (penal in nature) during the imperial China period.
- ❖ particularly the penalties and punishments in imperial China are often considered as barbaric, according to modern human rights standards.



**Western Law
Lens**

**Soviet Law
Lens**

Introduction to the Constitution in China

- ❖ The Constitution of the People's Republic of China is the supreme law of the People's Republic of China.
- ❖ It was adopted by the 5th National People's Congress on December 4, 1982, with further amendments in 1988, 1993, 1999, 2004, and 2018.
- ❖ It is the fourth constitution in PRC history, superseding the 1954 constitution, the 1975 constitution, and the 1978 constitution.
- ❖ The 1982 Constitution is a lengthy, hybrid document with 138 articles (original version). Large sections were adapted directly from the 1978 constitution, but many of its changes derive from the 1954 constitution.

Structure of the Constitution of China

- ❖ **Preamble**
- ❖ **Chapter I: General Principles**
- ❖ **Chapter II: The Fundamental Rights and Duties of Citizens**
- ❖ **Chapter III: The Structure of the State** — which includes such state organs as (1) the National People's Congress, (2) the President of the People's Republic of China, (3) the State Council, (4) the Central Military Commission, (5) the Local People's Congresses at All Levels and Local People's Governments at All Levels, (6) the Autonomous Organs of Ethnic Autonomous Areas, (7) the Commissions of Supervision, and (8) the People's Courts and People's Procuratorates.
- ❖ **Chapter IV: The National Flag, the National Anthem, the National Emblem and the Capital**

Structure of the Constitution of China

- ❖ the 1982 Constitution reflects the more flexible and less ideological orientation of foreign policy since 1978. Such phrases as "proletarian internationalism" and "social imperialism" have been dropped. **(Preamble)**
- ❖ The 1982 State Constitution provided a legal basis for the broad changes in China's social and economic institutions. **(Chapter I)**
- ❖ Due to the Cultural Revolution which was characterized by violence and chaos, the 1982 Constitution gives even greater attention to clarifying citizens' "fundamental rights and duties" than the 1954 and 1978 constitutions did. **(Chapter II)**
- ❖ The 1982 State Constitution significantly revised government structure. **(Chapter III)**

Preamble

China is one of the countries with the longest histories in the world. The Chinese people of all ethnic groups jointly created its magnificent culture and have a proud revolutionary tradition...

Both the victory in China's New Democratic Revolution and the successes in its socialist cause have been achieved by the Chinese people of all ethnic groups under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought by upholding truth, correcting errors, and surmounting many difficulties and obstacles...

In our country the exploiting class, as a class, has been eliminated, but class struggle will continue to exist within a certain scope for a long time to come...

The achievements of China's revolution, development and reform would have been impossible without the support of the world's people...

Preamble

- ❖ the political declaratory nature of the constitutional preamble: the applicability of the constitution .
- ❖ Since the introduction of the preamble in the 1954 constitution, it has become increasingly lengthy with each amendment.
- ❖ President Xi now has the distinction of being the first Chinese leader ever to have his theories enshrined in the constitution during his own lifetime since 1978.
- ❖ Whether the preamble and the main text hold equal legal force
- ❖ Whether the constitutional preamble contradicts the main text

General Principles

❖ **Article 1** The People's Republic of China is a **socialist state** governed by a **people's democratic dictatorship** that is led by the working class and based on an alliance of **workers and peasants**.

The socialist system is the fundamental system of the People's Republic of China. **Leadership by the Communist Party of China is the defining feature of socialism with Chinese characteristics**. It is prohibited for any organization or individual to damage the socialist system. (Amendment 2018)

❖ **Article 2** All power in the People's Republic of China belongs to **the people**.

The organs through which the people exercise state power are **the National People's Congress and the local people's congresses at all levels**.

The people shall, in accordance with the provisions of law, manage state affairs, economic and cultural undertakings, and social affairs through various channels and in various ways.

