ISSN 2188-1952

Nagoya University Asian Law Bulletin

Vol. 8
2023.2

特　　集：**グローバリゼーションの文脈における現代アジア型立憲主義のアイデンティティとダイナミクス**

Special Features：**The Identity and Dynamics of Contemporary Asian Constitutionalism in the Context of Globalization**

個 別 論 題 Thematic Papers

研究ノート（Research Note）

Center for Asian Legal Exchange

Nagoya University Asian Law Bulletin Vol. 8

Editors • MATSUDA Takafumi (Chief) • MURAKAMI Masako • MATSUO Yoh • KASAYA Yushi • ISMATOV Aziz • MAKINO Emi

Assistant Editor • MATSUYAMA Satoshi • KITO Masataka

Cover Design • KASAYA Yushi

Publisher • Center for Asian Legal Exchange, Nagoya University (CALE)

Furo-cho, Chikusa-ku, Nagoya, 464-8601, Japan

TEL：+81(0)52-789-2325 FAX：+81(0)52-789-4902

E-mail：cale-publication@law.nagoya-u.ac.jp

URL：https://cale.law.nagoya-u.ac.jp

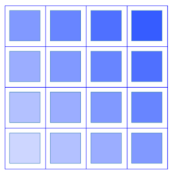
Date of Issue • February 28, 2023

ISSN • 2188 – 1952

Free electronic version available at https://cale.law.nagoya-u.ac.jp/publications/law

Nagoya University
Asian Law Bulletin

Vol.8, February 2023



Center for Asian Legal Exchange
Nagoya University

CALE

Nagoya University Asian Law Bulletin
第 8 号

◆◇◆　目次　◇◆◇

Nagoya University Asian Law Bulletin
Vol. 8

◆◇◆ Contents ◇◆◇

特集

グローバリゼーションの文脈における現代アジア型立憲主義のアイデンティティとダイナミクス

本特集は、2022 年 2 月 14 日-15 日、名古屋大学にて開催した CALE 年次国際会議「グローバリゼーションの文脈における現代アジア型立憲主義のアイデンティティとダイナミクス」（名古屋大学法政国際校育協力研究センター・大学院法学研究科主催）の報告者による寄稿論文である。本会議は、日本学術振興会・研究拠点形成事業 B アジア・アフリカ学術基盤形成型「アジア型立憲主義の解明―人権保障と法的安定性強化のための研究ネットワーク」の助成を受けて実施した。

❖ ❖ ❖

Special Features

The Identity and Dynamics of Contemporary Asian Constitutionalism in the Context of Globalization

This special feature is composed of research articles which initially were presented in the form of reports at the CALE Annual Conference - ‘The Identity and Dynamics of Contemporary Asian Constitutionalism in the Context of Globalization’, which was organized by the Center for Asian Legal Exchange and the Graduate School of Law of Nagoya University on February 14 and 15, 2022. This conference was supported by the JSPS Core-to-Core Program: Asia-Africa Science Platforms ‘Advancing Research in Asian Constitutionalism - Establishing a Transnational Research Network to Promote Human Rights and Legal System’.

【Research Article】

Global Constitutionalism under Stress: Russian Constitutional Reform as a Turning Point and Model of the Legal Transformation in Asia

Andrei N. Medushevskiy *

Abstract

Global constitutionalism become the main theoretical ground, form and practical instrument for the international legal integration after the end of the Cold War in the era of the "triumphant liberalism". Based on classic Western liberal values and principles of human rights it emphasized the role of international constitutional law and courts as a principally new form of supranational regulation trespassing the national borders, identities and state sovereignty. Up to now this trend took its practical implementation mainly in the Western part of the world (European Union) and partly associated regions (Latin America), but demonstrated growing difficulties in Eurasia (Post-Soviet region), and Asia.

The Asian region, in spite of great difference between more than 50 respective countries, demonstrated the growing common trend to legal fragmentation and state-oriented constitutional agenda. That resulted in visible asymmetry of the Asian constitutional development: the absence of the common Asian legal identity; priority of hierarchy in international system over state equality principle; the rebirth of Westphalian concept of sovereignty instead of post-national concept, the search for separate national legal identities. This variety of constitutional forms deeply rooted in colonial and post-colonial past of different Asian regions, cultures, nationalist beliefs, and current pragmatic interests.

In systematic and very clear form this new trend and its theoretical background represented in the Russian constitutional reform of 2020. The Russian Constitution of 1993 as adopted after the collapse of USSR and Communism in 1991, become one of the most liberal and pro-Western

* Andrey Medushevskiy, Dr., is a professor at the Higher School of Economics in Moscow, where he teaches Legal Philosophy, Comparative Constitutional Law and Political Science. He is Chairman of the Scientific Advisory Board of the reputed Russian journal "Comparative Constitutional Law" and the leading expert of the International Institute of Law and Public Policy, the author of 20 books and more than 500 articles in Russian and international learned journals.

legal acts of that period, but later appeared to be transform by different revisions towards conservative constitutional authoritarianism. This evolution of liberal constitutionalism in the form of legal retraditionalization, legitimized as anti-globalist restoration of national sovereignty, formed the crucial challenge for both Eurasian and Asian constitutional development – the necessity to make decisive choice between global constitutionalism and the protective constitutionalism as two opposite forms of adaptation to legal globalization in process.

Contents

I. Introduction

On the current stage of global development, many conventional ideas adopted earlier as a universal values, common standards or even as irreversible embodiment of the "common sense" demonstrate a strange paradox of eroding cognitive sustainability. They are still at presence in academic discourse and political agenda of international community and governments but lost a great part of their explicative force and practical importance for the real policy-makers in different regions of the world. This fate more or less characterizes the whole block of classic liberal legacy formed in the period of great revolutions of XVII-XIX-th centuries in the so called Western hemisphere of the world to become the theoretical ground of the liberal democracy in XX-th century, especially after the end of the Cold war. Ideology, theory and language of constitutionalism were formulate in a framework of this holistic vision of its role, substance and main building blocks – democracy, rule of law, human rights. The essence of global legal development according this outlook consists in the

adoption of these premised common rules, institutes or practices of international constitutionalism in order to create universal constitutional establishment. Establishment, presumably more faire and effective [1].

In this idealistic vision, all attempts to rethink this paradigm in critical and more pragmatic terms which taking place in many regions of the world means the "twilight of constitutionalism" – skepticism about the very idea of transnational constitutional guarantees in their authentic vision, the movement to illiberal democracy, populism and authoritarianism [2]. The clash between global constitutionalism and global authoritarianism in this logic is the crucial aspect of this complex dilemma. Leading authoritarian countries—including China, Iran, Russia, Saudi Arabia, and Venezuela—have developed new tools and strategies to contain the spread of democracy and challenge the liberal international political order. At the same time, the advanced democracies have retreated, failing to respond to the threat posed by the authoritarians [3]. This fundamentalist logic, as binding constitutionalism with liberal democracy, is perhaps irreproachable from theoretical point of view providing instruments for the clear and precise distinction between "normal" and "abnormal" forms of constitutionalism, healthy and pathological legal behavior of political regimes, and providing criteria for finding deviances on that road. Meanwhile, theoretical integrity of any abstract concept does not automatically imply the integrity of explanation, which presume more diversified view on different forms, historic periods and regional specificity of constitutional experience in its connection with social reality.

From this point of view, the whole system of established criteria, based on ideology rather than on pragmatic vision, could become ineffective: exception could become rule, deviance tends to becomes norm, and norm appeared to be deviance or a kind of abstract ideal model, which stay in a sharp divorce with political or legal reality [4]. For understanding Asian constitutionalism the simple value-oriented approach is not productive, because the result of investigation is in some way premised by the research hypothesis itself with quite predictable outcome – by definition this type of constitutionalism differ from Western ideal model, demonstrate more variability, deviances and inconsistences regarding the adoption of the rule of law standards. There is nothing new in this conclusion. More interesting is the question about cognitive motivation and internal logic of decision-making process in the adoption of different constitutional strategies and forms of their implementation

[1] Lang A.F., Wiener A. (eds.). Handbook on Global Constitutionalism. Cambridge: Edward Elgar Publishing, 2017.
[2] Dobner P., Louglin M. (eds.). The Twilight of Constitutionalism? Oxford: Oxford University Press, 2010.
[3] Diamond L., et al. Authoritarianism Goes Global: The Challenge of Democracy. Baltimore: John Hopkins University Press, 2016. P. 5-7.
[4] Brozek B., Stanek J. (eds.). Russian Legal Realism. Springer, 2018.

in the real world of international and domestic politics. Why this logic of constitutional engineering [5] is so mobile, and whether cognitive motives are really matter for projecting structures, incentives and outcomes of constitutional process of different global regions, countries? From this comparative point of view we will try to understand the role of the 2020 Russian constitutional reform for the Eurasian, Asian and global constitutional development.

