

Social Foundations of China's Living Constitution

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The chapter examines the social foundations of constitutionalism in China, focusing on constitutions as a historical response to particular events. The goal is to move beyond an analysis of the constitution as a formal text to shed light on the de facto constitutional order in China, on China's living constitution and its social, historical, cultural, economic, political and legal foundations. Part I begins with a brief historical overview of China's constitutions. Parts II discusses the current constitution, passed in 1982, and its four subsequent amendments. Part III explores the main functions of the constitution in China today and how the constitutional order actually operates. Part IV discusses China's living constitution. Part V concludes with some thoughts about the future of constitutionalism in China, and the possibility of a party-state alternative to liberal democratic constitutionalism.

I. From the Qing to New China to New New China: Qing, Republican and socialist constitutions and beyond

The contemporary Chinese term for constitutions - *xianfa* – existed in premodern times but assumed its present meaning when the idea of constitutions in the modern sense was introduced in the late 19th century from Western countries and via Japan. Since 1908, there have been twelve officially promulgated constitutions (and several drafts), including four socialist constitutions in 1954, 1975, 1978 and 1982, the last of which has been amended four

times.¹ The constitutions differ in important ways in terms of certain formal features, reflecting the different social, political and economic contexts in which they arose.² Nevertheless, on the whole, they share key characteristics

First, the constitutions were based on Western models. They were drafted by jurists with training abroad and familiar with the constitutions and constitutional practices of the dominant powers at the time. Accordingly, despite some distinctive features, the constitutions look familiar and seem broadly consistent with constitutions elsewhere in terms of general principles such as popular sovereignty, state institutions and their powers, and fundamental rights.

To be sure, the four socialist era constitutions reflect their socialist heritage and the moderation or radicalism of politics at the time of drafting. Drafters of the 1954 constitution drew heavily on the 1936 Stalin constitution of the USSR. The soviet influence is evident in concepts such as democratic dictatorship of the people and democratic centralism, in institutions such as the procuracy, and in the inclusion of an expansive list of social, economic and cultural rights. Some of the features of the socialist constitutions, including the reference

¹ The Common Program, a quasi-constitutional document, and the organic law adopted in 1949 served as the constitution from 1949 to 1954. The Common Program and all four socialist period constitutions (both English and Chinese versions) are available at <http://www.e-chaupak.net/database/chicon/>.

² For a detailed comparison of the key formal features of China's constitutions, see Andrew Nathan, "Political Rights in the Chinese Constitutions", in R. Randle Edwards et al. eds., *Human Rights in Contemporary China* 77-124 (1986).

in the preamble to the 1982 constitution to the Four Cardinal Principles,³ co-exist uneasily with many of the typical features of constitutions in liberal democracies.

Second, as true everywhere, China's constitutions were meant to serve a variety of purposes. In general, the constitutions have served to energize the people to better serve the state and contribute to a stronger China; symbolize national unity; affirm the policies of those in power; and set forth the ideals and goals for society to achieve. Different historical circumstances led to differences in emphases among these goals as well as to differences in how these broad purposes were understood. For example, in 1908, three years before the collapse of the Qing dynasty, the first of China's constitutions sought to establish a constitutional monarchy. One of the main goals in passing the constitution was to defuse the rising Han nationalism that was challenging the ruling Manchurian regime. Like subsequent constitutions during the Republican period, the Qing constitution was also intended to strengthen China as a nation and ward off encroachment from foreign powers.

While all of the constitutions have announced broad goals, the socialist era constitutions have had a more pronounced ideological and programmatic quality, particularly with respect to civil and political rights.⁴ The 1975 constitution, a Cultural Revolution product intended to

³ The Four Cardinal Principles, enunciated by Deng Xiaoping as topics not open for challenge as part of a broader attempt to liberalize political discussion, refer to the need to adhere to the socialist path, maintain the people's democratic dictatorship, uphold the leadership of the CCP and follow Marxist-Leninist-Mao Zedong thought.

⁴ See Nathan, "Political Rights"; R. Randle Edwards, "Civil and Social Rights: Theory and Practice in China Today", in *Human Rights in Contemporary China* 47-52; Jerome Cohen, "China's Changing Constitution," 76 *China Q.* 836-37 (1978).

consolidate Mao's power, was the most ideological of all with its repeated denunciations of foreign imperialists and the endorsement of continued revolution to fend off foreign aggression and combat class struggle at home. Nevertheless, all four socialist constitutions begin with a lengthy preamble that sets forth basic goals. The preamble to the 1982 constitution, for instance, traces the long and glorious history of China; laments the national humiliation at the hands of foreign powers from the mid 19th century until Mao Zedong and the Chinese Communist Party (CCP) were able to defeat the collective historical forces of imperialism, feudalism and bureaucratic capitalism to unify the nation and establish New China; and sets out some of the major achievements under the CCP in defending the nation against foreign aggression, developing the social and economic order, and improving the lives of citizens, before turning to major challenges.

Third, one of the key constitutional issues has been the strength of the executive relative to the legislative branch, or more fundamentally the extent to which state powers will be concentrated in the hands of a single person. Thus, debates in 1913 centered on the relative power of the executive and the legislature in the Temple of Heaven draft constitution. Liang Qichao and the Progressive Party favored giving more power to the president. The Nationalist Party favored a stronger parliament, which they controlled as a result of elections in 1912-1913.

Fourth, on the whole, judicial power and independence have been limited both formally and in practice. The 1946 constitution was the only of China's constitutions to provide for judicial review of laws for their constitutionality. However, it was never implemented due to

the civil war between the Kuomintang (KMT) and the communists. While the powers and independence of the courts varied in the four socialist constitutions, the courts have never enjoyed the broad powers of judicial review as in the U.S. Rather, courts' powers have been limited, as traditionally the case in civil law and parliamentary-supreme systems. Today, there is no constitutional court or constitutional review body. The NPC Standing Committee is charged with reviewing lower-level legislation for consistency with the constitution. Although the courts may review the legality of specific administrative acts or decisions, they do not have the power to review, and thus to strike down or quash, abstract acts (i.e. generally applicable rules).

The 1982 constitution provides for the independence of the courts in handling cases. However, both formally and in practice the courts are subject to a variety of party and state mechanisms to ensure accountability, including supervision by the people's congress, procuracy and party organs. In recent years, the courts have also been subject to increased scrutiny by the media and public.⁵

Fifth, concerns about concentration of power in the hands of a strong leader have proven well-founded. Leaders who have become too powerful have reverted to authoritarian rule, sought to undermine or dismantle the legislature, judicial organs or other competing sources of power, and imposed extensive restriction on individual rights in the name of social stability. Thus, once elected president, Yuan Shikai dissolved parliament in 1914 before declaring himself emperor in 1915. This usurpation of power resulted in an uprising by provincial warlords that forced Yuan to abolish the monarchy in 1916. Later, in April 1948, the KMT

⁵ See generally Randall Peerenboom ed., *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (2010).

essentially gutted the constitution by passing the Temporary Provisions Effective during the Period of Communist Rebellion. These provisions, along with the declaration of Martial Law in 1949, allowed the KMT in Taiwan to halt parliamentary elections, pass administrative regulations restricting civil and political rights and nullify provisions that would have imposed a term limit on the president.