❖ **Article 3** The state institutions of the People's Republic of China shall practice **the principle of democratic centralism**.

The National People's Congress and the local people's congresses at all levels shall be created through democratic election and shall be responsible to the people and subject to their oversight.

All administrative, supervisory, adjudicatory and procuratorial organs of the state shall be created by the people's congresses and shall be responsible to them and subject to their oversight.

The division of functions and powers between the central and local state institutions shall honor the principle of giving full play to the initiative and motivation of local authorities under the unified leadership of the central authorities.

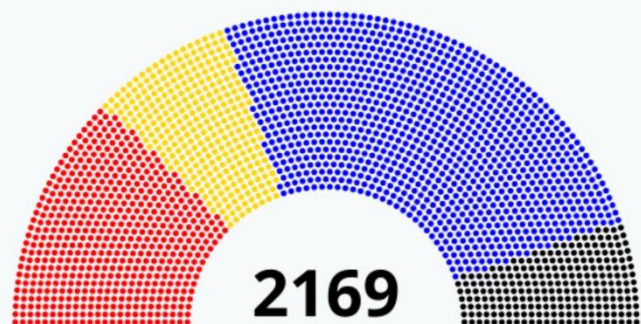
General Principles: *remarks*

- ❖ The 2018 Amendments add the phrases "Communist Party of China" and its "leadership" into the main body (Art.1) of the Constitution.
- ❖ Prior to the 2018 Amendment, the CCP and its leadership were only mentioned in the preamble. Constitutional preambles are often not legally binding (as with the United States Constitution).
- ❖ The amendment may be seen as providing a constitutional basis for China's status as a one-party state and formally rendering any competitive multi-party system unconstitutional.
- ❖ The leadership of the CPC is now constitutionally enshrined as the "defining feature of socialism with Chinese characteristics", and therefore it establishes one-party rule as an end-in-itself.

Structure

Seats

NC-CPPCC: 2169
NC-CPPCC Standing
Committee: 324



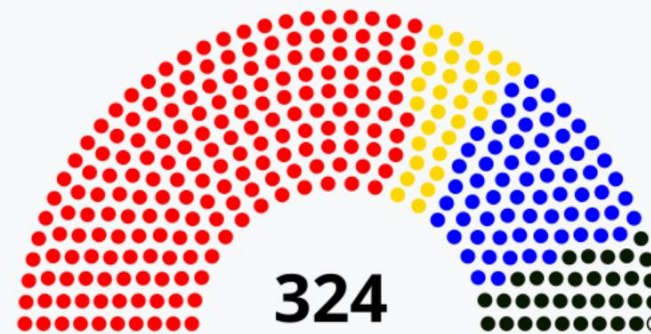
NC-CPPCC political groups

■ CCP, minor parties, and independents (544)

■ People's organizations (313)

■ Representatives of various groups (1076)

■ Specially invited people (236)



NC-CPPCC Standing Committee political groups

■ CCP, minor parties, and independents (193)

■ People's organizations (30)

■ Representatives of various groups (67)

■ Specially invited people (33)

□ Vacant (1)

Length of term

5 years

General Principles

❖ **Article 5** The People's Republic of China shall practice law-based governance and build a socialist state under **the rule of law**.

The state shall safeguard the unity and sanctity of the socialist legal system.

No law, administrative regulation or local regulation shall be in conflict with the Constitution.

All state organs and armed forces, all political parties and social organizations, and all enterprises and public institutions must abide by **the Constitution** and the law. Accountability must be enforced for all acts that violate the Constitution or laws.

No organization or individual shall have any privilege beyond the Constitution or the law.