II. Integration and fragmentation as two opposing trends in international constitutionalism

Global constitutionalism apparently become the main theoretical ground, form and practical instrument for the international legal integration developed after the end of the Cold War in the era of the "triumphant liberalism". Based on classic Western liberal values and principles of human rights it emphasized the role of international constitutional law and courts as a principally new form of supranational regulation trespassing the national borders, identities and state sovereignty [6]. The practical implementation this trend has found in the creation of the European Union – new communitarian project, realized after the collapse of the Soviet Union – another integration project pretended to be the universal matrix of the global integration based on Marxist philosophy and Soviet theory of law.

Integration project of EU predisposes the gradual adoption of the common European legal standards by all member-states through the constitutionalization process fulfilling in order to create supra-national unity, capable to transform the nascent confederation into federation – United States of Europe, and in ideal to become a model for the world-vide constitutional settlement [7]. The constitutionalisation means the commitment of all involved states to adopt the convergence process of international and national constitutional law in order to create new form of the European and international legal regulation – global, transnational or international constitutional law (European law is the main example) [8]. The structure of these regulation is based on three main levels - global constitutionalism; regional constitutionalism; bilateral framework. The third concept is a moderate formula for the description of constitutionalism in a proper sense as synthesis of international and domestic norms in one legal framework. Main prospects of this development are associated with the

[5] Sartori G. Comparative Constitutional Engineering. An Inquiry into Structures, Incentives and Outcomes. London: Palgrave, 2002.
[6] Medushevskiy A. Global Constitutionalism and Legal Fragmentation// Studia Iuridica Lublinensia, 2021. Vol. 30 (4). P. 393-440; Medushevskiy A. Global Constitutionalism: Integration or Fragmentation of International Relations during an Economic Recession// Social Sciences, 2021. Vol. 52, N. 2. P. 47-66.
[7] Klabbers J., Peters A., Ulfstein G. (eds.). The Constitututionalisation of International Law. Oxford: Oxford University Press, 2009.
[8] Koskenniemi M. From Apology to Utopia: The Structure of the Legal. Cambridge: Cambridge University Press, 2006.

concept of multilateral constitutionalism, which grounded on three fundamental characteristics - legitimacy, authority, validity [9]. They forms as well the basis of the global governance regime as a system of generally adopted norms of international, constitutional and administrative law.

Up to now this trend took its practical implementation mainly in the Western part of the world (European Union) and partly in associated regions or countries (Latin America), but demonstrated growing difficulties in Eurasia (Post-Soviet region), and Asia. The crucial obstacle to its implementation seems to be not fundamental values (hypothetically be common to all participants of the international dialog) but interests – economic, security, and political priorities of different world regions and the so called great powers like USA, Russia, China, India as well as involved regional state-unions. In this context the potential of integration process in international constitutionalism seems to be not great as well as the mediating role of the United Nations Organization, it's Security Council, and the International Court of Justice often incapable to resolve aggravating polarization of the world political actors. Actually, the UN Charter, which has been interpret by some authors as a prototype of the world constitution [10], does not play this role.

Fragmentation in international affairs – is another competing trend in global legal development. In reality, the actual stage of global development demonstrates the prevalence of fragmentation over integration, the predominance of national interests over international values, and the growing intention of developing countries to reconsider the dominant system of international law. The theoretic background of anti-globalist constitutional agenda was create by various intellectual currents -Critical school, New Approach to International Law (NAIL) or the Third World Approach to International Law (TWAIL) [11]. All of them represent the current trend of legal globalization as theoretically contradictory, morally inacceptable and even dangerous as practical tool. This Critical approach to international law involves rethinking of its theory and methodology [12], the rejection of its traditional reading, reconsideration of the changing place of global regions, correction of historical disproportions, and the search for its target-oriented transformation. That reevaluation should have place in the interests of global regions, which historically were exclude from international process in the period of

[9] Bhandari S. Global Constitutionalism and the Path of International Law. Leiden: Brill-Nijhoff, 2016.

[10] Fassbender B. The United Nations Charter as the Constitution of the International Community. Leiden. Nijhoff, 2009.

[11] См.: Mutua M. What is TWAIL? // American Society International Law Proceedings, 2000. Vol. 94. P. 31-40; Gathi J. TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography// Trade, Law and Development, 2011. Vol. 3. N. 1. P. 26-48.

[12] Okafor O.C. Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?// International Community Law Review, 2010. Vol. 10. P. 371-378.

Europe-centrism, imperialism and colonialism [13]. All that provide a very emotional reaction in the deliberations about unfair character of international law [14] as a system of "false universalism" [15]. This international system seems to critics unfair and interpreted as created by Western countries in order to keep their dominance over non-European parts of the world, including Asia region.

III. Global East: Asian constitutionalism in search of identity

The idea of Global East and protection of its special interests in competition with the Global North or global West is, perhaps, the main item in the rethinking of the mainstream program of international constitutionalism. In this context, the place of Asian region is very important. Is it part of the global constitutionalism or is it an alternative concept, based on principally different identity, values and traditions as well as on another vision of international law and its future?

The actual debate about integrity of Asian constitutionalism is not complete. The legal concept of critical school contraposes Global West and Global East. The Global East (or Global South) could be interpreted in more broad sense (include all non-Western countries) and in more narrow sense (include typical geographical regions) [16]. In this narrower sense, the Asian region means the original "Asian approach to international law" or "Asian vision" of constitutionalisation, oriented on the limitation of Western domination in constitutional debates [17]. In this context, different concepts of Asian constitutionalism includes various definitions of global constitution, its Asiatic implications and categorical apparatus for the practical delimitation of the border between Asian and Western constitutionalism and prospects for their future relations [18].

There are two contrasting positions in the current debate about the Asian legal identity. One group of experts thinks that common Asian approach to the international law really exists or eventually

[13] Anghie A. Imperialism, Sovereignty and Making of International Law. Cambridge: Cambridge University Press, 2004; Pahuja S. Decolonising International Law: Development, Economic Growth and the Politics of Universality. Cambridge: Cambridge University Press, 2011.

[14] Ramina L. Framing the Concept of TWAIL: Third World Approach to International Law// Revista Justica do Direito, 2018. 32 (1). P. 5-26.

[15] Xavier S. 2015. False Universalism of Global Governance Theories: Global Constitutionalism, Global Administrative Law, International Criminal Institutions and the Global South. PhD Dissertations. 20. 2015. Accessed: http://digitalcommons.osgoode.yorku.ca/phd/20

[16] Maldonado D.B. (ed.). Constitutionalism of the Global South. Cambridge: Cambridge University Press. 2013.

[17] Aydin C. The Politics of Anti-Westernism in Asia: Visions of World Order in Pan-Islamic and Pan-Asian Thought. New-York: Columbia University Press, 2007.

[18] Suami T., Kumm M., Peters A., and Vanoverbeke D. (eds.). Global Constitutionalism from European and East Asian Perspectives. Cambridge: Cambridge University Press, 2018.

possible [19]. The Asian region, in spite of great difference between more than 50 respective countries, demonstrated the growing trend to legal unification in terms of common vision of the global challengers. The ground of this position includes seven arguments - concepts diffusion, uniform identity, collective interests, uniform norms and facts, common process, uniform outcomes [20].

Another group of experts does not agree with this approach, because Asian legal systems are very different [21]. They emphasize another trend –- fragmentation, and state-oriented constitutional agenda in Asia. That resulted in the visible asymmetry of the Asian constitutional development: the absence of the common Asian legal identity; priority of hierarchy in international system over state equality principle; the rebirth of Westphalian concept of sovereignty in its authentic meaning instead of post-national concept, the search for separate national legal identities [22].

