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Socialist Constitutionalism in Contemporary China

BAOGANG HE

I. Introduction

This chapter examines the Chinese discourse on a socialist vision of constitutionalism as an alternative to liberal constitutionalism.¹ Chinese scholars have been searching for a new constitutionalism – one which differs from the so-called state-socialism of the Chinese Communist Party (CCP), and at the same time also goes beyond liberal constitutionalism. This ‘socialist constitutionalism’ can be seen as a subversive vision of socialism, one that Chinese scholars are developing to challenge the state’s present political order. Because China’s ideological commitment to socialism predates the constitutionalisation of the Chinese state, heterodox constitutional theorists are able to use this new conceptualisation to construct a new constitutionalist discourse that challenges the authoritarian and developmentalist vision of socialism espoused by China’s ruling party-state apparatus. This new socialist constitutionalism differs from the Chinese state’s authoritarian socialism by focusing on the value of popular sovereignty and civil society. It differs from liberal constitutionalism in its focus on providing effective and responsive governance rather than simply limited and constrained government.

Constitutional reform in China is a top priority in the minds of many Chinese and is sure to rise even further as an increasingly important political agenda over the next two or three decades.² Despite current government censorship on public deliberation over constitutionalism, it persists as a subject of great interest to the Chinese both privately and publicly (e.g., in online debates). Despite the claims of many in the CCP to the contrary,

¹ The chapter draws heavily on my own personal involvement with the development of this school of constitutionalism. I have participated in meetings and conferences and since 2012 have served as a member of the editorial committee of the *Constitutional Socialism Series* [Xianzheng Shehui Zhuyi Luncong].

² See, generally, Stéphanie Balme and Michael W. Dowdle (eds.), *Building Constitutionalism in China* (New York: Palgrave, 2009).

the question is no longer whether China needs constitutionalism, but what kind of constitutionalism it needs.

As to this latter question, there are three schools of thought as to what China's constitution should look like. The *Liberal* school sees constitutionalism as the institutionalisation of checks and balances on both governmental and CCP power. This includes general elections, bicameralism, multi-party competition, and an independent judicial system. As described in the preceding text, the *Socialist* school wants a constitution that retains China's socialist tradition, albeit in a humanist rather than authoritarian guise. On the one hand, it contests the hegemonic constitutional status of the CCP; but on the other hand, it also challenges the narrow focus of liberal constitutionalism on constraining rather than enabling the state.³ A third school is the *Confucian* school. It argues that China's constitutionalism should focus on reifying Confucian values. This includes, for example, the establishment of an unelected 'House of Confucian Scholars' as a deliberative and legislative body.⁴

Despite being censored by the CCP, the discourse on American liberal constitutionalism dominates the public discussion among the Chinese. It is the way in which most Chinese have come to understand constitutionalism. Subsequently, within the more conservative ranks of the CCP, many conflate constitutionalism with liberal constitutionalism. One prominent conservative CCP commentator, for example, asserted that constitutionalism only serves capitalism and the bourgeoisie class.⁵ Such people therefore regard constitutionalism as a dangerous doctrine that at best would only constrain the effectiveness of the CCP, and at worse would cause its downfall.⁶ They consequently reject constitutionalism per se.

Given the scope of the public discourse around liberal constitutionalism, can socialist constitutionalism or Confucian constitutionalism offer possible alternatives? This chapter explores whether Chinese socialist thought can construct an attractive and viable socialist constitutionalism that does indeed go beyond liberal constitutionalism. In part II, it introduces the background in which the socialist constitutional discourse has

³ See Michael Dowdle, 'Of Comparative Constitutional Monocropping: A Reply to Qianfan Zhang', *International Journal of Constitutional Law* 8 (2010): 977–984.

⁴ Jiang Qing, *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future* (ed., Daniel A. Bell and Ruiping Fan; trans., Edmund Ryden) (Princeton University Press, 2012).

⁵ 'Yang Xiaoqing', 'A Comparative Study of Constitutionalism and People's Democratic System', *Hongqiwenqiao* [Red Papers] No. 10 (2013): 4–10.

⁶ Zhen Zhixue, 'Understanding the Essence of "Constitutionalism"', *Dangjian* [Party Construction] No. 6 (2013): 29–31.

taken place. Part III then examines the various ways in which socialist constitutionalism has been conceptualised, contrasting and comparing 'socialist constitutionalism' to 'constitutional socialism', and societal visions of socialist constitutionalism to institutionalised visions of socialist constitutionalism. It will also look at how Chinese socialist-constitutionalist scholars conceptualise the proper role of the CCP in socialist constitutionalism. Part IV examines how socialist constitutionalism addresses the weaknesses found both in China's current 'party-state constitutionalism' and in liberal constitutionalism as it applies to China.

II. The Origin and Development of 'Constitutional Socialism'

Modern China has had a number of constitutions over its almost seven decades of existence. Its first constitution was promulgated in 1954, but was never really put into practice, due to the political disruptions of the Anti-Rightist movement (1957–1959) and then the Great Proletarian Cultural Revolution (1966–1976). A new 'Cultural Revolution constitution' was promulgated in 1975, but with the death of Mao and the ending of the Cultural Revolution one year later, it was quickly superseded by a more conventional, transitional constitution in 1978. The present constitution was enacted in 1982, with significant amendments in 1988 (legitimising the private economy); 1993 (establishing the 'socialist market economy'); 1999 (establishing 'rule of law' as a constitutional principle); and 2004 (strengthening citizens' rights to private property provisions).