❖ **1999 Amendment**

General Principles: *remarks*

- ❖ Emphasis is also placed throughout the 1982 Constitution on socialist law as a regulator of political behavior. (internal)
- ❖ Amendments to the Constitution also reflect the dynamic of the political situation in China. (external)

General Principles

❖ Article 4 All **ethnic groups** of the People's Republic of China are equal. The state shall protect the lawful rights and interests of all ethnic minorities and uphold and promote relations of equality, unity, mutual assistance and harmony among all ethnic groups. Discrimination against and oppression of any ethnic group are prohibited; **any act that undermines the unity of ethnic groups or creates divisions among them is prohibited.**

The state shall, in light of the characteristics and needs of all ethnic minorities, assist all ethnic minority areas in accelerating their **economic and cultural development.**

All areas inhabited by ethnic minorities shall practice **regional autonomy**, establish autonomous organs, and exercise the power to self-govern. All ethnic autonomous areas are inseparable parts of the People's Republic of China.

All ethnic groups shall have the freedom to use and develop their own spoken and written **languages** and to preserve or reform their own **traditions and customs.**



General Principles

❖ **Article 6** The foundation of the socialist economic system of the People's Republic of China is **socialist public ownership** of the means of production, that is, ownership by **the whole people and collective ownership** by the working people. The system of socialist public ownership has eradicated the system of exploitation of man by man, and practices the principle of “from each according to his ability, to each according to his work.”

In the primary stage of socialism, the state shall uphold a fundamental economic system under which **public ownership is the mainstay** and **diverse forms of ownership develop together**, and shall uphold an income distribution system under which **distribution according to work** is the mainstay, while **multiple forms of distribution** exist alongside it.

❖ **Article 7** **The state sector of the economy**, that is, the sector of the socialist economy under **ownership by the whole people**, shall be **the leading force in the economy**. The state shall ensure the consolidation and development of the state sector of the economy.

General Principles

❖ **Article 8 Rural collective economic organizations** shall practice a two-tiered system of both unified and separate operations with household contract management as its basis. Rural economic cooperatives — producer, supply and marketing, credit and consumer cooperatives — are part of the socialist economy under collective ownership by the working people. Working people who belong to rural collective economic organizations shall have the right, within the scope prescribed by law, to farm cropland and hillsides allotted to them for their private use, engage in household side line production, and raise privately owned livestock.

The various forms of **cooperative economic activities in cities and towns**, such as those in the handicraft, industrial, building, transport, commercial and service trades, shall all be part of the socialist economy under collective ownership by the working people.

The state shall protect the lawful rights and interests of urban and rural collective economic organizations and shall encourage, guide and assist the growth of the collective sector of the economy.

General Principles

❖ **Article 9** All mineral resources, waters, forests, mountains, grasslands, unreclaimed land, mudflats and other **natural resources are owned by the state**, that is, by the whole people, except for the forests, mountains, grasslands, unreclaimed land and mudflats that are **owned by collectives as prescribed by law**. The state shall ensure the rational use of natural resources and protect rare animals and plants. It is prohibited for any organization or individual to seize or damage natural resources by any means.

❖ **Article 10** **Land in cities is owned by the state. Land in rural and suburban areas is owned by collectives** except for that which belongs to the state as prescribed by law; housing sites and cropland and hillsides allotted for private use are also owned by collectives.

The state may, in order to meet the demands of the public interest and in accordance with the provisions of law, **expropriate or requisition land** and furnish compensation.

No organization or individual shall unlawfully transfer land through seizure, sale and purchase, or in any other form. **Land-use rights may be transferred in accordance with the provisions of law.**

All organizations and individuals using land must use it in an appropriate manner.

General Principles

- ❖ **Article 11** Non-public economic sectors that are within the scope prescribed by law, such as individually owned and private businesses, are **an important component of the socialist market economy.** (1999 Amendment)

The state **shall protect** the lawful rights and interests of non-public economic sectors such as individually owned and private businesses. The state shall **encourage, support and guide** the development of non-public economic sectors and exercise oversight and regulation over non-public economic sectors in accordance with law.

- ❖ **Article 12 Socialist public property is sacred and inviolable.**

- The state shall protect socialist public property. It is prohibited for any organization or individual to seize or damage state or collective property by any means.