Typology of Asian constitutional models is possible on the ground of different criteria. The most important of them for our research is their potential place in a system of global constitutionalism under formation. Classification of models of Asian constitutional settlements reveals variety of their adaptation strategies to global constitutionalism. Schematically, five main types could be represent:

1) *Assimilation*. In Japan – constitutionalism is by-national product, the hybrid of American and local traditional culture, a unique system of absolute pacifism (art. 9) [23]. This concept is interpret by some authors even as a constructive program for the civil society of the whole North-Eastern Asia region (the so-called Northeast Asia Regional Action Agenda (Tokyo Agenda), declared in 2005 as a common platform for the group of countries as a strategy of global constitution promotion [24].

2) *Gradual transformation of the national tradition*. India is perhaps the best example of country with a huge variety of legal traditions historically based on different confessional values, which were reevaluate according common Anglo-Saxon (British) constitutional standards, but with careful regard on stability, peaceful development and modernization purposes [25].

3) *Successful catch-up modernization*. After many constitutional experiments, South Korea, according many observers, fulfilled this option by creation of constitutional democracy and

[19] Jin-Hyun Paik, Seok-Woo Lee, Kevin Y.L. Tan (eds.). Asian Approaches to International Law and the Legacy of Colonialism. Routledge, 2012.

[20] Bhandari S. Global Constitutionalism and the Path of International Law. Leiden: Brill-Nijhoff, 2016.

[21] Chimni B.S. Is There an Asian Approach to International Law: Questions, Thesis and Reflections// Asian Yearbook of International Law. 2008. Vol. 14. P. 249-265.

[22] Belov M. (ed.). Global Constitutionalism and Its Challenges to Westphalian Constitutional Law. London: Hart, 2018.

[23] Higuchi Y. (ed.). Five Decades of Constitutionalism in Japanese Society. Tokyo: University of Tokyo Press, 2001.

[24] Kimijima A. Global Constitutionalism and Japan's Constitutional Pacifism, 2011. P. 43-60. Available at: http://www.ritsumei.ac.jp/ir/isaru/assets/file/journal/23-3_03_Kimijima.pdf

[25] The Constitution of India. With Selective Comments by P. M. Bakshi. New Delhi: Universal Law Publishing Co., 2003.

independent constitutional justice [26].

4) *Uneven constitutional modernization* [27]. The adoption of the universal legal standards at Philippines and Indonesia in the era of triumphant liberalism of 1990-s confronted later with the phenomenon of divided society [28], or the growing trend to conservative restoration in the form of national special way [29] and constitutional populism [30].

5) *Full rejection of Western constitutionalism* in favor of the legal self-determination. China is an open adversary of the global constitutionalism, the last protagonist of Westphalian system in its classic form and supporter of sovereignty and authoritarian government. Liberal constitutionalism in that concept seems to be a kind of Trojan horse introduced in the country by its Western enemies. China produced alternative vision of constitutionalism, based on original Asian values – Confucian and Marxist principles instead of human rights; priority of economic and social rights instead of civil and political rights; education (or informed participation) instead of democratic elections and meritocracy instead of democracy. Chinese approach to global constitutionalism often interpreted by Western scholars as "revisionist", "deviant" and "exceptional" because it stay in a sharp contradiction with the set of rules and moral priorities, which are normally associated with the global constitutionalism in formation [31].

This variety of constitutional forms deeply rooted in colonial and post-colonial past of different Asian regions, cultures, nationalist beliefs, and current pragmatic interests. The degree of pro-Western transformation depends on the role of USA and Britain traditions of dominance in different countries of that region if not come from much deeper heritage of Western colonialism – British, Dutch, Spanish, and Portugal, Russian or Soviet empires. In this context, typology should involve a group of undemocratic countries, which reject not only global constitutionalism, but as well constitutionalism as such, realizing different concepts of undemocratic development in forms of theocracy (Iran), totalitarianism (North Korea), ethno-confessional domination (Myanmar) or staying in the area of imitative or pretended constitutionalism (Thailand), demonstrating the special place of constitutions

[26] Kang-nyeong Kim. Korean Politics and Diplomacy in the Global Society. Shinji Press, 2011.

[27] Piccone T. Five Rising Democracies and the Fate of the International Liberal Order. New-York: Brookings Institution Press, 2016.

[28] Choudhry S. (ed.). Constitutional Design for Divided Societies: Integration or Accomodation? New York: Oxford University Press, 2008.

[29] See, for example,: Reynolds C.J. (ed.) National Identity and its Defenders: Thailand Today. Bangkok: Silkworm books, 2002.

[30] Daly T.G. Democratic Decay in 'Keystone' Democracies: The Real Threat to Global Constitutionalism? International Journal of Constitutional Law (2017). Available at: http://www.iconnectblog.com/2017/05/democratic-decay-in-keystone-democracies-the-real-threat-to-global-constitutionalism-i-connect-column/

[31] Carrai M.A. Global Constitutionalism and the Challenge of China's Exeptionalism// Global Constitutionalism without Global Democracy? Ed. by C. Coradetti and G.Sartor. Working Paper LAW 2016/21. Badia Fiesolana: European University Institute. 2016. P. 95-113.

in authoritarian regimes [32].

This multifarious development opens the way to quite different role of "Asian values" in the global constitutional agenda transformation. Asia as a global region could play different roles in the formation of global constitutionalism – to be recipient or designer of global constitutional settlement.

IV. The unstable place of Eurasian Post-Soviet constitutionalism in international power-game

The so-called Post-Soviet constitutional transformation demonstrates very clearly the conflict between two opposite impulses – integration of the regional countries in a framework of Western type of global constitutionalism, and fragmentation – the search of their own separate ways for stability and preservation of the ruling elites in power [33]. The constitutional development of Post-Soviet area in a narrower sense (former republics of the USSR) has some particular characteristics in comparative perspective:

1) Uneven character of Post-Soviet constitutionalism in all countries of the region, which proclaimed their independence only after the collapse of the USSR and had no constitutional traditions in their history. The situation, perhaps, comparable with new post-colonial states in other parts of the world standing in front of similar challengers to their statehood, sovereignty and national identity.

2) The great variability of the constitutional models under consideration in the formative period, which illustrates the "privilege of retardation" phenomenon. That means: theoretical possibility to adopt different foreign models, to transplant them voluntary from more advanced/conservative countries or, rather, to dispose historical possibility for the experiment with them without any critical regard to their historical origin, based on different legal cultures.

3) Unpredictable and controversial selection of constitutional priorities –from their partial corrections to adoption of models, which earlier were already reject as inadmissible. The result is the eclectic hybridization of constitutional blocks taken from different constitutional settlements which in different countries obtaining their own way of life.

4) The multiplicity of constitutional amendments to each adopted constitution, taken often without great respect to the formal procedures of amending process which demonstrates the absence of deeply rooted constitutional culture of respective countries.

[32] Ginsburg T., Simpser A. (eds.). Constitutions in Authoritarian Regimes. Cambridge: Cambridge University Press, 2014.
[33] Fruhstorfer A. Hein M. (eds.). Constitutional Politics in Central and Eastern Europe. Berlin: Springer, 2016.

5) The absence of the stable constitutional design (system of government) – the permanent search of the balance of power's process motivated more by political than legal logic and combined with the deficits of the neutral constitutional justice. A part of this instability is a precarious role of constitutional justice, which is fare from sustainable position and real independence in most countries of the Post-soviet region.

6) The unresolved question of finality for the crucial constitutional and judicial solutions: after the adoption of every new constitution or amendment the debates normally has not coming to end providing new bulk of projects and proposals. This "constitutional game" looks like a form of political self-identification for political parties or groups in power rather than a coherent and substantive legal discourse.

7)The acute necessity for all countries of Post-Soviet area to coordinate their constitutional experiments with the position of global actors in the region –Russia, USA, European Union, China as well as with the position of their neighboring countries like Turkey, Iran and Afghanistan.