Today, the major challenge faced by China lies in how to build a practice of constitutionalism out of the text of the constitution.⁷ This is a common issue throughout socialist Asia: Cambodia, Vietnam, and Laos – in addition to China – have all called for transforming their constitutions into constitutionalism.⁸ As latecomers to the constitutional project, all these countries have the advantage of copying and combining the best provisions from constitutions around the world. For this reason, their constitutions are often longer, more detailed, and relatively better written and well-crafted. But there remain significant obstacles to the actual implementation and enforcement of these constitutions. Effectively, they remain merely a piece of good paperwork.

⁷ See Qianfan Zhang, 'A Constitution without Constitutionalism? The Paths of Constitutional Development in China', *International Journal of Constitutional Law* 8 (2010): 950–976.

⁸ See, generally, Clanspeter Hill and Jors Menzel (eds.), *Constitutionalism in Southeast Asia*. Vol. 2: *Reports on National Constitutions* (Singapore: Konrad-Adenauer-Stiftung and Time Edge Publishing, 2010).

In China, there is significant popular pressure demanding that the constitution not simply be well written but also well put into actual practice.⁹ And China's leaders do fully understand that compliance with constitutional provisions is more likely to create an orderly society. Since the late 1980s, the CCP has stressed the importance of the constitution.¹⁰ This is clearly evident in the speech made by Hu Jintao, then President of the People's Republic of China (PRC) and head of the CCP, on September 15, 2004 to mark the fiftieth anniversary of the founding of the National People's Congress (NPC) (China's national parliament), when he said, 'Governing according to the law first requires governing according to the constitution, ruling according to law first requires ruling according to the constitution.'¹¹ Some years later, Wen Jiabao, who had been the leader of China's executive branch from 2003 to 2013, said in an interview that '[a]ny party, organisation, or individual cannot be above the constitution or the law; the constitution must be the fundamental criteria for conduct.'¹² The current PRC president and party leader, Xi Jinping, has also stressed that the exercise of political power should be in accord with the constitution in a speech celebrating at the sixtieth anniversary of the NPC.¹³

CCP leaders appear to desire a particular kind of constitutional order, similar to the party-dominated constitutionalism found in Malaysia and Singapore. Yet many Chinese scholars pursue a different path – advancing a distinctly socialist vision of constitutionalism that goes beyond both party-dominated constitutionalism and liberal constitutionalism.

The term *socialist constitutionalism* dates at least to 1993. But the term did not gain much traction until 2003,¹⁴ when Professor Hu Xingdou,

⁹ See Michael W. Dowdle, 'Popular Constitutionalism and the Constitutional Meaning of Charter 08', in Jean-Philippe Béja, Fu Hualing, and Eva Pils (eds.), *Liu Xiaobo, Charter 08, and the Challenges of Political Reform in China* (Hong Kong University Press, 2012), 205–228.

¹⁰ See Michael William Dowdle, 'Of Parliaments, Pragmatism and the Dynamics of Constitutional Development: The Curious Case of China', *New York University Journal of International Law and Politics* 35 (2002): 1–200.

¹¹ Sun Shangwu, 'Rally Marks 50th Anniversary of NPC', *China Daily*, Sept. 15, 2004.

¹² Cited in Guo Daohui, 'Realizing Historical Change from Revolutionary Party to Constitutional Party', *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 2 (2011): 169–170.

¹³ See Hou Ruili, 'Rule of Law Takes Center Stage', *China Today* (English edition), Nov. 11, 2014, at 4.

¹⁴ Cf. Michael Dowdle, 'Of "Socialism" and "Socialist" Legal Transformations in China and Vietnam', in John Gillespie and Pip Nicholson (eds.), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Canberra: ANU E Press, 2005), 21–44.

from the Beijing Institute of Technology, made explicit reference to 'Constitutional Socialism',¹⁵ and Professor Jiang Ping, the former president of the University of Politics and Law and one of China's most influential constitutional scholars, subsequently expressed his strong approval of the concept.¹⁶ In 2010, Northwest University Press published a 560,000-character monograph by a young scholar, Hua Bingxiao, titled *Beyond Liberalism: A Discourse on Constitutional Socialism* [*Chaoyue Ziyou Zhuyi: Xianzheng Shehui Zhuyi de Sixiang Yanshuo*].¹⁷

A year later, Hua launched a book series with that same press entitled *Constitutional Socialism* [*Xianzheng Shehui Zhuyi*]. Notably, the editorial board of this series includes two scholars over the age of seventy and five scholars over the age of eighty. This is quite extraordinary. These older scholars shared a genuine faith in socialism as young students, and subsequently suffered great hardship first during the anti-right movement and then during the Cultural Revolution. Given China's constitutional progress in recent years, they have come to view themselves as having a 'second life' – another chance to inject the socialist ideals of their youth into present-day public debate, policy formation, and political reform. They know the inner workings of both the party censorship apparatus and of the policy-making processes, and they have strong networks of academic and political support. They are both well motivated and well equipped to fight for better social justice in China. It is a measure of their integrity that on reaching what many regard as the twilight years they are willing to take up such a struggle.

