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## A CONSTITUTIONAL COURT FOR CHINA WITHIN THE CHINESE COMMUNIST PARTY: SCIENTIFIC DEVELOPMENT AND THE INSTITUTIONAL ROLE OF THE CCP

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**ABSTRACT:** One of the great current debates in Chinese constitutional law is the role of constitutional review within the Chinese legal-political system. This paper looks at the recent work of Chinese constitutional scholars to analyze the thrust of that debate. It suggests that this modern scholarship rightly focuses on the institutionalization and bureaucratization of politics as a hallmark of the scientific development of rule of law notions within China's political system. This bureaucratization and institutionalization has important ramifications for institutionalizing constitutional interpretation as a viable legitimating tool within this developing Chinese constitutionalism. However, the paper criticizes the current approaches because they tend to focus on state institutions, principally the National People's Congress, as the place from where the constitutional interpretation function ought to be exercised – whether implemented in the form of a court or some other collective. The paper proposes a different focus. Reading modern Chinese constitutionalism holistically supports the idea that the constitutional interpretation function ought to be exercised from the highest level of political authority in China. The Chinese Constitutional framework provides an important insight, one that is worth emphasizing – under the Chinese Constitutional system, the CCP is and ought to be recognized as the authoritative institutional interpreter of the constitution and the constitutional order over which it presides and under which it is bound. The highest institutional body within the Chinese constitutional system is the Chinese Communist Party rather than the state institutions, like the NPC, that have been the object of the current debate. As the institutional embodiment of the highest political authority in the nation, the CCP may be best suited for the role of authoritative interpreter of the constitution. An institutionalization of that function in the form of a constitutional court or similar collective organization within the CCP may thus represent the most appropriate way of further legitimating constitutionalism within the Chinese legal order.

**A Constitutional Court for China Within the Chinese Communist Party:  
Scientific Development and the Institutional Role of the CCP  
Larry Catá Backer**

There are great shifts in constitutional thinking taking place today in China among elite Chinese constitutional scholars. Among this group of elite constitutional law scholars, Ho Jintao's concept of scientific development (科学发展观,) has taken a concrete turn in the advancement of theories of Chinese constitutionalism under its current normative framework.<sup>1</sup> One of the more highly debated issues within Chinese constitutional law circles is constitutional review. The debate centers on the tensions between the current parliamentary model of constitutional review,<sup>2</sup> and Western models that seem to insist on the necessity of an independent judiciary with a constitutionally sanctioned supervisory role over administrative and political organs as a condition precedent to constitutional legitimacy.<sup>3</sup> The Chinese constitutional system is criticized for its lack of a robust system of judicial review because it has not embraced either the judicial or the constitutional court model of judicial review.<sup>4</sup> As one commentator recently noted:

As for judicial review powers, Amended Article 5 of the 1982 Constitution reads, "the People's Republic of China governs the country according to law and makes it a socialist country ruled by law," [and Article 127 provides that the Supreme People's Court is the highest judicial organ. However, constitutionalism in action and text reduced a potential for a rule of law rubric to a non-rule of law rubric, reduced a potential for legal accountability to political accountability. This left China's judicial system without a positive discursive machinery for judicial

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<sup>1</sup> Joseph Fewsmith, *Promoting the Scientific Development Concept*, CHINA LEADERSHIP MONITOR NO. 11 (Hoover Institute, Summer 2004), available at <http://www.hoover.org/publications/clm/issues/2904171.html>.

<sup>2</sup> As one commentator explained:

Although the Constitution is the Supreme law of China, suggesting constitutional supremacy as in Canada, constitutional review has been the responsibility of the NPC and its Standing Committee, suggesting a parliamentary/congressional supremacy as in the U.K. The NPC, a 2975-member body which meets for 2-3 weeks once a year, makes laws and supervises constitutional enforcement and Standing Committee decisions; the Standing Committee, a 175 –member body which meets for a week every other month, interprets the Constitution and national, provincial/autonomous region, and municipal legislation and decisions.

Zhenmin Wang, *Constitutional Review in China: Strengthening Government Accountability and Human Rights*, remarks before the *Asia Pacific Law Association of McGill (APLAM)*, available <http://lsa.mcgill.ca/aplam/Constitutional%20Review%20in%20China2.pdf>. See M. Ulric Killioin, "Building Up" *China's Constitution: Culture, Marxism, and the WTO Rules*, 41 *LOY. L.A. LAW REV.* 563, 578-79 (2008).

<sup>3</sup> Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 *CARDOZO L. REV.* 533 (1993).

<sup>4</sup> Keith J. Hand, *Using Law For A Righteous Purpose: The Sun Zhigang Incident And Evolving Forms Of Citizen Action In The People's Republic Of China*, 45 *COLUM. J. TRANSNAT'L L.* 114 (2006). See also, Thomas E. Kellogg, *Constitutionalism With Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7(2) *ICON (INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW)* 215-246 (2009); Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 *NW. J. INT'L L. & BUS.* 383 (2000).

review: neither constitutional review or constitutional court, nor decentralized (or diffused) or centralized (or concentrated) constitutional review.<sup>5</sup>

For Western observers of Chinese constitutionalism, then, there is no proper form of constitutional (or judicial) review because there is neither an appropriate institutional mechanism for its exercise set out in the Chinese constitution, nor is such a power otherwise vested in a proper court within the organs of state power.

But the notion of judicial review itself veils a certain variation in its application in Western governmental systems.<sup>6</sup> At one extreme is the Anglo-American model—grounded as it is on memorializations of common law principles of “higher law” notions protected by a self constituting and heavily socialized lawyer-judicial class.<sup>7</sup> This model, powerful and stable, tends to be heavily dependent on the cultural framework of customary law systems, and as a result has found few state adherents outside of states with common law traditions. At the other extreme is the political model of constitutional review—ranging from the now discarded French system of review of *lois* by the Constitutional Council<sup>8</sup> to systems in which the legislature or some other political organ is vested with power to interpret the validity of its own actions. Most states, however, have embraced a compromise model of sorts. This model, developed in modern form from the writings of Hans Kelson,<sup>9</sup> posit the creation of a distinct organ of state, the constitutional court, that merges the institutional forms and behavior of judicial institutions, with the limited political task of interpreting the constitution generally and the legitimacy of actions by other state organs (including the judicial organs) and private parties. But even this model has engendered criticism over the last century.<sup>10</sup> Still, eminent Western commentators have suggested even the possibility of a culturally contextualized form of constitutional review that invests some organ or another of the state apparatus with the power to deploy the constitution against all constitutional actors.<sup>11</sup>

The Chinese analysis of constitutionalism and rule of law in the context of the possibility of constitutional review mechanisms is interesting both because of its sensitivity to Western

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<sup>5</sup> M. Ulric Killion, “Building Up” China’s Constitution: Culture, Marxism, And The WTO Rules, 41 LOY. L.A. L. REV. 563, 578-79 (2008).

<sup>6</sup> Larry Catá Backer, *From Constitution to Constitutionalism: A Framework for Analysis of Nationalist and Transnational Constitutionalism*, 113:3 PENN ST. L. REV. (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1272264](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272264).

<sup>7</sup> EDWARD S. CORWIN, *THE ‘HIGHER LAW’ BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Ithaca, NY: Cornell University Press, 1955) (first published 42 Harv. L. Rev. 149-85 (1928-29)).

<sup>8</sup> JOHN BELL, SOPHIE BOYRON AND SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* 139-166 (Oxford: Oxford University Press, 1998).

<sup>9</sup> HANS KELSON, *GENERAL THEORY OF LAW AND STATE* (Trans. Anders Wedberg, New York: Russell & Russell, 1961); Hans Kelson, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 JOURNAL OF LAW & POLITICS 183 (1942).

