

The Emerging Trajectories of Chinese Constitutionalism in the ‘New Era’

Remarks delivered at Jesus College, Oxford
Conference: China’s Changing Constitution
15 November 2018
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Good morning everyone. I am delighted to have been given this opportunity to speak with you about some with dynamic developments in Chinese constitutional thinking, as well as its expression as politics and law. Great thanks to Ewan Smith for organizing this event and to the sponsors.

I would like to start with the sort of question that is usually avoided in polite academic society in the West—though it is always in the ether of our conversations when the topic turns to law, legitimacy, and constitutionalism.

That question is this: *what are we (and by ‘we’ I mean those of us in the West) to make of Chinese constitutionalism?*

For some, the term is an oxymoron; one cannot speak of any joinder of the two concepts. The premise is that either Marxist-Leninist systems are incompatible with any *theory of constitutionalism*. Inversely, the opposite premise suggests that the practice of Marxist-Leninist states makes constitutionalism impossible *in fact*. Ironically, there are schools of thought in China that have taken the same view but from a different conceptual starting point. There are those in China who, like their counterparts in the West, continue to believe that Chinese Marxist Leninism is fundamentally incompatible with constitutionalism. That judgment, however, is occasionally grounded on

the premise that constitutionalism is itself an ideological construct that embodies the values and premises of Western liberal democracy and is indistinguishable from it.

Other times the notion of constitutionalism may be rejected in China because the supposed core premise of constitutionalism (and of constitutions)—that of the supremacy of law—is fundamentally incompatible with systems the core premise of which is politics. As such, it is to the integrity of the vanguard party and its principles rather than to the construction of “higher law” that ought to be the centering element in Chinese political theory. From this some have taken to supposing that Chinese approaches to the constitution of their political system, and thus of their approach to law, is *sui generis*.

For others, Chinese constitutionalism can only be understood, like the Chinese state itself, as a work in progress. It is premised on the notion that China’s path toward constitutionalism is not yet complete—unlike, say France, the United States or Japan. It follows, then that the “elders” of constitutionalism, and especially their academics, have a responsibility to educating and helping China along the appropriate path toward some goal that inevitably arrives somewhere near Western values, sensibilities and presumptions.

Still others might suggest that Chinese constitutionalism misunderstood. The premise is sometimes tied to the thought that Westerners do not understand either the theory or the application of constitutionalism within China. But it is also sometimes the expression of a judgment that China does not itself understand its own constitutionalism, that is that neither Chinese academics nor the governing apparatus are self-aware.

A variation on this theme turns the issue inward; that is that constitutionalism in general is either

misunderstood or misapplied. That, of course, brings us back to an underlying issue in this discourse—something of a lack of consensus about the meaning of constitutionalism itself. That lack of consensus is particularly potent in the West, where indeed there remains a lively debate among intellectuals over the form and practice of constitutionalism and its central elements—markets, democracy (however that is understood) and democratic representation, rule of law, and separation of powers, among others.

There is, of course, quite an animated debate within Chinese academic and political *circles that to some extent mirrors* these quite distinct general perspectives on the question of China and constitutionalism. And there are a number of schools that have evolved around the issue of constitutionalism within Marxist Leninist states (in general) and Marxism Leninism with Chinese characteristics (in particular) especially from the time of the leadership of Jiang Zemin. For ease of reference these may be identified as a political constitutionalism, a legalist constitutionalism, and an evolutionary constitutionalism (others sometimes tend to use the more contextually political descriptors—left, right and center constitutionalism).

Political constitutionalism refers roughly to a very broad spectrum of schools that *center politics* within normative (sometimes binding but not necessarily legal) parameters. Values and principles matter here. At one extreme it preserves old approaches that embrace a perspective suspicious of Western notions of constitutionalism and of any constitutional project as a device for the preservation of class exploitation. This approach is particularly suspicious of markets, of representative democracy, and of normative structures that might appear to bind and limit political power.

At the other end it suggests a development of a strong element of structural normativity that sees in constitutions an important device for the expression of collective leadership. Marxism Leninism is not tamed by law, rather constitutionalism is the systematic approach to political self-discipline compatible with Marxist Leninist core values.