The separation of ways in the regional constitutional development makes it possible to identify three main strategies:

First. The so-called "color revolutions" - the direct and sometimes law-braking search of parliamentary alternative to the Russian model, which has been established itself after the collapse of USSR in Russia and many other countries of the region (color revolutions in Moldavia, Georgia, Kirgizia, Ukraine before 2014, Armenia in 2016);

Second. The gradual "step by step" constitutional reform strategy undertaken by the authoritarian governments for their self-preservation in power in the form of transition from more presidential to the mixed (presidential-parliamentary) system of government (Kazakhstan, Uzbekistan after 2014 including recent constitutional amendments and public debates on their implementation in 2022-2023);

Third. The establishment of the rigid mechanical legal stability by avoiding substantive constitutional reforms or by the presence of quasi-reforms fulfilled by the use of cosmetic changers (Azerbaijan, Belorussia, Turkmenistan, Uzbekistan before 2014), and otherwise, bloody coups and revolutions without any regard to the established constitutional guarantees and procedures (Kirgizia 2010 and 2020-2021, Ukraine 2014, the failed coup attempt in Kazakhstan in January 2022 with subsequent constitutional reform process) [34].

[34] Medushevskiy A.N, Tendentsii postsovetskich politicheskich rejimov v svete noveisheiy volny konstitucionnych popravok [Post-Soviet Political Regimes in the Light of Current Amendments Wave] // Social Sciences and Contemporary World [Obschestvennye nauki I sovremennost']. 2018, № 2. P.49-65.

Reciprocal influence of two factors - the constitutional design and the political regime, - is the subject of vivid debates in legal as well as in political science literature of all Post-Soviet region [35]. The change in the system of government (for example, the move from presidential to more parliamentary one) could be a proof of the real regime liberalization, but otherwise it could symbolize the deterioration of democracy if used only for protection of the established elites or clans in power. It could be as well both in one: constitutional reforms, undertaken in support of parliamentary system, could be initiate by the ruling elite and president in order to reproduce his power as prime minister resulting in a deeper political transformation (as it was in Georgia and later in Armenia). This interconnection of the legal and political parameters of the reform agenda reveals the important common characteristics of the unstable constitutional modernization process in the region under consideration and the role of Russian constitutional model as the main positive or negative orientation for all Post-Soviet constitution-makers.

V. Russian 2020 Constitutional reform in comparative perspective

Anti-globalist political turn become both the result and vehicle of fragmentation process in the international constitutionalism. In systematic and very clear form this new trend and its theoretical background were represent in the Russian constitutional reform of 2020 [36]. The Russian Constitution of 1993 as adopted after the collapse of USSR and Communism in 1991, become one of the most liberal and pro-Western legal acts of that period, but later appeared to be transform by different revisions towards conservative legal populism [37] and constitutional authoritarianism. Psychological factors for that reportedly grounded in historical traditions of the Russian statehood [38], Soviet mental

[35] See more about that debate in our publications: 1) Political Regimes of Central Asia: Constitutional Reforms in a Framework of Authoritarian Modernization// The Soviet Legacy and Nation-Building in Central Asia. APRC Proceedings Series, Seoul, 2011. N. 4. P. 5-28; 2) Konstitutsionnaia reforma v Turkmenistane: perechod k demokratii ili modernizacia avtoritarisma? [Constitutional Reform in Turkmenistan: Transition to Democracy or Modernization of Authoritarianism?]//Comparative Constitutional Review [*Sravnitel'noe Konstitutsionnoe obozrenie*], 2008, № 6 (67). C. 5-16; 3) Revolutsia v Kirgizii: itogi I perspectivy konstitutsionnych preobrazovaniy [Revolution in Kirgizia: results and prospects of Constitutional Transformation // Comparative Constitutional Review [*Sravnitel'noe Konstitutsionnoe obozrenie*], 2011, № 1 (80). C.13-33; 4) Konstitutsionnyi kontrol' I politicheskiy vybor v obshestvach perechodnogo tipa: k problem legitimnosti sudebnych resheniy na postsovetskom prostranstve [Constitutional Control and Political Choice in Transition Societies: Towards Legitimacy of Judicial Decisions in Post-soviet Region] //Zanger. Law Messenger of the Kazach Republic [*Зангер. Vestnik prava respubliki Kazachstan*], 2011, № 1 (114). C. 11-17; 5) Constitutional Transformations in Post-Soviet Region: Results of Previous Studies// Armenian Journal of Political Sciences, 2017, 1 (16). P. 81-112.

[36] Konstitutsia Rossiyskoiy Federatsii s Poslednimi Izmeneniami na 2022 god [Constitution of the Russian Federation with Recent Changes held on 2022]. Moscow: Ecsmo, 2022.

[37] Crawford C. et al. (ed.). Populism as a Common Challenge. Berlin-Moscow: ROSSPEN. 2017.

[38] Bodin P.-A., Hedlund S., Namli E. (eds.). Power and Legitimacy – Challenges from Russia. London and New York: Routledge, 2012.

stereotypes [39], original combination of formal and informal practices [40], but motivated as well by difficulties and mistakes of transformative period [41].

Being designed as a temporal constitutional settlement for the transitional period, Russian Constitution produced the original synthesis of liberal legal guarantees (based on the international human rights treatises), and rather authoritarian construction of the presidential power interpreted as the main force and the guardian of irreversibility of the democratization process. Formally the adopted form of government was similar to the presidential-parliamentary model of the French Fifth Republic but avoided some important checks and balances of this system. In reality, this construction paved the way to the system of plebiscitary authoritarianism with overrepresented presidential power and personified rule. This "authoritarian component" of the Russian constitutional and political system was the main problem for all Post-Soviet political debates, and kept staying at place as the main theme for all current projects of the constitutional modernization.

Key innovations produced by Russian 2020 constitutional amendments continued this authoritarian backslide but represented it in a new form, more systematic, structured and cohesive [42]. In sum, they reflected three broad areas of regulation actualized in the context of globalization/fragmentation competition.

The first one is the new approach to international law. The priority of the ratified international treatises over national legislation, as fixed in Constitution, stay at its place but according to the new redaction all decisions of international courts made on the basis of these treatises could be overruled by the national Constitutional Court if only they contradict Russian Constitution or public order of the country. The result is a new interpretation of human rights – gradual movement from the absolute guarantee of the natural or fundamental rights priority towards their more conditional interpretation formed in the context of obligations of the person to the state if not to political regime. The long story of debates between ECHR and the Russian Constitutional Court over many politically sensitive cases

[39] Plotnikov N. (Hrsg.). Gerechtigkeit in Russland. Sprachen, Konzepte, Praktiken. München: Wilhelm Fink, 2019. S. 423-460

[40] Medushevskiy A.N. 2019. Russian Constitutional Development: Formal and Informal Practices// BRICS Law Journal. 2019. Vol. VI. Issue 3. Special Issue: Russian Constitutionalism: 25th and 100th Anniversaries of the 1993 and 1918 Constitutions. P. 100-127.

[41] Osnovy Konstitutsionnogo prava Rossii: Dvadtsat' Let Razvitia [Fundamentals of the Russian Constitutional Law: Two Decades of Development]. Moscow: ILPP, 2013. Res Publica: Russkiy respublikanism ot srednevekov'ia do konca XX veka [Res Publica: The Russian Republicanism from the Middle Ages to XX century]. Moscow: NLO, 2021.

[42] Analysis of 2020 Russian constitutional amendments see in our publications: 1) Konstitutsionnaia reforma 2020 s poziciy teorii legitimnosti [Constitutional Reform of 2020 in a framework of Legitimacy Theory]// Theoretic and Applied Jurisprudence [*Teoreticheskaia I prikladnaia jurisprudentsia*], 2020. № 4. C. 15-30; 2) Konstitutsionnye popravki v Rossii 2020 kak politicheskiy project pereustroystva gosudarstva [Constitutional Amendments in Russia as a Political project of the State Transformation] // Public Politics [*Publichnaia politika*], 2020. T.4. №1. C. 43-66; 3) Perechod Rossii k konstitucionnoy dictature: razmyshleniya o znzchenii reformy 2020 goda [The Move of Russia to Constitutional Dictatorship: Reflections on Russian 2020 Constitutional Reform]// Comparative Constitutional Review [*Sravnitel'noe konstitucionnoe obozrenie*], 2020. T. 136. № 3. C. 33-50.

now came to its logical end than Russia definitely withdraw from European Council and jurisdiction of ECHR.