Meanwhile, on the mainland, the four socialist constitutions have reflected struggles over the concentration of power, although key developments have also been influenced by the CCP constitution and constitutional conventions. The 1954 constitution limited the term of the head of state. Although Mao relinquished the head of state position to Liu Shaoqi, he maintained his positions as head of the Party and the military. However, the split in the trinity of powers (state, party and military) proved unstable, and Mao used the Cultural Revolution to reunite the powers. The 1982 constitution distributed powers among different branches of the government to avoid the excessive concentration of power, with the Party constitution also being amended under Deng Xiaoping to achieve a similar purpose. However, the split of power led to political discord and competition among the political leadership, which erupted into public view over how to respond to the crisis in Tiananmen in 1989. This led to the re-integration of party, state and military power under Jiang Zemin. When Hu Jintao assumed power, he first became general secretary of the Party in 2002, state president in 2003, and chairman of the Central Military Commission of the CCP in 2004. However, Jiang Zemin remained head of the Central Military Commission of the PRC until 2005, when Hu assumed that post as well, completing the reintegration of power. In resigning his last post, Jiang Zemin endorsed the constitutional convention concentrating power: “the three offices, general

secretary of the Party, state chairman and chairman of the Central Military Commission, are integrated into a trinity system of rule. Such a leadership regime and a leadership model is not only necessary, but also most appropriate for a party and a country as large as ours.”⁶

Sixth, in addition to the horizontal checks and balances among the different branches and struggles over the concentration of power in the executive, another key issue has been vertical power relations between the central government and provincial and local governments. For instance, after Yuan’s death, the Progressive Party and the Nationalists sought to draft a new constitution, with debate centering on whether the constitution should only set out central powers or try to delineate the powers of local and provincial governments as well. Some feared that local warlords would undermine the constitutional order through violence if the new constitution tried to limit their powers; others worried that the failure to rein in the powers of the warlords would simply perpetuate the current political chaos. Between 1917 and 1923, a federalist movement arose in which many provinces enacted their own constitutions. Federalists hoped that the issue of national unity could be addressed after autonomous provinces had established their own governance systems. Provincially elected representatives would then meet to create a national constitution. The movement failed when local warlords resisted limits on their powers, and the need for national unity became more pressing.

Today, central-local relationships continue to be a major concern, which is not surprising given the size and complexity of China and the wide regional variation in terms of ethnicity,

⁶ *Jiang Zemin Wenxuan [Selected Writings of Jiang Zemin]*, vol. 3 (2006), p.603.

levels of wealth, strength of institutions and increasingly the nature of the local economy. In general, the Eastern region is much more economically developed and urbanized than the Western region, which is more dependent on agriculture.

Seventh, every constitution after 1908 has expressly or implicitly provided for popular sovereignty (albeit with restrictions based on class or political status in some cases). On the whole, however, elites have been skeptical about the masses and their capacity for governance. Sun Yat-sen, for instance, believed the masses lacked the education and political competence to govern directly. Accordingly, he endorsed a three-stage transition to a constitutional state. During phase one, an autocratic military government would unify the country. Phase two was a period of tutelage where people would be allowed to exercise political control over basic level government. This would lead to full blown constitutional democracy in phase three.

Thus, while most constitutions provided for popular sovereignty, none provided for its effective exercise by the people. As Nathan notes: "In no constitution was the executive directly elected. The national legislature was always elected either indirectly or by a limited electorate and had very limited authority in government affairs. The influence of the citizen over state policy was so buffered and checked as to be negligible in practice."⁷ In addition to limits on the number and choice of candidates and who could participate in the voting, some elections have been marred by fraud. During the Republican period, some political factions that lost at the polls carried out coups, committed political assassinations or engaged in military resistance. China's limited experience with elections then is that it is no panacea - a lesson current leaders and

⁷ See Nathan, "Political Rights," at 122.

citizens are likely to take from the experience of other developing countries in East Asia and elsewhere.⁸

Eighth, despite the limits on elections, citizens have played a role in the constitutional process. Constitutions have generally been subject to public debate. In general, as elsewhere, the drafting process itself has been dominated by elites,⁹ although with some avenues for citizen participation mainly through organized interest groups or associations. The public has usually then been given an opportunity to comment on published drafts. For instance, while the CCP clearly controlled the drafting of the 1954 constitution, a wide range of elites participated, including legal scholars who had studied in Japan and the US who were not Party members. The draft constitution was circulated to leading cadres in local government for comment, and then opened up to the public for three months of public comment, resulting in more than one million questions, comments and suggestions. The process of deliberation and discussion led to numerous revisions, including significant changes regarding the authority and independence of the courts.¹⁰ The National People's Congress (NPC) has ratified each new constitution or amendment, usually by unanimous or nearly unanimous vote.

In recent years, academic and public discussion of constitutional amendments has increased in breadth and intensity. In the run-up to the 2004 amendment, academics

⁸ See Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (2002).

⁹ Although formally the power to amend the constitution belongs to the NPC, in practice the CCP initiated constitutional revisions and determined their scope.

¹⁰ Glenn Tiffert, "Epistrophe: Chinese Constitutionalism and the 1950s," in Stéphanie Balme and Michael Dowdle eds., *Building Constitutionalism in China* (New York: Palgrave MacMillan, 2009), p. 66-70.

advocated a number of far reaching revisions. However, once the leadership had settled on the topics to be addressed and the basic principles, they put an end to further discussion, resulting in the cancellation of academic conferences and the harassment of some academics who continued to push for additional reforms.¹¹

Ninth, all constitutions failed to take root or function in the way constitutions have functioned in the more fully developed constitutional orders of wealthy Euro-American liberal democracies. There are two main explanations. The period from the end of the Qing through much of the socialist period has been a turbulent one, punctuated with military struggle against foreign aggressors, civil war between the KMT and CCP, and battles between the central state and provincial warlords; political struggle among competing factions both at the central and local levels; and major changes in the economic, legal and political systems, particularly during the socialist era with the Anti-Rightist Movement of the 1950s, followed by the Great Leap Forward, the Cultural Revolution, and then the transition to a market economy beginning in 1978. Xiao-Planes captures the difficulties in a neat summary of the Republican period equally applicable to the socialist era until the reform era: “The national entity imploded: political life became militarized; and power relations became personalized and fragmented.”¹²

An alternative but complementary explanation emphasizes the difficulty of transplanting Western liberal democratic institutions to the very different context of China. The

¹¹ Chen Jianfu, *Chinese Law: Context and Transformation* (Leiden and Boston: Nijhoff 2008), p. 95

¹² Xiaohong Xiao-Planes, “Of Constitutions and Constitutionalism: Trying to Build a New Political Order in China, 1908-1949), in Balme and Dowdle, p. 56.

constitutions were based on values and ideas that challenged core sociopolitical and cultural values and practices in China. Effective implementation of the constitution therefore required a radical transformation of local institutions, practices and values that had existed for thousands of years. Today, the liberal democratic origins of the constitution are being tested by an increasingly confident CCP committed to developing its own form of constitutional order consistent with China's national conditions.

II. The 1982 constitution and its amendments: from a centrally planned economy to a socialist market economy, from a revolutionary party to a governing party

Like the previous constitutions, the 1982 constitution was both backward looking and forward looking, and reflected both international practices and China's own circumstances. Whereas the 1954 constitution celebrated the recent victory of the CCP and China's close relations with the Soviet Union, the 1975 constitution consolidated Mao's power and displayed the radicalism of socialist ideology during the Cultural Revolution, and the short-lived 1978 constitution manifested the tension between continued endorsement of revolutionary politics and the need for stability, the 1982 constitution reflected Deng Xiaoping's rise to power, the shift from radical politics to modernization and economic development, and the Party's transformation from a revolutionary party to a governing party.