Legalist constitutionalism refers roughly to a very broad spectrum of schools that de-centers politics in favor of a *legal framework* for ordering politics and the state. Text matters most here. Legalist constitutionalism tends to draw attention to the State Constitution as the centering element of the institutionalization of power, even as in some variations, it concedes the authority of the CPC as the primary source of political legitimacy. These approaches can include variations on notion of the autonomy of the state constitution to which all other institution creating governance systems are bound. Another variation sees in instruments like the State Constitution an expression of delegation of authority from the political collective to the institutional apparatus of the state, sometimes with a focus on judicial authority.

Evolutionary constitutionalism refers roughly to a spectrum of approaches that inevitably centers people over vanguard and governmental constitutionalism over Communist Party. These schools tend to see Chinese constitutionalism as a process that will or should toward structures in which the role of the vanguard party is diminished and a direct relationship between the masses and the organs of government are solidified, sometimes through law and sometimes through institutionalized politics. Just as elements of political constitutionalism draw on old models of Soviet

Marxist Leninism, variants of evolutionary constitutionalism draw on notions of Western liberal constitutionalism which sees as the inevitable end of the process of political life in China a move toward a form of Western style democratic republicanism; republicanism of some sort.

And it is in this last stream of Chinese constitutionalist debate that converges with conventional Western notions of constitutionalism (at least with respect to many of its accepted characteristics). It is also in that evolutionary stream that Chinese approaches find its greatest challenge. His last pint precisely because evolutionary approaches suggested that Chinese efforts were neither whole in themselves, nor could they emerge from normative structures that were themselves legitimate or authoritative. Indeed, constitutionalism in this sense necessarily stated with the proposition of illegitimacy and of the transitory nature of the system now in place. If that were the case, then it was impossible to speak about constitutionalism and about China in the same breath.

All of these trajectories converged nicely converged in Chinese thinking at the time of the 19th Chinese Communist Party Congress in the autumn of 2017. This Congress was especially important for its robust embrace of a “New Era” in the development not just of the Chinese state, but as well of the Chinese Communist Party in its leadership role. The importance of the New Era announcement was largely lost to the West; just another ideological bauble with no real meaning, other than perhaps relating to the personal power of specific leaders. Despite Western indifference, the announcement had substantial implications for law, politics, economic and social organization. First the New Era signaled that China was entering a different historical stage that opened both the premises and operating

conditions of the past to reform. Principal among these were the great pillars of the prior Deng Xiaoping Era: socialist modernization, socialist democracy, the relationship of the CPC to the state and the masses, and the understanding and role of law in the relationship between the state and political organs. Principal among the changes from the Deng Xiaoping Era was a movement away from the key focus of socialist modernization—the development of productive forces—to a new focus on the distributive effects of wealth creation. This marked a long journey from the principal contradiction of the first, Mao Zedong, Era which focused on class struggle in the construction of Party and polity in the wake of the establishment of the “New” China in 1949, through the focus on development, to a new focus on distribution.

This new focus within a “New Era” also required a re-examination of the structures through which the new contradiction would be resolved. To that end, it was necessary to turn attention to the CPC’s role as a vanguard, its international operating principles, the relationship of that organization to the state and its government, and lastly to the relationship of state and CPC to the people. To that end, the 19th CPC Report emphasized a new basic relationship—between the core and the collective—that was to permeate social, political, and economic organization. The 19th CPC Congress Report emphasized the need to more deeply embed socialism as a complex cluster of social values, of working styles, of expectations, of accountability, and of rules, all bent to the purpose of continuing development of productive forces now directed toward distributive principles. A “New Era” required a substantial interrogation of contemporary approaches in light of changing circumstances, including the success of the socialist modernization project, and the challenges of

corruption and integrity in a system that was to be guided forward by the CPC.