<sup>10</sup> RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (Cambridge, MA: Harvard University Press, 2004). See also EDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LEGISLATION SOCIALE* (Paris: Marcel Giard et Cie, 1921).

<sup>11</sup> Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 LAW & SOC. INQUIRY 763 (2002) (suggesting the development of constitutional review in Korea and Taiwan as a model).

academic and political criticism and also because of its insistence on following the internal logic of the current governance framework within China.<sup>12</sup> Yet this sensitivity, in turn, creates both a tension and a certain blindness to the possibilities for reform within the current Chinese political framework that are well worth exploring. This is particularly the case with respect to judicial review. Western academic and political theory suggests judicial review as a foundation of legitimate constitutionalism—by which is meant both a state organ with authority to legitimately interpret the meaning of the constitution (as a system of process and substantive values norms), and to determine whether any action by the state apparatus (or others) exceeds their authority to act under that framework.

This short essay draws on recent work of three Chinese scholars to sketch the contours of the current foundation of one facet of the internal Chinese debate on judicial review. For that purpose it draws on the work of three contemporary scholars, Tong Zhiwei<sup>13</sup> (East China University of Law and Political Science) (2008), Dong Heping<sup>14</sup> (North-West University of Political Science and Law) (2008), and Hu Jinguang<sup>15</sup> (School of Law, Renmin University) (2008), research papers they presented at the “Conference on Constitutionalism in China in the Past 100 Years and Its Future, organized by the School of Law, City University of Hong Kong Centre for Chinese and Comparative Law and its director Lin Feng. That debate evidences a recognition of the importance of authoritative and legitimate mechanisms for constitutional interpretation within the emerging rule of law framework of Chinese constitutionalism, understood as the framework both for constituting a government (and its organs) and for organizing the political community through the Chinese Communist Party (“CCP”).

The essay then posits that the difficulty of constitutional review in China is rooted in an insistence on seeking it in the wrong place. Constitutional review is possible within China, and on Chinese terms, but only within the highest organs of power under the Chinese constitutional system. Those organs are not located within the state apparatus, but rather are vested by the Chinese constitution itself in the CCP. This insight provides a foundation for a pragmatic and Chinese basis for resolution of the tensions between the current governance framework in China and the organization of judicial review that permits a continued adherence to current political norms. Specifically, it proposes that for judicial review of constitutional questions to be successfully implemented in China judicial review ought to be vested in a Constitutional Court as an organ of political power located within the CCP, rather than as part of the state apparatus. But this ought to be a constitutional court with French sensibilities—where a written constitution

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<sup>12</sup> Zhu Soli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533 (2007).

<sup>13</sup> Tong Zhiwei, *Assessment of Short-Term Trends in China's Constitutional Development*, Presentation Conference on Constitutionalism in China in the Past 100 Years and Its Future, School of Law, City University of Hong Kong, Centre for Chinese and Comparative Law, October 18, 2008.

<sup>14</sup> Dong Heping, *The Route and Procedure for Constitutional Reform in China*, Presentation Conference on Constitutionalism in China in the Past 100 Years and Its Future, School of Law, City University of Hong Kong, Centre for Chinese and Comparative Law, October 18, 2008.

<sup>15</sup> Hu Jinguang, *Evolution and Challenge of Review of Public Authority in China*, Presentation Conference on Constitutionalism in China in the Past 100 Years and Its Future, School of Law, City University of Hong Kong, Centre for Chinese and Comparative Law, October 18, 2008.

was regarded “as a means to enshrine and control political reality.”<sup>16</sup> In this way the tension between state apparatus, the position of the CCP in governance over the state apparatus, and the need for rule of law based institutionalism might be resolved within a rule of law framework.

More importantly this approach will institutionalize the actual positions of the CCP as the party in power within a constitutionalist system. Justifying the power of the CPP would fold the current oversight role of the CCP within the constitutional framework of the current constitution, provide an institutional framework for the assertion of the CCP’s authority to determine political values, create a mechanism for transparent and regularized political expression, and institutionalize relations between the state apparatus and the CCP as party in power. At the same time, justifying the political role of the CCP at the constitutional level would not necessarily limit the CCP’s political role generally as the party in power.

### **I. Internal Chinese Debate: A Snapshot Glimpse.**

“There have been some mixed signs over the last decade that Beijing was moving in the direction of making some form of constitutional review a reality. In 2000, the NPC adopted the PRC Legislation Law, which provided citizens the specific right to “propose” that the Standing Committee review administrative regulations and rules that are deemed to conflict with the Constitution or national law.”<sup>17</sup> Yet this may suggest more about the foreign academics who watch China, and who cannot conceive of legitimate constitutional systems in the absence of some sort of constitutional review mechanism, than it does about the Chinese themselves.<sup>18</sup> Still, there is some movement toward consideration of mechanisms for disciplining constitutional discourse within Chinese academic circles.

Three contemporary Chinese constitutional scholars nicely frame the debate about constitutional review in Chinese. That debate is possible now because of the development of constitutionalism in China.<sup>19</sup> That variant of constitutionalism is grounded on rule of law in both of its aspects—process and values rule of law.<sup>20</sup> But constitutional review in China, and the debate about it, appears to be split in two. The more lively debate is focused on the construction

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<sup>16</sup> JOHN BELL, SOPHIE BOYRON AND SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* 139-166, 139 (Oxford: Oxford University Press, 1998).

<sup>17</sup> Thomas E. Kellogg and Keith Hand, *NPCSC: The Vanguard of China’s Constitution?*, 8(2) CHINA BRIEF (Feb. 4, 2008), available [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews\[tt\\_news\]=4666](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=4666).

<sup>18</sup> Cf. Michael W. Dowdle, *Dacey, Lubman, and Bagehot: Chinese Law in the Common Law Mind*, 19 COLUM.J. ASIAN L. 72, 78 (2005) (“Similarly, the fact that American legal academia has unexpectedly embraced Chinese legal studies is interesting not so much for what it says about scholars of Chinese law as for what it says about American legal academia.” Id.).

<sup>19</sup> 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) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929636](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929636) or [http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work\\_files/16TransntLL%26ContempPrblms29%282006%29ChineseConst.pdf](http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/16TransntLL%26ContempPrblms29%282006%29ChineseConst.pdf)).

<sup>20</sup> Michael William Dowdle, *Of Parliaments, Pragmatism, And The Dynamics Of Constitutional Development: The Curious Case Of China*, 35 N.Y.U. J. Int’l L. & Pol. 1 (2002). RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* (Cambridge: Cambridge University Press, 2002).

of systems of judicial review of administrative action and even action by state organs. Less often discussed is the idea of institutionalizing a system of constitutional review in the sense of developing a set of doctrines and ideas on which an understanding of constitutional law may be grounded beyond its application to state organs.<sup>21</sup>

Though the three views present substantially different solutions to the problems of institutionalization they share an important element in common: the three evidence the strength of the idea of the need for and the establishment of a framework for the *bureaucratization of politics in China*. And the push to bureaucratization fits in nicely both with the Three Represents principles of Jiang Zemin<sup>22</sup> and Hu Jintao's Harmonious Society campaign. This focus on bureaucratization is a natural extension of some of the most important applications of Hu Jintao's concept of scientific development, in the form of an institutionalization of governance generally within China. "To thoroughly apply the Scientific Outlook on Development, we must work energetically to build a harmonious socialist society. Social harmony is an essential attribute of socialism with Chinese characteristics."<sup>23</sup> The concept of scientific development is intimately tied to the project of institution building and stability within all aspects of Chinese governance—public and private. "Scientific development and social harmony are integral to each other and neither is possible without the other." *Id.* It is also a long term project that involves all aspects of political organization. "Building a harmonious socialist society is a historical mission throughout the cause of socialism with Chinese characteristics, as well as a historical process and the social outcome of correctly handling various social problems on the basis of development."<sup>24</sup>

Professor Tong Zhiweig, East China University of Law and Political Science suggests the difficulties of judicial review. He argues that judicial review is impaired by the relationships of the judiciary to the CCP. He would limit the political intervention of the CCP to "sensitive" cases and pointed to the 1954 Chinese Constitution as a stronger basis for strengthening the judiciary. The object is to increase the rate of a judiciary firmly entrenched in the state apparatus. This might present a fair reading of Hu Jintao's suggestion of the nature of scientific development in the context of state governance construction. "We must uphold and improve the system of people's congresses, the system of multiparty cooperation and political consultation under the leadership of the CPC, the system of regional ethnic autonomy, and the system of self-governance at the primary level of society. All this will promote continuous self-improvement and development of the socialist political system." For Professor Tong, then, the framework of analysis can be appropriately limited to the oversight of the actions of the state organs. Judicial

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<sup>21</sup> Larry Catá Backer, *From Constitution to Constitutionalism: A Framework for Analysis of Nationalist and Transnational Constitutionalism*, 113:3 PENN ST. L. REV (2009) (available [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1272264](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272264)).