Zhu Suli has observed that whereas in many countries the modern state preceded the rise of political parties and democratic constitutional orders, in China the rise of political parties preceded the modern nation state. As a result, both the CCP and KMT were elitist revolutionary parties that mobilized and led the masses from above: "both the CCP and the

KMT... have had to be much more proactive and aggressive in mobilizing China's fragmented and premodern political and social forces into a modern unified state – and through this attain the national independence, and related capacities for social and economic development, that political parties in the West have been able to largely take for granted.”¹³

The revolutionary nature of the CCP is also attributable to the shortage of qualified professional and educated elite, many of whom left with the KMT to Taiwan, although no doubt the Anti-Rightist Movement, the Cultural Revolution and other ideologically driven purges contributed to the shortage and curtailed the development of a professional judiciary and bureaucracy. In any event, the Party remained revolutionary for too long rather than transforming into a governing party, relying on party organization and leadership, including emphasis on ideology and discipline, to govern, rather than creating effective state bureaucracies.

The transition to a market economy required more effective governance, including a more effective legal system. Thus, the preamble declares that the central goal of the 1982 constitution is to “steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defense and science and technology step by step to turn China into a powerful and prosperous socialist country with a high level of culture and democracy.”

Since 1982, the amendment process has been used to codify, rather than signal, significant steps in the transition to a socialist market economy. Indeed, the amendments read

¹³ Zhu Suli, “Judicial Politics’ as State-Building,” in Balme and Dowdle, p. 31.

like a play by play of China's ongoing efforts to shift from a centrally planned to a more market-based economy with their increasing support for a more robust private sector, deregulation and the restructuring of SOEs. The first amendment in 1988 hesitantly announced that the "State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy." The 1999 amendment then upgraded the status of the private economy, which was acknowledged to be a "major component" of the socialist market economy. Other amendments reflected developments with respect to the autonomy and management of SOEs; changes in collectives and communes as a result of the rise of the rural household contract responsibility system; and the clarification of, and need to better protect, land use rights.

The amendment process has also sanctioned major ideological shifts resulting from leadership changes and the evolving nature of the economy, rather than signaling future policies. Thus, a 1993 amendment sought to reconcile socialism with the transition to a market economy and the rise of a capitalist class by introducing the notion of socialism with Chinese characteristics and announcing that China was in the primary stage of socialism. The basic idea was that China would first have to pass through a capitalist phase before a true socialist state could be realized. In 1999, the constitution was again amended, this time to acknowledge that China will remain in the primary stage of socialism "for a long time." The 1999 amendments also added Deng Xiaoping thought to Marxist-Leninist-Mao Zedong thought as the guiding ideology, reflecting the by then firmly established ideological shift from radical politics to economic development.

The constitution was amended once more in 2004 to add the “important thought” of the “Three Represents” associated with Jiang Zemin. The Three Represents refer to the CCP’s role as representative of the development needs of the advanced productive forces, of the progressive direction of China’s advanced culture, and of the fundamental interests of the broad majority of citizens. Their main import is to realign the CCP from a proletariat-based party to a more broad-based party that tracks changes in the economy and society by incorporating the new class of capitalists and entrepreneurs within the CCP, even though the 1982 constitution, like previous socialist constitutions, continues to describe China as a democratic dictatorship of the people led by the proletariat and based on an alliance of workers and peasants.

Given the historical pattern, the constitution will presumably again be amended to reflect the emphasis of the current administration of Hu Jintao and Wen Jiabao on the establishment of a *harmonious society*. The Deng-Jiang emphasis on aggregate growth led to rising inequality and severe environmental degradation. While pumping money into infrastructure development needed to support rapid growth, the government was ignoring other pressing social needs. The government’s public spending on education and health as a percentage of GDP has been among the lowest in East Asia. The reduced spending, combined with a turn toward market forces in education and health, and the underdevelopment of the welfare system, have exacerbated the plight of the most vulnerable members of society and heightened social tensions. With greater rights consciousness and higher expectations, Chinese citizens were turning to the courts, government agencies and Party organs to address their needs. When those channels proved inadequate, they took to the streets in increasing

numbers. There were 538,941 multi-party suits in 2004, up 9.5% from 2003.¹⁴ The number of petitions to government entities rose dramatically until 1999, before starting to decline. Even with the decline, in 2005, the letters and visits offices received a total of 12.7 million complaints.¹⁵ According to one survey, 63.4 per cent of those who eventually brought their complaints to the central authorities in Beijing had first sought resolution in the courts.¹⁶ The number of mass protests and large scale demonstrations also rose rapidly, from 58,000 in 2003, to 74,000 in 2004 and 85,000 in 2005 to over 100,000 in 2008. According to the state media, over 1800 police were injured and 23 killed during protests in the first nine months of 2005 alone.

The government viewed these protests as a threat to social stability, and thus a threat to sustained economic growth. The CCP's legitimacy is based to a large extent on its ability to ensure social stability and improve people's living standards. Understandably, the Hu-Wen administration announced a major new policy initiative.¹⁷

The new policy turned away from the single-minded focus on aggregate growth, emphasizing instead high quality sustainable growth, social justice and the creation of a harmonious society. The goal is now efficient resource use, environmentally friendly development and "green GDP" (although efforts to create a Green GDP measure have been

¹⁴ Supreme People's Court's 2005 Work Report, available at <http://www.court.gov.cn/work/200503180013.htm>.

¹⁵ Fu Hualing and Richard Cullen, "From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China," (forthcoming).

¹⁶ Yu Jianrong, "Dui 560 mingjing shangfangzhe de diaocha [An Investigation on 560 Petitioners to Beijing]," *Falü yu senghuo* [Law and Life], no. 5, p. 14 (2007).

¹⁷ These measures were set out in the Harmonious Society platform and 11th Five-Year Plan.

put on the back burner in light of the global economic crisis, technical difficulties and normative controversies).¹⁸ The harmonious society platform also pays more attention to income inequality, with greater efforts to stimulate growth in less developed regions through reallocation of state assets and new incentive programs as part of the Go Inland Campaign, the Great Western Development Strategy and the Revitalize the Northeast Campaign. In addition, the government has sought to address the plight of farmers by eliminating the agriculture tax, promised more affordable medical care in rural areas, and vowed once again to eliminate school fees that prevented children from poor families from attending public school. The 2004 amendment reflected to some extent the switch in development goals in announcing “the promotion of the co-ordinated development of the material, political and spiritual civilizations...”

The greater number of amendments addressing major changes in the economy compared to the number of amendments addressing political reforms testifies to the more limited nature of the latter since 1978. Elections remain limited to the township level, although there have been a few experiments at the county level as well as other elections for low-level administrative positions and for posts on neighborhood committees. Similarly, political participation remains limited in effectiveness, notwithstanding the emergence of an ever-growing civil society and more aggressive media, the passage of national and local access to information acts, and significant reforms to provide citizens increased opportunities to participate in the law and rule making and implementation processes.

¹⁸ The global economic crisis has also called into question the export-driven model of development favored by China and other East Asian states. China could switch to a more consumption-driven development path without amending the constitution as the constitution did not endorse the export-driven model.

