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ABSTRACT: Since the establishment of the Soviet Union, constitutional theory has tended to look suspiciously at the constitutionalization of Marxist Leninist state apparatus under the control of a single party in power. These judgments have formed the basis of analysis of Chinese constitutionalism as well. But are these criticisms inevitably correct in general, and wholly applicable in the post 1989 Chinese context after the structural reforms of Deng Xiaoping and his successors? This paper explores those questions, developing a constitutional theory for states organized on a state-party model. The thesis of the article is this: Chinese constitutionalism presents a coherent and complex normative system memorialized in a written constitution that is compatible with the basic presumptions of conventional constitutionalism. That system divides the organization of the state into two parts, both operating under the normative framework of the constitution—a government apparatus charged with the lawful operation of the state, and a Party apparatus charged with the elaboration of the substantive principles of constitutionalism and its application for the state sector whose actions are also governed by its own constitution. The article first reviews the basic principles of current constitutional theory and its importance as a legitimating global ideology for the organization of government and the framework within which its powers are delimited. The article then looks to the evolution of the party-state model of governance from its origins in 19th century European Marxist-Leninist theory to its initial reception in China, and its modern formal transformation “under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents’” (PRC Constitution 2004, Preamble). The article then suggests that it is possible to theorize a state-party model of state organization that remains true both to the ideals of constitutionalism grounded in the core postulate of rule of law governance and to the Marxist-Leninist principles under which the Chinese state is organized and through which it is governed. This argument is based on an understanding of the relationship between state and Party grounded in a division between economic and social citizenship and political citizenship. Rule of law constitutionalism in China, then, is better understood as state-party constitutionalism, with a necessary focus on party rather than state, grounded in separation of powers principles in which the administrative function is vested in the state and political authority over all is vested in the Party under law.

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I. INTRODUCTION.

In my own view, and in the view (explicit and implicit) of many Chinese and foreign scholars, the CCP’s influence and control is ubiquitous; it penetrates every aspect of society. Despite the many political differences between the CCP and its former arch-rival, the Nationalist Party (known as the Guomindang or GMD) and despite the fact that the CCP never used the GMD’s often deployed concept ‘Party-State,’ in practice, the CCP inherited the political tradition, initiated by Sun Yat-Sen and pursued by the GMD, comprised of a ‘party construction of the state,’ ‘party rule of the state,’ and ‘party above the state.’ Indeed, eventually, the CCP’s influence over society and the machinery of the state would far exceed that achieved by the GMD.  

Constitutionalism has, for the last century or so, sought to provide a basis in theory for legitimating certain forms of state organization within territorially based political communities. Constitutionalism serves as a basis for classifying the form of state systems of governance, distinguishing between tyrannies and other forms of governance. Its object is twofold—to develop an ideal of governance forms and to judge the legitimacy of a constitutional system against this ideal. Constitutionalism is grounded on the fundamental postulate


of rule of law—that states ought to be organized to avoid tyranny or despotism by grounding state action in law and by limiting the reach of such lawful state action on the basis of values reflecting the values of the political collective. Systems of personal rule, or rule based on sovereignty flowing downward from a monarch, though an important source of justification a century ago, are no longer considered legitimate. A critical component of legitimate constitutionalism for many is the provision of an independent institution for the review and elaboration of constitutional doctrine. Especially in the West, the rule of law postulate can be made effective only through the institution of some sort of judicial mechanism for interpreting and applying the rule of law system against all institutions of the state apparatus (its government) and between people and the institutions of the state.

Beyond this institutionalizing and legitimating objective, constitutionalism can be grounded on any number of legitimating value systems—each competing with the others for the allegiance of the greatest number of states. When the source of values is the transcendent genius of the nation itself, it is understood as nationalist constitutionalism. When the values are sourced in the consensus of the community of nations, understood as


common constitutional traditions of the community of nations or as the expression of international consensus in international conventional law or customary international law;\(^\text{12}\) it is understood as transnational constitutionalism.\(^\text{13}\) But such values can be sourced beyond the control of individuals in a number of other, and increasingly important, ways. Theocratic constitutionalism is on the ascendant.\(^\text{14}\) And natural law constitutionalism also has its adherents.\(^\text{15}\) These forms of state ordering are incompatible in the genesis and application of values of the state order, but they all share equally in the commitment to the fundamental values of a constitutional order—a rule of law based governance structure grounded in limits on state power and popular accountability based on law.

Since the establishment of the Soviet Union, constitutional theory has tended to look suspiciously at the constitutionalization of Marxist Leninist state apparatus under the control of a single party in power.\(^\text{16}\) There is a sense of illegitimacy, and a suggestion of the construction of sham constitutions, in regimes in which the ultimate state power is vested in an apparatus which itself is subject to the direction of an extra constitutional power, which in turn is usually suspected of badly masking systems of personal rule. With state under Party, and Party a system of leveraging personal power, the state-party system had come to be understood as a cover for tyranny and despotism, as a veil over the personal rule of an individual or a clique according to their whim and supported by the coercive power of military establishments and internal terror regimes. In this context, constitutionalism is incomprehensible.\(^\text{17}\)


\(^{16}\) “Events in 1939 and after 1945 have made amply clear that all the totalitarian dictatorships have a good deal in common. Unnoticed by many, Stalinism has emerged as the dictatorial reaction to revolutionary communism. Stalin, like Napoleon, uses the revolutionary slogans, but kills those who take them seriously. Fascism and Nazism were similarly the reaction to the revolutionary socialism of Central Europe.” Carl J. Friedrich, Constitutional Government and Democracy: Theory and Practice in Europe and America 455 (Boston: Ginn, 1950).

\(^{17}\) “One can grant that the task before Russian Marxism could not have been accomplished according to the precepts of Western constitutionalism or democracy. Of the alternative methods available for political consolidation and economic reconstruction, the policy chosen at every step was one that would vest the most additional power in the
These judgments have formed the basis of analysis of Chinese constitutionalism as well, serving as the foundations for critique especially after the reforms of Deng Xiaoping and his successors after 1989. Indeed, the intensity of the critique increased in parallel with the institutionalization of the campaigns to separate state from Party apparatus and to introduce notions of law and rule of law within the state and Party apparatus. The pre-Deng Chinese state governance architecture could be dismissed as anti-constitutionalist, rather than criticized for failures to appropriately incorporate constitutionalist principles. From the late 1970s, the nature of the engagement with constitutionalism changed. After Deng, China could be judged from a constitutionalist perspective—and it was increasingly judged harshly, especially after 1989, or dismissed as a capitalist but totalitarian state. “China and Russia represent a return of economically successful authoritarian capitalist powers, which have been absent since the defeat of Germany and Japan in 1945, but they are much larger than the latter two countries ever were.” Moreover, the move to a constitutionalist institutionalization of state power in China after 1979 also refocused the object of analysis—from Party-State dictatorship to state institutions under the constitution. The Chinese Communist Party was deemed either increasingly irrelevant, or an obstacle to democratization along Western lines. It was emphasized, for example, that “although they have continued to emphasize the importance of the role of law, at the same time they also insist on


18 See, e.g., JOSEPH FEWSMITH, CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION 6 (Cambridge: Cambridge University Press, 2001) (“Without a basic consensus on the territorial limits of the state or on who is a citizen and without an adequately functioning bureaucracy, it seems impossible to develop the other characteristics that Linz and Stepan identified as necessary for successful democratic transition: rule of law (a Rechtsstaat), a “free and lively” civil society, an institutionalized economic society, and a “relatively autonomous” political society.” Id., citing Linz and Stepan, “Toward Consolidated Democracies” in Linz and Stepan, Problems of Democratic Transition and Consolidation).

19 Of course on has to be careful here. As in the West, the notion of rule of law can be a slippery concept, and quite malleable, when invoked beyond its more general understanding. Thus, for example, the Chinese government (or the Party) can use the concept “rule of law” (“法制”) quite narrowly—in the sense of rule by law in its administrative applications, and only sparingly in the broad constitutionalist sense that I describe in Section II, infra. But that it is used, directly or indirectly in this way can be viewed as a significant advance, though one whose full development has yet to be realized.


maintaining the dominant role of the CCP in Chinese society, and cannot resolve the contradiction between these two policies."23 The state apparatus was criticized as both unresponsive to the will of the people and unconnected to the usual vehicle for accountability (free and fair popular elections). Viewed strictly from the perspective of the National Constitution and the State governmental apparatus, China was viewed as a failed constitutionalist state.24

But are these criticisms inevitably correct in general, and wholly applicable in the post 1989 Chinese context? This paper explores those questions, suggesting a basis for the articulation of a legitimizing constitutionalist theory for states organized on a state-party model along certain lines. Focusing on the evolution of state-party constitutionalism in China since 1989, the article first reviews the basic principles of current constitutionalism theory and its importance as a legitimating global ideology against which state organization, and the actions of state officials, are judged. It starts from the premise that constitutionalism is itself an ideology with its own framework of reference.25 That ideology and framework is important, not only as a powerful tool of analysis, but as a basis for making political judgments about the quality of state governance among the community of nations and increasingly, within political communities. Constitutionalism is best understood as a system of classification for the purpose of judging the legitimacy of state governance systems as conceived and as applied, grounded in the fundamental postulate of rule of law governance and based on a system of values beyond the control of any individual for the limitation and bureaucratization of governmental power.26 The basic premise of constitutionalism is to distinguish it from despotism or tyranny. The distinguishing characteristics of modern constitutionalism is its privileging of values systems which both limit state power and provide the basis for applying that power.27 Since 1945 three values variants have emerged within constitutionalism. The oldest is nationalist constitutionalism, of which the American and French constitutions provide the best examples. These derive substantive for values principally within the polity. Since 1945 transnational constitutionalism has emerged as a powerful force.28 Transnational constitutionalism is grounded in a constitutional values system derived from the common constitutional traditions of the community of states evidenced either in

23 Id.
25 See Section II, infra.
26 Bureaucratization is to be distinguished from bureaucratism—“the high handed attitude of cadres toward the masses.” FREDERICK C. TEIWES, POLITICS AND PURGES IN CHINA 198 (Armonk, NY: M.E. Sharpe, 1993).
shared practices and values, customary international law norms or memorialized international rules in the form of treaties and conventions. Since the 1970s another powerful values system has emerged. Theocratic constitutionalism is grounded in the embrace of the rule of law principle of state construction, but implemented on the basis of and through the rule systems of a single religion.29

Might post-Deng Chinese constitutionalism provide another legitimate variant of values systems within constitutionalism? To explore that issue it is necessary to more realistically examine the true context of Chinese constitutionalism—not as Westerners have come to understand its exposition, but as the Chinese have attempted to construct it for themselves.30 For that purpose, the article then looks to the evolution of the party-state model of governance from its origins in 19th century European Marxist-Leninist theory to its reception in China in the 1920s, and its modern transformation “under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents.”31

Drawing from the implications of the evolution of theories of state-party constitutionalism in China, the article suggests that it is possible to theorize a state-party model of state organization that remains true to the ideals of constitutionalism grounded in the core postulate of rule of law governance.32 The basis of Chinese state-party constitutionalism requires a different conception of an understanding of constitution—to include both the document constituting the state and that constituting the Party as equivalent components

32 This represents a substantial development of the socialist law notions transposed from the Soviet Union and adopted in an early version by the CCP. Early Soviet theorists suggested that “Taking an economic reductionist position, such theorists argued that, since a commodity economy was the essential material condition for law, law would cease to exist as that commodity economy withered away. Since law was class-bound and conflict-ridden, Marxist theory precluded any idea of socialist (or proletarian) law. Meanwhile, law in the transition period, while a commodity economy still existed, was only a continuation of ‘bourgeois law.’” Carlos Wing-Hung Lo, Introduction, in CHINA’S LEGAL A WAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG’S ERA 4 (Carlos Wing-Hung Lo, ed., Hong Kong: Hong Kong University Press, 1995). That changed with Stalin, and the introduction of Socialist law, as class law in contradistinction to capitalist or bourgeoisie law. “The new ‘socialist state’, proclaimed in the 1936 Constitution, was said to require a body of ‘socialist law’ totally different from (and allegedly superior to) bourgeois law: ‘Socialist law is not a further development of bourgeois law, but a new type of law that has grown out of the socialist revolution of the proletariat’. Elements of Marxist critical theory were bent to serve an ideological purpose. That was the frame of reference subsequently adopted by the Chinese Communist Party.” Id., at 5.
that together form the national constitution as understood in the West. It is also
based on a different understanding of the character of the Communist Party—
not as a political party or as a private actor but as an integral part of the
institutional structure of government, and more importantly, as the holder of
political citizenship.

These insights produce substantial consequences for the ways in which
Chinese constitutionalism are understood and evaluated under global
constitutionalist standards. The fundamental insight, one more readily
recognized within China than outside of it, is the nature and structural effect of
the “party in power” concept. Taking Chinese theory at face value it becomes
clear that at least since the time of Deng Xiaoping, the Chinese Communist
Party has sought to attain a more refined institutionalization within the political
order. With that institutionalization has come a reliance on those mechanisms
that constrain assertions of individual power through rule of law concepts. Rule
of law provides an expression of collective governance. That collective space,
in turn, serves as the site for democratic citizenship. That site is the Party itself,
as an autonomous community. That community itself serves as a representative
and proxy for the nation in two respects—it is the site where political values are
elaborated and protected and it serves as the body of individuals charged with
the task of such elaboration and protection within both the political order and in
its state institutions. It is in this sense that one can better understand the modern
meaning of that old Marxist notion of Party as vanguard, and the way it has
evolved from the old Soviet era notions—the Party itself is vanguard/guardian

33 The Chinese Communist Party is the party in power in China:
The CPC is a unified entity organized according to its program,
constitution and the principle of democratic centralism. The
Constitution of the Communist Party of China stipulates that any
Chinese worker, farmer, member of the armed forces, intellectual and
any advanced element of other social strata who has reached the age
of 18 and who accepts the program and constitution of the CPC and
is willing to join and work in one of the Party organizations, carry out
the Party decisions and pay membership dues regularly may apply for
membership in the CPC.

Structure of the State: The Party in Power,

34 See, Larry Catá Backer, The Rule of Law, The Chinese Communist Party, and
Ideological Campaigns: Sange Daibiao (the “Three Represents”), Socialist Rule of Law,
and Modern Chinese Constitutionalism, 16(1) Journal of Transnational Law &

35 See Joseph Fewsmith, China Since Tiananmen (Cambridge: Cambridge University
Press, 2001) (“even as he was making a bid for personal power, Jiang was conscious of
both a demand and a need to stress democratization and institutionalization. Deng
Xiaoping had sounded these themes in his justly famous 1980 speech “On the Reform of
the Party and State Leadership System,” but Deng’s own status as a revolutionary elder,
the repeated conflicts over policy, and doubtless also Deng’s reflexive resort to personal
decision making prevented implementation of his ideas.” Id., at 164).