At the core of all of these new era efforts was to be the Chinese Communist Party . It was to serve as the core of the new collective efforts to rebuild society with Chinese characteristics. But not just with generic Chinese characteristics. Rather those characteristics were to reflect the forward development of all aspects of society under the mandatory guidance of the core ideology for the advancement of which the state was re-founded in 1949. The normative elements of this were bounded by Marxist-Leninist-Mao Zedong, Deng Xiaoping principles now refined by their successors. The governance elements were bounded by Leninist principles of the mass line, democratic centralism, and the central role of the CPC in every aspect of social, economic, and political activity. The expression of this leadership was to be undertaken through traditional methods, now recast—socialist culture, socialist law, socialist democracy, and socialist markets based economic activity. It would also require new methodologies—social credit, morals campaigns targeting integrity, and a new data driven analytics providing real time assessment, management and compliance through interactive consequence-based algorithms.

Taken together, the foundational ideological premises of “New Era” changes were focused on political change. The 19th CPC Congress Report put the CPC in the center, manifested legitimate and authoritative political action through the leadership role of the CPC, and then anchored the CPC’s own actions within the cage, not of law, but of political principle now made current. Within these structures, what space might have been left for constitutionalism and its rule of law based legalism? What remained of the relation between the law of the state constitution and the constraints on the CPC?

For some the 19th CPC Report appeared to step back from what had seemed to be a march toward conventional rule of law based constitutionalism. Indeed, a cursory view might have produced the conclusion that the “New Era” formally acknowledged a move away from both rule of law-based systems, and, as well, away from principles of the supremacy of law and of constitution within legitimate and authoritative governmental systems. In an ideological system in which the “new era” centers politics over law, there is a sense that constitutionalism, and with it rule of law based legitimacy, will be officially downshifted in favor of a system in which politics is expressed through the systematic exercise of administrative discretion and where the principles of ideology have little constraining effect on the exercise of that discretion.

I will suggest that the 19th COPC Congress did acknowledge a quite profound change in the direction of constitutionalism with Chinese characteristics. But at the same time that change has been in development for a least a decade, and quite transparently so. I will suggest as well that one can see the contours of that change outlined quite specifically through an examination of the use of term constitution in the 19th CPC Report. Understood in context, what appears to emerge is a clearer relationship between the constitution of the political and the administrative sphere in China, and the respective roles of their constitutions. As well, there is developed the constitution of the leadership role of the vanguard party. But taken together, these references point to the development of three quite distinctive expressions of constitutionalism in China. *The first is socialist party-political constitutionalism.* This focuses on the constraints that the CPC imposes on itself in legitimating its leadership obligations. *The second is socialist*

legality. These center on the construction of socialist systems of law, and a socialist perspective on rule of law the object of which is both to express the political line of the CPC through law, and in that expression to substantially constrain the exercise of administrative discretion by state officials. *The third is socialist democracy*. This provides a constraint on the exercise of the political aspects of CPC leadership, and also a constraint on the exercise of administrative authority through state organs. Those constraints are constructed as system of accountability and consultation centering on the development of principles of endogenous democracy grounded in systems of mandatory consultation among representative bodies beyond the CPC.

So how is constitutionalism approached within the body of the 19th CPC Congress Report? I examined the nuances at a more leisurely pace in an article I have shared here recently published in the Connecticut Journal of International Law. In short, what 19th CPC Congress Report suggests are the contours of an emerging theory of constitutionalism that better aligns with the underlying normative framework of Chinese Marxism-Leninism that I have just suggested—political leadership of a vanguard party which must be constrained by its own line, the expression of that leadership and the basic political in the construction of a government apparatus, and the development of democratic practices built into a complex interaction among representative bodies constituted within and outside both the vanguard party and its administrative apparatus.

What are the signs and auguries embedded within the 19th CPC Congress Report that moves to make these grand statements about the great dynamic forward movement of Leninist

constitutionalism in China? I can start at the most general level—counting words. The word constitution—either referencing the state constitution, or the political constitution of the CPC itself—appears thirteen times in 9 different sections of the report. Understand that the single English word “constitution” actually is rendered differently in Chinese, a point explored in the article. With that caveat in mind, mentions of “constitution” were tied to notions of fidelity, to notions of responsibility, and to notions of legality. The state and CPC act solely in compliance with the strictures of the constitution; constitutional understanding must be regularized and institutionalized; constitutions must be held in great esteem; the recognition that the socialist system of laws revolves around the state constitution and that building a socialist country based on rule of law requires development of a robust socialist rule of law theory; the recognition that the CPC Constitution is at the center of the political responsibilities of the CPC; the acceptance of a notion that the constitution (state and political) serve as the articulation of the rules for a system of socialist endogenous democracy grounded in consultation among representative groups; and that constitutions themselves serve to align the Leninist governance binary—that between core and collective—with principles of norms based governance.