- ❖ **Article 13 Citizens' lawful private property is inviolable.** (2004 Amendment)

- The state shall protect the right of citizens to own and inherit private property in accordance with the provisions of law.
- The **state may**, in order to meet the demands of the public interest and in accordance with the provisions of law, **expropriate or requisition citizens' private property** and furnish compensation.

General Principles

❖ **Article 15** The state shall practice a **socialist market economy**.

The state shall strengthen economic legislation and improve macro regulation.

The state shall, in accordance with law, prohibit disruption of the socioeconomic order by any organization or individual.

(1993 Amendment)

General Principles: *remarks*

- ❖ **1993, 1999, 2004 Amendments** to the 1982 Constitution provides an extensive legal framework for the liberalizing economic policies of the 1980s.
- ❖ It allows the **collective economic sector** not owned by the state a broader role and provides for limited **private economic activity**.
- ❖ Members of the expanded rural collectives have the right "to farm private plots, engage in household sideline production, and raise privately owned livestock."
- ❖ The primary emphasis is given to expanding the national economy, which is to be accomplished by **balancing centralized economic planning with supplementary regulation by the market**.

General Principles

❖ **Article 18** The People's Republic of China shall permit **foreign** enterprises, other economic organizations and individuals, to invest in China and to enter into various forms of economic cooperation with Chinese enterprises or other economic organizations in accordance with the provisions of law of the People's Republic of China.

All **foreign** enterprises, other foreign economic organizations and Chinese-foreign joint ventures in the territory of China shall abide by the law of the People's Republic of China. Their lawful rights and interests shall be protected by the law of the People's Republic of China.

General Principles: *remarks*

- ❖ One key difference between the 1978 and 1982 constitutions is the latter's **approach to outside help for the modernization** program.
- ❖ Whereas the 1978 Constitution stressed "**self-reliance**" in modernization efforts, the 1982 Constitution provides the constitutional basis for the considerable body of laws passed by the NPC in subsequent years permitting and **encouraging extensive foreign participation in all aspects of the economy**.

General Principles

❖ **Article 31** The state may establish **special administrative regions** when necessary.

The systems instituted in special administrative regions shall, in light of specific circumstances, be prescribed by laws enacted by the National People's Congress.

The Fundamental Rights and Duties of Citizens

Article 33 All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China.

All citizens of the People's Republic of China are equal before the law.

The state shall respect and protect human rights. **(2004 Amendment)**

Every citizen shall **enjoy the rights** prescribed by the Constitution and the law **and** must **fulfill the obligations** prescribed by the Constitution and the law.

The Fundamental Rights and Duties of Citizens

❖ **Article 34** All citizens of the People's Republic of China who have reached the age of 18, regardless of ethnicity, race, gender, occupation, family background, religious belief, level of education, property status or length of residence, shall have **the right to vote and stand for election**;

persons deprived of political rights in accordance with law shall be an exception.

❖ As Chinese citizens are categorized into rural resident and town resident, according to the later promulgated election law 1982, rural residents had only 1/4 vote power of townsmen (formerly 1/8).

❖ However, the fore-said ratio of vote power has been readjusted to 1:1 by an amendment to the election law passed in March 2010.

The Fundamental Rights and Duties of Citizens

- ❖ **Article 35** Citizens of the People's Republic of China shall enjoy freedom of **speech, the press, assembly, association, procession and demonstration.**
- ❖ **The right to strike** was also dropped from the 1982 Constitution.
- ❖ The constitution has no stipulation of **freedom of transference**, those rural residents are restricted by the "**Hukou**" (**registered permanent residence**) and have fewer political, economic, and educational rights. This problem has largely been addressed with various and ongoing reforms of Hukou in 2007.
- ❖ **Article 53** Citizens of the People's Republic of China must abide by the Constitution and the law, keep state secrets, protect public property, observe discipline in the workplace, **observe public order**, and respect social morality.
- ❖ In a new era that strove for political stability and economic development, party leaders considered those citizen's rights politically destabilizing. Chinese citizens are prohibited from forming new political parties.