<sup>22</sup> 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) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929636](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929636) or [http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work\\_files/16TransntLL%26Con-tempPrblms29%282006%29ChineseConst.pdf](http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/16TransntLL%26Con-tempPrblms29%282006%29ChineseConst.pdf)).

<sup>23</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part VI.

<sup>24</sup> *Id.*

review is meant to serve as a mechanism for the self-discipline of state organs within the limits of their functional role within Chinese constitutionalism. But that role is limited the way the authority of state organs are limited. That is, within the limited role accorded to state organs under the Chinese constitution, there ought to be a judicial power co-extensive with that power the object of which is to ensure a proper use of power. But the sovereign power, the political power of the nation is greater than the power accorded state organs under the Constitution. The CCP, as the vanguard party in power is accorded a constitutional role beyond that of the state organs. Yet the judicial power as constructed by Professor Tong neither reaches that power nor includes it within a system of institutionalized self-discipline grounded in the need to adhere to the party line. This is thus administrative review of a French sort, but not necessarily a proposal for an institutionalized constitutional review system.

In contrast Professor Dong Heping of the North-West University of Political Science and Law would look elsewhere for a constitutional review framework. For Professor Dong, the start of the analysis is a core principle of Chinese constitutionalism—scientific development and harmonious society.<sup>25</sup> As such, the appropriate core constitutional focus is the welfare of the people. But the implementation of that welfare is viewed as the responsibility of the state organs, and principally the National People's Congress. As such, he advocates a stronger role for the NPC, and indeed he suggests that the NPC might even serve to ensure CCP compliance with its own norms. For Professor Dong, reflecting a strain of Chinese Constitutionalism going back to the early decades of the establishment of the People's Republic, the ideal is a state structure in which the CCP is subsumed within the system of state organs and together with them comprise the totality of power within the Chinese state. Over all of this system it is possible to erect an institution that would discipline the political and legal framework enshrined in the constitution. This is a view shared by others.<sup>26</sup> To that extent, it appears that Professor Dong might favor an institution sensitive to political realities, for example one recognizing the different forms of authority vested in the CCP, the NPC and the other organs of state, but all subsumed within the constitutional system. In effect, then, is the need to establish a constitutional court on Kelson's model. Yet the CCP has strongly rejected this approach in the past.<sup>27</sup>

This last point is taken up by Professor Hu Jinguang, of the Renmin University School of Law. He focuses on a critical issue of the nature of judicial review. Professor Hu correctly distinguishes between judicial review and constitutional review. He, too, focuses on the principles of scientific development—in his case focusing on the centrality of economics as foundational framework for state organization. Professor Hu suggests that a central element of state power is state power over the economy. That is sensible in light of the Marxist Leninist emphasis on economics as *urtext* for politics and social order. A consequence (also consist with

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<sup>25</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part III.

<sup>26</sup> Lin Laifan, *Xianfa buneng quanran meiya* [The Constitution Can't Be Toothless Forever], *Faxüe* [Legal Sci.], No. 6, 2004, at 90. Teng Biao, *Jihuo xianfa* [Activating the Constitution], July 7, 2004, [http://www.boxun.com/hero/tengb/18\\_1.shtml](http://www.boxun.com/hero/tengb/18_1.shtml).

<sup>27</sup> *Beijing Rules Out Constitutional Court To Protect Human Rights And Private Property*, Asia News.it, May 22, 2004, available at <http://www.asianews.it/index.php?art=840&l=en>.

Marxist Leninist theory) is a necessary focus of state organs on the executive power, and in a rule of law context, on administrative law. In that context, the constitution vests the National People's Congress Standing Committee as the supreme organ of constitutional interpretation for administrative law and its application by state organs. Yet the movement since 1979 has been on shrinking the ambit of direct involvement of government organs in economic direction as the movement to private economic activity advanced. Still, while the breadth of authority of state organs is shrinking, the public authority over all activity should be growing. That power is founded on the role of the CCP as the vanguard party. In a sense, then, the extent of political authority contemplated under the Chinese Constitution does not give rise to an organ of state with an interpretive power of equal breadth outside the CCP.

The approaches of these three eminent authorities are firmly grounded in an understanding of current constitutional realities. Principally among them are the notions that the state organs do not define the entirety of national power, that the constitution distinguishes between state power (vested in the state organs) and national political power (vested in the CCP), that while the elaboration of state power may be bureaucratized within well defined institution the elaboration of political power remains outside either institution or bureaucracy, that the institutionalization of the CCP's own governance is internal to it and beyond the direct regulatory power of the constitution. It suggests a distinction between the framework for the constitution of state organs—subject to constitutional constraints and the locus of law—and that of the CCP and its own internal governance (and external power). The latter, it seems, is subject to constitutional liberty grounded in its constitutional role as party in power. As such, the constitution appears to favor a two paths approach based on the distinctive roles of state and party apparatus.

The discourse is developed under an ambiguity in the current constitution. The Constitution vests the Standing Committee of the National People's Congress with power to interpret the Constitution.<sup>28</sup> What this means in practical terms has caused some debate within China. Part of that debate is fueled by the differences between this form of constitutional vesting of interpretive power and that generally found in the constitutions of other states. And, of course, there is always the suspicion that there is no difference between modern Chinese constitutionalism and the gesture constitutionalism of the former Soviet Union. At least three alternatives have been proposed. The first suggests the establishment of a constitutional oversight organ within the NPC. The other suggests the extension of a constitutional review power in the Supreme People's Court.<sup>29</sup> The later proposal is grounded in a purported application of separation of powers principles to the Chinese constitution. But while it might be clear that the legislature is hardly in the best position to review the legitimacy of its acts, it is not clear why the judiciary ought to be assigned the task under a Chinese constitutional system that does not adopt Western separation of powers principles. Moreover, scholars have suggested the creation of a constitutional court as well, among them, Li Zhong.<sup>30</sup>

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<sup>28</sup> Zhong Hua Ren Min Gong He Guo Xian Fa § 67(1) (The Constitution of P.R. China).

<sup>29</sup> JIANG JINSONG, THE NATIONAL PEOPLE'S CONGRESS OF CHINA, 281-89 (Beijing: Foreign Language Press, 2003).

<sup>30</sup> *Id.* at 283-84.

These lacunae and ambiguities help explain the decisive rejection of a constitutional court model for China by the authorities in 2004. At the time of its rejection, Zhang Chunsheng, from the Law Committee of the 10th National People's Congress, explained the reasons a constitutional court was not under consideration.