36 With respect, for example, to the old Czechoslovak Party, the idea was that the
“vanguard role of the CPSU is usually claimed in similar terms; that is, greater political
awareness uniquely qualifies it to guide Communist construction in the interest of the
of fundamental substantive values of the political state. And it is in this sense as well that one can understand Party membership 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 the deployment of values based rule of law substantive values, 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. But rule of law notions within the Party must then be applied to make such political citizenship available to all in exchange for adherence to the Party “line” (it substantive political values on which the state was founded). This is in-line with the ethos surrounding the Three Represents campaign. Rule of law, then, resides within the Party architecture. And it is from that Party architecture that rule of law concepts move out to the governmental, social and economic spheres.

State organization, then, devolves from, and reflects, Party organization and the values the Party represents as an institutionalized, rule governed, collective of the state’s political citizens. To understand Chinese constitutionalism, one has to recognize that the Chinese Constitution exists as a combination of polity and governing ideology, on the one hand, and state apparatus, on the other. The Chinese Communist Party serves as the institutionalization of the polity and the source of its substantive values. The National Constitution serves as the institutionalization of state power. Together they represent the Chinese constitutional order. Constitutional analysis, then, ought to focus more on the CCP Constitution, and its elaboration/application of people, even when contrary to their expressed desires.” Bernard A. Ramundo, Czechoslovakia And The Law Of Peaceful Coexistence: Legal Characterization In The Soviet National Interest, 22 Stan. L. Rev. 963, 974 (1970).

37 See discussion, infra Section III.
38 See discussion infra Section IV.
40 That constitutional order, of course, significantly limits the political rights of all citizens, vesting direct political power in Party cadres, and incidental representative selecting power in the general citizenry, who hold essentially social and economic citizenship rights. While these notions are highly problematic in the West, and rightly so within Western politico-cultural systems, see, e.g., Stijn Smismans, New Governance--The Solution for Active European Citizenship, or the End of Citizenship?, 13 COLUM. J. EUR. L. 595, 616 (2007), that alone should not be a basis for judging the Chinese arrangement illegitimate. For a more radical Western vision of citizenship and political participation, see, e.g., WILL KYMCLKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (New York, Oxford University Press, 1996); CHARLES YOUNG, MULTICULTURALISM: EXAMINING THE POLITICS OF DIFFERENCE (Princeton NJ: Princeton University Press, 1994); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (Princeton NJ: Princeton University Press, 1990).
rule of law ideals within its value system as part of the constitutional ordering that serves as the foundation for the elaboration of state power under the national constitution.

This structuring of power relationships between political collective and the governmental organizations meant to institutionalize state power (within that collective) have significant values effects on the way in which Party, state and individuals relate. These include the reflection of the party-state construct (1) in a division of the character of citizenship between economic and social citizenship, claimed by all persons, and political citizenship, which can be exercised through the Party, (2) in an understanding of political organization in which the state power and its institutions are subordinate to political authority, (3) in an institutionalization of political authority within a collective that serves as the source and conduit of constitutional values to be applied by the holders of state authority, and (4) in a system in which Party elaboration of rule of law values is contingent on state and party self discipline.

Chinese constitutionalism, when understood as a symbiosis of state and party constitutionalism can, together, serve as a basis for understanding the way in which rule of law governance is legitimately possible where the disciplinary focus of constitutional duty is focused, not primarily on the state apparatus, but instead centers on the Party apparatus. Rule of law constitutionalism in China is better understood as state-party constitutionalism, with a necessary focus on party rather than state. But for all the focus on the party, it is a state that is being developed. This state is acquiring a governance apparatus true to the basic notions of constitutionalism—rule of law, accountability, and limited government. The unique features of the system lie in the role of the Party. That role remains constitutionalist to the extent that it, too, embraces both rule of law and institutionalization concepts. But Party does not serve merely as a supervisory overlay to the state system—the way that the religious establishment serves as such an overlay in theocratic constitutionalist systems. Instead, the Party also serves as polity, and it is in this sense especially that its connection with constitutionalism can be acute. With a transformation from a party of individuals to an institution representing the political citizenship of the nation, the Party retains its constitutionalist character to the extent that in its internal operations it observes the same rule of law framework as that imposed externally on the state apparatus. Thus constructed, even state-party systems can claim a certain legitimacy as a constitutionalist system—though one whose substantive values are inconsistent with those of secular transnationalist constitutionalist states. This is constitutionalism with Chinese characteristics.

41 See, Larry Catá Backer, Theocratic Constitutionalism: Religion as Basis for Constitutional Legitimacy in a Global Age, 16:1 Indiana Journal of Global Legal Studies – (forthcoming 2008), and discussion, infra at Section IV.
42 The intensity of that relationship is understood within China. “Therefore, distinguishing the status of party and government officials is trul not that important.” Zhu Soli, Political Parties in China’s Judiciary, 17 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 533, 535 (2007)
II. THE CONTOURS OF CONSTITUTIONALISM

Constitutionalism has come to be understood as a complex systemic ideology of the construction of governance.\(^{43}\) In its simplest reduction, it can be understood as consisting of five elements: (1) a system of classification, (2) the object of which is to define the key characteristics of constitutions, (3) for the purpose of determining the legitimacy of a constitutional system as conceived or as implemented to provide a principled basis for outsiders (foreign states, entities, individuals) to judge the lawfulness of the constitutional order created and for insiders (citizens) to judge the distance between the ideals of their constitutional system and its reality (and to act thereon), (4) based on the fundamental postulate that the use of governmental power is subject to rule of law limits that are in turn (5) grounded on values derived from a source beyond the control of any individual. (Id.). Constitutionalism rejects the idea that any systematization of governance through a written document styled a “constitution” can legitimate the state apparatus created thereby. At its most basic form, constitutionalism provides a means for erect a high wall between, on the one hand, governance grounded in institutional values and actions centered on the common good, and on the other hand, governance grounded in personal power of individual or ruling cliques centered on the perpetuation of personal or group power.

Structure and values are at the heart of constitutionalism. Rule of law best captures the structuring ideals of constitutionalism. “The general cohesive power of law, in its nondespotic and tyranny-restricting role, is termed in Anglo-American legal usage as the rule of law... The general cohesive power of law, in its nondespotic and tyranny-restricting role, is termed in Anglo-American legal usage as the rule of law... These expressions refer to partly similar assumptions and legal prescriptions found in the various traditions referring to the state’s structure, organization and operations.”\(^{44}\) The source of the classic Anglo-American understanding of “rule of law,” that is, rule of law in states with strongly developed and integrated independent judiciaries, can be found in Dicey.\(^{45}\) The rule of law is usually understood in two senses.\(^{46}\)

First, rule of law is understood as embedded in mandatory systems for maintaining firm limits on the arbitrary use of state power by the individual. This is the idea of rule of law in its process aspect, limiting the use of state power only when grounded in legitimately enacted law. Second, rule of law is understood in its substantive aspect as vesting the state with a critical role as guardian of a set of foundational communally


\(^{44}\) ANDRÁS SÁJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 205 (New York: Central European University Press, 1999).


embraced substantive norms that are to be protected and furthered through the use of state power grounded in law.\textsuperscript{47}

It is understood that “constitutionalism has one essential quality: it is a legal limitation on government.”\textsuperscript{48} Law assumes a critical role in the avoidance of personalism in governance; it is the means by which conduct norms and governance systems can be institutionalized in a manner that opens the system to use by and the possibility of accountability to the people. “The common idea in the various concepts is that the state’s bodies act according to the prescriptions of law, and law is structured according to principles restricting arbitrariness. . . . To be sure, no constitutional system can exist without the rule of law.”\textsuperscript{49}

This idea acquired universalist aspirations after 1945.\textsuperscript{50} These concerns are bound up in notions of process—protections against arbitrary actions on the part of government or any of its servants. Many of these notions are now understood as an aspect of “rule of law.”\textsuperscript{51} In this sense, rule of law can be understood as embedded in mandatory systems for maintaining firm limits on the arbitrary use of state power by the individual. This is the idea of rule of law in its process aspect, limiting the use of state power only when grounded in legitimately enacted law. Second, rule of law is understood in its substantive aspect as vesting the state with the critical role as guardian of a set of foundational communally embraced substantive norms that are to be protected and furthered through the use of state power grounded in law.\textsuperscript{52}

But process is not enough to protect a polity from itself.\textsuperscript{53} Rule of law or limits as a foundational component of constitutionalism also has a substantive aspect. Academics sometimes speak of positive as well as passive constitutionalism associated with the vindication of certain norms. “Thus, we should talk about constitutionalism in terms of what government should do,

\textsuperscript{49} ANDRÁS SÁJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 205 (New York: Central European University Press, 1999).
\textsuperscript{51} See, RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 126-188 (Cambridge: Cambridge University Press, 2002).
rather than what it cannot or should not do. We must tackle the challenge posed by Leon Duguit many years ago: ‘Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of powers cannot do certain things; second, there are certain things they must do.”

The principles under which legality is constituted becomes of paramount importance within modern constitutionalism. Hayack, for example, noted that “all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right.”

For many, the focus is on democracy, (e.g., Dewiel 2000, or the role of the judiciary. In a sense, constitutionalism is inverted into its indicia, and the indicia assume the privileged place in constitutionalist analysis. Samuel Issacharoff speaks of “the role of constitutionalism in stabilizing democratic governance in . . . fractured societies. . . because of the limitations it imposes on democratic choice.”

If rule of law provides the appropriate limits to the forms of constitutionalist governance, then values provides the specific principles used to limit the choices available to the polity and its representatives with respect to the use of governance power. “Constitutionalism is thus a written constitution per se surrounded by a cloak of unwritten principles, values, ideals, procedures, and practices.” But not all values are constitutionalist. The racist values of fascism, the militarism of Imperial Japanese constitutionalism, and the

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despotism of “big man” African dictatorships grounded in some sort of values ideology are not legitimately constitutionalist. The key to values in constitutionalism, like that of rule of law in constitutionalism, is to avoid despotism or tyranny. It also provides the values to which the political culture aspires. “Aspirational constitutionalism defines a country, a nation, in terms of its future, its goals and its dreams. Other countries’ constitutions and constitutional examples can be used to express this aspirational sense and may be positively selected precisely in order to do this.” Imitation appears to be a great avenue for realizing at least the form of constitutional aspiration. “For example, many second- and third-wave European democracies may have adopted the model of the Federal Constitutional Court of Germany precisely to demonstrate that they, too, aspired to realize the constitutional principles that the Constitutional Court had helped Germany achieve.”

There is a strong sense that the values chosen ought to reflect the particularities of the political culture from which it arises, especially as to moral or ethical norms. Still, these substantive notions themselves are value laden and ambiguous. Still, within nationalist and internationalist constitutionalist discourse, there is a rough standard of values—most centering on human rights and principles of limited government. Within other rising constitutionalist traditions the foundations of values are frameworked within the strictures of pronouncements of the divine will—and to some extent much of the language of that will can be understood to overlap nationalist and internationalist constitutionalist concerns. However, the implementation may be quite different.

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64 Id.
65 See, Daniel P. Franklin, Michael J. Baun, Introduction: Political Culture and Constitutionalism, in POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 1, 6-7 (Daniel P. Franklin, Michael J. Baun, eds., Armonk, NY: M. E. Sharpe, 1995).
But the ultimate purpose of constitutionalism is to deploy its understandings of the boundaries of appropriate governance construction as a basis for judging political governance systems legitimate or illegitimate. That purpose has great significance. It serves as a mechanics for the international community in the regulation of the relations among states. It also serves as a basis through which a polity can base action to reform or replace a particular framework of governance. Both intervention and revolution are at the foundation of constitutionalism in its internal relations function and in its domestic legitimacy function. But it also serves as the articulation of political aspiration. It is inevitable that there exist a gap between the social-political values principles encased in constitutionalist systems and the operation of such systems. But the elaboration of such principles, and their placement within a law framework provides a basis for a nation to judge itself and to judge those who would be given the authority to assert political power.

III. THE TRADITIONAL STATE-PARTY MODEL OF POLITICAL ORGANIZATION: FROM LENINIST RUSSIA TO POST REVOLUTIONARY CHINA.

Over the course of the last century or so, the State-Party model of governance has provided the traditional opposite of constitutionalists governance systems. This section provides a short description of those characteristics of state-party theory that has been at the center of that determination and the evolution of state-party theory from its earliest application in Leninist Russia to its evolution during the period of the Cultural Revolution in China. It suggests the basis for an understanding of this theory as anti/constitutionalist. Certainly that was the case as state/party theory was elaborated within the Soviet Union and its satellites—to disastrous long-term effect. It also suggests the path to legitimate constitutionalism, though one very different from that which the West has embraced.

An excellent starting point for an understanding of the origins of the classical notions of the state-party construct is, of course, Vladimir Lenin’s germinal work. The thesis of Lenin’s much cited and less often read The State

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69 These consequences were made apparent, for example, in the ways in which the international community and the Honduran people reacted to the removal of President Zelaya in June, 2009. The international component of constitutionalism as a legitimating device and its application to the internal construction of national constitutionalism was at the heart of the reaction of the Honduran constitutional crisis in the wake of that removal. See, e.g., Doug Cassel, Honduras: Coup d’Etat in Constitutional Clothing?, American Society of International Law ASIL INSIGHT 13(9) July 29, 2009, available http://www.asil.org/insights090729.cfm.


71 See, Vladimir Lenin, The State and Revolution, Collected Works Vol. 25, p. 381-492; Progress Publishers, Moscow, USSR (1917), can be found online at: http://www.marxist.net/lenin/staterev/index.html.
and Revolution, focuses on the relation of the socialist proletarian revolution to the state. The purpose of the publication is to correct the distorted applications of Marxism by the bourgeoisie and opportunists within the labor movement. In Lenin’s view, these groups “omit, obscure, or distort” the revolutionary aspects of Marxism which call for the overthrowing of the state. According to Engels, “the State is...a product of society at a certain stage of development.” As such it serves as the product and manifestation of the irreconcilable antagonisms among societal classes.