The Fundamental Rights and Duties of Citizens

❖ **Article 36** Citizens of the People's Republic of China shall enjoy **freedom of religious belief**.

No state organ, social organization or individual shall coerce citizens to believe in or not to believe in any religion, nor shall they discriminate against citizens who believe in or do not believe in any religion.

The state shall protect normal religious activities. No one shall use religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the state's education system.

Religious groups and religious affairs shall not be subject to control by foreign forces.

The Fundamental Rights and Duties of Citizens

❖ **Article 42** Citizens of the People's Republic of China shall have **the right and the obligation to work.**

The state shall, in various ways, create employment opportunities, strengthen worker protections, improve working conditions and, based on the development of production, increase remuneration for work and work-related benefits.

Work is an honorable duty for every citizen who is able to work. All working people in state owned enterprises and in urban and rural collective economic organizations should approach their own work as masters of their country. The state shall encourage socialist work contests and commend and award model workers and advanced workers. **The state shall encourage citizens to participate in voluntary work.**

The state shall provide necessary pre-employment training for its citizens.

The Fundamental Rights and Duties of Citizens

❖ **Article 46** Citizens of the People's Republic of China shall have **the right and the obligation to receive education.**

❖ **Article 49** Marriage, families, mothers and children shall be protected by the state.

Both husband and wife shall have the obligation to practice family (birth) planning (计划生育) .

Parents shall have the obligation to raise and educate their minor children; adult children shall have the obligation to support and assist their parents.

Infringement of the freedom of marriage is prohibited; mistreatment of senior citizens, women and children is prohibited.

Article 25 **The state shall promote family planning** to see that population growth is consistent with economic and social development plans. (GP)

The Fundamental Rights and Duties of Citizens

- ❖ **Article 52** Citizens of the People's Republic of China shall have **the obligation to safeguard national unity and the solidarity of all the country's ethnic groups.**
- ❖ **Article 53** Citizens of the People's Republic of China must abide by the Constitution and the law, **keep state secrets**, protect public property, observe discipline in the workplace, observe public order, and respect social morality.
- ❖ **Article 54** Citizens of the People's Republic of China shall have **the obligation to safeguard the security, honor and interests of the motherland**; they must not behave in any way that endangers the motherland's security, honor or interests.

The Fundamental Rights and Duties of Citizens

- ❖ Much of the PRC Constitution is modeled after the 1936 Constitution of the Soviet Union,
- ❖ But there are some significant differences:
 - while the Soviet constitution contains an explicit right of secession, the Chinese constitution explicitly forbids secession.
 - While the Soviet constitution formally creates a federal system, the Chinese constitution formally creates a unitary multi-national state.

The Structure of the State

- ❖ Section 1 – The National People’s Congress
- ❖ Section 2 – The President of the People’s Republic of China
- ❖ Section 3 – The State Council
- ❖ Section 4 – The Central Military Commission
- ❖ Section 5 – Local People’s Congresses at All Levels and Local People’s Governments at All Levels
- ❖ Section 6 – Autonomous Organs of Ethnic Autonomous Areas
- ❖ Section 7 – Commissions of Supervision (2018 Amendment)
- ❖ Section 8 – People’s Courts and People’s Procuratorates

The Structure of the State

- ❖ **Legislative Branch** (National People's Congress)
- ❖ **Chief of the State** (President)
- ❖ **Executive Branch**
 - Head of Government (Premier and Vice premiers)
 - Cabinet (State Council and its ministries)
- ❖ **Judicial Branch** (Supreme Court)
- ❖ **Similar organizations at lower levels**
- ❖ **Communist Party**
 - Central Committee and Politburo