"The system in China is different from that in America or European countries," he said. "They have the division of three powers - constitutional, legislative and executive - so their constitutional courts have the right to supervise the executive and legislative bodies." But on the mainland, only the National People's Congress and its Standing Committee had the legal entitlement to supervise the implementation of the constitution. "So we cannot put in place a constitutional court or supreme court to supervise the implementation of the law," he said.<sup>31</sup>

Yet difference among legal and constitutional systems, standing alone, is hardly an adequate reason for rejecting a judicial model for an organ charged with constitutional interpretation. Nor is recourse to the constitutional assignment of a review power in the National People's Congress necessarily an impediment under the constitution when read on the basis of its framework principles.

To the extent that the NPC is the supreme organ of state power, with constitutional authority at its level of constitutional authority, that authority remains inadequate to review any greater power. This remains an open question in China. Some scholars believe that under the constitutional system the CCP must be under the constitutional review authority of the NPC. "Cai Dingjian further argues that Communist Party is the only party in power and participates directly in decision making and management of state affairs. Therefore the Communist Party must respect the law and put itself under the oversight of the people's congresses."<sup>32</sup> And, indeed, an insistence, following Western patterns, of seeking to locate review powers within the state apparatus marks much of the current movement for constitutional review within China. The efforts to force the hand of the NPC over the Sun Zhigang incident nicely evidence the application of this view in practice among Chinese scholars and activists.

Chinese legal reformers viewed the controversy over Sun Zhigang's death as an opportunity both to challenge the C&R system and to establish a precedent for constitutional review in China. . . . Legal scholars hoped that by filing the Review Petition, they would breathe life into this mechanism. [FN42] "This is not aimed just at the Sun Zhigang case," said Xu Zhiyong. "We are concerned about the system itself. A mechanism for reviewing violations of the Constitution should be established and initiated in order to root out abuses and innovate continually." Scholars expressed strong support for the Review Petition and concluded that its filing was as significant as the Sun Zhigang case itself.<sup>33</sup>

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<sup>31</sup> *Beijing Rules Out Constitutional Court To Protect Human Rights And Private Property*, Asia News.it, May 22, 2004, available at <http://www.asianews.it/index.php?art=840&l=en>.

<sup>32</sup> JIANG JINSONG, *THE NATIONAL PEOPLE'S CONGRESS OF CHINA*, 256 (Beijing: Foreign Language Press, 2003).

<sup>33</sup> Keith J. Hand, *Using Law For A Righteous Purpose: The Sun Zhigang Incident And Evolving Forms Of Citizen Action In The People's Republic Of China* 45 COLUM. J. TRANSNAT'L L. 114, 124-25 (2006).

But importantly, others within China suggest that the NPC's constitutional oversight is limited to equal or inferior organs and that, as a consequence such oversight cannot include the CCP. "First, the Constitution provides for the Communist leadership over the state. Second, the Constitution expressly lists those under the NPC's oversight and does not include the Communist Party."<sup>34</sup>

The consequences are easy to discern: institutionalization of a judicial function must necessarily remain tied to the administrative aspects of governance. But such a judicial function cannot be understood as including a power sufficient under the current constitutional framework to support *judicial* review of constitutive elements of the constitution itself. That function lies outside of the administrative apparatus that is the sum of the National People's Congress system. Constitutional review beyond a power to determine whether administrative actions fall within the powers vested in them under the constitution implicates the extent of the authority of the state apparatus itself. Under the Chinese model, that sort of analytical and interpretive authority cannot lie within that state apparatus itself—but must lie elsewhere. As such, this model vests power in substantial contrast to the patterns of power inscribed in the American constitution that supported both the notion of judicial supremacy within the scope of its function and the possibility of characterizing the interpretation/review function as historically judicial.<sup>35</sup> Despite efforts to the contrary<sup>36</sup>, Chinese constitutionalism is unlikely to readily incorporate any form of judicial model of constitutional review that is embedded in the state apparatus. Such a pattern is essentially incomprehensible in Chinese constitutionalist terms, and inimical to the basic postulates of the political organization of Chinese in which the state apparatus is assigned an important but not all encompassing role. It follows that the focus on an amorphously constituted power of constitutional interpretation vested in an organ of state power can lead to a view that constitutional review, as such, and perhaps the constitution itself, is an embodiment of principle rather than a bureaucratization and institutionalization of state and political power.

But Chinese scholars may not believe that.<sup>37</sup> The discussion of constitutional review, then, can best be understood in contemporary China as a search for systems of testing disputes over legal rights derived from the constitution. Constitutional law, as such, remains an essentially political task, and as such, part of the political tasks of the vanguard party within the framework of its own internal institutional systems. It is possible to develop systems that test state organ's fidelity to law, but not systems that reduce the power of the CCP to serve as the embodiment of the political will of the people and of the values enshrined in the constitution. There is the great difficulty of Chinese constitutionalism—the incorporation of the CCP within the framework in a way that realistically acknowledges its position within the hierarchy of constitutional actors. As long as the focus remains of the state and its organs, constitutionalism will remain confused. It is to the issue of the CCP within the Chinese constitutional state and its relevance for constitutional review debates that the essay turns next.

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<sup>34</sup> *Id.*

<sup>35</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>36</sup> Tahirih V. Lee, *Exporting Judicial Review From The United States To China*, 19 COLUM. J. ASIAN L. 152 (2005).

<sup>37</sup> See Zhu Soli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533 (2007).

## II. The Bureaucratization of Constitutional Interpretation in the CCP in the Form of a Constitutional Court?

Chinese constitutionalist discourse focuses its bureaucratization process discourse on the organs of state power, and on administrative regulation. And there is a sound theoretical foundation for that limited discourse. For all that I believe this approach is too self-limiting. It may be possible to justify a system of institutionalized constitutional review within the strictures and value systems of the Chinese Constitution and its political framework without distorting that system. For that purpose it is necessary to apply the higher law principles of constitutionalism and its elaboration at the appropriate level of national governance. That level is not within the state apparatus, but within the highest institutional expression of constitutionally sanctioned political power in China—the organs of the CCP itself.<sup>38</sup> “The Chinese state is an aggregate, a fusion of outward and inward institutional manifestations of power, of CCP and State within China.”<sup>39</sup> I agree with Jiang that it cannot be denied that “the Constitution is the paramount criterion to be cited in overseeing the other constitutional branches.”<sup>40</sup> However, the consequence of this understanding is not necessarily the constitution of the organs of the state apparatus as either the highest organs of national power, or the supreme institutional manifestation of sovereign power under the Constitution. Instead, I believe that the Constitution itself vest that position and authority in the CCP. To that extent, the CCP, rather than the inferior organs of state power, may be the appropriate place under the constitution, to vest paramount constitutional review as well as the elaboration of constitutional values.<sup>41</sup>

Within China, of course, the ubiquitousness of the CCP is hardly worth comment. And that is where the difficulties come for outsiders seeking to engage Chinese constitutionalism. Zhu Suli noted accurately that

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 of the "party-state," in practice, the CCP inherited the political tradition, initiated by Sun Yat-sen<sup>5</sup> 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.<sup>42</sup>

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<sup>38</sup> Larry Catá Backer, *The Communist Party and the Constitutional State: A Theory of Constitutionalism and the Party-State*, JOURNAL OF CHINESE AND COMPARATIVE LAW. (2009).

<sup>39</sup> 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, 60 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929636](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929636) or [http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work\\_files/16TransntLL%26Con tempPrblms29%282006%29ChineseConst.pdf](http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/16TransntLL%26Con tempPrblms29%282006%29ChineseConst.pdf).

<sup>40</sup> JIANG JINSONG, THE NATIONAL PEOPLE'S CONGRESS OF CHINA, 257 (Beijing: Foreign Language Press, 2003).

<sup>41</sup> Larry Catá Backer, *The Communist Party and the Constitutional State: A Theory of Constitutionalism and the Party-State*, JOURNAL OF CHINESE AND COMPARATIVE LAW. (2009).