The state, thus, arises when and where these class antagonisms cannot be reconciled. As such, the state might best be understood as an instrumentality of a hegemonic class rather than of the people in whose name sovereignty is asserted. The creation of this order legalizes and perpetuates the oppression by serving as the moderator of the conflict between the classes. But the state is also an instrument of exploitation in the service of subordination, the state of the bourgeoisie exists to keep the class antagonisms alive but in check. To maintain its special public power above that of society, the state must tax and issue state loans. Because the state is run and dominated by the most powerful economically dominant class, it can serve only as an instrument of exploitation of wage-labor by capital.

As against this construct, there appears to be no compromise, no utility in the instrument over the long term for the benefit of mass movement revolutionary parties. To overcome this system of domination by the few in the name of the many, Lenin would call the proletariat to take down the state and so raise themselves within a different sort of collective venture.

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72 Id., Section 1.
73 Id.
74 Id.
75 Id.
76 Id.
77 Id. According to Marx, Lenin notes, “the state could neither have arisen nor maintained itself had it been possible to reconcile classes.” Id.
78 Id., Ch. 3.
79 Id.
80 Id. According to Lenin, “a democratic republic is the best possible political shell for capitalism, and therefore, once capital has gained possession...it establishes its power so securely, so firmly, that no change of persons, institutions or parties in the bourgeois-democratic republic can shake it.” Id.
81 There is thus a great tension within Leninist theory about the state and its relation to the revolutionary Marxist movement. There is a sense that the state is a representative construct, and that its utilization would pollute the revolutionary cause. Thus, for Lenin, a state arises, a special power is created, special bodies of armed men, and every revolution, by destroying the state apparatus, shows us the naked class struggle, clearly shows us how the ruling class strives to restore the special bodies of armed men which serve it, and how the oppressed class strives to create a new organization of this kind, capable of serving the exploited instead of the exploiters.

Id., Ch. I, Section 2.
rejects calls for a stronger state in the service of the workers as opportunism, which in hindsight, ironically enough, quite insightful as a description of the Soviet Union after 1929 under Stalin and his successors. Against this Lenin contrasts "the opportunism now prevailing that trains the members of the workers' party to be the representatives of the better-paid workers, who lose touch with the masses, 'get along' fairly well under capitalism, and sell their birthright for a mass of pottage, i.e., renounce their role as revolutionary leaders of the people against the bourgeoisie."\textsuperscript{82}

The state is thus seen both as ultimately unnecessary and inimical to the attainment of the objectives of the Marxist revolutionary project. But once overthrown, ought it to be replaced with a socialist state? Here is the great ambiguity that has served as a source of opportunism for purported Marxists constructing states built on cults of personality in the name of "eventualism."\textsuperscript{83} Lenin suggests that once the proletariat has seized control of the state, it is expected that the apparatus of the state will wither away.\textsuperscript{84} When the state at last "becomes the real representative of the whole society, it renders itself unnecessary."\textsuperscript{85} As such, revolutionary change requires a transitional period in which the forms of the former social and political order serve as the bridge to the attainment of fundamental transformation. It is in this transitional phase that there is a role for the state as a disappearing entity—as the framework through which the Communist Party, as a vanguard representative of the ultimate (no state) objective can bring it about. The Communist Party is understood as torch-bearer—the vanguard element—in guiding the proletariat through this process.\textsuperscript{86}

The idea of the Party as vanguard and its entanglement with the state is central to the idea of transformation of governance. The notion then is of the

\textsuperscript{82} Id., Chapter II, Section 1.

\textsuperscript{83} By eventualism, of course, is understood the notion of a process moving collective governance from the forms of democratic bourgeois organization to some sort of more intimate and less formal system of commune organization (and thus to communism). While the notion is essential to the transitional aspects of Marxist Leninist theory, it also a point that can easily be subverted in the name of that theory, and in the process subvert generations of European Western fellow travelers. See, e.g., JEAN PAUL SARTRE, THE GHOST OF STALIN (Martha H. Fletcher and John Kleinschmidt, trans., New York: George Braziller, 1968).

\textsuperscript{84} Vladimir Lenin, \textit{The State and Revolution}, Collected Works Vol. 25, p. 381-492; Progress Publishers, Moscow, USSR (1917), can be found online at: \url{http://www.marxist.net/lenin/staterev/index.html}, at Section 4. For a discussion of the concept that also draws in the way in which the concept was transposed to Chinese theory before Deng Xiaoping, see Eugene Kamenka & Alice E.-S. Tay, Marxism, Socialism and the Theory of Law, 23 COLUM. J. TRANSDISTATIONAL LAW 217 (1985).

\textsuperscript{85} Id. “The proletariat seizes from state power and turns the means of production into state property to begin with. But thereby it abolishes itself as the proletariat, abolishes all class distinctions and class antagonisms, and abolishes the state as state.” Id.

\textsuperscript{86} Id. The first act by which the state comes to represent the whole of society occurs when the coercive structure of the state is dismantled and reassembled by transferring the means of production from its traditional class bound owners to the vanguard elements of society in the name of all. Id.
state as instrumental, the tool through which vanguard elements of society could work through the state to make it obsolete. It is in this sense that Lenin then draws on a variety of elements from 19th century theory Marxist and pre-Marxist theory, to suggest the way in which vanguard parties would use the state as an instrument of its own destruction. It is in this transitional sense that the party is in power and may temporarily utilize the state apparatus to its ultimate ends. The emphasis was on the vanguard status of the Party and its consequential obligation to induce “right thinking” in a process that would obsolete both state and party as both merged with the people.

Yet, there is a difficulty here as well and a danger during the transition, precisely because the vanguard assumes the rhetorical stance of the very class that it displaced, and thus runs the great danger of transitioning from a vanguard to a class party (like that it replaced) rather than serving to oversee the transition from the state to a communist society. The transitional nature of the post bourgeoisie state might also permit the vanguard to resort to those mechanics of coercion that served as the basis for class subordination before the start of revolutionary transformation. Still, in striving for socialism, Lenin is convinced that as the masses transition from socialism to communism, the need for violence against people in general, for the subordination of one man to another, and of one section of the population to another, will vanish altogether since people will become accustomed to observing the elementary conditions of social life without violence and without subordination.

In a higher phase of communist society, after the enslaving subordination of the individual to the division of labor, and with it also the antithesis between mental and physical labor, has vanished, after labor has become not only a livelihood but life’s prime want, after the productive forces have increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly - only

87 Describing the self destruction of the state through “withering” as the government of persons is replaced by the administration of things, and by the conduct of processes of production. Vladimir Lenin, The State and Revolution, Collected Works Vol. 25, p. 381-492; Progress Publishers, Moscow, USSR (1917), can be found online at: http://www.marxist.net/lenin/staterev/index.html, at Section 4.
88 Lenin notes that “by educating the workers’ party, Marxism educates the vanguard of the proletariat, capable of assuming power and leading the whole people to socialism, of directing and organizing the new system, of being the teacher, the guide, the leader of all the working and exploited people in organizing their social life without the bourgeoisie and against the bourgeoisie.” Id., Chapter II, Section 1.
89 This is essentially the route taken by the Russians and those in their thrall after 1917. JEAN PAUL SARTRE, THE GHOST OF STALIN (Martha H. Fletcher and John Kleinschmidt, trans., New York: George Braziller, 1968). This was also a great criticism of the Catholic Church in opposition to European Marxist Leninist States. See, e.g., FULTON J. SHEEN, COMMUNISM AND THE CONSCIENCE OF THE WEST 86-122 (Dublin: Browne & Nolan, Ltd., 1948).
90 Id., Ch. 4.
91 Id.
then can the narrow horizon of bourgeois law be left behind in its entirety and society inscribe on its banners: From each according to his ability, to each according to his needs.\textsuperscript{92}

And indeed, for a while in the last century it appeared that Leon Trotsky’s vision of a stateless world globalized within Communism was irresistible.\textsuperscript{93}

But history, of course, has evidenced the contradictions and tensions in this view, and the resultant turn in governance. Prominent among them were the relationship of party to state, of democracy to dictatorship of the proletariat and of the proletariat to the party. In effect, Marxist Leninist mass movement revolutionary governments were confronted with the same issue that all governments founded on a critical mass of assumptions face—how to preserve the character of the state against those who would turn away from the normative framework on which it is based without, in so doing, betraying those principles. This problem plagues Western democracies as well. The stakes, even at the beginning, were high—the legitimate basis of assertions of power by the Bolsheviks (and later by other communist mass movement parties come to power). “If the dictatorship, on the other hand, frankly abolished proletarian democracy it would deprive itself of historic legitimacy, even in its own eyes.”\textsuperscript{94} On the other hand, failure to limit the power of the masses to act could threaten the conceptual foundations of the state—the equivalent, perhaps, of permitting an electorate to adopt a form of governance that would fundamentally change the character of the state. This is a course of action that even Western democratic theorists find problematic.\textsuperscript{95}

But from Lenin’s death, the choice that the Soviets made was to emphasize dictatorship, hierarchy, obedience and a monolithic state structure. “It

\textsuperscript{92} Id., Ch. V, Sec. 4.

\textsuperscript{93} As a later Chinese commentator noted:

The completion of the socialist revolution within national limits is unthinkable. One of the basic reasons for the crisis in bourgeois society is the fact that the productive forces created by it conflict with the framework of the national state. . . . The socialist revolution commences on the national arena, is developed further on the inter-state and finally on the world arena. Thus, the socialist revolution becomes a permanent revolution in a newer and broader sense of the word; it attains completion only in the final victory of the new society on our entire planet.


\textsuperscript{95} See, e.g., JÜRGEN HABERMAS, THE DIVIDED WEST (Polity Press, 2006); Vivian Groswald Curran, Fear of Formalism: Indications From the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law, 35 CORNELL INTERNATIONAL LAW JOURNAL 101 (2002).
would cease to be a proletarian dictatorship in the strict sense. Its use of that title would henceforth be based on the claim that it pursued a policy with which the working class, in its own interest, ought and eventually must identify itself, but with which it did not as yet identify itself. The dictatorship would then at best represent the idea of the class, not the class itself.\textsuperscript{96} Totalitarianism served as the conceptual fig leaf over a dictatorship that rejected basic constitutionalist assumptions—rule of law, popular sovereignty and the like—in favor of assumptions (embraced in equal measures by mid 20th century fascist regimes) of the merger of the individual into the mass and the merger of the mass into the leadership of party.\textsuperscript{97}

Thus rather than a withering away of the state, one saw the institutionalization of the party within the state apparatus, and the use of the government as an instrument through which power was asserted.\textsuperscript{98} With this came the institutionalization of a state order with a comfortable group of Party bureaucrats and the perpetuation of a totalitarian state organization under the rule of a party in power, that itself masked an aristocratic or feudal organization in which hierarchical power relationships were key. This failure was well documented, especially within the controlled satellite states of the Soviet Union as it approached senility and oblivion.\textsuperscript{99}


\textsuperscript{98} As Stalin made clear in the 1930s:

We are for the withering away of the state. But at the same time we stand for a strengthening of the proletarian dictatorship, which constitutes the most powerful, the mightiest of all governing powers that have ever existed. The highest development of governmental power for the purpose of preparing the conditions for the withering away of governmental power, this is the Marxian formula. Is this "contradictory"? Yes, it is. But this contradiction is life, and it reflects completely the Marxian dialectic.

In the following years he strongly emphasized this view, claiming in 1933 that increased governmental power was necessary to "put an end to remnants of the dying classes." By 1938 this increased power was deemed essential for the defense of the country, since the victory of socialism in the U.S.S.R. could not be considered final as long as it was surrounded by hostile states."


\textsuperscript{99} The Czechoslovak example was particularly well understood in the West:

According to its Statutes, the foundation of the Party's internal life is "inner-Party democracy" and its cornerstone is "democratic centralism." " Lenin's and Stalin's bolshevik principle of democratic centralism," said Gottwald, "offers a reliable guidance on how to build the Party and how to shape the mutual relationship of its organs on all levels." [Rudé právo, December 8, 1951]. Copying Soviet rules, the KSČ Statutes refer to it as "the guiding principle of the
The difficulty wasn’t necessarily in the fact of party leadership, or in the suspension of proletarian democracy under the tutelage of the party, it was more that even within the Party there was virtually no space for the expression of proletarian democracy in any form. And indeed, the totalitarian turn in Communism had been criticized as a perversion of the original idea of Party and state.\textsuperscript{100} Trotsky, its author and also one its most prominent victims, made it clear for those wary of the legitimacy of party state systems as unrepresentative of the people from whom they ostensibly derived their authority.\textsuperscript{101}

And thus, from a constitutionalist perspective, the emphasis moved from the people to the dictatorship, as Soviet inspired political systems sought to “harden themselves monstrously into their cadaverous rigor.”\textsuperscript{102} So, by the

organizational structure of the Party” and use an exact translation of the Russian formula to spell out its four basic points: (a) election of leading Party organs, from the lowest to the highest; (b) periodic accountability of elected organs to the organizations which elected them; (c) strict Party discipline and subordination of the minority to the majority; (d) the unconditionally binding character of the decisions of higher organs on lower organs.

At face value, these four elements of democratic centralism are compatible with the concepts of democracy. In theory, their use would not impair the democratic character of the Party embracing them. But, in adopting the Soviet formula, communist leaders of Czechoslovakia absorbed simultaneously the body of dictatorial usages and practices that have grown around it in its native Russian habitat and distorted the formula’s original meaning. Consequently, the gap between the theory and the practice of democratic centralism is almost as wide in Czechoslovakia as it is in the country of its origin. This can be illustrated by taking the four basic ingredients of democratic centralism and comparing their democratic phraseology with actual Party conditions.

\textsuperscript{100} See George Orwell, Animal Farm (London: Secker & Warburg, 1945).
\textsuperscript{101} As Isaac Deutscher trenchently noted:

When Trotsky now urged the Bolshevik party to ‘substitute’ itself for the working classes, he did not, in the rush of work or controversy, think of the next phases of the process, although he himself had long since predicted them with uncanny clear-sightedness. ‘The party organization would then substitute itself for the party as a whole; then the Central Committee would substitute itself for the organization; and finally a single dictator would substitute himself for the Central Committee.’ The dictator was already waiting in the wings.

1960s all that was left was the state as a governance apparatus of the party, and an internal party structure that emphasized centralist elements and little by way of democratic ideology. Law, and rule of law, as such, was subsumed within “politics” and made to serve as an instrument of the will of the people, as expressed through the state-Party. The ideology of the system itself suggested that law, like the state, served only as an instrument of higher order values—politics and economics. Law, like the state system, would eventually wither away, but remains until then, the tool for expressing the economic and social structure of society.

Yet, that itself, might produce a deviation from founding ideals, which itself has been the object of criticism. The bureaucratic corporatism of Stalin and Castro, in which party and state were conflated in a manner that emphasized the dictatorship, even within the party structure was deeply incompatible with constitutionalist notions. But through the 1980s that was a point of pride in those states.