The Structure of the State

- ❖ the 2018 Amendment sets up the National Supervisory Commission (Section 7), establishing a new anti-graft agency, extending the powers of the CCP's graft watchdog.
- ❖ **Chief of the State: the 1982 Constitution does not explicitly provide that the President is the Chief of the State of China.**
- Art. 81: The president of the People's Republic of China...**on behalf of** the People's Republic of China...
- “Collective Chief of the State”: President + Standing Committee NPC

The Structure of the State

- ❖ The 1982 State Constitution is also more specific about the responsibilities and functions of offices and organs in the state structure. There are clear admonitions against familiar Chinese practices that the reformers have labelled abuses, such as concentrating power in the hands of a few leaders and permitting lifelong tenure in leadership positions.
- ❖ Prior to 1982 there were no term limits on key leadership posts. The 1982 Constitution imposed a two-term limit (10 years total) on all but the chair of the Central Military Commission.
- ❖ **The 2018 Amendment** removing term limits for both the President and Vice President, enabling Xi Jinping to remain president indefinitely. Xi is also the General Secretary of the Chinese Communist Party, the de facto top position in CCP ruling China without term limit.

The Structure of the State

- ❖ On the other hand, the Constitution strongly oppose the western system of separation of powers by executive, legislature and judicial.
- ❖ It stipulates the **National People's Congress (NPC)** as the highest organ of state authority power (Art. 57), under which the State Council, the National Supervisory Commission, the Supreme People's Court, and the Supreme People's Procuratorate are responsible to.
- ❖ The NPC's permanent organ is the **National People's Congress Standing Committee**. (Art. 57)
- ❖ The National People's Congress and the National People's Congress Standing Committee exercise the legislative power of the state. (Art. 58)