This new school of socialist constitutionalism had gained significant support from governmental organisations. These organisations provide funding and conference venues to scholars of socialist constitutionalism, and grant or secure publication licences for their writings. In March 2004, Yang Jingyu, then Chairman of the Law Committee of the NPC, made a public proposal that 'China should build up a socialist constitutional state.'¹⁸ Hu Deping, the son of former CCP leader Hu Yaobang, endorsed a conference on socialist constitutionalism in an open speech on December

¹⁵ See Zhang Zhixin, 'An Overview of the Socialist Constitutionalism Study', *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 2 (2011): 148–149.

¹⁶ See also Jiang Ping, 'On Constitutional Socialism', *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 1 (2011): 3–6.

¹⁷ Hua Bingxiao, *Chaoyue Ziyou Zhuyi: Xianzheng Shehui Zhuyi de Sixiang Yanshuo* [Beyond Liberalism: A Discourse on Constitutionalism] (Xian: Northwest University Press, 2011).

¹⁸ Zhao Tao, 'Department of Propaganda and Other Departments Hold a Study Meeting on the Constitution', *Renmin Ribao* [People Daily], March 26, 2004, at 4.

24, 2011.¹⁹ Yu Keping, Director of the Center for Chinese Government Innovations at Beijing University and New World Senior Fellow in the Ash Center for Democratic Governance and Innovation in the John F. Kennedy School of Government at Harvard University, has stated that the debate on socialist constitutionalism is ‘a new form of intellectual liberation’.²⁰

In May 2013, however, a party publication criticised the socialist constitutionalism school as harbouring a hidden agenda to overthrow CCP rule,²¹ and the CCP began strictly censoring any public discussion of constitutionalism, socialist or otherwise. Even this author was requested in October 2015 to delete the word *constitutionalism* from a Chinese article on the status of political studies in China.

III. What Are the Core Values of Socialist Constitutionalism?

The ideal of socialist constitutionalism derives from Chinese practices of popular resistance, citizen engagement, and local self-governing.²² Influential examples include the united investigative group of local parliamentary representatives and political consultative councillors in Wukan, a village in Guandong Province, where villagers protested against corrupt leadership – a practice that is now known as ‘training civil society in plural governance’.²³ The Nanshan District of the Shenzhen Special Economic Zone instituted a similar practice in which local governmental officials, local community representatives, local parliamentary representatives, and local party officials get together to solve local issues.²⁴ Through such devices, civil society can become included in the organisational structure of the state while at the same time remaining functionally separate from the state. In this way, China is a good example of what Gavin Anderson has recently termed ‘incorporating social movements within constitutional discourse’.²⁵

¹⁹ Hu Deping, ‘Study the Urgently Needed Big Topic in Our Time’, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 3–4 (2012): 1–4.

²⁰ Li Yang, ‘The Heated Debate Arising from the Constitutionalist Socialism Study’, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 2 (2011): 164–169.

²¹ Zhen, ‘Understanding the Essence of “Constitutionalism”’, 29–31.

²² See, generally, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Series] 3–4 (2012).

²³ Dai Jietao, ‘The Constitutional Meaning of Wukan Event’, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Series] 3–4 (2012): 505–509.

²⁴ Hua Bingxiao, ‘Local Governance and the Grassroots of Constitutional Socialism’, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Series] 3–4 (2012): 476–485.

²⁵ Gavin Anderson, ‘Societal Constitutionalism, Social Movements, and Constitutionalism from Below’, *Indiana Journal of Global Legal Studies* 20 (2013): 881–906.

Beyond this, however, there are many different visions of what socialist constitutionalism looks like. Jiang Ping, mentioned in the preceding text, sees the heart of constitutional socialism as lying in its promotion of rule of law and democracy within a China's party-state system. The great lesson to be learned from the Soviet Union, he argues, is that *party-dominated* constitutionalism (as contrasted against a *party-led* state) is doomed to failure. China needs to change from party-dominated constitutionalism to a people-dominated constitutionalism in which people will have the right to monitor and help the CCP correct its mistakes.²⁶

Zhou Shuzhi, by contrast, sees four basic principles as lying at the heart of socialist constitutionalism. These are (1) that the constitution is superior to the CCP; (2) that citizen welfare is fundamental; (3) that common prosperity is ensured (including wealth redistribution so that the whole of society is able to share meaningfully in the means of production); and (4) that the 'reform and opening up' initiative initiated by Deng Xiaoping in the late 1970s be extended to include the reform and opening up of public and political institutions. Like Jiang, Zhou also believes that by incorporating a democratic framework, socialist constitutionalism is the only way to regulate the power of the CCP, and thereby safeguard the rights of citizens, the public interest, and the cause of socialism.²⁷

A. '*Socialist Constitutionalism*' or '*Constitutional Socialism*'?

In the past, many scholars distinguished 'socialist constitutionalism' [Shehui Zhuyi Xianzheng] from 'constitutional socialism' [Xianzheng Shehui Zhuyi]. The former, they claim, puts the emphasis on constitutionalism, and thus too diminishes the ultimately socialist goals of the project. Hua Bingxiao, who as we noted is one of the founders of what I am (in English) calling the 'constitutional socialism school', sees 'socialist constitutionalism' as being too restrictive because it subordinates the socialist aspect of the constitution to the larger demands of constitutionalism per se. Like the 'market economy', he argues, constitutionalism is not necessarily 'capitalist', 'socialist', or 'liberal'. It is therefore inappropriate to label 'constitutionalism' with a prefix. 'Constitutional socialism' is a more commanding concept precisely because it describes a political-legal system

²⁶ Jiang Ping, 'On Constitutional Socialism'.