At least in its crudest form of analysis, it is worth considering whether this rate and the forms of the references to constitutions appears aberrational in the history of the leadership of the CPC as expressed in its Congress Reports. To that end CPC Congress Reports from the 7th CPC Congress were considered. Considering that group of Reports as a whole, the short answer is ambiguous. To some extent, the quality of the mentions points to development that is distinct from that became before it. Yet that development

dies not suggest a rejection, so much as an advance, in the theoretical foundations of constitutional mention in prior CPC Congress Reports.

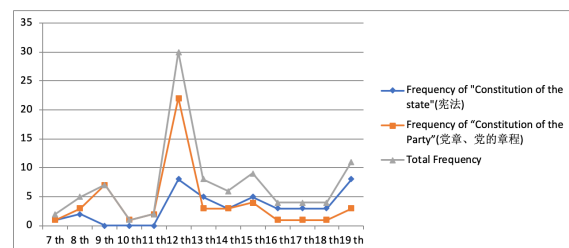


Figure 1 Frequencies of the term "constitution of the state" and "constitution of the party" in reports to each national congress of CPC²³

Simultaneously, the rate of “constitution” mention also appears to fall within upper ranges of the references to constitution in prior CPC Congress reports dating back to the 7th CPC Congress. The crude chart I distributed points to that conclusion. However, that conformity may benefit from a little bit of explanation. Undeniably, except for the extraordinary proceedings of the 12th CPC Congress, undertaken in the wake of the transition from the Cultural Revolution, references to the state constitution and the constitution of the CPC have remained roughly level since the 14th CPC Congress. Indeed, references to both state and CPC constitutions appeared higher in the 19th CPC Congress Report than at anytime since the pivotal 12th CPC Congress. The more important change that the historical patterns suggest, however, is the way in which rates of mention of the state as opposed to the political constitution of the CPC have changed. The prominence of the political constitution appears to have occurred in the 12th CPC Congress. From then, the focus appeared to have shifted to the state constitution (which for Westerners is treated as the only constitution worth considering). That pattern continues through the 19th CPC Congress Report, again indicating that the move toward “New Era” ideology represents an evolution rather than a

rejection of the foundations laid down at the start of the Deng Xiaoping era of socialist modernization. And indeed, inherent in the self-description of this dynamic development is the notion not of a break with the past of the building on the past to adjust ideology and practice to meet the challenges of the times. This deliberate investment of a strong dynamic element in the foundations of Marxism and Leninism distinguishes China from those Marxist Leninist states whose theory appears more ossified, locked into some increasingly remote founding moment. Cuba is an important example of the constraints to reform that such a quite different approach produces.

But a closer look reveals nuance the nuance that is essential to understand the character of the changes in Chinese constitutionalism that flow from a qualitative analysis of the mentions of constitution in the 19th CPC Report. Let me end these remarks with a brief look at those markers and what they suggest about the realities of constitutionalism in the “New Era.”

First, references to the political constitution of the CPC suggest an enhanced commitment to political constitutionalism. The CPC constitution is understood as the fundamental rules of CPC authority. It centers politics, but institutionalizes it within a cage of rules of its own making. Thus is not to be confused with the Western notion of constitutions over the political. Rather it expresses the notion that constitutions memorialize the political decisions that are wholly in the province of the vanguard, but that once made those decisions bind the CPC and its members. Constitutions, then serve two purposes. It extends socialist legality by ensuring a basis for supervision and discipline. As such, constitutionalism is an important supporting element to the Supervision Law and its progeny. At the same time, the references to the CPC

constitution centers the Leninist notion of democratic centralism in the way in which the CPC exercises its political authority. As such, constitutionalism moves to the center of the development of Leninism even as it conforms to the global expectations of rule of law legitimacy. It is not so much about the devolution of power as its manifestation through rules that itself permits the expression of collective and process based rather than personal and discretionary decision making.