The second area of constitutional changes concerns with ideological priorities in domestic regulation. This attitude to international law in terms of countries' legal protection from negative global trends transformed the role of the national legal tradition reconsidered by Reform as a ground for the national legal order. Constitutional reform agenda fixed new cognitive orientations in terms of time, space and the sense of life – common history, language, shared religious and patriotic feelings, traditional gender priorities, traditional family values, respect to older generations and others to provide the sense of common national identity. New social contract is a part of this ideological construction. It has been ground on solidarism instead of liberal market economy – loyal citizenship based on social guaranties provided by the state in terms of minimal wages, indexation of salaries and pensions on the inflation level, etc. What is important – the reintroduction of some Soviet-kind stereotypes as for example, the guiding role of the state in social policy standards implementation, the role of the universal education standards, and protection of the "working people". Identity, hence, is construct on basis of convergence of the legal and extra-legal criteria incorporated to the text of the revised constitutional norms. Pluralism as a constitutional principle was not remove. Still, conservatism has been officially proclaim as quasi-official doctrine of the state.

The third area of regulation reflects the concept of the strong statehood in international and domestic policy. The main preoccupation of reformers become the protection of the sovereignty – as national and state sovereignty. In the context of Reform, that means the reevaluation of three important items:

1) Reestablishment of the legal continuity of the Russian Federation with the USSR and cultural (political) continuity with the Russian Empire, broken by the Revolution of 1917 and the collapse of the state in 1991;

2) Declaration of non-changeable character of the national borders and prohibition of any discussions on that matter (it is possible to debate only the right to integrate, but not the right to leave the Russian state for any territories);

3)"Nationalization of elites" – the system of restrictions for the highest officials in terms of double citizenship, possibility to have accounts in foreign banks, etc. Plus, the declared protection of Russian citizens all over the world against all kinds of discrimination or pressure of any kind. This important in the context of official declaration that the whole zone of Post-Soviet region is an area of the Russian political responsibility.

VI. Russian statehood in the process of current transformation

The legal theory of proclaimed constitutional amendments is the unitary concept of the federal state and its main institutes. This concept is represent by the "unity of the system of public power" principle, introduced to revised text of the Constitution. For contemporary Russian legal regulation, that means constitutional transformation in five main areas:

1) New interpretation of federalism in order to make it more centralized and prevent any potential conflicts between three levels of regulation – federal, subjects of federation and local self-government units by their incorporation in one vertical of the state public power.

2) Reconsideration of bicameralism in order to transform the upper chamber of parliament (Council of Federation) in a least dangerous institute at the whole architecture of coordinated state. This target achieved by transformed principles of formation of this institute making it more loyal to presidential power.

3) Reestablishment of the local self-government as a part of the unified power vertical in a framework of "unity of the system of public power".

4) Reinterpretation of the separation of power's principle in the triangle – State Duma, Government, President, in terms of their functional efficiency, centralization and coordination by federal administration. In the ideal, they should be treat as united system, separated only by their functional role in a state machinery, headed and coordinated by presidential power.

5) Dubious role of the Constitutional justice in treatment of constitutionality of international obligations, federal legislation (including acts of subjects of federation) and even treatment of draft laws on constitutional amendments. From the one hand, Constitutional Court received the new prerogative of preliminary control of laws and become the important institute in final conflict resolution between Duma and President on legislative matters. From the other hand, many of these new competences could be realize by Court only on the initiative of presidential power, which as well received new prerogatives in formation of Constitutional Court, nomination and denomination of judges which made the Court more dependable on behalf of the President [43].

The special area of constitutional transformation, perhaps the most important one, reflects the changing place of the presidential power itself. 2020-es Russian Constitutional reform demonstrates the further evolution of the system of government - from the mixed system to quasi-presidential system.

The system of government originally adopted in the Russian constitution, has been construct on

[43] Konstitutsionnyi Sud Rossii: Osmyslenie Opyta [Russia's Constitutional Court: Rethinking its Experience]. Moscow: Tsentr Konstitutsionnych Issledovaniy, 2022.

the model of Fifth French republic (1958) but consequently eliminated some important checks and balances of this form. It gradually transformed its nature through the past 30 years to become the quite original system, combining elements of mixed and presidential systems. Here, the president has huge legislative prerogatives, control over the government, but can dissolve the Parliament as well. All these lines of institutional coordination are concentrate in the hands of the all-powerful head of the state playing in reality the role of latent monarch [44]. Personified character of that power has been emphasize by amendments in the transition of power question tactical solution. The mandate of the President was formally limited by two cadences, but the actual President (V. Putin) could stay in power two more cadences a cause of that constitutional reform fact itself – theoretically, until 2036.

The new meta-constitutional status of the Russian President is the most characteristic feature of this transformation. In spite of important prerogatives of the Russian president, which were already fixe in the original text of 1993 Constitution treating him as head of the state, guarantor of the Constitution and human rights, his real power grown substantially by consequent modification of constitutional legislation, judicial interpretation and political practice of two passed decades. Besides that, in 2020 the President received new and very important symbolic and real prerogative - as protector of civil peace and agreement, the guardian of countries' sovereignty, independence and integrity, the promoter of functional cohesion of the whole system of public power (art. 80). This formula makes him the crucial element of meta-constitutional regulation in the country and outside it – in representation and promotion of ideological and symbolic image of the state in international affairs.

VII. Conclusion: The importance of the new Russian constitutional concept for Eurasia legal constellation

The unstable perspectives of global constitutionalism in its classic Western or liberal understanding opens the way for the transnational experimentation process – elaboration of new models of constitutionalism based on principally different pictures of the past and future, and the place of global regions in the international, regional or local governance. This experimentation process reveals quite different concepts of globalization and fragmentation, implying symmetry or asymmetry in international relations, legal identity and forms of adaptation to new reality of legal globalization

[44] Medushevskiy A. Vozrojdenie Imperii? Rossiyskaia konstitutsionnaia reforma 2020 na fone globalnych izmeneniy [The Revival of the Empire? The Russian Constitutional Reform against the Background of Global Change] // Messenger of Europe [*Vestnik Evropy*], 2020. T. 53/54. C. 82-97. Available at: http://www.vestnik-evropy.ru/issues/the-revival-of-the-empire-russian-constitutional-reform-2020-against-the-background-of-global-change.html

regarding reconsideration or modification of established constitutional forms and standards.

The Asian region, in spite of some common cognitive attitudes, intentions and reactions on global changes, demonstrated the great difference between more than 50 respective countries, and the growing trend to legal fragmentation and state-oriented constitutional agenda. That resulted in visible asymmetry of the Asian constitutional development: the absence of the common Asian legal identity; priority of hierarchy in international system over the respect to presumed state equality principle; the rebirth of Westphalian concept of sovereignty instead of post-national or transnational concept, the search for separate national legal identities. This variety of constitutional forms deeply rooted in colonial and post-colonial past of different Asian sub-regions, cultures, nationalist beliefs, and current pragmatic interests. The crucial problem of this new development consists in the possibility to find some reliable combination between high standards of international constitutionalism and stable governance in order to maintain cultural values and traditions, regional and national interests, including the enforcement of modernization and pragmatic realpolitik agenda.

In this comparative context, the Russian 2020 constitutional transformation demonstrates an important turning point in the legal globalization debate. This transformation has been realize in the form of constitutional reform, which formally did not break with fundamental liberal values (fixed in unchangeable chapters 1, 2 and 9) promoting the legal continuity of the country since 1993. From the other side, the whole bulk of amendments (to chapters 3-8) demonstrated a juridical coup from substantive as well as procedural point of view. More than 50 articles were change in direct or indirect way, the whole logic of constitutional expectations was redefine, as well as amending procedures, which has been substantially revised during the process of reform itself. The old constitutional form has been fill out by new normative substance, reflecting changed legal and political priorities in a very consistent representation.

That constitutional transformation does not mean the simple rejection of transnational constitutionalism but the clear proposal of its alternative version, based on the adoption of the world's fragmentation – inevitable asymmetry of global regions guided by most powerful countries. That form of international constitutionalism concentrates not on values rather on interests of global actors in prevision of the forthcoming reconfiguration of global spheres of influences. The new legitimacy formula of the Russian political regime combines three guiding principles. Limited functional adoption of international law in the strict accordance with national (regional) sovereignty protection; restoration of highly centralized system of public power in neo-imperial ideology style; and the over represented institute of imperial president, which becomes the meta-constitutional symbol and driving force of the political regime in domestic and international relations.