²⁷ Zhou Shuzhi, 'On the Origin of Constitutional Socialism School in China', *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 3–4 (2012).

that is *comprehensively* socialist.²⁸ While he sees the two terms as being inextricably tied together, he favours ‘constitutional socialism’ because it advocates for a more expansive pursuit of socialism, one that is constitutionalist in means but socialist in ends.

But at the end of the day, Hua Bingxiao regards the concepts of socialist constitutionalism and of constitutional socialism as being inexorably linked together. By contrast, Gao Fang, a law professor at People’s University and an expert on the law of the Soviet Union, argues that ‘socialist constitutionalism’ and ‘constitutional socialism’ do not have much in common, and ought not be confused or conflated. According to him, the term *socialist constitutionalism* is a far more accurate understanding of the proposed changes to the constitution in China than *constitutional socialism*. In contrast to Hua, Gao believes that the ultimate focus of the constitutional project should be on constitutionalism – and in particular on constitutional control of the CCP – rather than just on socialism.²⁹

Similarly, Wang Zhanyang, Director of the Political Science Department at the Central Institute of Socialism, also prefers ‘socialist constitutionalism’. Like Gao Fan, he holds that the principal function of constitutionalism lies in its safeguarding of democratic governance, separation of powers, rule of law, human rights and civil rights, and civil society. It is the only way that a state can be made to obey and serve society.³⁰ For this reason, constitutionalism is a prerequisite for rather than an adjunct to the realisation of socialism, which makes socialist constitutionalism a more accurate description of what China ultimately needs from its constitutional system.

By contrast, Professor Tong Zhiwei, formerly dean of the East China University of Politics and Laws and one of China’s most respected constitutional scholars, argues that whether ‘socialist constitution’ or ‘constitutional socialism’ is the correct term is simply a matter of opinion. The key is to ensure that China’s constitutional system is accurately tailored to the distinct, and distinctly socialist, needs of China’s social and political environments. According to him, whether we call it socialist constitutionalism

²⁸ Hua Bingxiao, ‘On the Constructive Reform Path of Constitutional Socialism’, paper presented at the 2011 China’s Reform Summit: Present and Future (Beijing, 2011).

²⁹ Gao Fang, ‘Party-dominated Constitutionalism Is Not the Essence of Constitutionalism’, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 3–4 (2012): 627–633.

³⁰ Wang Zhanyang, ‘What Is Constitutional Socialism?’, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 2 (2011): 470–472.

or constitutional socialism, its principal purpose has to be establishing and protecting rule of law.³¹

Overall, the Chinese scholar community tends to prefer the term *socialist constitutionalism* to *constitutional socialism*. In November 2014, the Chinese Academic Journal Database [Zhongguo Zhiwang] returned 435 listings under a subject search for the term ‘*socialist constitutionalism*’, but only forty-five listings under a subject search for ‘*constitutional socialism*’. A title search for ‘*socialist constitutionalism*’ returned ninety-one items, whereas a title search for ‘*constitutional socialism*’ returned only seven items. And seven PhD dissertations have listed ‘*socialist constitutionalism*’ as one of their key words, whereas none have listed ‘*constitutional socialism*’.

B. *Societal Constitutionalism or Institutionalised Constitutionalism?*

Scholars of socialist constitutionalism also disagree as to what socialist constitutionalism should focus on in restricting state power. Some argue that state power is best restricted by the proper design of political and legal institutions. They argue for what is sometimes called an ‘institutional’ [zhidu] approach to constitutionalism. Others believe that effective constraints on state power must come more organically, from society itself, what they call ‘societal constitutionalism’ [shehui de xianzheng zhuyi]. Of course, these different strategies are not mutually exclusive of one another.

Professor Guo Daohui, a former Vice Chairman of NPC Law Committee and editor-in-chief of the journal *China Law* [Zhongguo Faxue], favours societal constitutionalism over its institutionalised version. Doing so, he reinterprets the idea of ‘socialism’ as a political system in which society reigns supreme, ‘counterbalancing the power of the state’.³² For Guo, this means that the rights and the interests of society need to be core, whereas the needs of the state, government, and institutions should be more peripheral concerns. This comports better with what he sees as the historical processes of societal development, in which society evolved prior to the emergence of the state. The rights of the state in this sense are bestowed by society and the people, not the other way around.

Guo holds that this social power resides in civil society and individual citizens. It exerts external influence on state power, keeping the state free from corruption, in addition to bringing benefit to social

³¹ Tong Zhiwei, ‘The Core Value of Constitutional Socialism Is to the Rule of Law’, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 2 (2011): 478–481.