These ideas were particularly well developed in the African context. “The state is conceived as the most effective agency for effecting the nation’s will, a will that can only become conscious via an explicit and exclusive political ideology.” But not just conscious via ideology—but conscious through the channeling of popular will by a “leader,” for that consciousness required a “big man” to activate it. The archetypical example was Kwame

103 For a discussion of the concept of law within the Soviet Union, for example, see, e.g., PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 183-202 (2nd ed., London: Cavandish Publishing, Ltd., 1999); WILLIAM BUTLER, SOVIET LAW (Oxford, 1987).
105 “In the absence of legality, it is a repressive extra-legalism that will regulate socialist society, either nakedly, or masquerading as law.” Sygnovich, supra, at 27.
Nkrumah of Ghana, who merged traditional African tribal traditions with Leninist vanguard traditions. And like Stalin and others, the notion of democratic centralism was manipulated to emphasize the centralism and marginalize the democratic elements, even within the systems of internal party governance. Democratic centralism, in Africa, was viewed as the fig leaf covering descents into authoritarian rule. “Internal to this thinking was the belief that any arrest or obstruction in the implementation of the plan was the result of sabotage, imperialism, or neo colonial forces at work seeking to overthrow the government.” The consequence was the creation of states that might work well within the theoretical models on which they were constructed, but were also fundamentally anti-constitutionalist. It was common, then, in the first decades of African national liberation after the Second World War for states to adopt “‘techniques of suppression’ to achieve not only unanimity but also the dominance of the government over the opposition and the state over the entire society.”

Still, nothing delegitimizes a political framework like failure. by the 1980s, the contradictions of state-party governance and proletarian democracy as practiced in Soviet or African style party-state governmental apparatus became increasingly ridiculed as anachronistic. The attacks became more pronounced after the collapse of Soviet style Marxist-Leninist political organization and the embrace of constitutionalism by Russia and the states of the old Soviet Empire. Either way, however, the relation between state and party was defined in ‘political’ and ‘power’ rather than in ‘legal’ and ‘systemic’ terms.

The rules of constitution and constitutionalism would have necessarily been rejected as a disguised means of privileging class elements. In its place would be substituted a universalizing values based program of governance

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111 Id.
113 Id.
115 Thus, for example, Derrida insightfully suggested:

   Now, as one can see foreshadowed, it seems, everywhere in the world today, the structure of the party is becoming not only more and nor suspect (for reasons that are no longer always, necessarily, ‘reactionary,’ those of the classical individualist reaction) but also radically unadapted to the new—tele-techo-media—conditions of public space and political life, of democracy, and of the new modes of representation (both parliamentary and non-parliamentary) that they call up.

meant to overturn the current conceptions of state governance and to provide a new framework or language for understanding political reality. “A world army of the revolutionary proletariat—that is what now stands for communism, and, at the Congress just ended, received organizational form and a clear, precise and detailed programme of action.”

Constitution, then is ultimately rejected in favor of a direct application rule through conflations of law and politics. “As a state philosophy, Marxism-Leninism presents itself as an all-inclusive system, in which all things are held to be dialectically interrelated, so that a mistaken idea in any one field (including law, or even natural science) must ultimately lead to mistaken views in every other field, including politics.”

The anti-constitutionalism is apparent—not so much in its totalitarianism, an easy target, but in its straightforward transition from a dictatorship of a vanguard party to the dictatorship of the leader of the vanguard party. “First and foremost, there is an ideology of totalitarianism, a collection of reasoned vindications in support of a type of society minimally characterized by a mass movement of solidarity animated by a specific Weltanschauung, rule by a single party hierarchically organized under the charismatic or pseudocharismatic rule of a leader in an institutional system that provides for state monopoly of communication, coercion and economic control”.

And that, more than the issue of the place of state apparatus or party, is the abyss that separates such systems from constitutionalist legitimacy.

It was both the tentativeness of the state apparatus, and its characterization as tool rather than institution that post Revolutionary China embraced for long periods after 1949 and in heated form between the late 1950s and the late 1970s. “Maoism, the ideological engine that drove CCP rule since 1949, insisted that policy innovations be tentative and that implementation be adjusted to reflect specific local conditions; its imprint on legislative drafting remains strong.”

In any case, this very brief excursus through the framework of party-state conception serves to make a point critical to the analysis that follows: that the emphasis on the party-state form of governance placed heavy emphasis on the state portion of the relationship. More importantly, the party aspect of the party-state construct suggested cover for a dictatorship—the privileging of a Praetorian element in the state who whose privileged position was dependent on obedience to the leader. Through a perversion of the original notion of

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democratic centralism (where the emphasis shifted from democratic to centralism), this dictatorship could present itself as democratic while asserting authority through a tyrant. What was institutionalized was power in the hands of an individual (and his retainers); what was bureaucratized was the system of exploitation of theory in the service of the few, without law and without limits on the discretion of the purported servants of party and state.

It had never occurred to Marxist to reflect whether it was possible or admissible to try to establish socialism regardless of or against the will of the working class. They simply took that will for granted. For the same reason it seemed to the Bolsheviks as clear as daylight that the proletarian dictatorship and proletarian (or Soviet) democracy were only two complementary and inseparable aspects of the same thing. . . . Now a conflict arose between the two aspects of the Soviet system.120

Historically caught up in the contradictions of mass movement revolutionary parties, the Soviet response set the model, which was followed for several generations throughout the Marxist-Leninist world.

That response also effectively served to reject the possibility of constitutionalist legitimacy as a basis of state, party or national legitimacy. For a long time this sort of rejection—as theory and practice—did not matter. But things change. To gauge the nature and profundity that that change, its potential and its actuality, it is necessary to turn to the development of Chinese governance theory over the last thirty years.

IV. MOVING TOWARD OF NEW MODEL OF THE STATE-PARTY: FROM DENG XIAOPING TO HU JINTAO, AN EVOLVING IDEOLOGICAL CONSTRUCTION.

Like constitutionalism, state-party governance theory has also evolved. In China in particular, the push towards what the Chinese refer to as scientific development in the political field121 has produced a great leap in the sophistication of the concept. This section describes the form of that transformation that is occurring in China, a transformation that the article suggests provides a basis for its increasing conformity to modern global constitutionalist values. For China transformation required overcoming the

problems and limitations of the Soviet approach to post revolutionary mass movement proletariat democracy. It suggests that, unlike the ossification that resulted from the Stalinist settlement of Marxist-Leninist governance in Soviet dominated states, the Chinese have been able to fashion, over the course of the last thirty years, the foundations of a different approach to the great fundamental contradiction of post revolutionary governance—the legitimation of party leadership in governance in a proletariat mass democracy organized along traditional law-state lines. Understanding that conceptual transformation is the key to understanding both the emergence of a post-Mao Zedong conception of the relationship between state, Party and government, and the organization of that relationship within a rule of law framework.

Much more than an embrace of rule of law and a constitutionalist Weltanschauung was at stake in this enterprise. The movement from a revolutionary mass movement denominated a “party” to a governing apparatus at the heart of state and nation also denominated “party” has taken over half a century. But the contours of that change are becoming clearer. There is now a growing gulf between the self-conception of the CCP as a revolutionary band well outside any form of legitimate power and the immense political movement overseeing a state apparatus as it seeks to maintain its role as the supreme embodiment of political authority. The movement from a conception of Party within rather than outside the state, without the embrace of the individualist turn of the Soviet model, suggests that the CCP has chosen a different and plausible path inherent in Marxist-Leninist theory at its inception more than a century ago. Anti-constitutionalism was the status quo in 1979; by 2008 the theoretical framework of something different—a single party constitutionalist state—could be discerned. And from this “something different,” it may be possible to discern the foundations of a uniquely developing theory of governance.

To understand this fundamental, and fundamentally important change, at the level of theoretical self conception (at least) it is necessary to journey from the nascent party-state framework fashioned by the newly institutionalized worker party state under Mao Zedong, through the vast consolidation and deepening of some of the critical elements lying quietly within that Maoist framework by Deng Xiao Ping and Jiang Zemin. Lastly, it requires an appreciation of the current efforts to put this together and implement theory on the ground through the current (by no means complete) elaboration of scientific development” as the legitimating principle and Ba rong ba chi (八荣八耻) as the politico-ethical principles by Hu Jintao.

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The era of Mao Zedong represents the formative period of Chinese political thought. Its great importance cannot be underestimated as an organic component of Chinese political and thus constitutional theory. But Mao Zedong’s thought is increasingly historicized. And rightly so. Mao Zedong developed his thought during a time of great dynamism in the history of China and the CCP. But it was also a time largely marked by a sense of the outsider position of the CCP. The CCP was not merely a vanguard party, but for a long time a revolutionary party. Even after the end of the civil war, the CCP continued to think of itself as outside the apparatus. It was the process of moving from an outsider to an insider conceptualization of the CCP’s position within China that produced a large measure of the dynamism in the relations of CCP to state and to the nation.\(^{124}\) This was a period of paranoia, perhaps justified, “the perception of party leaders, Mao in particular, that hostile forces remained in China long after the civil war was over caused a fluctuation between periods of transformation and consolidation but inhibited the onset of adaptation.”\(^{125}\) This was the period of the great emphasis on dictatorship, of hegemonism and on de-institutionalization, of the period leading through the Cultural Revolution. The focus was on political and ideological problems and not on institution building, especially after the great leap forward.

The rise and fall and rise of Pen Zhen, ultimately one of the critical contributors to China’s 1982 constitution, is a metaphor for the approaches to

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\(^{124}\) This dynamic started well before the end of the Mao Zedong era. Deng Xiaping noted the consequences of moving from outside to inside leadership on the constitution of the CCP.

Being the party in power can also easily breed conceit and self-complacency among the membership. Some Party members become puffed up over the smallest success in their work, looking down on others—particularly the masses and non-Party people, as though the mere fact of being a Party member puts one head and shoulders above non-Party people. Others, fond of showing off their positions as leaders, stand over the masses and order them about and are reluctant to consult them when matters arise. This, in fact, represents a tendency towards narrow sectarianism, an extremely dangerous tendency which could lead to absolute isolation from the masses.

In view of this situation, the Party must constantly be on the alert to combat subjectivism, bureaucratism and sectarianism and must keep up our guard against the danger of becoming divorced from reality and the masses. Therefore, apart from strengthening the ideological education of its members, the Party has an even more important task, namely, to strengthen the Party's leadership in every way and to make appropriate provisions in both the state and the Party systems for strict supervision over Party organizations and members.


party state and law in China through the early 1980s. “The rehabilitation of Peng Zhen in 1979 after twelve years of disgrace and his subsequent rise to become one of the dozen top Party leaders and chairman of the National People's Congress Standing Committee represent one of the most significant turnabouts in the political history of the People's Republic of China.”[126] Stanley Lubman perhaps most pithily describes the “great leap” into Chinese Constitutionalism in the post-Mao Zedong era.[127]

The extraordinary innovation was grounded in the two decisions made by the CCP in the late 1970s. The first was to separate the Party apparatus from the State. The second was to formalize the relationship of apparatus—both state and Party apparatus—to law. Under this great ideological (and to use the language of Chinese theory—scientific) advance, both state and Party were to be grounded in rule beyond the whim of individuals under the reorientation of the post 1979 era. But the values basis of the rules based systems were to be developed and protected by the Party, and applied by the state apparatus. Both of these notions were expressed in the constitutions of the Nation[128] and of the CCP,[129] and in the formulation of the ideological foundations of the new political state-party construct.

The first of the two great principles came explicitly and early from Deng Xiaoping. Though not well understood at the time—the contours of constitutionalist framing within state-party context was outlined by Deng Xiaoping in 1986. Separation of Party from government would provide the basis for separation of powers governance. But this separation of powers doctrine

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[127] He explained:
Under Mao, policy alone as articulated and applied by the Chinese Communist Party (“CCP”) had directed and guided the entire Chinese Party-state, and legislation had been used only formalistically to declare policy. It was imprecise, exhortational, tentative, and subject to unlegislated revision. The Constitution that was adopted in 1982 recognized promulgated laws enacted by the legislative organs of the state as the appropriate vehicles both for defining and implementing policy rather than CCP policy directives, even though the implementation of legislation still depends on CCP policies and changes in them. Reform has brought a fundamental new orientation toward governing China that has generally been followed, in which formal legislation has become the major framework for the organization and operation of the Chinese government. (Lubman 2000, 384).

differs significantly from that understood in the West. “The last time I talked with some comrades about economic work, I called their attention to the necessity of reforming the political structure, including the need to separate the functions of the Party and the government and to delegate powers to lower levels.”

The state apparatus, the government, deals with the problems of oversight of the population. “While we are correcting unhealthy tendencies and cracking down on crime, we must leave matters that fall within the scope of the law to judicial institutions; it is not appropriate for the Party to concern itself with such matters. The Party should concern itself with inner-Party discipline, leaving legal problems to the state and the government.”

The Communist Party deals with the oversight of the government. “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.”

And rule of law issues are inextricably linked to state-Party governance. “If the Party intervenes in everything, it will not help the people understand the importance of the rule of law. This is a question of the relations between the Party and the government, of the political structure of the country.” Thus critical to the first principal of separation of state from Party is the need to consolidate and institutionalize party leadership in a system that leaves room for a state apparatus. That institutionalization was grounded in not the governmental role of the Party—but in its institutional leadership role. That leadership role is a critical construct easy to misunderstand. No longer merely a bare knuckles control of all activity, the leadership suggested is ideological and political. The CCP is to provide a model for the society it is seeking to lead eventually to a pristine Marxist stateless system as well as serve as the source of those political values through which state action can be understood, applied and state power interpreted. In this context, Deng’s emphasis on both the Four Cardinal Principles and on the separation of state from Party becomes more understandable. The state is to serve the people in their everyday affairs. But

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131 Id.
132 Id.
133 Id.
134 The four cardinal principles consist of (1) the leading role of the CCP; (2) adherence to socialism; (3) dictatorship of the proletariat; and (4) adherence to Marxist/Leninist/Mao/Deng Xiaoping/3 Represents Thought). See Constitution of the People’s Republic of China (Zhonghua Renmin Gonghu guo Xianfa). Xian Fa (1982 as amended) (P.R.C.), http://english.people.com.cn/constitution/constitution.html. Preamble (“The basic line of the Communist Party of China in the primary stage of socialism is to lead the people of all ethnic groups in a concerted, self-reliant and pioneering effort to turn China into a prosperous, strong, democratic, culturally advanced and harmonious modern socialist country by making economic development the central task while upholding the Four Cardinal Principles and the reform and opening up policy.”) Id.
the Party is to serve the state by providing it with the values system critical to a proper application of the rules of law through which it is to operate.