Second, references to the state constitution suggest the advance of a movement to conflate socialist legality and the organization of the state organs within the construction of a rules based (constitutional) order. In some sense this reflects the traditional center of constitutionalism—the construction of a government that conforms to and advances the political project of the community that adopts it. At the same time, in the Chinese case, state constitutions are quite clearly subordinated to the political world of the vanguard. It is not the source of authority, but rather its reflection. It is the expression of the CPC line, but now directed toward the authoritative ordering of the state. The 19th CPC report makes clear that the state constitution cannot be understood or applied except in the context of the leadership of the CPC and its direction. To that extent, the law, including the fundamental power of the state constitution, provide a basis for action, for supervision, and for its justification in ways that appeal internally as well as to China's foreign audience.

Yet it is in the so-called hybrid references to constitutions, that the understanding of constitutionalism emerges most clearly. These are references to the state constitution which together with the sole references produce the quantitative conclusion that the state constitution is mentioned most in the CPC Congress reports. But

the character of the reference points in a different direction. The normative thrust of the statements points to conventional constitutional theory—the primacy of a state constitution, the principle of equality before the law, the principle of the supremacy of the law and of the illegitimacy of abusive discretion and cults of personality. At the same time, it deviates from conventional constitutional approaches because it shifts the responsibility for those constitutional principles to a very specific political institution that itself is subject to its own paramount constitutive instrument. Thus, for example, reference to the obligation to improve the Chinese Socialist system of laws, “at the heart of which is the Constitution” falls on the CPC, and is exercised through the CPC's own rules and governance institutions. These mixed references appear in the key sections describing socialist legality, socialist democracy, and the construction of socialist rule of law. These references suggest that constitutionalism has migrated in and through the organs of the CPC, and is now constituted within the political constitution of the CPC, whose manifestation to the collective is expressed in the state constitution.

So, what is the state of Chinese constitutionalism in the wake of the 19th CPC Congress? It is clear that the issue of socialist rule of law, and socialist democracy remain substantial priorities for the CPC itself and a core policy of governance. It is also clear that the State Constitution remains a central instrument of governance. But it also becoming clearer that the fundamental constituting document of the *political order* is not the state constitution but the political constitution of the CPC, which provides the structures through which CPC leadership can permeate the structures of politics, law, economics and society. The State Constitution assumes more the character of a derivative and implementation document—the cage of regulations whose character and interpretation is

in every aspect bounded by the higher principles of the CPC Constitution in general and its General Program in particular. The 19th CPC Congress did not make this declaration explicit, but it made that conclusion inevitable in its discussion of constitutionalism and its practice. That shift is most noticeable in the concentration on the building of socialist consultative democracy—a self-consciously political institution, rather than on the construction of legalized institutions through constitutional meta-rules.

So, what is Chinese constitutionalism in the New Era? Perhaps the best answer is provided in the 19th CPC Congress Report itself—an “institutionalized development of consultative democracy.”

What are we left with then? Chinese constitutionalism is framed within a separation of powers that does not mimic that adopted in the West. First is the form of constitutionalism that serve as the fundamental rules for the organization and operation of the political order. Second is a form of constitution that serves as the heart of the socialist system of laws and the foundation of socialist rule of law theory, but not as the foundation of socialist democracy.

Where, then, does socialist democracy emerge? The 19th CPC Congress Report constitutes socialist democracy apart from socialist constitutionalism. It emerges as an autonomous system through which the CPC, as a core power, exercises its leadership responsibilities among the representative organs of the masses—and particularly those organs constituted through the state and the United Front parties. It is to the challenge of structuring those relations within the constructs of constitutionalism that China will likely grapple over the coming years.

I have now come to the end of this somewhat complex journey. But complexity is not unexpected in the construction of theories for the organization of powerful states. For all that complication, however, it is relatively easy to build complex, nuanced, self-referencing theory, like some spectacular castle in the sky. The true test of leadership, and legitimacy, however, lies in the ability to actually realize this theory in the operation of the state, that is to embed these ideals into the everyday lives of individuals and institutions. For China, like other states, the distance between the ideals of theory and the realities of practice, can be quite great. How China will choose to bridge those gaps will serve as the true test of the long-term viability of its emerging constitutionalism theory.