³² Guo Daohui, ‘An Outline of Constitutional Socialism’, *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 2 (2011): 453–459.

groups – especially disadvantaged groups – that the state might otherwise ignore. Social power promotes equality of opportunity, legitimises the government exercise of its coercive powers, and guarantees the political and economic rights of the citizenry and their social organisations, with the aim of achieving common prosperity for all society.

In Guo's opinion, it misses the point if we only focus our attention on implementing the constitution in governmental institutions. Instead we should look at strengthening civil society and social power vis-à-vis the state. Admittedly, he says, we also need to pay attention to the separating and balancing of state power among state bodies (and China still has a long way to go in this area), but without the participation and support of civil society even this will be very difficult to achieve and implement.

Guo also emphasises the need to uphold human rights and protect constitutional equality. China's official policy of 'social management [shehui guanli]' should mainly rely on the input, support, and power of civil society. In light of this, he is highly critical of China's particular regime of criminal law, which puts the interest of the state and its police above that of the people. For instance, it allows police or other security personnel to legally detain people, for up to seven months, without going through standard warrant procedures or without court authorisation.³³ In addition, it allows people accused of being a 'national threat' or of being engaged in 'terrorist activities' to be detained in secret – that is, without informing family members of the detention.³⁴ He is also critical of the *Decision on Reforming the Identity Law* [Guanyu xiougai shenfenzhenfa de jue ding], issued by the NPC Standing Committee on October 29, 2011, because this decision clearly contained at least two rules that diminished citizens' rights to privacy – one holding that all citizens must have their fingerprints recorded on their identity card and the other expanding police powers to investigate the identities of individuals – without going through any process of public consultation.³⁵

Of course, societal constitutionalism also needs the help of political institutions to be feasible and workable. Hua Bingxiao, for example, while supporting the key ideas of societal constitutionalism, argues that we should nevertheless focus our attention primarily on the institutional needs of constitutionalism. In particular, he proposes:

- Implementing intra-party rule of law and expanding intra-party democracy, by strengthening the status and capacity of the CCP's plenary body,

³³ Id.

³⁴ Id.

³⁵ Guo Daohui, 'The Constitutionality of Social Management and Socialization', *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 3–4 (2012): 462–466.

the National Party Congress, and by strengthen the status and capacity of the CCP's 'judicial organs', i.e., its Central Discipline Inspection Commission;

- Implementing judicial reforms that uphold and guarantee judicial independence by building an independent judicial-organisation system within the CCP;
- Reforming the People's Congress system by expanding people's democracy; that is, by converting the standing committees of People's Congresses into what he calls 'participatory councils', while nevertheless guaranteeing the leadership role of the CCP;
- Reforming the People's Consultative System by promoting the use of democratic consultation, which involves transforming the People's Consultative Congresses at all levels into what he calls 'political deliberative councils [*yizheng yuan*]', whose councillors are nominated and elected by the people.³⁶

Hua Bingxiao's ideas on institutionalised constitutionalism have strong root in local practice. For example, his institutional ideas resemble the ways that Hunan Province has been greatly enhancing 'rule of law' in governmental administration. On April 17, 2008, Hunan Province promulgated the *Hunan Province Administrative Procedure Regulations* [Hunansheng xingzheng chengxu guiding], the first one in China. This was then followed by the *Hunan Province Regulations on Administrative Power* [Hunansheng kuifan xingzheng cai liangquan] and the *Hunan Province Government Service Regulations* [Hunansheng zhengfu fuwu guiding].³⁷ Collectively, these three legislative instruments represented the first time anywhere in China where all aspects of administrative behaviour – including law enforcement, governmental contracting, the issuing of executive legislation and executive rulings, process of mediation and popular consultations, and demands of openness, monitoring, and accountability – have been integrated into a single, coherent, comprehensive regulatory framework. Collectively, they mandate that administrative decision making must go through a process of investigation and collective research, expert discussion, public participation, and other measures that insure social legitimacy and prevent misuse of governmental power.

³⁶ Hua Bingxiao, *Chaoyue Ziyou Zhuyi* [Beyond Liberalism], ch. 8.

³⁷ See, generally, Jiang Haisong and Su Dan, 'The Unique Features of the Rule of Law in Hunan', *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 3–4 (2012): 495–504.

C. *The Role of Chinese Communist Party*

Hua Bingxiao's analysis of the institutional predicates of socialist constitutionalism brings us to one of the primary distinguishing concerns of that school: What is the role of the party in a *constitutional* party-state? When the United States developed its constitution it did not have competing political parties. In fact, James Madison, often regarded as the 'father' of the American Constitution, famously detested the idea of political parties.³⁸ As a result, the American framers could focus on constructing long-term political solutions without having to worry as much about their immediate impact on electoral support. As a matter of contrast, Nepal's present prospects for federalism are being undertaken in a political environment in which three major political parties are locked in intense competition.³⁹ This is making the process of drafting a constitution exceedingly difficult. These parties' competing proposals are directed at securing immediate electoral support, not at the construction of a long-term, sustainable system.