The second of the great post-Mao principles was realized through the adoption of a constitutional framework for the governance of state and Party. However, the constitutionalization project was not meant to mimic Western models. It focused both on rule of law institutionalization of the state apparatus (through a Western style constitution framework) and a similar institutionalization of Party organization through its own constitution. Thus the principle of constitutionalization in China might best be understood as bifurcated, and in that bifurcation reflecting the political organization of society. In that context it is important to understand the constitution as consisting of two documents—the Chinese Constitution of 1982 and the constitution of the party in power, that of the Chinese Communist Party. The former lays out the organization of the state and the relationship between the state apparatus to the party in power as the holder of supreme collective political authority. The constitution is meant to provide both a framework for the devolution of inferior governmental power to an apparatus of state organizations and for the constitution of the superior political authority in the apparatus of the Communist Party. The later organizes and institutionalizes the manifestation of political authority within the nation—the power is collective, corporate and is expressly bound by rules and norms that give character to that polity. What distinguishes both from the vanguard party governance prior to 1979 was the use of law as a mechanics of institutionalization and bureaucratization of political power. But this difference is crucial from a constitutionalist perspective; the move from politics unbounded to a law bounded framework for governance represents a crucial step toward the adoption of a rule of law foundational framework for the organization of political power. This, of course, is the critical presumption of constitutionalist states.

The Chinese constitution attempts to establish the context on which these two aspects of government can come together—the formal institutions of the state and the oversight of values/governance role of the CCP. The Constitution carefully develops the overlap between State and Party. Yet, Western commentators tend to focus more on those parts of the constitution most like their own—the sections dealing with the formal organization of the

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state. They tend to be blind to those portions of the constitution that open a window on that other important aspect of government—the relation of government and CCP—that is, on the relationship between institution and ideology. The constitutional role of the Communist Party as the source of political values and the guardian of those values as applied by the state apparatus is embedded in the Constitution. And as thus embedded, the CCP can be said to be subject to the Constitution. It is in this sense that one can understand the relationship of the rule of law provisions of the Chinese Constitution and those of the CCP Constitution: “The Party must conduct its activities within the framework of the Constitution and other laws. It must see to it that the legislative, judicial and administrative organs of the state and the economic, cultural and people’s organizations work with initiative and independent responsibility and in harmony.”

The state itself can be considered complete only when the formal state apparatus is joined with the apparatus of the CCP, both under the rule of law framework expressed in the Chinese Constitution and as reflected in the CCP Constitution. That expresses the meaning of the division of authority between Party and State that Deng conceived. For the West, this is difficult to grasp—impeded by the Western conceptual limitations on the meaning and character of parties and their connection with state institutions and political power. Yet from the Chinese perspective, that division between state and Party might be viewed as equivalent to the separation of powers notion in western constitutionalism. Administrative power rests with the state and its institutions—all to be limited by and exercised through law. Political power and the protection of the values inherent in the constitutional framework and the values on which the nation is organized rests with the CCP. The Party may not directly exercise administrative authority—that is now a function of the NPC and exercised according to law. But the interpretation and preservation of the Constitution and its values rests with the CCP and its organs.

On this basis it is easier to understand the CCP’s own understanding of ‘rule of law’ as a hybrid concept:

Ruling the country by law means that the broad masses of the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work by the state proceeds in keeping with

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139 Id., art. 5.
140 CCP Constitution, supra, General Program).
law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader.\textsuperscript{143}

This requires a fusion of the outward and inward institutional manifestations of power within China.\textsuperscript{144} It is only within this context that the elaboration of the foundational organizing values of the political and administrative powers of the nation—sange daibiao (or the “Three Represents”)—assumes its importance for Chinese constitutionalism and the advancement of the rule of law culture in China.\textsuperscript{145}

\textit{Sange Daibiao} (三个代表)—the CCP has always represented the most advanced productivity and culture in China, as well as the most fundamental interests of the majority of the Chinese people—is meant to reaffirm the position of the CCP as the supreme collective instrumentality of political authority bounded by a popular welfare maximization constraint.\textsuperscript{146} “While Deng Xiaoping had interpreted socialist tenets to suit current conditions, Jiang Zemin saw in the Party a vehicle of social, economic and cultural progress. This was reflected in his call for the implementation of the ‘Three Represents.’”\textsuperscript{147} Among the more important elements of Sange Daibiao was the form of its incorporation. Sange Daibiao was not articulated as political theory but was concretized and given an institutional framework as and within law. It found its expression first as Not just

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\textsuperscript{144} Thus, Jiang Zemin noted: The Party has led the people in drawing up the Constitution and other laws, to which it confines its activities. In ruling the country by law, we can unify the adherence to Party leadership, the development of people's democracy and do things in strict accordance with the law, thus ensuring, institutionally and legally, that the Party's basic line and basic policies are carried out without fail, and that the Party plays the role of the core of leadership at all times, commanding the whole situation and coordinating the efforts of all quarters.


\textsuperscript{147} See Raviprasad Narayanan, \textit{The Politics of Reform in China: Deng, Jiang and Hu}, 30(2) Strategic Analysis 329, 335 (2006).
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One of the great developments captured by Sange Daibiao was the opening of CCP membership to broader elements of society.\(^\text{148}\) It provided a conceptual basis for the extension, at least as a theoretical matter, of Party membership to merchants. The price they paid was simple—embrace the ideological limits of Chinese Marxist Leninist Mao Zedong thought, Deng Xiaoping theory and the important thought of three represents, in return for which Party membership and extended prosperity for all would be more likely.\(^\text{149}\) Still, the process has been uneven and bound up in the general controversies over the direction of the scientific development of political values frameworks in China. Party membership by merchants was first welcomed in the 1980s and then prohibited in the years leading to the difficulties of 1989. Their membership was controversial because of its connection with corruption—the use of Party membership for economic gain. By the early 1990s the policy was again reversed, and membership was reopened and institutionalized by Jiang Zemin through Sange Daibiao—ironic in light of the efforts by a younger Jiang to prohibit such membership.\(^\text{150}\)

That this change was profound is gleaned from the difficulty of transposing this notion in the face of resistance from those members of the CCP more heavily invested in the old vanguard and revolutionary outsider presumptions of the less well-developed Party lines from the 1940s and 1950s.\(^\text{151}\)

For instance, in March the leftist journal Quest for Truth (Zhenli de zhuiqiu) published a harsh attack on Li Junru, vice president of the Central Party School and one of the creators of Jiang’s new ideological system, the “three represents” (sange daibiao). The article asked sharply, “Is not this sort of party” —that is, one that would admit capitalists—“metamorphosing from being the vanguard of the working class into a ‘whole people’s party’?”\(^\text{152}\)

And yet, that might well be precisely where a rule of law based institutionalized Party framework might well be heading. Hu Jintao has broadened this approach to reach deeper into Chinese society. “Whereas the red-expert dichotomy had a zero sum quality during the Maoist era, by the late 1980s new recruits were

\(^{148}\) Id., 336-338.
\(^{149}\) See, Jia Hepeng, The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalists?, 24 THE CATO JOURNAL (2004).
expected to be young, educated, and politically stalwart. In addition, greater attention was given to recruiting ‘workers on the front line of production,’ whether in industry, agriculture, or technological fields.”

Hu furthered the institutionalization and depersonalization (at least as a formal matter for the moment) of Party ideological leadership over state and nation inherent in Sange Daibiao with the introduction of the “scientific concept of development” as a refinement of the emerging ideology of rule of law as state separation from Party and the Party’s role in governance. The principles of scientific development, unveiled in 2003, are meant to stress the importance of deep progress to sustain the economic revolution in China (that is to try to keep it truer to its political roots in Marxist Leninist Mao Zedong Thought (and especially Deng Xiaoping Theory). "It stresses people-centered development that is comprehensive, coordinated and sustainable."

The “scientific development” concept flows naturally from the principles of the Three Represents—especially with respect to development. "The "three represents" important thought has enriched the ideology concerning the harmonious development of socialist material civilization, political civilization and spiritual civilization." It suggests a certain dynamism in the evolution of Marxist Leninist principles and the construction of governance. Indeed, it might be thought to have been implicit in that campaign. Thus the Chinese Communist Party was careful to describe it in terms that resonate with prior developments: "It refers to coordinated development between urban and rural areas, among different regions, between economic and social development, between the development of man and nature, and between domestic development and opening up to the outside world."

This relationship is well understood even at the level of popularizing the ideas of the campaign to rank and file Party Members. The stress is on forward movement and pragmatism geared toward the principal object of Party and State apparatus—deep popular development.

157 Id. Thus, for example, the description of the Three Represents in scientific development terms: “The important thought of the “three represents” is the newest fruit of the localization of Marxism. . . . It is an expression of emancipation of the mind, seeking truth from facts and keeping pace with the times, the most distinctive theoretical quality of “the three represents” important thought, as well as the most distinctive theoretical quality of Marxism.” Id.
"All the Party members are required to stick to the policies of reform and opening up, advance scientific development, promote social harmony and strive together for new victories in the process of building a well-off society in an all-round way, the meeting said. The meeting also called on all Party members to understand the new requirement of the country's development and the new expectation of the people to draw guidelines and policies adapted to the times and the people.\textsuperscript{159}

The Chinese Communist Party is quite aware of the necessity for building governance capabilities. "Of the series of major strategic ideas and theoretical, innovative new achievements released since the 16th CPC National Congress, the most vital and crucial is the overall blueprint or layout for Party building with hallmarks to stress not only stepping-up of Party building in an all-round way but taking the hold of "key points" and the "motif" in the course of Party building. Namely, it is focused on the enhancement of its governing capacity, and taken the increase of Party members' advancement as the motif."\textsuperscript{160}

Still, the progress objective requires the Party to get its own conceptual house in order. But as recent commentary has suggested, Party building is still subject to intense competition among factions within the Party. Some of it is part of the formal framework of public debate. For that purpose, it seems, the Party has entertained at least a limited public debate over the form of future reform.\textsuperscript{161} On the other hand, Willy Lam, for example, has suggested the nature of some of the factional fighting, which conflate personal influence and political agenda.\textsuperscript{162} He notes the conservatism of the theory of scientific development, its placement (as the third of the "four insistences" campaign, the relation of that campaign to Hu's efforts to solidify his and his faction's hold on the governing machinery of the Party, and (from my perspective) the fairly audacious efforts to overlay Deng Xiaoping's Four Cardinal Principles with the interpretive trope of the four insistences.\textsuperscript{163}

On the other hand, the caution in Hu's moves, from a certain perspective more cautious and institutional than similar moves by his predecessors, may suggest at least a (very) limited headway towards institutional "rule of law" within the Party. Chinese constitutional law theorists, as well as


\textsuperscript{162} Willy Lam, Limited Reforms: Status Quo at the 17th Party Congress, China Brief VII(17):6-7 (Sept. 19, 2007).

\textsuperscript{163} Id.
some critical actors within the CCP, have begun to note that the cultivation of an intra party democracy is a necessary key to political progress within China.\textsuperscript{164} To the extent that, as Lam suggests, Hu pushes forward on that front, there may also be progress on a broader basis. I am less inclined to believe in the sort of "western style" possibilities of the "thought liberation" portion of the "four insistences." Such liberation must be understood as possible only within the normative framework of Chinese political theory—Marxist Leninist, Mao Zedong Thought, Deng Xiaoping Theory, and the important thought of the Three Represents, to which some or all of the four insistences might be added. To de-contextualize thought liberation, is to set the reforms up to failure from an incorrect starting perspective. In the context of Chinese constitutional norm development, it seems that the third and fourth of the four insistences (scientific concept of development, social harmony and prosperity) are likely to be far more important than the first two (thought liberation and reform and open door policy).

Still, scientific development should not be underestimated either for its importance in the development of Chinese political constitutional theory or as a mechanism for the constitutionalization of CCP governance. The public organ of the Chinese Communist Party recently announced what had been rumored for some time--proposed amendments to the Chinese Communist Party Constitution. Communist Party of China to Amend Part Constitution, People's Daily Online, Sept. 17, 2007. The amendment is expected to be adopted at the 17th National Congress scheduled on October 15, 2007 "The amendment should be made 'under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thoughts of 'Three Represents,' and to reflect the major strategic thoughts the CPC Central Committee has set forth since the 16th CPC national congress was held (in 2002), such as the scientific concept of development," said the meeting.\textsuperscript{165} These amendments will formalize Hu Jintao's stamp on Party governance, in a manner similar to that of his predecessor and the incorporation of the "three represents" (sange daibiao) theory into the normative structure of Communist Party governance.\textsuperscript{166}

Thus, to the extent that "the scientific concept of development" serves as a formal platform for legitimacy to govern all social sectors, the CCP may continue to serve in fact as well as in name as the "party in power" of the apparatus of the Chinese state. But this will require continuous efforts to absorb


the leading elements of Chinese society, and to assimilate them to the political values culture of the CPC, as well as to articulate those values in a way that accords with the aggregate interests of all sectors. For that purpose, Hu Jintao’s scientific concept of development is well positioned to serve as a basis for governance. The trick will be to see if the Party’s bureaucracy is as adept in developing its praxis as the intellectual organs of the Party are in recognizing problems and shaping theoretical approaches to its solution. It is easy enough to herd intellectuals, and to frame programs. The Chinese political apparatus has become quite successful at it. But success is marked by operations at the level of contact with the governed—from rural peasants to important industrialists, and the foreign community whose involvement is not to be lightly dismissed. If the party cannot practice what it preaches, it will lose its mandate. The highest levels of the Party understand this: “They include, among others, unfolding activities to educate the CPC members in retaining their advanced character, pushing ahead the building or development of the study-type political party, going in for the inner-party democratic construction, developing inner-party democracy, improving the CPC members’ conduct and building a clear government, still bettering the Party’s leading and governing methods, and further improving the inner-Party supervision.”

But whether this understanding can be naturalized among its lowest level cadres is another matter.

Hu Jintao’s Report to the 17th Party Congress in 2007 elaborated these themes. Hu makes reference to the importance that political restructuring, based on increased economic and social development, has on the overall reform of the political process so as to be more inclusive of the people. To achieve political development under socialism with Chinese characteristics, Jintao calls on the people and Party of China to “integrate the leadership of the Party, the position of the people as masters of the country, and the rule of law.” This will include maintaining the features and advantages of the socialist political system while defining institutions, standards, and procedures for socialist democracy to be able to provide the political and legal guarantees needed to ensure lasting stability of both the Party and the country.