NPC



Standing Committee of the NPC



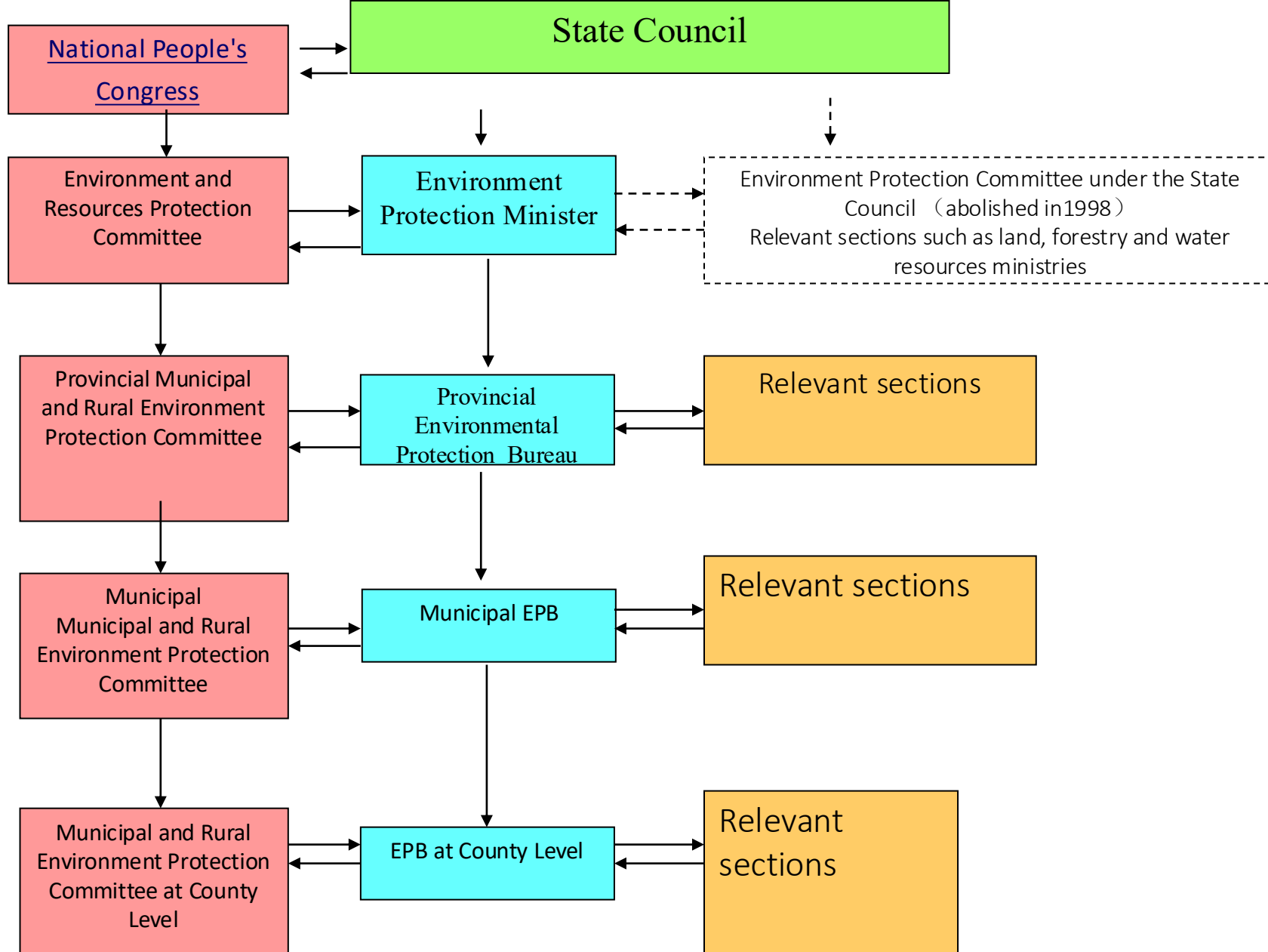
The Structure of the State

❖ **Article 64 Amendments to the Constitution** must be proposed by the National People's Congress Standing Committee or by one-fifth or more of National People's Congress deputies and be adopted by a vote of at least two-thirds of National People's Congress deputies.

Laws and other proposals shall be adopted by a majority vote of the National People's Congress deputies.

❖ The NPC shall enact and amend criminal, civil, state institutional and other basic laws (Art.62.3)

❖ The Standing Committee of the NPC enact and amend laws other than those that should be enacted by the NPC. (Art. 67.2)



The Structure of the State

- ❖ The 1982 Constitution establishes **separation of functions, but not separation of powers.**
- ❖ Each agency is required to exercise their own powers and functions and not interfere in the exercise of functions by any other agency, unless authorised.

The Structure of the State: Judicial Review

- ❖ Apart from the Supreme People's Court, which has function to issue judicial interpretations, courts do not have formal jurisdiction to interpret laws or do not have the power of judicial review to declare laws, rules or regulations invalid.
- ❖ This power of judicial review is exercised by the Standing Committee of the National People's Congress
- ❖ The courts exercise the function to determine the lawfulness of specific administrative conduct only to the extent specifically granted by legislation.
- ❖ For instance, *the Seed Law case in Henan Province*

The Structure of the State: Constitutional Review

- ❖ The constitution stipulates that the NPC and its Standing Committee have the power to review whether laws or activities violate the constitution (Art 67.1). Unlike many Western legal systems, courts cannot invalidate a statute on the grounds that it violates the constitution.
- ❖ However, the NPC and its Standing Committee have never explicitly ruled that a law or regulation is unconstitutional in practice.
- ❖ On December 16, 2019, the Standing Committee of the NPC passed the "Working Methods for the Filing and Review of Regulations and Judicial Interpretations." Starting from 2020, the Standing Committee officially initiated the work of constitutional review.

The Structure of the State: Constitutional Review

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Semantic constitution: weak constitutional enforcement

- ❖ the legal applicability of the Chinese constitution is debated
- ❖ Courts cannot directly invoke the Constitution as the legal basis for their judicial decisions