Nevertheless, the shift from revolutionary politics to effective governance is evident in a 1999 amendment endorsing rule of law, albeit a socialist variant of rule of law, where the country is governed in accordance with law. The amendment reflects the growing importance of the legal system for economic growth, a different concept of law where law is also understood to apply to state actors and limit state power, and the considerable progress made in improving the legal system since 1978. While not reflected directly in constitutional amendments, there have been many measures to rationalize and professionalize administrative agencies, the judiciary, the procuracy, police, the legal profession and other judicial and government actors.¹⁹

The increased salience of human rights both internationally and domestically is also reflected in China's constitutional history. The 1954 constitution contained a broad list of civil and political as well as social, cultural and economic rights, albeit some of them to be realized gradually as China developed economically. The 1975 and 1978 constitutions were more restrained in their treatment of rights, and restricted their enjoyment by requiring citizens to support the leadership of the Party and the socialist system. The 1982 constitution once again set forth an expansive list of rights, and signaled the growing global importance of rights by moving the rights section to the front ahead of the section on the structure of the state. In 2004, the fourth amendment of the constitution added a paragraph announcing that "The State respects and preserves human rights."

¹⁹ For a discussion of the evolution of rule of law in China as well as competing conceptions of rule of law, including socialist rule of law, see Peerenboom, *China's Long March toward Rule of Law* (2002). For additional overviews of legal reforms, see generally Albert Chen, *Introduction to the PRC legal system* (Hong Kong: Butterworths, 2nd ed. 2004), Chen Jianfu, *Chinese Law*; Balme and Dowdle, *Building Constitutionalism in China*.

The meaning, purpose and practical import of the 2004 amendment have been much debated. Although China signed the ICCPR in 1998, it has yet to ratify it, which is not surprising given the restrictions on civil and political rights.²⁰ The 2004 amendment may have been intended to fend off international pressure to ratify the ICCPR or at least demonstrate a greater commitment to the protection of (civil and political) rights. Indeed, the amendment breaks new constitutional ground in referring to “human” rights, as opposed to rights of workers, citizens or people. On the other hand, China has increasingly become more assertive in resisting foreign pressure on human rights issues.²¹ Thus, the amendment may have been intended more for domestic consumption. The amendment may seem like a return to the tradition of programmatic statements of rights, a feature of many early Chinese constitutions and a pronounced feature of socialist constitutions more generally.²² Yet, as we have seen, most amendments have been backward looking, ratifying economic and political developments and ideological changes that already occurred. It is possible that the amendment was intended to ratify or acknowledge significant changes over the last several decades with human rights, as was arguably the case for the 1999 rule of law amendment, which both announced a distinctive socialist variant of rule of law and also reflected decades of progress in rebuilding legal institutions and in legal reforms. Although many would dismiss this possibility given China's record on civil and political rights, in fact there has been a considerable shift in thinking from the time rights were dismissed as a capitalist tool to

²⁰ Tight restrictions on civil and political rights in the name of social stability during the initial period of rapid growth is one of the defining features of the East Asian Model of development. See Peerenboom, *China Modernizes*.

²¹ Ming Wan, “Democracy and Human Rights in Chinese Foreign Policy,” in Yong Deng and Fei-Ling Wang eds, *China Rising* (2005), 279-304.

²² See Nathan, “Political Rights.”

induce false consciousness. Perhaps more importantly, China outperforms the average in its income class on most indicators of rule of law, good governance, human rights and human wellbeing, with the notable exception of civil and political rights.²³ Moreover, the amendment may have been sought by those in China who were beginning to explore the possibilities of constitutional litigation and adopting more aggressive litigation strategies to protect rights.²⁴ Although the constitution is not directly justiciable, and in any event the provision is too broad to provide a meaningful basis for resolving rights claims, the amendment may indirectly support better protection of rights both through litigation and other non-court means by signaling a more receptive attitude.²⁵

At the same time, another amendment was added providing that "The State establishes a sound social security system compatible with the level of economic development." On the one hand, this provision reflects ongoing efforts to create a viable welfare system. On the other hand, it reflects growing concerns about the broad commitment to social and economic rights typically found in socialist constitutions, the global trend to make social economic rights justiciable and to judicialize socio-economic claims, and the difficulty China's courts have had handling such claims given the lack of adequate resources and the relative weakness of the courts.²⁶ Thus, the provision highlights the more programmatic or aspirational nature

²³ See Peerenboom, *China Modernizes*.

²⁴ Xu Xianming and Li Buyun, two well-known academic advocates for human rights, apparently played a role in promoting the provision.

²⁵ A group of 30 leading legal scholars recommended 18 constitutional reforms to make good on the commitment to human rights. See He Weifang et al., "Suggestions for the Improvement of Constitutional Protection of Human Rights in Our Country," www.law-thinker.com/details.asp?id=2078.

²⁶ See Randall Peerenboom, "More Law, Less Courts: Legalized Governance, Judicialization and Dejudicialization in China," in Tom Ginsburg and Albert Chen, eds., *Administrative Law and Governance in Asia* (RoutledgeCurzon 2008).

of social and economic rights, seeks to lower expectations, and suggests that welfare rights will be treated as an obligation of the government rather than a justiciable right for individuals.

III. The functions of the constitution and the operation of the constitutional order

The constitution has clearly served a signaling function, reflecting major changes in ideology, the nature of the economy, governance and also, by negative implication, the slower pace of fundamental political reform. However, to what extent has the constitution played a functional role as the most fundamental law of the country? From a functional legal perspective, constitutions serve several broad purposes. Most fundamentally, constitutions authorize, delineate and limit political (and military) power and the power of the state, state organs and state actors. More specifically, constitutions, constitutional law, and constitutional litigation serve three functions: addressing division of power issues among state organs; resolving conflicts between the central and local government, including inconsistencies between lower level regulations and the constitution; and protecting individual rights

Horizontal power issues

The main role of the constitution to date has been to provide an initial distribution of power among state organs. This then provides the backdrop against which legal reforms, which frequently affect the balance of power among key state actors, are negotiated. For example, the constitution now gives the procuracy the power to supervise the courts. In recent years, the procuracy has interpreted this power to mean that it has the authority to supervise final

judicial decisions. As expected, the judiciary has argued that the procuracy's power of supervision should be eliminated, or at least limited to general oversight of the court or investigation of particular instances of judicial corruption. According to most judges, the procuracy should have no power to supervise individual cases. The courts have also come into conflict with the legislative branch over similar powers of individual case supervision and with administrative agencies over the power of judicial review of agency decisions.

As in all legal systems, the judiciary has acted strategically in defending and promoting their interests vis-à-vis other branches. Historically, the courts have been relatively weak compared to the government agencies (particularly the Ministry of Public Security), the procuracy and even the legislature. In recent years, they have adopted various strategies to improve their position. One strategy, reflected on a policy level under former SPC President Xiao Yang but much more pronounced under the current president Wang Shenjun, has been to embrace populism. Thus the judiciary has adopted a number of measures to become more user-friendly, cheaper and more efficient, more accessible and transparent. The goal has been to better meet the actual demands of Chinese citizens who use the courts.

After years of emphasizing litigation in courts as the main means of resolving disputes, beginning in the early 2000s, the SPC began to emphasize once again mediation of disputes. The renewed interest in mediation is in part the attempt of the judiciary to enhance its legitimacy by responding to the needs of citizens, many of whom, particularly in rural areas, want decisions that reflect local customs and norms rather than the formal central laws promulgated by national legislators in far off Beijing. The increasingly popular practice of

senior judges meeting with parties in potentially incendiary large collective suits to explain the legal issues is another example.