<sup>42</sup> Zhu Soli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 535 (2007).

Zhu accurately understands the nature of political—and now owing to the constitutional development in China, the legal—hierarchy and its implications for the development of a legal system founded on the rule of law. “In contemporary China, nearly every political force has either been integrated into the CCP, or, as in the case of former and present capitalists, counter-revolutionaries, bad elements, and rightists during the Cultural Revolution (1966-1976), denied political expression.”<sup>43</sup> The CCP is an integral part of the governance structure of the Chinese nation. Its role is not merely that of a factional party on the Western model. This role has been acknowledged within China as a framework for understanding the development of democratic institutions.<sup>44</sup>

The institutional role of the CCP has been increasingly elaborated in a constitutionalist sense since the establishment of the principles of Three Represents within the substantive framework of Chinese constitutionalism. “The Three Represents suggests that in China, the CCP exists in two guises simultaneously. First, the CCP serves as a supreme political party. Second, the CCP serves as the paramount institution of state power; it is both a political (the Party) and governance (the State) entity.”<sup>45</sup> Usually dismissed as mere ideological propaganda in the West where different patterns of discourse prevail, these ideas are meant to provide in condensed form, a fundamental understanding of a legal order in which the organs of government do not sit at the very top of the political order, but instead serves as an inferior component of a greater enterprise. This is an idea that is both frightening and largely incomprehensible in the West. And, as incomprehensible, is dismissed as unworthy of study.

But the Three Represents and the principles of scientific development also point to a form of democratization within Chinese rule of law principles. Its origins can be traced to Deng Xiaoping theory “Deng was interested in defining a middle path, using ‘reform and opening up’ to oppose ‘leftism’ and using the ‘four cardinal principles’ to oppose ‘bourgeois liberalization.’”<sup>46</sup> That middle path produced a system in which state organs would be given substantial administrative authority, but political authority, the framework for the political system, would be retained by the higher organs of the CCP, all under the constitution.<sup>47</sup> Zhu also nicely understands the implications for democratic governance and the development of democratic principles contextually applied. “[I]n the more than two decades since China began its reform and “opening up” in 1978, and especially following the inclusion of the concept of the

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<sup>43</sup> *Id.* at 538.

<sup>44</sup> Lin Feng, *Constitutionalism in China Under the Leadership of the CPC: Is it Possible?*, October 18, 2008 (A Paper delivered at the Conference on Constitutionalism in China in the Past 100 Years and Its Future, School of Law, City University of Hong Kong, Centre for Chinese and Comparative Law).

<sup>45</sup> 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, 72 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929636](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929636) or [http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work\\_files/16TransntLL%26Con tempPrblms29%282006%29ChineseConst.pdf](http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/16TransntLL%26Con tempPrblms29%282006%29ChineseConst.pdf).

<sup>46</sup> Joseph Fewsmith, *Promoting the Scientific Development Concept*, CHINA LEADERSHIP MONITOR No. 11, 27 (Hoover Institute, Summer 2004), available at <http://www.hoover.org/publications/clm/issues/2904171.html>.

<sup>47</sup> Larry Catá Backer, *The Communist Party and the Constitutional State: A Theory of Constitutionalism and the Party-State*, JOURNAL OF CHINESE AND COMPARATIVE LAW. (2009).

"the three representatives" in the Party's and PRC's constitutions, the CCP has pursued becoming a governing party that represents the basic interests of the greatest number of people and that has daily strengthened its ability as a governing party."<sup>48</sup>

The current scholarship on constitutional institutionalization in China thus continues to reflect the fundamental difficulties of fashioning a bureaucratization of politics with Chinese characteristics true to the values framework of the Chinese national political system, where the CCP thus represents the whole of the political power, and political citizenship within China.<sup>49</sup> And essentially the problem reduces itself to the mechanics of legitimating rule of law constitutionalism while preserving the vanguard status of the CCP. "The problem of the rule of law in China can be understood as concentrating on the resolution of the questions of the long-term fundamental role of the CCP in China, and of the relationship between the CCP and the State apparatus it has created—and now dominates—in the service of the masses."<sup>50</sup> The difficulty flows from a conceptual error—the attempt to bring over from Western political and constitutional theory the idea that there is a necessary equation between state power and law. The Chinese have suggested a different approach, one in which the state authority is subject to a higher law power—the CCP—itsself the focus of the obligation to develop democratic principles and representative policies within its established values framework.<sup>51</sup>

Recent developments in Chinese constitutional theory have made clear that the CCP is not above the great governance principles of the Three Represents or Scientific Development through construction of a harmonious society. As an American commentary noted at the time, "Chinese scholars often worry that the country suffers from an eroding system of beliefs and a lack of common aspirations and values. To help build a new values system, the party's objective "is to try to perfect the socialist democratic legal system," one in which "the rule of law is to be carried out completely, and people's interests and rights are to be respected and guaranteed," the plenary statement said."<sup>52</sup>

Hu Jintao made that very clear as well. "To thoroughly apply the Scientific Outlook on Development, we must strengthen our efforts to build the Party in earnest. As is required by the Party's lofty mission of governing and rejuvenating the nation, our efforts to improve the Party's governance capability and maintain and develop its vanguard nature must serve our task of directing scientific development, promoting social harmony, guiding development and progress

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<sup>48</sup> Zhu Soli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 538 (2007).

<sup>49</sup> Larry Catá Backer, *The Communist Party and the Constitutional State: A Theory of Constitutionalism and the Party-State*, JOURNAL OF CHINESE AND COMPARATIVE LAW. (2009).

<sup>50</sup> 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, 73 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929636](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929636) or [http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work\\_files/16TransntIL%26Con tempPrblms29%282006%29ChineseConst.pdf](http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/16TransntIL%26Con tempPrblms29%282006%29ChineseConst.pdf)).

<sup>51</sup> Larry Catá Backer, *The Communist Party and the Constitutional State: A Theory of Constitutionalism and the Party-State*, JOURNAL OF CHINESE AND COMPARATIVE LAW. (2009).

<sup>52</sup> Maureen Fan, *China's Party Leadership Declares New Priority: 'Harmonious Society': Doctrine Proposed By President Hu Formally Endorsed*, The Washington Post, October 12, 2006, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101610.html>).

in China and better representing and realizing the fundamental interests of the overwhelming majority of the people.”<sup>53</sup> And this involvement has found expression in the structure of Party discipline, especially in connection with the campaigns against corruption. As Fewsmith nicely explains,

“Efforts to institutionalize procedures—and enhance the ‘governing ability’ of the CCP—were extended to the party in February 2004 with the promulgation of the ‘Regulations of the Communist Party of China of Inner-Party Supervision (Trial)’ and the ‘Communist Party of China Regulation on Disciplinary Measures.’ The regulations try to institutionalize several procedures of inner-party life, including requiring voting (but not necessarily secret voting) for major decisions (Article 13) and requiring party standing committees and discipline inspection commissions at all levels to make annual reports on their activities to the relevant plenary sessions (Article 19).<sup>54</sup>

It is clear, then, that one of the great successes of the Three Represents theory, as refined by the principles of scientific development and the objective of building a harmonious society has produced a set of powerful values in China—values with political effect, core, constitutional values.

It is also clear that bureaucratization is meant to encompass not merely the elements of state organization but also the overarching authority of the CCP within the Chinese constitutional system. As Hu Jintao noted, under the constitutional system, the CCP must:

Improve the mechanism of restraint and oversight and ensure that power entrusted by the people is always exercised in their interests. Power must be exercised in the sunshine to ensure that it is exercised correctly. We must have institutions to govern power, work and personnel, and establish a sound structure of power and a mechanism for its operation in which decision-making, enforcement and oversight powers check each other and function in coordination. We will improve organic laws and rules of procedure to ensure that state organs exercise their powers and perform their functions and responsibilities within their statutory jurisdiction and in accordance with legal procedures. We will improve the open administrative system in various areas and increase transparency in government work, thus enhancing the people's trust in the government.<sup>55</sup>

The suggestion is clear—as a constitutive and vanguard element of Chinese Constitutionalism, the CCP has a vital institutional role to play within the constitutional system. That role is

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<sup>53</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part III.