The essence of the whole system could be describe in terms of protective constitutionalism, constitutional authoritarianism (constitutional dictatorship), or authoritarian legalism. Authoritarian nature of this political system obviously makes it incompatible with established international liberal democracy standards but does not exclude its pragmatic efficiency in forthcoming international power game. Thus, the Russian reform formed the crucial challenge for both Eurasian and Asian constitutional development – the necessity to make decisive choice between offensive and defensive legal strategies - global liberal constitutionalism and the global protective constitutionalism - as two opposite forms of adaptation to the legal globalization in process.

【Research Article】

Russia's Constitutional Amendments of 2020 Read through the Post-Colonial Lens: Do the Amendments Pave the Way for Russia to Become a Colonial Power Again?

Herbert Küpper *

Abstract

The 2020 amendments of the Russian Constitution have triggered an extensive academic discussion both within and outside Russia. The prevailing Western interpretation in the light of democratic constitutionalism states the fact of an authoritarian roll-back but cannot really explain why Russia falls back into old patterns of autocracy and isolationism. A post-colonial reading of the amendments can provide for a comprehensive explanation which does not replace, but adds to the post-authoritarian perspective. Putin's Russia wants to become again the imperial centre that Tsarist Russia and the Soviet Union were in their time. For this purpose, the concentration of all state power in a 'strong-man president' serves – inter alia – the purpose of making Russia internally fit for its neo-imperial role; the redefinition of Russia's role in the world glorifies bygone 'greatness' and thus paves the way for colonial ambitions; and also the negation of the binding force of international law is not just a relapse into traditional isolationism and exceptionalism but has the potential to rid Russia from international legal duties that may hamper its expansive colonial intentions. A closer post-colonial look reveals, however, that nothing of this is new: tendencies of imperialism and isolationism date back to the Yeltsin years and were intensified under Putin. By elevating these tendencies onto the constitutional level, the 2020 amendments are a quantitative, but not so much a qualitative change.

Contents

* Director of the Institute for East European Law in Regensburg, www.ostrecht.de. E-mail: herbert.kuepper@ostrecht.de.

I. Introduction

The Russian constitutional amendments invited considerable academic attention and will probably continue to do so. Whereas the Russian president and in his suit many Russian legal scholars tend to downplay the impact of the amendments and paint them as 'business as usual', foreign scholarly works tend to interpret the amendment as the end of Russia's post-authoritarian era and its slide-back into autocracy. I would like to suggest an additional perspective: the post-colonial theory of constitutions and of law [1].

[1] This perspective is laid out in more detail by William Partlett and Herbert Küpper, *The Post-Soviet as Post-Colonial. A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire* (Cheltenham: Elgar, forthcoming).

Before discussing the Russian constitutional amendments in the light of post-colonial theory, I would like to raise the question of how this subject fits into the overall scope of the seminar "The Identity and Dynamics of Contemporary Asian Constitutionalism in the Context of Globalisation"?

Colonialism may be seen a form of globalisation, though a very one-sided one. When one country tries to establish itself as a colonial power to the detriment of other countries and/or societies, this can be understood as a process of globalisation both for the colonising state and its society as well as the colonised subalterns. Insofar, colonialism is one form of globalisation. When we analyse Russia's constitutional amendments under this perspective, we raise the question of which position the constitution of Eurasia's largest country takes with view to globalisation. The thesis of this paper is that one function of the constitutional amendments is to make Russia fit for playing the role of an imperial, colonising centre again. If this is true, it means that Russia – which so far has always been seen as one of the losers of globalisation – seeks to play a more active role in the self-same globalisation.

II. The post-colonial lens and the former colonial centre

Usually, post-colonial theory (theories) in general and post-colonial theory (theories) of constitution and law in particular focus on the effect of (bygone) colonial rule on the colonised, the subaltern. Yet, Russia (both in its Tsarist and its Soviet phase) was not a colony but the centre of a colonial empire and – this is my thesis – wishes to assume such a role again. Therefore, the post-colonial lens on Russia is that of a former metropolis.

In post-colonial theory, there are relatively few studies on the effect of former colonialism and decolonisation on the former centre and its constitutional dynamics. There is some literature on France where the transition from the 4th to the 5th Republic with an entirely new, more presidential constitutional design in 1958 was intended to help the French government to gather the strength to let go of its colonies, especially Algeria. As a more recent example, the Brexit is interpreted also in a post-colonial perspective: as a British move away from Europe and back to the former colonies (imperial nostalgia) – a feeling that is hardly reciprocated by the former colonies, as Britain's failure to negotiate favourable trade agreements with those countries show. Apart from France and Great Britain, there is practically no research on how decolonisation influences constitutional development in the other former colonial powers, including 'non-overseas' imperial structures such as the Ottoman and the Russian (Tsarist) empires.

Despite this lack of substantiated research, it stands to reason that the end of a colonial empire has effects on the former metropolis as well. Therefore, applying the post-colonial lens to the constitutional amendments of present-day Russia may deepen our understanding of constitutional life in Russa. At the same time, it adds another case study to post-colonial theory and may therefore enrich it by new insights.

III. The Russian constitutional amendments of 2020

Russia's constitutional amendments of 2020 affected a considerable part of the constitutional text. It has been the largest and most extensive amendment of the Russian Constitution since its enactment in 1993. The central part of the amendments and probably their driving motive was the so-called 'obnulenie' ('setting to zero'). This 'obnulenie' is to set back the counting of Putin's number of presidencies to zero so that the – still limited – number of allowed presidential offices of the same person starts to count anew in his case. As a result, Putin's former presidencies do not count, and he can remain in office until 2036 [2].

Apart from the 'obnulenie', the amendments of 2020 bring about numerous changes in the power arrangements, but also certain additions to the basic rights and several changes and additions to the state identity norms. Most of these changes are not really new. They existed before 2020 in statutory law, sub-statutory norms and / or political practice. Yet, now they are enshrined in the Constitution, which may make a symbolic difference.

If we apply the post-colonial perspective to this wide range of amendments, we will find that not all of them are meaningful under the post-colonial lens. The new or widened social rights, to give just one example, are quite neutral in terms of post-colonial constitutional dynamics. Their main function was to serve as a bait for the people to give a positive vote on the amendments in the consultation (plebiscite).

For analytical reasons, I classify the amendments that do have a bearing under a post-colonial perspective in three groups:

- internal provisions: they relate to the power architecture in the Russian Federation and create or reinforce a 'strong state' embodied by a 'strong man' at the top, i.e., enhance the autocratic element;

[2] Article 81 (3.1) Russian Constitution as amended. On the '*obnulenie*' as part of Putin's strategy to consolidate his power see Sergej A. Denisov, "Das Wesen und die Bedeutung der Änderungen der russischen Verfassung im Jahr 2020," in *Die Reform der russischen Verfassung*, ed. Rainer Wedde (Berlin: Berliner Wissenschafts-Verlag, 2020), S.25–42, 30–32.

- external provisions: the relate to Russia's position in the world and its relationship to bygone Tsarist / Soviet colonialism;

- provisions on the position of international law within Russia: they form the link between the internal and the external provisions.

Before we analyse the amendments thus classified under the perspective of post-colonial constitutional theory, we first take a look at constitutional realities: Do we find any political or factual indications that Russia is pursuing a policy to become the centre of a colonial empire again?

IV. Russia on its way to become a colonial power again?

Whether Russia or, to be more precise, Russia's leadership aims at the role of a colonial metropolis is a political rather than a constitutional or legal question. Therefore, we will briefly look at the political course of the Russian Federation.

1. The Yeltsin years: ending external and upholding internal colonialism

Russia in the 1990s appeared to have accepted the end of the Soviet empire. It recognised the former Soviet republics as independent states and conducted its foreign policy towards them on the basis of the (formal) equality of states as enshrined in the most basic principles of international law, inter alia in the Charter of the United Nations. In this respect, Russia gave up its imperial role and ambitions and integrated into the international community and international political and legal life as a 'normal' state.