Hu Jintao traces goals or objectives under which these goals can be achieved. They include: (1) Expanding the people’s democracy and ensuring that they are masters of the country; (2) Developing primary-level democracy and ensuring that the people enjoy democratic rights in a more extensive and

169 Id., at Section VI.
170 Id.
171 Id.
practical way; (3) Comprehensively implementing the rule of law as a fundamental principle and speed up the building of a socialist country under the rule of law; (4) Expanding the patriotic united front and unite with all forces that can be united; (5) Accelerating the reform of the administrative system and build a service-oriented government; and (6) Improving the mechanism of restraint and oversight and ensure that power entrusted by the people us always exercised in their interest.\footnote{Id.}

With regard to the first objective, above, Hu Jintao calls for the improvement of socialist democracy through the improvement of the institutions of democracy to guarantee the people’s rights to be informed, to participate, to be heard, and to oversee the actions of the government. Within this movement, the goal is to turn the Party’s propositions into the will of the state through legal procedures. In addition, the effort will also center on ensuring greater transparency and public participation in building scientific and democratic decision-making functions.\footnote{Id.}

The second objective calls for leadership of Party organization in aiding the people to be “masters of the country” as they directly exercise their democratic rights in accordance with the law. With respect to the third, the Party is instructed to have organizations at all levels and Party members at all levels to act under the Constitution and laws and to take the lead in upholding the authority of the Constitution and laws.\footnote{Id.} Of course, since it is the Party who in the end guides and determines the law, this method serves to help keep the Party in control of both lawmaking and law enforcement. Hu Jintao also calls on the Chinese people and Party to implement the Party’s basic principle as it relates to religious affairs, especially in connection with the fourth objective. As part of this, the Party is instructed to bring into play the positive role of religious personages and believers in promoting economic and social development.\footnote{Id.}

Hu Jintao stressed that the Party “will accelerate the separation of the functions of the government from those enterprises, state assets management authorities, public institutions and market-based intermediaries, standardize administrative practices, strengthen administrative law-enforcement agencies…and reduce government intervention in microeconomic operations.”\footnote{Id.} Lastly, Hu Jintao called for implementing the intra-Party oversight regulations, strengthening democratic oversight and giving scope to the oversight role of public opinion. To maximize efficiency, the oversight forces are instructed to pool together.\footnote{Id.}

These ideological developments have gone a long way to differentiating state-party notions in post Mao Zedong China from its Soviet antecedents. Indeed,
that development, now institutionalized within the scientific development party line, has made it possible to criticize the Soviet variant as incompatible with basic principles of Marxist-Leninist state organization as well, something that might have been impossible even a generation ago. Chinese theorists suggest, for example, that the Soviet experience failed to adhere to Marxist principles because it “departed increasingly from being the ‘plenipotentiary.’ The state power was actually centralized in the party and the executive departments, even to a few people or a single man.” (Jiang 2003, 37). Because Marxists adhere to two major attributes of socialist democracy; (1) full realization of the people’s power and rights, and (2) the Communist Party’s leadership over the state, they insist upon Communist leadership over that state as the precondition and guarantee of the people’s ability to exercise and enjoy their power and rights. (Id.). In the case of Stalin, these values were sacrificed and his rule was instead legitimized in the name of the Communist leadership over the state. (Id.). “It is impossible to reach socialism by starting from Stalinism, for one will never reach anything except something whose instrument has been Stalinism.” (Birchall 2004, 213, citing Sartre, VIII Situations 354)

Yet, these significant theoretical advances are by no means evidence of a deep transformation of the state or the party. The issue of implementation is relatively untouched. Though that is changing.178 Recently, Hu made clear the relationship between Jiang’s “Sange Daibiao” and his “scientific development” concepts.

Chinese President Hu Jintao recently made a site tour in Ansai County, Shaanxi Province, to publicize a campaign for the Scientific Concept of Development. It’s an ideology with the same principles of the previous Party leaders' theories known as Mao Zedong Thought, Deng Xiaoping Theory and the Important Thought of “Three Represents”. The theories all say the CPC has always represented the most advanced productivity and culture in China, as well as the most fundamental interests of the majority of the Chinese people.179

The fundamentals are clear enough--the CCP serves in a representative capacity, but in that capacity is bound to a specific set of norms beyond which it may not venture. The CCP stands as vanguard party, embodiment of political citizenship and custodian of the values that make governance legitimate. But

178 Responding to criticisms on that “party organizations and individuals persist in influencing and interfering with the judiciary,” Zhu Suli noted: “although these interferers are sometimes leading party cadres who wave the flag of the local Party organization, it does not mean that this individual’s interference represents the Party’s or that particular party organization’s interference. To the contrary some of them are violating CCP principles, policies, and disciplinary rules.” Zhu Soli, Political Parties in China’s Judiciary, 17 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 533, 540 (2007).
that position is dynamic--and requires demonstration of a constant commitment--
in direct and physical terms--to the welfare of the people, if the CCP means to
retain its position as the legitimate representative of the people above the state
apparatus created through the constitution.

The staging of this reinforcement/education campaign took the form of
a trip was carefully planned for its symbolism. "Ansai, a county subordinate to
Yan'an City, is Hu's site for the on-the-spot study of the ideological drive.
Yan'an served as the capital for the CPC-led revolutionary base during the
1930s-40s, before the Party took over the power in 1949."\textsuperscript{180} And the discussion
was not conducted at the level of high theory--but in the language of
participation and wealth creation. "While talking with villagers in Houguomen,
Ansai County, Hu said the new policies, based on a practice of the Scientific
Concept of Development, will bring substantial benefits to farmers by allowing
them to lease their rights to contract cultivated land and forests."\textsuperscript{181}

That conflation of Party, theory and wealth creation was centered on
the efforts of the local Party officials. "During his stay . . ., Hu learned about
new progress made by the leadership of the village's Party branch. The villagers
have had their income remarkably increased and their living standards much
improved, Hu was told."\textsuperscript{182} The most interesting element, at least at the level of
local Party governance was the identification of a new method for better
accountability by local Party officials within the local state governance
structures—the Party Member Promise System—a form of Party discipline that
reflects a rules bound orientation at the lowest level of party operation. "All the
village cadres and applicants for Party membership are required to make the
promise, according to Yang Fengqi, head of the village's Party branch. Hu called
the Party Member Promise System a good way to help Party members and
cadres display their exemplary role. 'We must do what we have promised to do
by actions' he stressed."\textsuperscript{183} Grass roots Party organization has become an
important component of governance reforms. And as Hu is making clear at the
lowest levels of Party organization, this is necessarily so given the implications
of the scientific development of Sange Daibiao. And it is critically important, for
that purpose, that the lowest levels of Party organization reflect a commitment to
the most refined development of Party governance theory. That requires special
measures.

As Hu symbolically noted, the success of the last decade's drive toward
deepening a system of normative social and political values under the
representative guardianship of the CCP will depend very much on buy-in from
all social sectors. The masses are most willing to concede political citizenship to
the CCP and its cadres, and to satisfy themselves with social and economic
citizenship rights, as long as there are strong and working methods of

\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
accountability and there is satisfaction that the CCP is doing its duty—including policing itself. But the buy-in from senior party officials may depend on the reliability of the development of another facet of Chinese democracy within the CCP.

Yet it is implementation—that large space between theory and practice—that rightly continues to generate much internal and eternal criticism. Implementation carries its own constitutional issue, that of vindication of rights. It is in this context that Chinese constitutionalist theory supplies a ready theoretical answer, but where theory remains aspirational. Not that there is a single method of vindication of rights that is required. While the West has focused on judicial vindication, it is not the only path. However, to the extent that the Chinese seek to invoke that model in their construction of a state apparatus, they remain vulnerable to criticism for failure to properly implement. It is here, especially, the constitutionalism with Chinese characteristics has much room to develop. This development requires action not only at the state level, but at the Party level as well. The recent emphasis on corruption campaigns is an indicator of both.

For all that, though law continues to be “conceived and operates as an instrument with which to uphold the Socialist political order and perpetuate party domination,” China has also begun to organize its legal system within a proper Western-style hierarchy of law administered by State officials and the institutionalized value systems that the Party is now obligated to further. But though the form of organization is similar, the values foundation are different, and its implementation—that is the way in which the state and political structure is implemented—are substantially different from forms of governmental systems in the West.

And so the Chinese governance/political framework in 2008 is very different both from the classical Soviet state party structure and from its own level of development in 1978. Three major elements mark this transformation. The first is a move from a reliance on an undifferentiated politics as the engine of governance, a governance that reached its zenith during the Cultural Revolution, to an embrace of a formal rule of law culture—the pinnacle product of which has been a constitution that has begun to serve as more than the symbolic tokenism of the Soviet era in Russia. The second is the use of this

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rule of rule framework to effect a separation of powers organization of political power, and with it a more formal hierarchy of power. At the lower level sits the state apparatus, charged with the governance of the people. Above it is the CCP, as the supreme political authority. Its guiding role is effected indirectly through oversight. But this is a powerful function, made more so by the third element, the institutionalization and bureaucratization of such power in the institutions of the state and of the party. The bureaucratization, separation and oversight characteristics of the emerging organization are roughly expressed in the recent constitution of the politburo.

“As a consequence of these trends, Politburo membership is increasingly allotted on the basis of policy expertise and of institutional representation. This does not mean that conflict among leadership factions has withered away; it simply means that leadership competition has instead been channeled into a structure of leadership work that suits the tasks of managing an increasingly complex economy and society and maintaining political stability to that end.”

Thus Deng’s movement from revolutionary outsider vanguard movement governance to insider institutionalization of is taking a formalist constitutionalist and institutionalized turn. “The pattern of balancing institutional constituencies emerged in that context as a means of facilitating collective decision-making under the general secretary as first among equals rather than as paramount leader.”

IV. SKETCHING THE CONTOURS OF A CONSTITUTIONALIST PARTY-STATE: THE PARTY AS POLITY AND THE STATE APPARATUS, FROM IDEOLOGY TO APPARATUS.

For nearly a century, then, the idea of constitutionalism in the context of Marxist-Leninist state, or better put, Party-state constructions was impossible. Indeed, from the time of Stalin (and except perhaps for Stalin’s intellectuals toadies in the West and elsewhere) constitutionalism was considered incompatible with Marxist-Leninist governance principles. The theorists of each viewed the other as the most subtle and nefarious forms of subordination. Yet, as the previous section suggested, Chinese intellectuals, and indeed, to some extent, the CCP apparatus itself, has appeared to move radically to bridge that gap. The foundation of that bridging was made possible by the theoretical foundations of Deng Xiaoping, and the possibilities actualized under the principles at the heart of Sange Daibiao whose transformative potential is legitimated under the dynamic principles inherent in the recently adopted party line, scientific development. These theoretical movements present a normative framework grounded in rule of law substantive values derived from the universalist rationalism of Marxist-Leninist theory itself, as developed in a

188 Id.
contextualized and dynamic way by the Party apparatus itself, while remaining loyal to core principles.

Is it possible to extract from this great movement in state-party understanding in China a universal notion of the constitutionalism inherent in a particular adaptation of the state-party governance model? This section suggests the possibilities of such efforts, as well as the critical limits of constitutionalist state-party systems. Those possibilities can be extracted both by the theoretical advances in Chinese Marxist Leninist theory and their application to the construction of a state and political apparatus in China. Critical to an understanding of that framework are the development of not only the Chinese Constitution of 1982 but also the Constitution of the Chinese Communist Party.

The Chinese constitutional system resembles modern constitutions elsewhere, and adheres to the current structure of modern constitutionalism in its form and objectives—to formulate a system of governance based on legitimating principles and authoritative values. It adheres to thick “rule of law” constitutionalism. The power of the state and its governance organs are strictly limited and may be asserted only through law. Those limitations are set forth in the constitutional instrument itself. But more important, the constitution is itself a flow through document—shifting political authority for substantive values to the Chinese Communist Party. Article 1 of the constitution declares that the nation is a “socialist state under the people’s democratic dictatorship.” Adherence to the people’s democratic dictatorship is to be effected “under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents’.” Article 2 then declares that all power “belongs to the people” yet vests only the “exercise of state power” in the National People’s Congress and local congresses. The organization of the state and its apparatus is elaborated in the Constitution, and all persons and parties, including the Communist Party, are subject to its provisions. But the Constitution itself acknowledges the special leadership role of the Communist

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192 “The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law.” PRC Constitution, art. 5 (1999 amendment).
193 PRC Constitution, art. 1.
194 PRC Constitution, Preamble.
195 PRC Constitution, Art. 2.
196 PRC Constitution, art. 2.
197 “All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated.” PRC Constitution, art. 5.
Party within this Constitutional framework—not beyond the Constitution so much as above all state actors through the Constitution itself. “Leadership by the Party means mainly political, ideological and organizational leadership.”198 It is in this sense that Deng Xiaoping’s principles of rule of law organizational framework coupled with a separation of state from Party apparatus where the Party retains a paramount political position in the state,199 is memorialized as foundational constitutional rule of law.

The power of the CCP, in turn, is substantially constrained by its ideological foundation, the preservation and implementation of which is a basic legitimating source of its power in the nation. “The Four Cardinal Principles -- to keep to the socialist road and to uphold the people’s democratic dictatorship, leadership by the Communist Party of China, and Marxism-Leninism and Mao Zedong Thought -- are the foundation on which to build our country.”200 Like state organs, the CCP is understood as an institutionalized collective whose authority is based on doctrines beyond the power of any individual to trample. “The Party is an integral body organized under its program and Constitution on the principle of democratic centralism.”201 In this sense the Chinese constitutional pattern follows emerging models of transnational constitutionalism.202

The difference—and a critical one to be sure—is the source of the norms constituting those boundaries of governance and the mechanisms for engaging with those norms. Unlike secular transnational constitutions that look to the consensus among the community of nations for the binding set of universal governance norms, or theocratic constitutions, that look to the commands and rules of a particular universalizing religion, the Chinese constitutionalist state looks to a contextually relevant application of the universalizing norms of Marxist Leninist theory that focuses on the construction of a political citizenship vested in the Communist Party and the filter through which the common good is understood and applied. That framework acquires a constitutionalist cast as it has become institutionalized and bureaucratized.203

198 CCP Constitution, General Programme. “Acting on the principle that the Party commands the overall situation and coordinates the efforts of all quarters, the Party must play the role as the core of leadership among all other organizations at the corresponding levels.” Id.
199 See discussion, supra, at text and notes--.
200 See CCP Constitution, supra, General Program.
201 CCP Constitution, supra, art. 10.
China’s government is not merely a collection of bureaucracies that reflect an imposition of a Marxist state apparatus without limits—governed in accordance with the individualized discretion of powerful Party cadres. Instead, it suggests a principled basis of state organization through law the object of which is to secure the benefits of a specific (though perhaps odious to non-believers) set of legitimate (to believers) normative values. And those values themselves are constructed as extra governmental—that is beyond the power of the state apparatus to alter, and themselves subject to interpretation through an institutional system that increasingly views itself as also bound by law—both the internal rules of process for the elaboration of Party governance and the substantive values which that process is meant to implement. The evolution of constitutional values has been an important element of constitutional development since 1979.