China, in contrast to the political systems of Nepal and the United States, has a single, dominant party – the CCP. All constitutional reform proposals must deal with the role and place of the CCP in the constitutional order, and the nature and role of the CCP therefore is of critical concern in thinking about China's constitutional future. This is a very thorny issue. It is now very difficult for the CCP to return to being a totalitarian party, in the way it was historically conceived. But it is equally problematic for the CCP to introduce pluralist political competitiveness, because of its historical claim to be the best guardian of China's future.⁴⁰ Similarly, the CCP has long claimed to operate within the boundaries set by the Constitution and its laws. But at the same time, it often sees these constraints as unnecessarily impeding its quest for a better China. Such constraints are also structurally incompatible with the CCP's organisational reliance on internal self-discipline on the part of its members rather than on the checks and balances of independent and external enforcement. Nevertheless, at some point, for

³⁸ See, e.g., James Madison, 'Federalist No. 10', in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (ed., Clinton Rossiter) (New York: Signet Classics, 2003), 71–79.

³⁹ See Manjushree Thapa, 'Nepal's Slippery Fast-Track', *The Wire*, June 13, 2015, <http://thewire.in/2015/06/13/nepals-slippery-fast-track/>.

⁴⁰ Cf. Zhu Suli '“Judicial Politics” as State-building', in Stéphanie Balme and Michael W. Dowdle (eds.), *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), 23–36.

the sake of its legitimacy, the CCP will likely have to yield to the provisions and constraints of constitution.

Within the school of socialist constitutionalism, different people offer different approaches to this dilemma. Some think that the party-dominant state can be made compatible with socialist constitutionalism by installing that constitutionalism within the structure of the party, rather than outside the party as is the case with most Western constitutional systems. According to Larry Catá Backer, a Cuban-American legal scholar and professor of law and international affairs at Pennsylvania State University, China's party-state model of constitutionalism is moving toward a legitimately 'constitutional' governance system by apportioning power between the administrative organs of government and the CCP. There are four features of this party-state constitutionalism: (1) a division of citizenship in which social and economic citizenship is held directly by all, but political citizenship held and exercised through the CCP; (2) the subordination of state power and institutions to political rather than legal authority; (3) the institutionalisation and segmentation of the CCP's political authority so that its exercise is beyond the control of any particular clique of individuals, and will therefore be deployed in the service of constitutional values; and (4) a reliance on internal party discipline for the elaboration of rule-of-law values.⁴¹

But when this author gave a brief account of Backer's work on China's party-state constitutionalism at a recent academic conference in China, many Chinese scholars immediately rejected Backer's model of party-state constitutionalism because they thought it augments the power of the CCP without taking into account the complexity of the relationship between the party and the state – a complexity that in their minds imposed foundational limits to the utility of a party-led constitutional system.

Gao Fang, for example, argues that a party-led constitution has nothing to do with the essence of socialist constitutionalism. The main reason for the disintegration of the Soviet Union, he claims, was precisely because it had a party-led constitution rather than a society-led constitutionalism. When excessive power is concentrated in the party, especially in the central party secretariat, the people's freedoms and democratic rights will inevitably become limited and constrained. Gao further claims that

⁴¹ See, generally, Larry Catá Backer, 'The Party as Polity, the Communist Party, and the Chinese Constitutional State: A Theory of State-Party Constitutionalism', *Journal of Chinese and Comparative Law* 16 (2009): 101–164; 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', *Journal of Transnational Law and Contemporary Problems* 19 (2006): 29–102.

party-led constitutionalism, such as that which led to the collapse of the Soviet Union, is actually simply a distorted form of constitutional monarchy.⁴² His historical analysis of the Soviet Union implies that China's socialist constitutionalism should rid itself of one-party domination. The difficult task facing China's constitutional reform, therefore, lies in the political question of how to change China's Soviet model of party-led constitutionalism into a democratic constitutionalism.

Guo Daohui also questions the wisdom of party-led or party-dominated constitutionalism. In 1994, in the first issue of the journal *Legal Studies* [*Fa Xue*], Guo published an article discussing the legal relationship between the CCP's power and power of the NPC. In it, he questions the whether the CCP could be meaningfully described as representing the interests of the country as a whole, and whether its political power correspondingly should be able to override the parliamentary power of the NPC: 'Our party's rule is not from divine right, nor is it settled once and for all', he wrote. In order to guarantee citizens' freedoms, what is now most urgent is that the citizen's rights and interests are constitutionally protected from interference or encroachment by either the state or the party.⁴³

(It should be noted that both Gao Feng and Guo Daohui are more than seventy years old, and are therefore representative of the more radical and much bolder older generation of socialist constitutionalism thinkers discussed.)

As evident from his particular, institutional approach to socialist constitutionalism, Hua Bingxiao, by contrast, defends the necessity of the party leadership of the constitution through his concept of 'new unitary constitutional structure'.⁴⁴ This concept acknowledges that national sovereignty belongs to the people, but also claims that the people need the CCP's leadership and support to exercise that sovereignty. Hua also provides historical justifications for this claim. These include the CCP's role in the success of the national revolution; the CCP's success in bringing national stability to China; and the CCP's success in expanding the economy and improving people's lives.