At the same time, Russia after 1991 fiercely opposed the dissolution of the Russian Federation, as is best illustrated by the Chechen wars and their bloodshed. Thus, in the 1990s, Russia let go of external colonies but still pursued a colonial regime within the borders of the Russian Federation. Just as in Tsarist and Soviet times, in the post-1991 Russian Federation, we can clearly differentiate between the dominant (ethnically) Russian centre and the subaltern non-Russian periphery. The Russian centre bases its dominance over the non-Russian subalterns at least partly on racial grounds and mechanisms, and its dominance is inherently violent, as is best exemplified by the Chechen wars: the Russian dominance over its non-Russian periphery answers perfectly the usual definitions of colonialism. The fact that the colonised territories are not overseas but adjacent to the centre in itself does not question the colonial nature of that rule. This internal colonialism, for which the German language has the very appropriate word '*Binnenkolonialismus*' (internal or inner colonialism), is

constitutionally veiled by constitutional language about the 'multinational people of the federation' and by an asymmetrical federalism. On the other hand, other constitutional text is more outspoken about the ongoing colonial nature of centre-periphery relations in the Russian Federation. As a start, the state name '*Rossiiskaya Federatsiya*' defines the federation as '*rossiiskii*' which means Russian not in an ethnic sense (that would be '*russkii*') but in an imperial tradition of a Russian state much larger than the area inhabited by ethnic Russians, and at the same time under the dominance of the ethnic Russian element. The 1993 constitution reflects this dominance, apart from the state name, in clauses on the leading role of the Russian ('*russkii*') people and the Russian (again '*russkii*') language.

2. The Putin years: aiming at the re-establishment of a 'Russian empire'

A few years after Putin's take-over of power, it became more and more obvious that Russia wanted to be a world power again, that it claimed a position in the world such as the Soviet Union had enjoyed. Russia fancied and fancies itself on the same level as the US and China which is, of course, an illusion and an aspiration which is not born by facts. Compared to the two super-powers US and China, Russia lacks political attractiveness and economic substance as well as soft power – an important difference to the Soviet Union that, with its 'progressive' Marxist-Leninist ideology, could present itself as an attractive alternative to Western capitalism. With the collapse of that imperial ideology, the Soviet empire itself had collapsed.

Where Yeltsin's Russia acquiesced to the loss of the empire and was self-contained in its internal colonialism, Putin's Russia has aspirations that go beyond its own borders. First, Russia reasserts the former Soviet space, which it defines as its 'near abroad', as its own zone of influence where it tolerates no influence of other countries. Putin's demand that NATO must refrain from accepting former Soviet republics as member states reflect the Russian claim to an exclusive zone of influence. In this near abroad, Russia no longer accepts the former colonies' sovereignty, as exemplified by the wars in East Ukraine, the annexation of the Crimean peninsula and the aggressive war against Ukraine that stated in March 2022, as well as by the presence of Russian troops in Moldova and Georgia against the will of the Moldovan and Georgian governments and also by Russia's role of the neutral arbiter between Armenia and Azerbaijan or of the helping friend in Kazakhstan in the unrest in January 2022 [3].

[3] The unrest in Kazakhstan does not seem to be a 'decision of orientation' as in Ukraine or Moldova but probably a fight for power between several cliques: Andreas Steininger and Joachim Schramm, "Eine erste Einschätzung der Lage in Kasachstan: Demokratiebewegung oder der banale Kampf der Cliquen um die Macht," *Wirtschaft und Recht in Osteuropa* 31, no. 2 (2022): S.33-36.

Beyond the former Soviet space, Russia under Putin wants to be a world power again and, perhaps even more important still, to be accepted as such. Russia's interventions in Syria since 2015 or in Libya, Russian mercenaries in various African states, as well as the Russian claim that NATO must withdraw from its East European member states show Russian power aspirations beyond its 'near abroad', show that Russia wants to play a central role in world-wide international politics which includes the subordination of other states' interests under the Russian interests. Putin certainly wants Russia to be an imperial power of global importance, and Russia's disrespect for the sovereignty of other states is colonial by nature.

Therefore, it is safe to say that Russia's colonial aspiration no longer remain within the RF, but go to the outside, into the 'near abroad' and beyond. Yeltsin's self-contained internal colonialism has turned into aspirations for an expansive external colonialism. Russian's intention is to become again the centre of a colonial empire, to re-imperialise itself. This is well reflected by Putin's often-quoted statement that 'the collapse of the Soviet Union was the greatest geopolitical catastrophe of the 20th century'. [4]

We will now see how the constitutional amendments of 2020 help these neo-imperial aspirations of the Russian leadership.

V. Making Russia internally fit for imperialism: the 'strong state' embodied by a 'strong man'

The first group of amendments, the amendments that we call 'internal provisions', concern the power architecture within the Russian Federation.

1. What do the amendments contain?

The amendments affecting the balance between the supreme state organs strengthen the position of the President. One example is the additional presidential powers in Article 83 (as amended). Some of the new rules appear at a first reading to boost the role of the parliament vis-à-vis the President. However, a more detailed analysis reveals that these changes as well strengthen the President [5]. Thus,

[4] As far as we know, it was first pronounced in Putin's Address on the State of the Nation on 25th April 2005.

[5] Denisov and the other papers in Wedde (n 2). European Commission for Democracy through Law (Venice Commission), *Russian Federation Interim Opinion on Constitutional Amendments and the Procedure for their Adoption* (19–20 March 2021) CDL-AD(2021)005 Or. Engl., no 68–109. Otto Luchterhand, "Präsident Putins Verfassungsänderungsvorschläge: Vorbereitung des letzten Umbaus seines Regimes," *Jahrbuch für Ostrecht* 60 (2020): S.13–53. William Partlett, "Russia's 2020 Constitutional Amendments: A Comparative Analysis," *Cambridge Yearbook of European Legal Studies* 23 (2021): pp.311–342. Partlett and Küpper, *The Post-*

the new rules on the supreme federal organs concentrate even more power in the President, reducing the other federal organs more and more to a mere façade of a constitutional state. It must be noted that the hyper-presidential concentration of power started as early as under Yeltsin and was intensified by Putin even before the amendments 2020. However, now the constitution itself spells out the super-powers of the president which adds a new quality to the until then extra-constitutional 'crown presidentialism' [6].

The reinforcement of presidential autocracy vis-à-vis the other state organs is not the only centralisation that the amendments have brought about. They also reduce the impact of federalism [7] and local autonomy [8] – both institutions that, if taken seriously, have the potential of decentralising the political system and of adding additional layers of checks and balances. The amendments reduce this potential, inter alia by introducing the new institution of the 'organs pertaining to the uniform systems of public power' which is guaranteed by the President. [9] Thus, the 'uniform system of the organs of public power' centralises all state power on the federal level (as opposed to the subjects of the federation and the local government) and within the federal level in the office and the person of the President (as opposed to other federal organs such as the bicameral parliament or the government).

This hyper-centralised power arrangement corresponds to traditional Russian state philosophy. In this traditional view, the Russian state has to be strong in order to protect Russia from an outside world which is basically perceived as inimical and always conspiring against Russia. The Russian state, in this view, is strong if it has a strong man (not: woman) at its top, embodying and leading the state. This was the prevalent view in Tsarist times and also during some parts of the Soviet period, e.g., during Stalinism. It is obvious that a state that depends existentially from the one man at the top is anything but strong, it is the weakest and most fragile form that statehood may adopt. This weakness is well illustrated by the numerous crises of the Tsarist and Soviet reign. Nevertheless, the need for a strong state guaranteed by a strong man is the classical Russian position which is also the position of President Putin [10].

Soviet as Post-Colonial (n 1), 36–60. Rainer Wedde, "Russland: Die jüngsten Verfassungsänderungen und die Gewaltenteilung," *Jahrbuch für Ostrecht* 61 (2021): S.54–63.

[6] William Partlett, "Crown-Presidentialism," *I·Con* (2022), forthcoming.

[7] See, e.g., the amendments in Article 67(1)2 and the new federal powers in Articles 71 and 72.

[8] See, e.g., the amendments in Article 131 (1.1).

[9] See, e.g., Articles 80(2) and 132(3), as amended. The Venice Commission translates the formula in Article 80(2) (as amended) with "unified system of public authority": European Commission for Democracy through Law (n 5), no 100–108. For more detail see Herbert Küpper and Antje Himmelreich, "Article 132," in *Handbuch der russischen Verfassung, Ergänzungsband*, ed. Bernd Wieser (Vienna, Verlag Österreich, 2022, forthcoming), no 32–34.