To see the constitutionalist framework of the Chinese system, it is perhaps useful to contrast it to the emerging theocratic constitution of Iran. The government constituted pursuant to the Chinese Constitution is in some great sense democratic, though subject to the mandatory direction of the Communist Party and the principles of democratic centralism. People are given a limited role in the selection of individuals who represent their interests within the apparatus of government. The Iranian Constitution of 1979 is also democratic in this sense, the people may have a role in electing their representatives of the state apparatus, but that apparatus itself is subject to the ultimate limitations of the supreme religious leader.

Both the religious governing super structure of Iran and CCP structure of China are themselves in turn subject to theoretically strict limits—both as to ideological range of value choices for the nation (Shia Islam in Iran and Marxist-Leninist Mao Zedong Thought, Deng Xiaoping theory, the important thought of Sange Daibiao and scientific development in China), and as to organization. In the case of China, the CCP itself is subject to a rule of law institutionalization of intra-Party organization. “The Communist Party of China leads the people in promoting socialist democracy and building socialist political civilization. It keeps expanding socialist democracy, strengthens the socialist legal system, rules the country by law, builds a socialist country under the rule

204 RAN D ALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (Cambridge: Cambridge University Press, 2002).
207 PRC Constitution, Preamble, arts. 2-3.
208 PRC Constitution, art.
209 Iranian Constitution 1979, supra. arts. 6-8.
210 See id., art. 5.
of law and consolidates the people’s democratic dictatorship.”\(^{211}\) In both cases, this superstructure sits atop the state apparatus. That apparatus is charged with the direct governance of the people. But its power is subject to the guidance of the superior political authority of the Guardian Counsel (a politically constituted religious body) in Iran\(^ {212}\) and the CCP in general and the politburo in particular in China.\(^ {213}\) This separation of powers is embodied in the organic law of the nation—their respective constitutions.\(^ {214}\)

The process elements of rule of law constitutionalism are observed in both systems. The Chinese Constitution provides for a basis of government through law, and a system for its legislation that, at least in theory, is transparent (in the sense that one understands the process of legislation) and certain.\(^ {215}\) “No law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law.”\(^ {216}\) The Iranian Constitution also provides for rule through law, and specifies the system of law making.\(^ {217}\)

Both constitutions also specify the powers and functions of the executive and judicial officials. Judicial officials are constituted independent in form.\(^ {218}\) But they also owe a duty of fidelity to the principles of state values organization. And constitutional interpretation is vested in the legislative branch,\(^ {219}\) subject to the guidance of the CCP.\(^ {220}\) In addition to the separation of powers between the government and the CCP, there is also a significant element of separation of powers in the construction of the state apparatus in both state constitutional systems. The Chinese constitution constructs an elaborate system of governance grounded in the National People’s Congress and the State Council.\(^ {221}\) Though in the Chinese case, these organs are subject to the

\(^{211}\) CCP Constitution, supra, General Program.
\(^{212}\) Iranian Constitution of 1979, supra. Art. 56 (“Absolute sovereignty over the world and man belongs to God, and it is He Who has made man master of his own social destiny. No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group. The people are to exercise this divine right in the manner specified in the following articles.”).
\(^{213}\) Chinese Constitution, supra, Preamble.
\(^{214}\) Chinese Constitution, supra, arts. 57-94, 123-135. Iranian Constitution of 1979, supra., art. 57 (“The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the absolute religious Leader and the Leadership of the Ummah, in accordance with the forthcoming articles of this Constitution. These powers are independent of each other.”).
\(^{215}\) Chinese Constitution, supra., arts. 57-67.
\(^{216}\) Chinese Constitution, supra., art. 5.
\(^{217}\) Iranian Constitution, supra., 1979, arts. .
\(^{218}\) Chinese Constitution, supra., arts. 123-135.
\(^{219}\) PRC Constitution, art. 67(1).
\(^{220}\) PRC Constitution, Preamble.
\(^{221}\) PRC Constitution, arts. 57-92.
The Iranian Constitution also constructs a system of interlocking government organs with distinct functions. Though, again, in the Iranian case, this is carried out only accordance with the limitations of Islam generally as exercised through the religious leader.

In addition, the substantive elements of modern constitutionalism are also observed. The positive and passive obligations of the state are described. Human rights are enshrined in the constitution and protected. Those are described in articles 33-56 of the Chinese Constitution and articles 19-42 of the Iranian Constitution. Indeed, those within the Chinese academic establishment hailed the 2004 amendments to the Chinese Constitution for that very reason. “The draft amendment to the Constitution is expected to inject stronger protection of private property rights, clarify that the country respects and safeguards human rights, and strengthen social security among other things. More important, Professor Hu Jinguang of Renmin University of China, said this amendment is being conducted amid increased constitutionalism awareness among the public.”

In both systems the power to petition the government is preserved, though in both constitutions these petition rights are ambiguous as to both the extent preserved and the protections for assertions of the right. The Chinese Constitution provides such a right but with a strong set of penalties for those who appear to abuse the power in certain ways. The Iranian Constitution provisions are ambiguous with respect to the protections offered. The Iranian Constitution creates a system of government grounded in rules and separation of powers. Like the Chinese Constitution, the Iranian Constitution vests the legislative power in the representatives of the people. Like modern constitutions it also imposes limits on power that can be exercised by the state, though some of these are explicitly grounded “in conformity with Islamic criteria.” The Chinese Constitution also limits state power with respect to a

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223 For the limiting parameters, see, Iranian Constitution, to Art. 5 and Arts., 90-99.
224 See, Iranian Constitution of 1979, at arts. 56-63.
226 PRC Constitution, supra, art. 41.
227 PRC Constitution, supra, articles 26-27
228 Id., at art. 20 (equal protection of the laws); 21 (rights of women); 24 (press freedom except when “detrimental to the fundamental principles of Islam”); 27 (public gatherings, same as art. 24); 28 (right to choose occupation, “if not contrary to Islam and the public interest”).
number of rights, though many of these restrictions are subject to exception and to the overriding obligation to protect the objects of the Revolution.

But constitutionally granted authority may only be exercised within the limits of the legal framework of the values systems incorporated into the constitution. In China that values system is Marxist-Leninist Mao Zedong Thought, Deng Xiaoping theory and the important theory of three Represents. And the institution charged with its elaboration assumes a leadership role in the direction of the state and the oversight of the government. That institution, in turn, is charged with maintaining cadres that represent and ensure state compliance with the values system on which both state and party are built. In Iran that values system and the institution authoritative charged with its elaboration assumes a leadership role in the direction of the state and the oversight of the government. Islam is constituted not only the normatively foundation of the state but also as a foundational system of legal organization.

The legalist nature of Islam within Iranian constitutionalism is further refined in Art. 12. The authority of these legal schools are legitimized through the constitution as well. “These schools enjoy official status in matters pertaining to religious education, affairs of personal status (marriage, divorce, inheritance, and wills) and related litigation in courts of law. In regions of the country where Muslims following any one of these schools of fiqh constitute the majority, local regulations, within the bounds of the jurisdiction of local councils, are to be in accordance with the respective school of fiqh, without infringing upon the rights of the followers of other schools.” This is not a supplement, but a substitute for the constitutionalist values represented by the international system and the values generated by the community of states.

This constitution is not imposed from above but represents an act of will of the people—a recognition, freely embraced—of the appropriate form of political organization. This is the framework of both the Chinese and Iranian constitutions—well in line with the core tenets of constitutionalism. The Preamble of the Chinese Constitution speaks of a broad values based front.

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231 Chinese Constitution, supra, with respect to religion (art. 36); detention (art. 37); right and duty to work (art. 45); right to material assistance; the right to education (art. 46).

232 Id., art. 28 (“The State maintains public order and suppresses treasonable and other criminal activities that endanger State security; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals.”).

233 PRC Constitution, supra, Preamble.

234 Id.

235 Iranian Constitution of 1979, supra., art. 12 (“The official religion of Iran is Islam and the Twelver Ja'fari school [in usual al-Din and fiqh], and this principle will remain eternally immutable.”).

236 Id., at art. 12: “Other Islamic schools, including the Hanafi, Shafi'i, MalikI, Hanbali, and Zaydi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites.” Id.

237 Id.
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In the long years of revolution and construction, there has been formed under the leadership of the Communist Party of China a broad patriotic united front that is composed of the democratic parties and people’s organizations and embraces all socialist working people, all patriots who support socialism, and all patriots who stand for the reunification of the motherland. This united front will continue to be consolidated and developed.\(^{238}\)

Article 1 of the Iranian Constitution, provides that “The form of government of Iran is that of an Islamic Republic, endorsed by the people of Iran on the basis of their longstanding belief in the sovereignty of truth and Koranic justice, in the referendum of 29 and 30 March 1979, through the affirmative vote of a majority of 98.2% of eligible voters, held after the victorious Islamic Revolution led by Imam Khumayni.”\(^{239}\)

The privileging of Islam in the political context is absolute, as is the privileging of the religious establishment—a party in power in every sense of the word as Chinese Marxists might understand it.\(^{240}\) It parallels an understanding of the notion of values aspects of the party in power concepts in Chinese constitutionalism. Islam “applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha’ of the Guardian Council are judges in this matter.”\(^{241}\) For that purpose, the constitutional systems creates an institutional framework for religious oversight of political activity,\(^{242}\) at the apex of which stands the Guardian Council,\(^{243}\) “with a view to safeguard the Islamic ordinances and the Constitution, [and] in order to examine the compatibility of the legislation passed by the Islamic Consultative Assembly with Islam.”\(^{244}\) This is a party in power but one that is separated from the operation of the state but fundamental to it. Indeed, the representative legislature\(^{245}\) “does not hold any legal status if there is no Guardian Council in existence” in the way that the organs of the Chinese state could not assert legal rights without the Party in power in existence. There is no popular right to interrogate and alter the formulation of the basic substantive norms on which political governance is founded—unless one is part of the instructional structure of the religion.


\(^{239}\) Iranian Constitution, supra., art 1.

\(^{240}\) Here again is an example of the way in which the notion of political party cannot be understood in the Western sense of faction within a community. Rather, the model reifies a more basic division between different forms of citizenship. For the classic discussion, see, James Madison, Federalist, No. 10 (November 22, 1787).

\(^{241}\) Iranian Constitution of 1979, art. 4.


\(^{243}\) Iranian constitution of 1979, supra., art. 91.

\(^{244}\) Id.

\(^{245}\) Id., art 93.
It is possible, at least on a superficial level, to see in the role of the clergy in Iran similarities to the role played by the Party in China, though in a contextually specific way grounded in the religious rather than the “scientific” nature of its value systems and institution building project in the clergy, on the one hand, and party, on the other. “This Constitution affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state in legal form; it is the fundamental law of the state and has supreme legal authority.” 246 The intertwining of state and political apparatus is both constitutionally mandated and follows the process and values framework of the rule of law system instituted—if it works right! “The party leaders simultaneously hold positions in the governmental institutions. One leader could hold several positions. All powers are in the hands of party leaders. The party exercises "democratic centralism" by which every party member has to abide. So the party totally dominates the policy-making process within these governmental institutions.” 247 While written as a criticism, it actually reflects a values choice that is institutionally embedded in the constitutional system—again, if it works right.

It might follow that within the constructed apparatus of state institutions, the framework for constitutionalist state organization could be recognized as legitimately constitutionalism, though in application the values of which are inimical with those embraced in Western constitutions. With theocratic constitutionalism, the fundamental difference is found in the source of values and legitimacy—religion. In rationalist constitutionalist systems like that being attempted in China, the fundamental difference is found in the source of political legitimacy and normative political values—the Communist Party as the embodiment of the political values and legitimacy of the nation. This fundamental insight, one more readily recognized within China than outside of it, is the nature and structural effect of the “party in power” concept. Taking Chinese theory at face value248 it becomes clear that at least since the time of Deng Xiaoping, the Chinese Communist Party has sought to attain a more refined institutionalization within the political order. This is nicely brought out in the Constitution of the Chinese Communist Party. 249

246 Chinese Constitution, supra, Preamble. What is affirmed and the basic system institutionalized is “socialist modernization by following the road of building socialism with Chinese characteristics. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory,” Id.
249 Chinese Constitution, supra art. 10.
“The Communist Party of China leads the people in promoting socialist democracy and building socialist political civilization. It keeps expanding socialist democracy, strengthens the socialist legal system, rules the country by law, builds a socialist country under rule of law and consolidates the people’s democratic dictatorship.” \(^{250}\) That effort is bounded by a values system it is charged with advancing. \(^{251}\) The institutional context in which the CCP operates is bounded by democratic values, applied inward. \(^{252}\) And constitutional rule of law ideals are applied within the CCP architecture. \(^{253}\) The CCP acts institutionally under its rules and subject to its ideological principles. \(^{254}\) Party action is meant to be collective. \(^{255}\)

Here there is a conception of the party fundamentally different from that in which the concept originated over a century ago. \(^{256}\) As an institutionalized collective it has principal responsibility for constitutional values—for shaping the form and values substance of the rule of law. The source of thick rule of law in China is the CCP—and that function is vested in the CCP through the Constitution that also organizes the state governmental apparatus beneath it. In this sense the CCP is a state institution with its own functional role constrained by the rule of law notions described in the constitution.