Still another example is found in what Stephanie Balme and Michael Dowdle refer to as “popular constitutionalism.” As they point out, post-Mao constitutionalism “is not and cannot be the exclusive product of elite intellectuals.”²⁷ Debates about the constitution and the constitutional order reflect different views, both elite and popular, about how to envision the state and what type of polity China is to become. Now that the authorities have let the genie out of the bottle by endorsing rule of law and attributing normative, legal and political significance to the constitution, the meaning and role of the constitution have become part of public discourse and open to political contestation, with state and non-state actors appealing to the constitution to pursue their (often conflicting) goals and agendas.

In one manifestation of popular constitutionalism, judges in local courts have taken on socially controversial cases as a way of enhancing their professional stature and gaining support by responding to citizen demands for social justice. They decide such cases by adopting a more purposive approach that emphasizes the spirit of the constitution and a sense of popular justice rather than on the basis of a strict positivist analysis or formalist interpretation of textual rules.²⁸

Other courts have adopted a different strategy to increase their stature and maintain the legitimacy and reputation of the judiciary. He Xin shows that lower courts in Guangdong

²⁷ Balme and Dowdle, “Introduction: Exploring for Constitutionalism in 21st Century China,” in Balme and Dowdle, p. 16.

²⁸ Stephanie Balme, “Ordinary Justice and Popular Constitutionalism,” in Balme and Dowdle, p. 179-198..

province have effectively resisted pressure from Party and government organs to take on socio-economic disputes, raising questions about the extent to which they are controlled by superior political powers.²⁹ Citing legal barriers and enforcement difficulties, the courts resisted the global trend to judicialize these disputes, pushing them back to political and administrative channels. However, the courts then demonstrated their strategic sophistication by claiming the right to review the government's decisions in administrative litigation. In so doing, the courts retain an advantageous position in the power relationship with the governments. Moreover, as these cases inevitably leave some groups dissatisfied, the court is able to avoid public displeasure by forcing the government to make the difficult decision. He concludes that Chinese courts are capable of deliberating about and transforming their situation by strategically interpreting the law and negotiating with superior powers. Consistent with the findings of others,³⁰ he suggests that judicial independence in China is far more complicated than is often recognized, and that judicial behavior cannot be adequately explained without thick descriptions of the legal arguments, resource constraints and strategic interpretations open to the courts in a particular context.

In the absence of a constitutional court, however, most issues involving the balance of power between state organs, such as whether the procuracy and people's congress should be able to review court decisions, have been left to the political process, with the Party being the ultimate arbitrator when the conflicts become too intense or there appears to be a deadlock.

Vertical power issues

²⁹ He Xin, "The Judiciary Pushes Back: Law, Power, and Politics in Chinese Courts," in *Judicial Independence in China*, p. 180-195.

³⁰ See generally, *Judicial Independence in China*.

Constitutional law also provides the basis for addressing conflicts between the central government and lower level governments, which is a form of principal-agent conflict. The rapid pace of legislation and an incentive structure that rewards local officials for achieving high growth rates have led to numerous inconsistencies between lower level regulations and higher level laws and the constitution. Rather than relying on the courts to strike down lower level laws that are inconsistent with the constitution, the main way for addressing inconsistent regulations is through a filing and review system, with the review performed by the administrative superior agency (OLA 2007).

The 2000 Legislation Law granted citizens and other entities the right to propose to the National People's Congress Standing Committee (NPCSC) that lower regulations were inconsistent with the constitution or laws. The government has now established a NPC committee to perform this task, and is in the process of working out the details of how this mechanism will work in practice (Wang Zhenmin). This has provided an opportunity to push for changes to protect citizens' constitutional rights and advance constitutional claims.

For example, after Sun Zhigang, a university student from Hubei, was beaten to death while detained in a form of administrative detention known as Custody and Repatriation, several young scholars filed a proposal challenging the legality and constitutionality of the Custody and Repatriation Measures. One of the key arguments was that the Measures were passed by the State Council. However, the Legislation Law required all restrictions of personal liberty to be based on a law passed by the NPC or its Standing Committee. The case

was widely reported in the media, and resulted in the State Council repealing the Measures, thus avoiding the need for the NPCSC to strike down the regulation.

In another well-known case, Peking University law professor Gong Xiantian published two open letters arguing that the draft Property Law violated basic principles of socialism and a constitutional provision declaring that state property is inviolable (Hand 2008). NPC spokespersons, including NPCSC Chairman Wu Bangguo, issued public statements defending the constitutionality of the draft law, and noting that the draft had been amended to provide greater protection to state property and avoid the fraudulent sale of state assets. Although delayed for a year, the Property Law was passed in 2007

To what extent this new review mechanism will empower citizens remains to be seen. Citizens have submitted at least 37 requests for review (Hand 2008). However the NPCSC has yet to respond formally to a citizen proposal for review. Moreover, although the NPCSC issued two circulars setting out detailed procedures for handling proposals for NPCSC review of administrative regulations and judicial interpretations, these circulars do not provide much transparency into how the decisions are actually made.

More generally, while the NPCSC review creates a constitutional mechanism for dealing with one type of principal-agent problem, for the most part, principal-agent issues such as inconsistent regulations, abuse of power and corruption, are dealt with through other administrative and political mechanisms, including Party mechanisms such as the nomenklatura system of appointments, the Party-endorsed incentive structure for the

promotion of government officials, the Party discipline committee and *shuanggui*, a form of detention and investigation for Party members suspected of corruption.

Constitutional litigation and the protection of individual rights

Constitutional litigation to protect individual rights is only just beginning, and future progress is likely to be slow. As noted, there is no dedicated constitutional review body, the constitution is generally not considered to be directly justiciable,³¹ and many rights have a programmatic or aspirational flavor. The Supreme People's Court did rely on the constitution in reaching its decision in a civil case involving the right to education (Shen 2003). However, that case did not involve enforcing the constitution against the government. The case was also extremely controversial, with proponents of expanded constitutional litigation drawing hyperbolic comparisons to *Marbury v. Madison*, and critics arguing that decision was at odds with the constitutional structure or unnecessary to provide relief in the particular circumstances. Since then, there have been no cases where a court has cited a constitutional right as the sole basis for its holding (although courts do sometimes cite specific constitutional provisions along with other laws and regulations to support their decisions).

The constitution has however been invoked in a series of discrimination cases. In one case that combined the right to education with a discrimination claim, three students from Qingdao sued the Ministry of Education for its admissions policy that allowed Beijing

³¹ This is more a matter of interpretation and convention than formal constitutional provision. See Letter of Reply by Supreme People's Court Regarding the Inappropriateness of Quoting the Constitution as the Basis for Deciding a Criminal Case and Imposing Penalty, Collected Laws of the PRC 120 (Jilin People's Press ed. 1990).

residents to enter universities in Beijing with lower scores than applicants from outside Beijing (Yu Meisun 2004). In another case, a person infected with Hepatitis B won an administrative litigation suit when he was denied a post as a civil servant because of his disease (China Law and Governance Review 2004).³² The court did not reach the constitutional issues raised in the case but held that the application of the standard on the plaintiff was wrong (Kellogg forthcoming). Other employment discrimination cases have challenged height, gender and age restrictions.

Rural residents have also appealed to the constitution to protest discriminatory treatment. In one well-known case, three students were killed in a traffic accident. In China, compensation is based on average income, which differs significantly between rural and urban areas. Thus, the families of two of the victims who were urban residents received more than twice the compensation of the family of the victim who was a rural resident. The family of the rural victim brought a lawsuit to challenge the discriminatory compensation, arguing the standard violated the principle in Article 33 of the constitution that all citizens are equal before the law. But the court held that the compensation was in accordance with existing law (Inner Mongolia News Net 2007).