At the same time, however, Hua also discusses the idea of establishing 'a separation of and balance between sovereign power, party power, government power, and public power'. Sovereign power belongs to the people, as exercised through national, regional, and local parliaments;

⁴² Gao, 'Party-dominated Constitutionalism Is Not the Essence of Constitutionalism'.

⁴³ Guo Daohui, 'Authority, Power, or Rights? A Legal Reflection on the Relationship between the Party and People's Congress', *Legal Studies* [*Fa Xue*] No. 1 (1994): 3–11.

⁴⁴ Hua, *Chaoyue Ziyou Zhuyi* [Beyond Liberalism], 383–412.

party power belongs to the CCP; government power belongs to the 'government', which in the Chinese constitutional system includes both the executive (i.e., the State Council) and the judiciary; and public power belongs to civil society.

Under his system, sovereign power works to check party power, party power works to check government power, and public power works to check both sovereign power and party power. For example, the NPC checks the CCP by its power to pass laws and constitutional amendments to which the CCP must conform (what Hua terms 'ruling-party laws'). The CCP checks the government by nominating persons for high-level constitutional and governmental office and by monitoring their performance, and public power checks sovereign power, party power, and government power through interest group activities and public opinion.⁴⁵

Geng Guojie is another who thinks that party-led constitutionalism can be compatible with socialist constitutionalism. This can be done, he argues, by establishing what he calls a public will-based form of party building.⁴⁶ Similarly, Xu Yaotong advocates an intra-party constitutionalism based on the following principles:

- Implementing open debate within the party: party members should have the right to criticise the party's path, direction, policies, principles, system and actions; and the work of party leaders – imposing one particular point of view on others or on the party as a whole should not be permitted;
- Developing intra-party elections: the nomination process should be improved so that a nomination system includes nominations not simply by party officials, but also by civil society organisations, and by ordinary party members or their representatives;
- Dealing scientifically with party factions: it is and should be strictly forbidden to organise *personalized* factions within the party (i.e., cliques), but *ideological* factions should be permitted, for two reasons. First, they both promote and help regulate the trend of increasingly open policy debate within the CCP. It is completely natural for ideological factions to form under such conditions, and there is no need or reason to stop this from occurring. Secondly, since reform and opening some thirty years ago, some ideological factions, most notably the 'left' and 'new left', have

⁴⁵ See *id.*

⁴⁶ Geng Guojie, 'The Transformation of the Party and the Reconstruction of China's Governance Model', *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 3–4 (2012): 438–460.

for practical reasons been permitted to exist without impeding party effectiveness.⁴⁷

In closing, it might be noted that while the idea of a party-led constitutionalism might sound odd to contemporary ears, there is a strong affinity between this vision of constitutionalism and that of Jean-Jacques Rousseau. Rousseau's vision of constitutionalism revolved around his claim that representative assemblies could be constructed so as to naturally articulate the 'general will' of the polity. Many of the arguments for party-led constitutionalism make a very similar claim, except that they locate the general will in the CCP rather than in the parliament, and the powers they would give to the CCP parallel those Rousseau gave to his parliament. At the same time, however, these advocates seek to reform the CCP so that it is able to functionally replicate a Rousseauian assembly, thus bringing their vision of party-led constitutionalism into general agreement with Rousseau's constitutional vision.

IV. 'Beyond Liberal Constitutionalism': The Different Views

As detailed in part in this volume, many countries are attempting to find ways of overcoming the limit of liberal constitutionalism. Nepal, for example, has to accommodate a diversity of ethnic groups' demands. Nepal's constitutional design therefore has to go beyond the classical version of liberal constitutionalism that does not take into account ethnic identities in its institutional design.⁴⁸ Beyond this, Larry Catá Backer has identified at least three alternatives to liberal constitutionalism: global constitutionalism, Islamic constitutionalism, and party-state constitutionalism.⁴⁹

In China, both the socialist and Confucian schools offer a critique of the dominant liberal constitutionalism. Within socialist constitutionalism, there is a diversity of views as to why and how Chinese constitutional design needs to go beyond liberal constitutionalism.

'Going beyond liberal constitutionalism' refers to a departure from liberalism's straightforward focus on limiting state power, looking in addition

⁴⁷ Xu Yaotong, 'The Issues Concerning Intra-Party Democracy Need to Be Explored,' *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 3–4 (2012): 345–349.

⁴⁸ D. B. Gurung, Narad Bharadwaj, Khagendra Neupane, and Aparajita Acharya, *Towards a Federalized Democratic Nepal* (Kathmandu: Friends for Peace Publishers, 2009).