But it is more; because it is not just an instrument among others within the state apparatus. Its role is also extra constitutional in the sense that it represents the political power of the people of the state. Democratic governance is funneled through the CCP in a manner that mimics loosely the way in which

\(^{250}\) CCP Constitution, General Programme.
\(^{251}\) “The Communist Party of China takes Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents as its guide to action.” Id.
\(^{252}\) “Within the Party, democracy and the initiative and creativity of Party organizations at all levels was as well as the vast number of Party members must be given full play.” Id.
\(^{253}\) “It is strictly forbidden in the Party to take any measure against a member that contravenes the Party Constitution or the laws of the state, or to retaliate against or frame a member. Any offending organization or individual must be dealt with according to party discipline and the laws of the state.” CCP Constitution, Art. 37.
\(^{254}\) CCO Constitution, art. 10 (“The Party is an integral body organized under its program and Constitution on the principle of democratic centralism.”).
\(^{255}\) CCP Constitution, art. 16. “Party organisations must keep to the principle of subordination of the minority to the majority.” Id. But consensus is preferred. “In case of controversy over major issues in which supporters of the two opposing views are nearly equal in number, except in emergencies where action must be taken in accordance with the majority view, the decision should be put off to allow for further investigation, study and exchange of opinions followed by another vote.” Id. Where consensus is impossible, “[u]nder special circumstances, the controversy may be reported to the next higher Party organisation for a ruling.” Id.
political power of the state was vested in the enrolled electorate in 18th century America. With that institutionalization has come a reliance on those mechanisms that constrain assertions of individual power through rule of law concepts. Indeed, “the effort to strengthen 'democratic centralism' has been accompanied by a campaign to diminish personalism within the party. Similar is the move to strengthen the role of NPC not only to pass legislation but also to supervise implementation of law. These trends are healthy as they might lay the foundation for a more institutionalised era.”

Rule of law, then, provides an expression of collective governance both within and outside government. The CCP serves to bridge those areas. On the one hand it is bound by the constitution as the guardian of national political framework values. On the other, the CCP serves as the representative (Sange Daibiao) of the people in their capacity as sovereigns with rights to political citizenship. Thus that collective space serves as the site for democratic citizenship. That site is the Party itself, as an autonomous community. The Party becomes the polity. This notion is consonant with long held notion of differences between political power and the power of rule that has long been held by virtually all strata of CCP leadership. Thus, for example, from the earliest period of CCP rule in China, “[d]istinguishing between the concepts of political power (zheng quan) and the power of rule (zhi quan), Peng argued that the political power of the people did not include the powers of direct election and recall of officials.”


258 For those who adhere to the view that political citizenship equally and horizontally dispersed among the people is a prerequisite for a values positive constitutional state, this notion is both radically offensive and evidence of the anti-constitutionalist stance of the Chinese model. The creation of a hierarchy of political citizenship, with Party cadres assuming a leading role lies at the heart of what people seeking fidelity to advanced western political models would view as a critical defect of the State-Party mechanism. These defects lie at the heart of a criticism of any argument suggesting that state-Party systems like that in development in China can ever attain constitutionalist legitimacy. The answer, of course, is not necessarily. Party as polity notions run counter to deeply held value systems at the heart of Western and transnationalist constitutionalism. But they do not necessarily run counter to constitutionalist notions grounded in deep rule of law notions in which democratic governance principles are indirect rather than direct and where those vested with primary political citizenship are themselves bound to normative values that enhance, if indirectly, democratic participation and popular welfare. These values are incompatible with Western notions, to be sure, but not, for that reason alone, incompatible with constitutionalist notions. In this respect, Chinese state-Party, and theocratic constitutionalism have more in common with respect to the values basis of political organization than either might have with Western or transnational constitutionalism. See, Larry Catá Backer, Theocratic Constitutionalism: Religion as Basis for Constitutional Legitimacy in a Global Age, 16:1 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES – (forthcoming 2008).

That community itself serves as a representative and proxy for the nation in two respects—it is the site where political values are elaborated and protected and it serves as the body of individuals charged with the task of such elaboration and protection within both the political order and in its state institutions. It is in this sense that one can better understand the modern meaning of that old Marxist notion of Party as vanguard—the Party itself is vanguard/guardian of fundamental substantive values of the political state. The CCP, then, cannot be understood as an orthodox party natural to liberal democratic states; “they represented movements of solidarity, movements charged with infusing the masses with a belief system.”

The CCP, in this sense, embodies the consequences of its principal mission, the assumption of “pedagogical and tutelary responsibilities never before exercised by men outside of religious orders.”

And it is in this sense as well that one can understand Party membership 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 the deployment of values based rule of law substantive values, 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. This both nods to the traditional origins of communist parties as vanguard parties and the evolution of that traditional role into something more institutionalized and evolutionary once the vanguard revolutionary party became the holder of the highest national power within the political community it leads.

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. But rule of law notions within the Party must then be applied to make such political citizenship available to all in exchange for adherence to the Party “line” (its substantive political values on which the state was founded). This is in line with the ethos surrounding the Sange Daibiao (Three Represents) campaign. But political citizenship is no longer direct governance. The constitution has set that separation of powers framework quite distinctly.

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261 Id.
262 The focus underlying each of the three represents, is the centrality of the Party to progress and governance. The underlying principle suggesting that between the people and the community, organized as such, must stand the Party as the representatives of the people, to whose welfare they are committed but strictly bounded by the values systems on which the state is organized. See, Larry Catá Backer, The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the “Three Represents”), Socialist Rule of Law, and Modern Chinese Constitutionalism, 16(1) Journal of Transnational Law & Contemporary Problems 29 (2006).
Rule of law, then, resides within the Party architecture, and between that Party architecture and the elaboration of the state apparatus. And it is from that Party architecture that rule of law concepts move out to the governmental, social and economic spheres. State organization, then, devolves from, and reflects, Party organization and the values the Party represents as an institutionalized, rule governed, collective of the state’s political citizens. To understand Chinese constitutionalism, then, one has to understand the constitutional order within the Chinese Communist Party as well as the constitutional order as elaborated in the government constituted through the constitution. Constitutional analysis ought to focus on the CCP Constitution, and its elaboration/application of rule of law ideals within its value order to understand its elaboration as national political power under the national constitution.

This structuring of power relationships between political collective and the governmental organizations meant to institutionalize state power (within that collective) have significant values effects on the way in which Party, state and individuals relate. These include the reflection of the party-state construct (1) in a division of the character of citizenship between economic and social citizenship, claimed by all persons, and political citizenship, which can be exercised through the Party, (2) in an understanding of political organization in which the state power and its institutions are subordinate to political authority, (3) in an institutionalization of political authority within a collective that serves as the source and conduit of constitutional values to be applied by the holders of state authority, and (4) in a system in which Party elaboration of rule of law values is contingent on state and party self discipline.

The most important consequence, however, flows from the idea of the Party as polity. That is, that the site of democratic development, and of the deepening of the practice and culture of rule of law, must be focused on the Party, its internal structure, its mechanics for accepting and nurturing members, and its relation to the state apparatus. Thus, for example, the great exponent of a law based political structure, Peng Zhen "stressed the realistic formulation of policy; the strengthening of leadership and supervision over cadres; and the practical reeducation of Party members. Peng emphasized the need for discipline in the formulation and fulfillment of Party policies. Noting that the Party often was accused of "being able to talk but unable to act," Peng advocated realism in the formulation of policy and rigor in the fulfillment of policy." The object has been to subject mass movements to organizational control. This is a theme very much on the minds of Chinese theorists—bureaucratization and institutionalization of political power, but centered on the CCP.

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264 Id.
At the same time the separation of powers aspects of that structure must also be recognized. The heaviest burden falls on the Party to ensure fidelity to the values system that is inherent in the constitution, binding on its and on the state organs as well. It is with Party internal engagement with deep rule of law in theory and practice that constitutionalism can be understood in China and its practices deepened within state organs and among the polity. But it is with the state apparatus that the administration of the state must be effected. While the theoretical framework has been elaborated with greater clarity over the last decade, the actual implementation—and the training of party cadres in this normative framework (especially at the local level)—has a long way to go.266 But then, one might have said something similar looking back at the cadres making up the American political class formulating their conceptions of constitutionalism in the 1820s.267

V. CONCLUSION.

This paper has argued that the traditional Western reflex to dismiss state-party political organization as always and inherently despotic, and as inconsistent with constitutionalism, is both anachronistic and too simple minded for the emerging possibilities in states like China. While many state-party can justifiably be dismissed as despotic—as the use of a party organization as a cover for centralized power, that is for individual power—this paper sketches a basis, in theory, for conceptualizing a state-party governance model on a constitutionalist. The paper has not suggested that such constitutionalism is as yet deeply embedded or adequately practiced throughout the Chinese governance system. Still, theory is important—certainly as important in China as it was in the young United States working through such basic governance issues as federalism,268 the form of constitutional review,269 and values constitutionalism in the context of a constitutional permission to enslave a large portion of the American population.270

Nor is the purpose of the paper to advocate a state-party political organization as a viable alternative everywhere, or that it ought to be considered

267 These notions contribute both to a certain aspirational nature to the American constitution, see, e.g., Kim Lane Schepple, Aspirational And Aversive Constitutionalism: The Case For Studying Cross-Constitutional Influence Through Negative Models, 1 INT’L J. Const. L. 296 (2003) and a certain frustration with the slow pace of attainment of its goals. See, e.g., Frank I. Michelman, Socioeconomic Rights In Constitutional Law: Explaining America Away, 6 INT’L J. Const. L. 663 (2008); Arthur S. Miller, Pretense and Our Two Constitutions, 54 GEO. WASH. L. REV. 375 (1986).
268 See McColluch v, Maryland, 17 U.S. 316 (1819).
in places like the United States and other political communities that must draw on their own rich cultural-political heritage for their governance frameworks. Nor do I suggest that any state has actually attained in practice the full measure of the objects of constitutionalism. Like their American counterparts, the Chinese are astute observers of the space that separates goals from reality. But they have been willing to define that space and to point to the direction in which they mean to travel.

That is the point here—it is possible to describe goals within a state-party governance architecture that parallel those of western constitutionalism—and these represent an evolution of traditional ways of conceiving of the state party relationship. These are grounded in the basic assumptions of constitutionalist states--rule of law, institutionalized governance, accountability, limitations on the power of governing organs based on both process and substantive values that are grounded in sources beyond the power of individuals to change or manipulate. Just as the United States has been able to construct a constitutionalist state by contextualizing universal value sets touching on the boundaries of legitimate state and social organization in the political sphere, so have the Chinese sought to do the same, contextualizing the universal within a different political context.

What constitutionalist theory helps us understand is just that. It provides us with the tools necessary for better analysis of political systems. It helps us judge them against an unmoving set of assumptions and criteria. It helps us distinguish between difference based on value choices grounded in political, religious, economic, and social frameworks from those based on organizational frameworks. All despotism tends to share certain characteristics but also evidences a great variation in its actual implementation—adjusting to local conditions. So, too, constitutionalist states share a certain set of core characteristics—characteristics that distinguish constitutionalist states from despotism. That the American and Chinese value systems are incompatible does not affect the conclusion that both presents legitimating variations on constitutionalist political organization.

271 In a sense, all constitutionalism is aspirational, or contains aspirational elements. See, e.g., PHILIP ALLOTT, EUOMIA: NEW ORDER FOR A NEW WORLD 135-136 (2 ed, Cambridge University Press, Cambridge, 2001) Conventional American analysis would have it understood that Americans tend to be pragmatic about their constitution while Europeans tend to be more aspirational in the organization and elaboration of constitution. The former approach is thought to focus on implementation and workability, the latter on principles. See, e.g., Cass R. Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees?, 56 SYR. L. REV. 1, 14-15 (2005). I suspect Professor Sunstein, like Queen Gertrude in Hamlet, “doth protest too much, methinks.” Hamlet, Act. 3, Scene 2.

China presents an interesting variant on constitutionalism—at least at the theoretical level. It suggests the possibility of authoritarian constitutionalism, that is, of constitutionalism with an extreme variant of western style democratic values. For that purpose, the CCP plays a critical role. It is no longer the institutionalized cover for personal dictatorship, kleptocracy or tyranny (whether or not organized as old fashioned totalitarianism). Instead it plays a dual role in the political order—both bound tightly (again in theory) by rule of law presumptions. On the one hand, the CCP serves as the political collective from which constitutional norms are formulated, developed, defended and reviewed. The CCP plays a role as constitutional source of values for the application as rule of law (the constitution applied). That constitutes it a critical component of rule of law constitutionalism as developed under the Constitution of 1982. The CCP both adheres to rule of law governance and serves as the source of the values framework within which rule of law is understood and applied by the government. The CCP thus sits atop the state apparatus. But the CCP serves as more than the supreme institutional collective of political power. It also serves as the representative of the people. It is the sovereign collective—those who, because of their fidelity to the core notions of national organization, have been afforded political citizenship.

This role of the CCP has emerged more clearly with the rise of Sange Daibiao and the methodologies of scientific development. It is also consistent with the long term goal of creating a Marxist democratic society. That goal is impossible without a mechanism for including all people within its framework. And the opening of the CCP to all class elements, that is all class elements who demonstrate a fidelity to the framework within which rule of law governance operates in China, appears to be the governing mechanism for that objective. The 1982 constitution thus begins to draw a picture of a different sort of constitutionalism—one heavily invested in rule of law notions, but rule of law notions with actors playing substantially different political and governance roles that would be tolerable within Western constitutional traditions. The difference is values, and not necessarily legitimacy. The difficulty will be implementation—something of which the Chinese are well aware.

China today is not our grandfathers’ Stalinist dictatorship over the Soviet Union. Nor is it 1980s style Castroism. Nor does it suffer from the individualist expressions of the Cultural Revolution period of a generation ago. I have suggested that the real constitutionalist revolution began in the 1980s with the theoretical refinements of Deng Xiaoping, as elaborated during the leaderships of Jiang Zemin and Hu Jintao. The core of that refinement focused on the relationship between party and state—but also between party and nation. The nexus between the three, institutionalized and bureaucratized through rule of law, provides a basis, in theory, for creating a constitutionalist state with Chinese characteristics. While its normative and political values may, to some great extent, be either incomprehensible or anathema to the constitutional values

traditions of the West, it demonstrates the sort of framework that might fairly be considered constitutionalist.
REFERENCE LIST


ANDREW ARATO, FROM NEO-MARXISM TO DEMOCRATIC THEORY: ESSAYS ON THE CRITICAL THEORY OF SOVIET-TYPE SOCIETIES 26 (Armonk, NY: M. E. Sharpe, 1993)


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----------, Is Political Reform Ahead?--Beijing Confronts Problems Facing Society--and the CCP, 1 CHINA LEADERSHIP MONITOR (2002).


Jürgen Habermas, *The Divided West* (Polity Press, 2006).


Vladimir Lenin, The State and Revolution, Collected Works Vol. 25, p. 381-492; Progress Publishers, Moscow, USSR (1917), can be found online at: http://www.marxist.net/lenin/staterev/index.html (last visited on October 10, 2008).
164 LAW REVIEW


James Madison, Federalist, No. 10 (November 22, 1787).


ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM (New York: Central European University Press, 1999).


Constitutions and Other Public Documents


Constitution of the Communist Party of China


Constitution of the United States of America (1789 as amended).