Citizens have also drawn on constitutional principles to uphold privacy claims. In a much publicized case, a Shaanxi couple was awarded damages after police stormed into their bedroom while they were watching an adult movie and a scuffle broke out between the husband and police, resulting in injuries to the husband (Peerenboom 2007).

³² While the plaintiff won the suit in that the court quashed the act to deny him employment, the court could not order the defendant to provide a job as the post had already been filled. See Hand (2008).

To be sure, most of these cases have been dismissed on technical grounds, including lack of jurisdiction, failure to apply to the proper court, or the lack of authority to overturn an abstract administrative act.

Moreover, in most cases, relief came in the form of a change in the laws, not a favorable court judgment, and was the result of a fortuitous conflux of circumstances, including media attention. For instance, the civil servant Hepatitis B case arose after a man in Zhejiang, after being denied a civil service position because he was a Hepatitis B carrier, killed a local official and seriously injured another. Although the man was eventually sentenced to death, his case attracted much sympathetic media attention. At the time, a proposal had also been submitted by a group of Hepatitis carriers to the NPCSC on the discrimination issue. In the wake of these events, several provinces announced that they will not exclude non-infectious Hepatitis carriers from public employment (Yan 2004). And in 2004, the NPC revised the Law on the Prevention and Control of Infectious Diseases, banning discrimination against the disease carriers.

Similarly, the rural resident compensation case arose at a time when the Hu-Wen administration was announcing the new policy to create a harmonious society and address social injustice, including rising rural-urban inequality. After the case, which was again widely reported in the press, several provinces adopted a uniform compensation standard for urban and rural residents.

These quasi-constitutional cases generally have involved economic issues. They do not involve political dissidents or the right to free speech. Parties who invoke the constitution to

criticize the government or call for greater democratization have been notably unsuccessful.³³

Further, most of the successful cases raised discrimination claims. Discrimination is less politically sensitive, and equality claims are easily understood and generally supported by the public.

The recent arrests of activist lawyers and the closure of a leading public interest organization suggest that judicialization of two types of disputes in particular have not been successful and will be looked on unfavorably in the future: (i) political disputes that challenge, or are perceived to challenge, the ruling regime; (ii) certain socio-economic disputes, particularly involving a large number of plaintiffs.³⁴ The limits on political cases reflect the nature of the regime and the limits of political cause lawyering in China and in effectively single-party authoritarian states generally,³⁵ the current state of socio-political stability, the dominant conception of law/rule of law, China's model of development and the political

³³ For instance, Wang Zechen was sentenced to six years for subversion for attempting to establish a Liaoning branch of the banned China Democratic Party, attacking the Party as a dictatorship, and advocating the end of the single party system and the establishment of a multiparty system with separation of powers. In court, Wang did not contest the facts but argued the acts were legal. Peerenboom, *China Modernizes*.

³⁴ Xu Zhiyong and Zhang Lu were detained, and Open Constitution Initiative (*Gongmeng*), shut down, for failing to pay taxes on a \$100,000 gift from Yale University. Both were released on bail, along with a Xinjiang political activist, the day after the new US ambassador arrived in Beijing. Although some commentators have speculated that the arrests were a temporary precaution in the run-up to the October 1st 60th anniversary of the PRC, it would appear that the detentions are part of a much broader crackdown that reflects structural concerns about social and political activism. According to reports, more than 50 activist lawyers lost their license to practice law. In addition, a number of non-lawyer activists have been detained, most notably Hu Jia and Liu Xiaobo. Both have been prominently involved in a wide range of issues, and were signatories of the Charter '08 petition, a manifesto calling for democracy, human rights and the end of CCP dominance, which was modeled on Charter 77, a petition written in 1977 by Czech intellectuals and artists that helped to undermine the Soviet empire in Eastern Europe. See generally China Human Rights Defenders, China Human Rights Briefing, August 3-9, 2009; Chinese legal activist held for tax evasion, Associated Press, Aug. 4, 2009; China's Lonely Heretic, The Australian, July 3, 2009.

³⁵ Political lawyering emphasizes first generation, civil and political rights - the negative rights of freedom of speech, thought, religion, movement and association - and the political institutions of (primarily economically advanced western) liberal democracies that protect these rights. See Scheingold and Sarat 2004; Halliday et al. 2007.

contract between central and local governments.³⁶ The second type of socio-economic case reflects the realities in a lower-middle income country such as China, and the fact that in many cases the courts are not able to provide parties with legitimate complaints an effective remedy for various reasons - most notably resources are insufficient and institutions such as the social welfare system are too weak.

Notwithstanding these qualifications, the increased reliance on litigation signals an growing willingness on the part of plaintiffs, lawyers and courts to look to the constitution as the basis for norms and principles that may be applied in particular cases to expand protection of the rights of individuals, subject to current doctrinal, jurisdictional and political limitations.

IV. China's living constitution: socialist constitutionalism with Chinese characteristics

As is clear from the previous section, China's constitution is not the only authoritative source for political order in China. Anyone who only looked to the formal constitution would not be able to understand how key decisions are made and power is exercised.

Indeed, many scholars and commentators have dismissed the constitution as irrelevant or unimportant, with little political or legal impact. On this view, China is a single party authoritarian state. At best, like other socialist constitutions, the current constitution is programmatic or aspirational; at worst, it is simply a sham, an ideological smokescreen to conceal the tyranny of personal rule or rule by a small clique of elites while appearing to conform to international standards and practices. There is a constitution without

³⁶ For an elaboration of these points, see Fu Yulin and Peerenboom, "A New Analytical Framework for Understanding Judicial Independence in China," in *Judicial Independence in China*, pp. 95-133.

constitutionalism. Real power lies elsewhere, in the Party apparatus, which is governed by its own constitution, practices and norms.

Proponents of this view often add that what is needed is liberal democracy. The political, economic, legal order must comply with international standards: a WTO-compliant market economy rather than the admittedly hitherto successful East Asian Model of a developmental state focused on export-driven growth; genuine competitive multiparty democracy rather than socialist democracy and the notions of democratic centralism and a democratic dictatorship of the people under the leadership and guidance of the CCP; liberal democratic rule of law rather than statist socialist rule of law; and a liberal interpretation of human rights which emphasizes individual autonomy and expansive civil and political liberties (evidenced by ratification of and compliance with the ICCPR) rather than human rights policies and practices based on subsistence as the most fundamental right, the reduction of poverty, and restrictions on civil and political rights in the name of social stability and economic growth.

Others approach the constitution more instrumentally. They seek to use the constitution where possible to individual rights and other reforms. Many adopt this approach because they believe that there simply is no hope for a more radical rapid transition to liberal democracy at this point. Others believe that such a transition would be unwise at this point. Still others may disagree on substantive normative grounds with the notion that liberal democracy as a whole or particular aspects of the liberal democratic agenda are appropriate or desirable. Indeed, there is widespread disagreement over fundamental issues relating to the economy, regime type, legal reforms and human rights in China. The range of opinion, and the depth and

intensity of disagreement, is much greater than in Euro-American liberal democracies, and not easily reduced to the simultaneously over-inclusive and under-inclusive categories of (New) Right and (New Left), liberals and conservatives, or reformers and hardliners.