⁴⁹ Larry Catá Backer, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering,' *Indiana Journal of Global Legal Studies* 16 (2008): 85–172; Backer, 'The Party as Polity'.

at developing more 'societal' forms of constitutionalism;⁵⁰ at paying more attention to the inevitability of party politics; and at exploring more complex divisions of power (often involving the party as well as the government).⁵¹

Wang Zhanyang sees socialist constitutionalism as being close to liberal constitutionalism in most aspects: that is, preventing despotism; implementing universal suffrage; placing political power in the hands of the people; implementing separation of powers; placing the constitution first; and implementing and safeguarding the human rights and civil rights of all members of society. He sees socialist constitutionalism as differing from liberal constitutionalism in its concern for providing middle-class income levels for government workers, so that legislative, executive, and judicial powers are not controlled wholly by the bourgeoisie. He argues that although the democratic ideals of classical Marxism surpass those of classical liberalism in some aspects, they do not replace them completely, but rather combine with them to make what he calls a 'universal liberalism'. Contemporary liberal constitutionalism is not fundamentally opposed to socialism, but rather simply needs to be 'socialised' into socialist constitutionalism.⁵²

Zhou Shuzhi, by contrast, is very critical of the liberal school and searches for a new constitutionalism with Chinese characteristics. He argues that liberalism in China is a school of politics formed by scholars who have studied in the United States. Its supporters openly advocate American forms of economic privatisation, corporatisation, and laissez-faire capitalism. They excessively idealise the American versions of constitutional democracy, separation of powers, and the multi-party political model. They overlook the problems with the American system: that its elections are controlled by money interests; that its political parties are locked into paralysing and short-sighted competition for money and votes; and that its pursuit of international and transnational hegemony contradict its professed liberal ideals. Along these lines, he cites the American response to the global financial crisis – which was caused by American capitalist interests, but during which the America government nevertheless took to protecting these interests above all others. In light of all this, he writes:

⁵⁰ David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge University Press, 1992), 1–15.

⁵¹ Baogang He, 'Intra-Party Democracy: A Revisionist Perspective from Below', in Kjeld Erik Broedsgaard and Yongnian Zheng (eds.), *The Chinese Communist Party in Reform* (London: Routledge, 2006), 192–209.

⁵² Wang Zhanyang, 'Reflections on the Concept of Constitutional Socialism', *Xianzheng Shehui Zhuyi Luncong* [Constitutional Socialism Forum] 3–4 (2012): 590–600.

How can we study this kind of political model? In my view we cannot pursue comprehensive Westernisation. We must maintain the Chinese people's own road of political system reform and create a new kind of political system suitable for China's national conditions.⁵³

Hua Bingxiao also seeks the development of a constitutionalism that goes beyond liberalism. According to him, liberalism treats freedom as the paramount value of constitutionalism and therefore places the individual at the core of constitutional discourse. By contrast, constitutional socialism sees societal development as the paramount value of constitutionalism and therefore focuses its attentions first and foremost on matters of state and social capacity, and on fairness. Instead of focusing on the rights of individuals, it focuses on the rights and capacities of civil society, seeking freedom and democracy in the name of fairness rather than of individual autonomy.⁵⁴

V. Conclusion

Societal constitutionalism has adopted different forms. In Nepal, societal constitutionalism focuses on the constitutional implications of ethnic diversity. In China, it focuses on the constitutional role of civil society.

In this way, the Chinese discourse on socialist constitutionalism opens up a conceptual space in which a variety of constitutional ideals that are not well captured by liberal visions of constitutionalism can be presented and discussed. These include the relationship between the army and the party (China, like other developing socialist countries, has been very successful in avoiding the threat of military coups, compared to the experiences of other kinds of constitutional regimes operating at similar levels of economic development); the relationship between the constitutional state and capitalism; and questions about the fundamental rights of (civil) society in addition to those of individuals.

Constitutional reform proposals from scholars associated with the socialist constitutional school have been submitted to national leaders. But Beijing has neither openly taken up their ideas, nor openly opposed them. In fact, the leadership currently does not permit open public discussions of socialist constitutionalism. But given the modern history of Chinese economic and political reforms, the current censorship on socialist constitutionalism is likely to be temporary. This author is optimistic

⁵³ Zhou, 'Origin of Constitutional Socialism School', 624.

⁵⁴ Hua, *Chaoyue Ziyou Zhuyi* [Beyond Liberalism], ch. 3.

about the future of socialist constitutionalism in China. Despite currently suffering from occasional party criticism and censorship, I believe it will continue to gain traction in the public mind and through that infuse into the CCP political agenda. It may take decades. But enlivening the discourse on socialist constitutionalism now offers a fresh way to not only rethink the current party-state constitutional arrangement, but also to preserve China's rich history and experience (both good and bad) with embedding the values of socialism into the country's constitutional framework.

Perhaps, as suggested by Wang Zhanyang, China will rediscover the true value of Marxism and combine it with liberal constitutionalism to create a new sort of 'mixed constitutionalism'. And indeed, it seems that China has already taken significant steps in this direction. Many socialist constitutionalist arguments contain a core of liberal elements – like democracy and fundamental civil and political rights – on the one hand, while rejecting other liberal elements (like the constitutional elevation of the individual over civil society), on the other. In other words, China is warming up to the idea of constitutional hybridity. It is seeking a constitutional system that incorporates liberal components but is not dominated by them.⁵⁵ The general direction of China's political development in recent decades has been along these lines. And while this mixed system approach has its share of problems, I believe it may nevertheless offer the best means of achieving an effective and humane constitutional governance in China.

⁵⁵ He Baogang, 'Constitutionalism and Transcending the Competition between the Left and the Right', *Jinyang Journal* [Jingyang xuekan] No. 4 (2010): 21–24.