<sup>54</sup> Joseph Fewsmith, *Promoting the Scientific Development Concept*, CHINA LEADERSHIP MONITOR No. 11, 5 (Hoover Institute, Summer 2004), available at <http://www.hoover.org/publications/clm/issues/2904171.html>.

<sup>55</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part VI, 6.

grounded in bureaucratization and institutionalization of rule of law governance. "We will focus on tightening oversight over leading cadres and especially principal ones, over the management and use of human, financial and material resources, and over key positions. We will improve the systems of inquiries, accountability, economic responsibility auditing, resignation and recall. We will implement the intra-Party oversight regulations, strengthen democratic oversight and give scope to the oversight role of public opinion, pooling forces of oversight from all sides to make it more effective."<sup>56</sup> The role is political—but its expression can be institutionalized. And maybe that institutionalization is necessary to continue to develop both CCP and State: from a system in which the CCP represents a collection of individuals who together comprise a revolutionary vanguard (to which political power over the state and its organs might be appropriate) to a system in which the CCP becomes the source and protector of the core values of Chinese society to which an ever broadening base subscribes. That is, the CCP moves from a revolutionary vanguard party outside the system, to become the system itself—the values and principles that ground the construction and operation of all organs of political power in the nation.<sup>57</sup>

For that purpose, the CCP cannot continue to rely on the forms and behaviors of the time it sat outside the state. As the guardian of national values—now enshrined through law in the constitution—it must adopt the forms of inside governance. It is no longer adequate to rely on revolutionary forms suitable for a vanguard party out of power and whose legitimacy is endangered.<sup>58</sup> It can no longer be true that "Parties become a quasi-constitutional structure in another sense as they serve as an alternative for or a necessary stage on the road toward constitutionalism: within the party, party discipline and guiding principles perform the function the function of law and statutes."<sup>59</sup> Constitutionalism has already been attained, and its forms adopted as a core party line.<sup>60</sup> Rule of law is now internal to the CCP as well as external to the organs of state government. As Jiang Zemin suggested in the Three Represents, the revolutionary movement in China has shifting from outside to inside. The object is now to inculcate the appropriate fidelity to the Chinese Constitutionalism and the political values it enshrines among all the people.<sup>61</sup> The methodology for that revolutionary goal is derived from the principles of scientific development in the service of a harmonious society. Its form is that of democratic centralism, positing both participation and obedience within the elite structures of the

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<sup>56</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part VI, 6.

<sup>57</sup> Larry Catá Backer, *The Communist Party and the Constitutional State: A Theory of Constitutionalism and the Party-State*, JOURNAL OF CHINESE AND COMPARATIVE LAW. (2009).

<sup>58</sup> William C. Kirby, *Renshi 20 Shiji zhongguo* [Understanding China in the 20<sup>th</sup> Century], 2001 21st Century No. 10, 114-124 (2001), available at [http://www.usc.cuhk.edu.hk/wk\\_wzdetails.asp?id=1523](http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1523).

<sup>59</sup> Zhu Soli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 551 (2007).

<sup>60</sup> 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), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929636](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929636) or [http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work\\_files/16TransntIL%26ContempPrblms29%282006%29ChineseConst.pdf](http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/16TransntIL%26ContempPrblms29%282006%29ChineseConst.pdf).

<sup>61</sup> *Id.*

CCP.<sup>62</sup> This is a concept at the heart of the innovative direction of CCP governance. “Institutionally, we will emphasize improving democratic centralism.”<sup>63</sup> At last we come to the substantive value of bureaucratization within the values framework of emerging constitutionalism.

The institutionalization of the interpretive function of political power requires a collective body dedicated to that purpose. The object is to elaborate systems that serve to legitimate the expression of political values consistent with the constitutional system. The state organs or additional organs created at that level are inadequate to the task. Their scope of power is essentially administrative. Political power is ultimately vested in the CCP. It seems logical to propose a bureaucratization of political power over the interpretation of constitution not in the state but in the CCP itself. “When a given legal system includes a constitution, the “rule of law” requires that the sovereignty of the constitution be protected.”<sup>64</sup> The Chinese constitution vests the state organs with administrative power and the CCP with a superior authority to supply and protect the substantive values of the constitutional order. Those values, under which all provisions of the constitution must be interpreted, include Marxist Leninist Mao Zedong thought, Deng Xiaoping Theory, and the important thought of the Three Represents. This, in the aggregate constitutes, the political *gründnorm* of the Chinese constitutional state.<sup>65</sup> “Party organizations at all levels and all Party members must act under the Constitution and laws on their own initiative and take the lead in upholding the authority of the Constitution and laws.”<sup>66</sup> *The Chinese Constitutional framework thus provides an important insight, one that is worth emphasizing—under the Chinese Constitutional system, the CCP is and ought to be recognized as the authoritative institutional interpreter of the constitution and the constitutional order over which it presides and under which it is bound.*

That leaves us with the question—what form should that institutionalization take within the CCP? It is possible that a committee form—for example a special committee of the highest organ of the CCP, might be an appropriate place for institutionalization of the interpretation function. There is some appeal to this approach. It mimics the current suggestions for organizing an interpretation function within the NPC apparatus. And it retains the bureaucratization forms that privilege the political character of interpretive decision making within the Chinese constitutional system—the great ideological campaigns through which substantive constitutionalism has developed over the last quarter century.<sup>67</sup>

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<sup>62</sup> STIG THORSON, *PARASITES OR CIVILIZERS: THE LEGITIMACY OF THE CHINESE COMMUNIST PARTY IN RURAL AREAS, IN BRINGING THE PARTY BACK IN: HOW CHINA IS GOVERNED* 192-216, 204-12 (Kjeld Erik Brødsgaard and Zheng Yongnian, eds., Singapore: Eastern Universities Press, 2004).

<sup>63</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part 12.

<sup>64</sup> *United Mizrahi Bank Ltd v. Migdal Village*, Supreme Court Israel C.A. 6821/93, 49(4) P.D. 221 (1995).

<sup>65</sup> HANS KELSON, *GENERAL THEORY OF LAW AND STATE*, 124 (Trans. Anders Wedberg, New York: Russell & Russell, 1961).

<sup>66</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part VI, Section 3.

<sup>67</sup> 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*

But *constitutional values formation and interpretation are distinct functions*. Interpretation—including the application of constitutional norms to the organs of the state apparatus, is distinct from the process of formulating constitutional values. Interpretation goes to the bureaucratization of politics to which the current Chinese scholarship, described above, points. For that purpose the institutional *form* of a Constitutional Court would be useful.<sup>68</sup> That is an institution, that is part of the highest level of political power, and independent of the institutions that actually exercise governmental power directly through law, is best situated to offer the constitutional system a necessary protection from abuses of power, internal and external, individual and institutional. It is not that the function of this institution is juridical in the traditional sense. The opposite is truer—the function is essentially political—and in the service of the constitutional order. As a constitutional court, the CCP would incorporate another aspect of collective governance within the organ of the nation most legitimately able to exercise the power. The determinations of that body would remain political, and the touchstone would have to be the normative grounding of Chinese constitutionalism as specifically set forth in the constitution—including the vanguard status of the CCP and the principles under which the CCP must function.