A more recent approach has been to take the differences between the formal constitutional order and the actual operation of power as an invitation and opportunity to explore China's living constitution.³⁷ This approach highlights the fact that constitutions everywhere are more than just a piece of paper or a set of formal rules. The actual constitutional order consists of related legal rules, conventions and institutions, as well as formal and informal practices and norms.³⁸ The living constitution depends on how the

³⁷ See, e.g., Larry Catá Backer, "The Party as Polity, the Communist Party, and the Chinese Constitutional State: A Theory of State-Party Constitutionalism," *Journal of Chinese and Comparative Law*, Vol. 16, No. 1, 2009; Jiang Shigong, "Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China," *Modern China* (); Zhu Suli, "Judicial Politics." Many other scholars have also implicitly called attention to China's living constitution by noting the "gap" between the formal constitution and actual constitutional practices and the de facto constitutional order. See, e.g., Yu Xingzhong, "Western Constitutional Ideas and Constitutional Discourse in China," in Balme and Dowdle, p. 111-124 (noting that the Chinese constitution is very Western at first glance but operates quite differently). In an article first published in 1996 and reprinted in 2006, Andrew Nathan suggested that "the constitutionalist scenario gains credibility from the improbability of the alternatives." Yet his canvassing of the proposals to develop constitutionalism simply invoked the standard features of liberal democratic constitutionalism: empower the NPC, expand elections, strengthen constitutional supervision, enhance judicial independence, improve the protection of human rights, etc. In focusing on the process of constitutional development rather than the substance or content of a stable or mature constitutional order in China, Michael Dowdle was one of the first Western scholars to entertain the possibility that China may develop its own variant of constitutionalism. See Michael William Dowdle, "Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China," 35 *N.Y.U. J. INT'L L. & POL.* 1 (2002); Andrew Nathan, "China's Constitutional Option," in Dittmer and Liu eds. *China's Deep Reforms: Domestic Politics in Transition* (2006), p. 172..

³⁸ Todd Pettys, "The Myth of the Written Constitution," *Notre Dame Law Review*, Vol. 84, p. 991 (2008); Ernest Young, "The Constitution Outside the Constitution," U. Texas Public Law Research Paper No. 119 (2008).

constitution is interpreted, with theories and methods of interpretation varying widely, including original intent, positive and purposive approaches.³⁹ Constitutional practice may change dramatically through interpretation even if there are no formal amendments to the constitution. Notable examples from the US include the establishment via interpretation and convention of a robust and decentralized system of judicial review that allows all courts to strike down federal or state laws at odds with constitution; the discovery of the right of privacy; and changes in the interpretation of what constitutes unreasonable search, due process in criminal trials or cruel and unusual punishment.

This approach is also motivated by the realization that relative to the rather dismal results for most developing countries, China's reforms have been extremely successful, even though – or perhaps *because* - they did not comport to Western models for promoting democracy, rule of law, human rights or the neoliberal prescriptions of the Washington Consensus for economic growth. Although some commentators continue to portray China as on the brink of collapse,⁴⁰ the dominant view among most scholars is that China is reasonably stable.⁴¹ Rather than seeing reforms as stalled,⁴² many scholars now see the CCP as responding effectively to crises and capable of sustaining the momentum of reform and deepening the reform agenda.⁴³ Moreover, poll after poll shows Chinese citizens overwhelmingly continue

³⁹ Jack Balkin, "Framework Originalism and the Living Constitution," *Northwestern University Law Review* (2009), available at <http://ssrn.com/abstract=1290869>.

⁴⁰ Gordon Chang, 2002. *The Coming Collapse of China*. New York: Random House.

⁴¹ David Shambaugh, ed. 2000. *Is China Unstable?* Armonk, N.Y.: M.E. Sharpe.

⁴² Minxin Pei, 2006. *China's Trapped Transition: the Limits of Developmental Autocracy*. Cambridge: Harvard University Press.

⁴³ Dali Yang, *Remaking the Chinese Leviathan: Market Transition and the Politics of Governance in China* (Stanford: Stanford University Press (2004); Andrew J. Nathan, "Authoritarian resilience," *Journal of Democracy* 14:1, January 2003; Cheng Li, *China's*

to support the Party, take pride in the growing power of China, and are optimistic about their own future and the future of the country. Thus, the current system enjoys considerably more legitimacy than often acknowledged abroad.

Just as the failure of many third wave democracies led commentators to reject the assumption that countries were in transition to liberal democracy, and to focus on developing new descriptive and analytical categories, theories and models that better captured and explained reality in these countries and better predicted where they may heading,⁴⁴ so too China's success and the seeming durability of the current form of government has led to a search for new categories, theories and models to better capture the current situation in China and predict where it might be heading.⁴⁵ There is growing recognition that China has not mimicked, and need not simply mimic, Western liberal democratic constitutionalism, and cautious attempts to articulate the main features of a new form of constitutionalism – socialist constitutionalism with Chinese characteristics – or state-party constitutionalism.

Leaders: The New Generation (Rowman and Littlefield, 2001); Guoli Liu and Lowell Dittmer, "Introduction: The Dynamics of Deep Reform" in Dittmer and Liu eds. *China's Deep Reforms: Domestic Politics in Transition* (2006). See also the articles by Yang, Barry Naughton, Jacques deLisle, Joseph Fewsmith, Dowdle, and Peerenboom – all of which take issue with the central claim that China is trapped in transition - in Randall Peerenboom, ed., *Is China Trapped in Transition?* (Oxford: Foundation for Law, Justice and Society, 2007). It bears emphasizing that all these scholars are considerably more cognizant of the challenges China faces going forward than the more hyperbolic reports in the popular media that suggest we now living in an era dominated by the G2, and soon to be living in an era dominated by the G1 – China. See, e.g., Susan Shirk, *China: Fragile Superpower* (2007).

⁴⁴ Thomas Carothers, "The End of the Transition Paradigm," *Journal of Democracy* 13 (2002).

⁴⁵ Pierre Landry et al., "Introduction: Markets, Courts and Leninism," *The China Review* 9:1 (2009) ("The unorthodox institutional arrangements that symbolize China's legal system compel social scientists to think seriously about the micro-foundations of these arrangements, as well as their consequences. It is no longer tenable to dismiss the unexpected outcomes as transitional simply because we regard them as temporary 'out-of-equilibrium' phenomena" [by liberal democratic or Marxist-Leninist standards]).

The two most salient features of this new constitutional order reflect the two most significant differences between a liberal democratic order and contemporary Chinese socialism. First is the absence of genuine multiparty elections. Despite the existence of nominal non-CCP parties and institutions like the Chinese People's Political Consultative Committee, China remains an effectively single party state where the CCP claims to represent all viewpoints. As a result, there is greater emphasis on inner party democracy and the CCP as representative of all interests. As Zhu Suli notes:⁴⁶

The Party has long been aware that national modernization cannot be accomplished by the party's political elite alone. The task of social integration requires that the party enjoy some significant degree of voluntary support from other social forces in China. This requires, in turn, that it be able to comprehend and appreciate the different interests that underlie these different societal factors. The CCP has responded to this by adopting a certain degree of democracy *within* the party. In this sense, the party itself becomes a quasi-constitutional structure – a structure whose own internal democracy can supplement or even compete with (and through such competition improve) the more formal constitutional apparatus of the state.

Political contestation is internalized within the Party, with inner party democracy serving as a less politically volatile and potentially destabilizing form of democracy. As Backer observes:

⁴⁶ Zhu, "Judicial Politics," p. 28.

... Party membership [serves] as the functional equivalent in the West of political citizenship. The holders of political citizenship—Party members—then serve *within* the Party as the forces for social cohesion, ... and *outside* the Party in a fiduciary capacity to all people in the political community who are holders of social and economic rights, but who lack political rights. Political citizenship, then, though limited, is open to those who would adhere to and further the political and rule of law values of the Party within the governance structures of the state set up for that purpose.⁴⁷

The second most salient feature of the living constitutional order is the relationship between the Party and the state, including the relationship between the Party constitution and the state constitution, and between Party practices, norms and conventions, and the practices, norms and conventions of state institutions.

Whereas the 1975 and 1978 constitutions acknowledged the leadership role of the party in their operative clauses, the 1982 constitution deliberately relocated leadership of the party to the preamble, announced in the preamble for the first time that constitution was the fundamental law, and provided in Article 5 that “All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the constitution and the law. All acts in violation of the constitution or the law must be investigated. No organization or individual is privileged to be beyond the constitution or the law.”

⁴⁷ Backer, “The Party as Polity,” p. 109.

Countless books and articles have been written to try to reconcile the tension between the leadership role of the party and these constitutional provisions. To be sure, in any constitutional order, there are tensions between the ultimate source(s) of power and the institutions, rules and practices for limiting that authority. In liberal democracies where the courts are charged with constitutional and judicial review, the issue is the democratic deficit of the judiciary. In parliamentary-supreme systems, the issue is the independence and authority of the judiciary and how to entrench and protect fundamental rights from being overridden or restricted by parliament. Forests have been felled trying to grapple with these issues as well.

There is no theoretical or practical way in any legal system to resolve completely the tension between ultimate political power and the need to impose restraints on such power. In all systems, the restraints will be a matter of degree, and the combined result of market, legal, political, military, and social forces, reflected in formal and informal institutions, codified rules and non-codified conventions and practices.

In China, the need to constrain Party power while still allowing the Party to play a positive role in leading the country in the mission to modernize is well-accepted in general, though the specifics are contested in practice. As Deng Xiaoping stated,

We uphold the Party's leadership, but the problem is whether the Party is doing a good job of leading. It should give effective leadership and not intervene in too many matters.

The Central Committee should take the lead in this regard. What I am proposing will not

weaken the Party's leadership. On the contrary, its leadership will be weakened if it tries to take responsibility for too many areas.⁴⁸

There is a line between the party and state, but the line is determined largely by convention. For both practical and ideological reasons, some matters are left to the state. As noted in the previous section, the general trend during the reform era has been to rely more heavily on state organs to govern. The main role of the Party is to determine major policies, which are then transformed into state laws and regulations, and interpreted and implemented by state actors, subject to supervision by a combination of Party and state (and increasingly non-state) mechanisms.

Part V. The future of constitutionalism in China

Early Chinese constitutions were largely Western imports, used to fend off foreign aggression and strengthen the Chinese state's claim to legitimacy and sovereignty. Even the 1982 constitution is predominantly Western in origins. The liberal democratic origins of the constitution are difficult to reconcile with the actual constitutional order, and a rising, increasingly confident China firmly under the leadership of the CCP.

After 30 years of economic and legal reforms, it is now abundantly clear that China is neither a traditional Marxist-Leninist regime nor a liberal democracy. It is equally clear that China has been extremely successful in achieving economic growth, improving living conditions and maintaining social stability, particularly in comparison to the rather dismal

⁴⁸ Deng Xiaoping, "Help The People Understand The Importance Of The Rule Of Law," in "Selected Works of Deng Xiaoping" (1986).

results in most developing countries. If we are to understand how China has achieved these results, better appreciate the challenges China faces and its prospects, and better predict the possible development paths in the future, we can no longer afford to dismiss the results and the development model in China as temporary out-of-equilibrium phenomena. We must develop, and take seriously, new conceptual and analytical categories that better capture reality in a non liberal democratic, non Marxist-Leninist country with a “socialist market economy” and party-led “socialist rule of law.”

How then might constitutionalism in China develop in the future? There appear to be four possibilities. The first two involve providing a more solid constitutional foundation for the role of the Party by amending the constitution.

Option one would be to amend the constitution, moving the general provision about the leadership role of the Party from the preamble back to the operative clauses,⁴⁹ and leaving the specifics of how that general provision should be operationalized to be dealt with through some combination of state and Party regulations, policies, practices and conventions.

Option two would be to amend the constitution to not only provide for the leadership of the Party but to delineate with more specificity how Party leadership is to be operationalized in practice. Of course, there would still be room for further clarification and development via state and Party laws, regulations, practices, conventions, etc.

⁴⁹ Constitutional law scholars are divided about the legal effectiveness of the preamble: some hold that entire preamble has legal effect, some that it has no legal effect, and some that only certain clauses have legal effect. Even if all or part of the preamble has legal effect, there are debates about the nature of that effect in general and with respect to particular issues.

The main benefit of these amendments would be to provide a firmer legal foundation for the role of the Party, thus reducing but by no means eliminating the tension between the leadership role of the Party and the constitution as the fundamental law of the land.

However, the political cost would be high. Both of these options would encounter fierce opposition at home and abroad. They would be seen as entrenching the Party's role, enhancing the Party's power, and thwarting efforts to separate the Party and the state, and thus at odds with the historical trend toward liberal democratic constitutionalism. Granted, formal incorporation of a broad provision in the constitution need not result in any substantive changes in how the constitutional order currently operates. Like other constitutional amendments that reflected major changes in the nature of the economy or ideology, its main impact arguably would just be to ratify the constitutional order that has arisen and become more stable and delineated in its main features. Moreover, the second option could, at least in theory, result in both the clarification and limitation of the Party's role vis-à-vis other state actors.

A third option would be to overcome the gap between China's socialist constitutional order and the transplanted liberal democratic constitution on which it is based by becoming a liberal democracy, or at least more closely approximating one. This is the hope of liberal reformers pushing for gradual or piecemeal change, as well as the hope of those wishing for a more rapid and radical transition to liberal democracy.

None of these three options appear to be likely at present or in the near future. Thus, the most likely outcome is a fourth approach of continuing to muddle through, setting aside

ideological tensions, jurisprudential puzzles and technical inconsistencies, while adopting a results-oriented pragmatic approach that adjusts the multifaceted relationship between the Party and state on an ongoing basis through a combination of formal and informal rules, conventions and practices.

In the longer term, it is possible that China will democratize, and adopt the main features of liberal democracy, though as with other Asian states, constitutional democracy in Asia is likely to be less liberal than in Euro-America.⁵⁰ It is also possible that the economy will continue to grow and the CCP will become increasingly confident that the current arrangements suit China's particular circumstances, at which point options one or two may become more attractive. It is certainly true that the central leadership has been more adamant in stressing the leadership of the Party, issuing white papers on human rights, democracy and rule of law, all of which endorse distinctly socialist variants. Government spokespersons, including Zhou Yongkang, the head of the Political-Legal Committee and former head of the Ministry of Public Security, as well as the newly appointed President of the Supreme People's Court Wang Shengjun, have been adamant in insisting that Chinese courts and the legal system more broadly will not mimic those in Western liberal democracies. Whether these statements reflect a growing sense of confidence and triumphantalism about the rise of China, or reflect growing insecurity about color revolutions, rising instability and structural weaknesses, is debatable. However, should China remain stable and prosperous, it is possible that there will be another white paper, this time articulating and defending a non-liberal democratic, socialist variant of Party-state constitutionalism.

⁵⁰ See generally, Randall Peerenboom, "An empirical overview of rights performance in Asia, France and the USA", in Peerenboom ed. *Human Rights in Asia* (2006).