But forms can be elastic. The form of a constitutional court requires an implantation that fits within the values understanding of the political unit which it is meant to serve. The form of an English common law court is perfectly suitable in the United States and Australia. The old form of *Parlements* might better suit the French.<sup>69</sup> An institution charged with the review of conformity to constitution does not have to be disguised in the robes of Western judges, to suit the prejudices of Western legal academics and theorists. Nor need it operate like the judicial branch of the Chinese state apparatus. It must be functionally differentiated like any other department. And it should be staffed with people who are charged with a leadership role within the CCP. But the form of the organization matters less than its function and placement within the Chinese political (note I did not say state) system.

Its principal function would be similar to that reserved for the first modern constitutional court—the control of legislative discretion in line with constitutional limits (including the limits of state power organs under the guidance of the CCP). “Kelsen recognized the need for an institution with power to control or regulate legislation. In the case of post-World War I Austria, the concern was mostly for maintaining federal arrangements, that is, regulating the relationship between the national and provincial governments.”<sup>70</sup> In the case of China, the constitutional court might, in the first instance, be most useful in maintaining the arrangement between state

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TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 29 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=929636](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929636) or [http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work\\_files/16TransntIL%26Con tempPrblms29%282006%29ChineseConst.pdf](http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/16TransntIL%26Con tempPrblms29%282006%29ChineseConst.pdf)).

<sup>68</sup> Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 JOURNAL OF LAW & POLITICS 183 (1942)

<sup>69</sup> Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U. S. Supreme Court*, 34(1) AMERICAN JOURNAL OF COMPARATIVE LAW 45-92 (1986).

<sup>70</sup> John E. Ferejohn, *Constitutional Review in the Global Context*, 6 LEGISLATION & PUBLIC POLICY 49, 52 (Dec. 2002), available at <http://www3.law.nyu.edu/journals/legislation/issues/vol6num1/ferejohn.pdf>).

power and political power—that is between the NPC architecture and the CCP. But it would maintain this constitutional division of power in an institutionally legitimate way—under the constitution, now understood as creating a separation of functions substantially distinct from that in the West—separation of power with Chinese characteristics. “So, constitutional judges as they function now, in Europe and elsewhere, regulate legislative production, administrative production, and judicial action. That is their position.”<sup>71</sup> This might serve as a valuable insight with utility for a Chinese model developing bureaucratized forms of legitimacy in its own context. In line with contemporary Chinese notions of the relation of constitution to state organs, the Constitutional court might serve to review the legitimacy of administrative and state organ activity (including statutes, decisions, policies and the like). That review might be triggered only by the application of a majority of members of the NCP Standing Committee. It might assert this authority only within a very short time after the enactment of the offending actions. But it would have no authority to hear appeals from individuals. That this sounds like the old French *Conseil Constitutionnelle* is no coincidence.<sup>72</sup> The object, of course, is to ensure that the CCP retains effective authority as the “Party in Power” in a way that institutionalizes that role and bureaucratizes its procedures. It is not necessary to constitute it like a common law court, or even a Western style politico-judicial constitutional court in the modern sense. But it is important to add legitimacy to the role already embraced by the CCP.

In this context, incrementalism that conforms to current understanding of the basic constitutional environment are crucial for conceiving of plausibly successful systems. The institutionalization of constitutional review that conforms to Chinese constitutional principles, rather than those privileged elsewhere is the only approach can make sense. The argument about the form of institutionalization of that review must be conducted in Chinese terms, rather than in those of other states.<sup>73</sup> As Randall Peerenboom noted, “Courts in China also do not have the

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<sup>71</sup> *Id.* at 53.

<sup>72</sup> As the French themselves note:

La mise en place d'un contrôle juridictionnel de constitutionnalité de la loi est une création récente dans l'histoire constitutionnelle française. Longtemps refusée du fait de la souveraineté absolue de la loi, "expression de la volonté générale", selon les termes de l'article 6 de la Déclaration des droits de l'homme et du citoyen de 1789, l'existence d'une institution chargée d'examiner la conformité de la loi à la Constitution est une innovation de la Vème République. La Constitution du 4 octobre 1958 lui consacre un titre VII et pas moins de 7 articles. Cette création se caractérise aussi par son originalité : sur bien des points le Conseil constitutionnel est différent des autres Cours constitutionnelles. Conçu initialement comme un arbitre ayant principalement pour fonction de contrôler le respect du domaine de la loi par le législateur, le Conseil s'est transformé en juge de la conformité de la loi à l'ensemble des règles et principes à valeur constitutionnelle.

Conceil Constitutionnelle, Le Conceil Hier, available <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/le-conseil-constitutionnel/le-conseil-hier/le-conseil-hier.25723.html>.

<sup>73</sup> I am reminded here of an insight from Randall Peerenboom:

In China's case, reforms have been relatively successful, although there remains much to be improved. While most commentators portray political ideology as the main obstacle to establishing rule of law in China, the biggest obstacles at present are systemic in nature and involve the lack of institutional capacity. In the future, economic factors, the interests of key institutional and social actors, and ultimately political ideology (if China remains a single-party socialist state) are likely to exert the most influence on legal reforms and their likelihood of success. This suggests that when political will for change is present, reforms aimed at improving

power to strike down abstract acts in administrative litigation suits; in other words, courts may not overturn a generally applicable administrative regulation or rule simply because it is inconsistent with the Constitution or higher level court decisions. Although the court may apply the higher level law in the particular case, the conflicting lower level regulation remains in place.<sup>74</sup> But this precisely what an institutionalized organ of the CCP ought to be able to do, beyond the jurisdictional limits of state organs written into the Chinese Constitution itself.

This, the point is not to create a judicial arm through which citizens might constitutionalize political power, but to create an institutional mechanism to legitimate the expression of that political power as constituted within the framework of the Chinese constitution itself. This is a critical distinction. Indeed, it is possible to conceive of a system which, in its inception, ought to be constituted as a means through which citizens may complain to the appropriate Party officials who might then refer matters of constitutional interpretation to the appropriate central authority.<sup>75</sup> But that system need not embrace the additional power to review the activities of state organs generally for compliance with the Constitution at the behest of individuals. The judicial power can remain administrative and within the organs of the state system.<sup>76</sup> However, even this might require hard review of the relationship between the Supreme People's Court, as an adjudicative body, and the Constitution as the fundamental basis for its determinations when individuals dispute the application of law or actions of state organs.<sup>77</sup> And it remains a civil law type system, where the value of individual cases may be limited.<sup>78</sup>

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institutional capacity will likely prove beneficial. Reforms, however, must be sequenced to avoid overtaxing the existing institutions.

Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting and Assessing Regal Reforms in China*, 27 MICH. J. INT'L L. 823, 864 (2006).

<sup>74</sup> Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 219 (2005). He notes that "The absence of an effective constitutional court or review entity has further reduced the importance of the Constitution as a source of rights protection." *Id.* But he suggests that even the establishment of a constitutional court would not necessarily produce a Western style constitutional jurisprudence. "Even if there were a constitutional court or similar entity, it is doubtful that the Constitution would be interpreted in a liberal way given the prevailing statist socialist conception of rule of law, the existing threats to social order combined with support from both the ruling regime and broad public for stability, and the non-liberal orientation of the majority of Chinese citizens." *Id.*

<sup>75</sup> Cf. Carl F. Minzner, *Xifang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. L. REV. 103 (2006).

<sup>76</sup> See Chen Jianfu, *The Revision of the Constitution of the PRC: A Great Forward or a Symbolic Gesture?*, 53 *China Perspectives* at n. 47 (2004), available <http://chinaperspectives.revues.org/document2922.html#ftn47>. He reproduces a statement by Hu Jintao, "[I]t is desirable to promote the Constitution extensively in society so that it is known to every household and penetrates to the people's heart, which will lead the broad masses of people to the notion that the Constitution is not only a norm every citizen should observe in behaviour, but also a legal weapon with which they can safeguard their citizens' rights." (citing to an English translation, available from 2 (3) *Human Rights*, pp. 1-5 (2003), a journal published by the China Society for Human Rights Studies, Peking).

<sup>77</sup> As Sanzhuan Guo noted:

In 1955, China's highest court, the Supreme People's Court (SPC), issued a reply to the Xinjiang High Court saying that "the PRC's Constitution is not proper to be the legal basis of conviction and punishment in criminal judgment". Although this reply referred only to the inappropriateness of using the Constitution as a legal basis in criminal judgments, it has become the main reason Chinese courts hesitate or refuse to apply the Constitution in all cases--including civil and administrative litigation. In addition, another SPC reply to the Jiangsu Provincial High Court in 1986 listed standardized documents Chinese courts can cite as legal bases when making judgments, omitting the Constitution.

Constitutional power ought to be collegially administered within an appropriate institutional form. The issue, as modern Chinese scholars note, is bureaucratization, the development of appropriate institutional frameworks for regularizing the hierarchy of lawful authority recognized under the Chinese Constitution. In this sense, the judicial system can serve as the focal point of the constitutionally permissible application of law to citizens. This function could be understood as administrative and under the Constitution.<sup>79</sup> The issue of constitutionality itself, the core question of the exercise of political power in the ordering of the state—would remain the province of the “Party in Power”, now institutionalized within its organizational framework. This is not bringing the Party into the government, but extracting political questions of the highest orders out from the state organs to the higher-level consideration of the Party. Thus, “although the CCP has its own ideology and exercises significant influence on the judiciary, taken as a whole, this ideology is not necessarily incompatible with the general view of justice shared by ordinary people.”<sup>80</sup>

And lastly, where might this institutional interpretive function of the CCP be located? Perhaps within or drawn from an organ of the Central Committee of the CCP as a Constitutional Court for the nation? This essay does not seek to wrestle with the specific issues of implementation. It notes that implementation would require a coordinated effort to reform the Chinese Communist Constitution, within which implementation would be centered, and perhaps to add a clarifying provision to the Chinese Constitution. Hu Jintao himself might help us on this score as well.

We will strictly implement democratic centralism, improve the system that combines collective leadership with division of responsibilities among individuals, and oppose and prevent arbitrary decision-making by an individual or a minority of people. We will introduce a system of voting for use by local Party committees in discussing and deciding on major issues and appointing cadres to important positions. . . . All Party members must firmly uphold the centralized and unified leadership of the Party, conscientiously abide by the Party's political discipline, always be in agreement with the Central Committee and resolutely

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Sanzhuan Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8 CHINESE J. INT'L L. 161, 171 (2009). The reference was to Supreme People's Court, Reply on People's Courts Using Standardized Legal Documents When Making Judgments (<http://cecc.gov/pages/newLaws/standardLegalDocs.php?%20PHPSESSID=074622a55e0c2660f1ae1ad1639e485b>) (最高人民法院关于人民法院制作法律文书如何引用法律规范性文件的批复 1986年10月28日, 最高人民法院)。

<sup>78</sup> Zuo Haicong, *Legal Education in China: Past, Present and Future*, 34 OKLA. CITY U. L. REV. 51, 56 (2009).

<sup>79</sup> That might be a more useful way of thinking through the need for an “as applied” mechanism that assure people that the organs of state, and its administration, are all acting only in accordance with the law. Cf. Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANSNAT'L L. 114 (2006).

<sup>80</sup> Zhu Soli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 543 (2007).

safeguard its authority to ensure that its resolutions and decisions are carried out effectively.<sup>81</sup>

Democratic centralism, CCP organization and the need to advance the position of rule of law practices within the CCP as well as in the state organs,<sup>82</sup> point to an organ of the Central Committee as the most likely place within the CCP to place this interpretive and disciplinary rule of law function. A constitutional court will serve as an excellent site for a true practice of democratic centralism—"freedom of discussion, unity of action"<sup>83</sup>—not its Soviet style empty gesture, where the centralism is emphasized at the expense of democratic deliberation within the CCP. In this, a constitutional court mechanism would enhance the democratic leadership of the CCP within the constitutional framework.<sup>84</sup>

### III: Conclusion.

The CCP expresses the highest political power in the nation. It, like the organs of state, are now committed to rule of law based on the construction of values and procedures that implement a certain values vision of the state and guard against the assertions of personal power against the collective. The form of a institutionalized constitutional court might serve as a useful form of institutionalizing the exercise of political power constitutionally vested in the CCP. But that need ought to be expressed in a way that acknowledges the structure of the political order in China, rather than the aspirations of Western states with distinctive constitutional traditions.<sup>85</sup> The injection of Western sensibilities in the debate over the development of rights mechanisms and institutionalized rule of law protections against the excesses of state organs, has created great tension within Chinese academic and activist circles.<sup>86</sup> Hu Jintao has suggested the CCP's obligation to

Continue to strengthen the Party's governance capability and focus on building high-quality leading bodies. Strengthening the Party's governance capability has an overall impact on Party building and the cause of socialism with Chinese characteristics. In building the leading bodies at all levels, we must focus our efforts on promptly and effectively improving their art of leadership and governance capability. Following the requirement of scientific, democratic and

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<sup>81</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part 12.

<sup>82</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part VI.

<sup>83</sup> Vladimir Lenin, "Report on the Unity Congress of the R.S.D.L.P. (1906) available <http://www.marxists.org/archive/lenin/works/1906/rucong/viii.htm>.

<sup>84</sup> Lin Feng, *Constitutionalism in China Under the Leadership of the CPC: Is it Possible?*, October 18, 2008 (A paper delivered at the Conference on Constitutionalism in China in the Past 100 Years and Its Future, School of Law, City University of Hong Kong, Centre for Chinese and Comparative Law).

<sup>85</sup> For a similar discussion in the context of Western exportation of advocacy legal work, see, Michael William Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Aid in China*, 24 *FORDHAM INT'L L.J.* 56 (2000)

<sup>86</sup> See, Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 *FORDHAM INT'L L.J.* 1209 (2007).

law-based governance, we will improve the way of thinking of leading bodies, the governing competence of leading cadres, their styles of leadership and governance, the leadership system, and the working mechanisms of the leading bodies of local Party committees that have had their staffing restructured.<sup>87</sup>

The bureaucratization of constitutional power, centered on the CCP, and grounded in democratic centralism, lends itself strongly to the forms of a constitutional court, which itself represents the Western essence of democratic centralism. As one author recently put it:

The strengthening of the party's role in China runs counter to the ruling paradigm in contemporary China studies, which through the 1990s, have focused on the societal aspect of party/state-society relations, resulting in a plethora of studies on civil society, social organizations, private entrepreneurs and other forms of non-governmental development. In fact, this focus on society and social movements has pushed the party out to the ruling paradigm. It is high time to bring the party back in.<sup>88</sup>

A constitutional court within the CCP may be the next natural step in the evolution of constitutionalism with Chinese characteristics. And more importantly, perhaps, it will represent another step in the scientific development of Chinese constitutionalism by placing the CCP within the overall construction of a constitutional system which acknowledges the CCP as the source of political citizenship and the state apparatus working under its guidance in the construction of a well run and constitutionally limited administrative state.

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<sup>87</sup> Hu Jintao, [Hold High The Great Banner Of Socialism With Chinese Characteristics And Strive For New Victories In Building A Moderately Prosperous Society In All](#), Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, at Part 12, available .

<sup>88</sup> Kjeld Erik Brødsgaard, *Management of Party Cadres in China*, in *Bringing the Party Back in: How China is Governed* 57, 87 (Kjeld Erik Brødsgaard and Zheng Yongnian, eds., Singapore: Eastern Universities Press, 2004).

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