[10] On this aspect of traditional and present Russian state philosophy see Markku Kangaspuro, ed., *Russia: More different than most* (Helsinki: Kikimora, 1999). Katlijn Malfliet, *Rusland na de Sovjet-Unie: een normaal land?* (Leuven: lannoo campus, 2004). Gerhard

2. How can we interpret the amendments?

Before applying the post-colonial lens, we will analyse how the traditional reading of democratic constitutionalism interprets the hyper-centralisation of all power in the president.

(1) Democratic constitutionalism

Democratic constitutionalism interprets the concentration of all power in the head of state, combined with the reduction of both checks and balances and avenues for democratic participation, as a post-authoritarian roll-back. In this perspective, Russia tried, in the 1990s, to free itself from both Tsarist and Soviet traditions of authoritarian autocracy and tried to create a system of democratic constitutionalism. This view quotes as a witness the Russian constitution of 1993 before its amendment.

Compared to the original version of the 1993 constitution, the 2020 amendments cannot but appear as a relapse into pre-democratic autocracy. The reason that democratic constitutionalism can identify is tradition. In the end, ancient traditions and views, inter alia on what a proper Russian state should look like, turned out to be stronger than 'new', post-authoritarian, democratic and constitutional ideas.

(2) Post-colonial theory

Post-colonial theory points out that the increasing concentration of power in the President does not only intensify the autocratic nature of the regime by enhancing Putin's personal power. In addition, it puts the Russian state into a position where it is – in the perspective of the traditional-new Russian state philosophy – an efficient instrument to achieve geopolitical imperial and super-power aspirations. In a Russian understanding, the Russian state can play an important international role only if it can act without obstacles and impediments from the inside. And when we say the Russian state can act, this means that the strong man at the top can act freely.

Therefore, the constitutional amendments reduce all internal mechanisms that may restrict the President's freedom of external activity: separation of powers, checks and balances, federalism and local autonomy are all seen as obstacles that may stand in the President's way. Therefore, their abolition or at least weakening is seen as 'strengthening' the state, thus making it fit for playing the role of a(n imperial or colonial) centre of world-wide importance. Autocracy as the leading principle

Simon, "Die Russen und die Demokratie: Zur politischen Kultur in Rußland," in *Politische und ökonomische Transformation in Osteuropa*, ed. Georg Brunner (Berlin Verlag: Berlin, 3rd ed., 2000), S.133-152.

of the inner organisation of the state is interpreted as the prerequisite for an active and successful global role of the Russian state.

I would like to stress again that this post-colonial interpretation does not replace, but supplements the prevailing post-authoritarian reading of Russian constitutional dynamics. The gradual abolition of democratic constitutionalism first in constitutional practice and 2020 in constitutional text first of all serves to consolidate Putin's personal power. However, Putin's agenda is not limited to internal despotism. He wishes to restore Russia's imperial role beyond a self-contained internal colonialism; he wants to be – and even more so: to be accepted as – one of the world leaders. For this external ambition, he needs to make the Russian state fit so that it can be the instrument Putin needs.

VI. Russia's position in the world: imperial past and imperial future

The Russian constitutional amendments are not limited to inner power arrangements. An important set of amendments refers to the external part of Russian statehood.

1. What do the amendments contain?

Russia's 1993 constitution was widely interpreted as a good-bye to traditional Russian and Soviet exceptionalism and self-isolation from the world. It expressed Russia's wish to become a member of the international community. Therefore, it embraces the rules of international life, accepts the country's convergence into international legal life. This text is still there, the amendments did not abolish it, but added new text with a different impetus.

First, the new Article 67.1(1) declares the Russian Federation to be the legal successor of the Soviet Union on its territory and to continue the Soviet Union in international relations. This means that Russia now officially steps into the legal shoes of the previous colonial centre. Before 2020, it did so without express constitutional authority, e.g., by assuming the Soviet veto seat in the UN Security Council. International practice never questioned Russia's self-styled role as a political and partly legal successor to the Soviet Union, but accepted it tacitly. Therefore, there is no external reason to stress Russia's claim for succession to the Soviet Union right now. Consequently, there must be internal reasons for introducing Article 67.1(1) into the Russian Constitution.

Referring to the Soviet Union as the imperial predecessor of today's Russian Federation may be read as imperial nostalgia, as a wish to continue Soviet 'greatness'. This nostalgic longing for past 'greatness' is even more obvious in the new constitutional text on World War II. Now, Russia protects

the memory of the Soviet or Russian victory in that war [11]. The new text does not identify that victory as Soviet or Russian but leaves the appropriation of the victory by today's Russia open to interpretation.

Second, under the new Article 69(3), Russia assumes responsibility for 'compatriots', i.e., ethnic Russians and/or former Soviet citizens abroad. This is not limited to the former Soviet space (the so-called 'near abroad') but may refer to Russians everywhere in the world. Before 2020, this responsibility was (and still is) enshrined in statutes. In practice, care for 'compatriots' has been used as a leverage for what Russia defined as 'humanitarian interventions' in the 'near abroad', e.g., during its attacks on Georgia. In its aggressive war against Ukraine, one Russian argument is that Russia protects its citizens whose human rights are allegedly violated by the Ukrainian state. In this argument, Russia has reverted to traditional Tsarist and Soviet exceptionalist by claiming rights that it denies others: Russia claims to have the right to intervene into other states under the title of 'humanitarian intervention' but strictly denies the existence of such an instrument in international law when anybody else wants to do so, e.g., when Russia denied the NATO to have the right to intervene to stop the genocide in Kosovo.

Third, new text stresses strongly the Russian Federation's sovereignty and territorial integrity [12] and the principle of non-interference in the internal affairs of the state [13]. Although the text does not say so explicitly, the principle of non-interference in internal affairs is designed as a one-way street, fighting off foreign interference into Russian affairs, but not forbidding Russia to interfere elsewhere. This is highlighted by Russia's aggressive war against Ukraine because the reasons Russia gives are that both Russian and Ukrainian citizens need to be protected against alleged human rights violations by the Ukrainian state and that Russia needs to bring about a regime change in Ukraine, the present government being allegedly a 'Nazi' regime.

Next to being the basis for a more 'robust' foreign policy, the stress on Russian sovereignty and integrity has also an internal meaning. It is designed to prevent the dissolution of the Russian Federation. This dissolution is not a question of actuality right now because since the end of the Chechen wars, there have been no more secessionist or irredentist tendencies worth mentioning. Nevertheless, the new rules make it clear to the outside world as well as to potential secessionists within Russia that the Russian state is willing to keep its empire together. This internal aspect is addressed also by strengthening the role of the ethnic Russian within the federation, combined with

[11] Article 67.1(3) as amended.

[12] See Articles 67(2.1), 67.1(1), and 83 lit. zh) as amended.

[13] See Article 79.1 as amended.

lip-service to the role of the other, non-Russian ethnic entities as part of the 'multinational' Russian people [14].

New constitutional text forbids high-ranking officials to hold dual citizenship, foreign residency or money and other valuables abroad [15]. Before 2020, statute contained these restrictions but collided with the constitution. Since 2020, the statutory provisions have been elevated to constitutional level, thus terminating their unconstitutionality. These restrictions reflect the traditional Russian distrust against the outside world. Furthermore, they reduce, in a Russian perspective, the leverage that foreign countries may exercise on Russian officials, thus making Russia more independent from the outside world and enhancing its capacity to become a colonial centre again.

Fourth, new rules intensified the expansive character of the Russian Federation. Since 1993, Article 65(2) has allowed the adoption of new federal units into the federation. In 2014, Russia made use of this provision for the first time when it took the Crimean Peninsula away from Ukraine and converted it into two new federal units of the Russian Federation [16]. A new expansive element was introduced into Article 81(2) which contains the prerequisites for presidential candidates. Since 2020, the President – just as holders of many other public offices, as was mentioned in the previous paragraph – has been banned from holding foreign citizenship or residence. In the case of a presidential candidate, this restriction extends to the past as well: a former foreign citizenship or residence disqualifies the person from running for the office of the president. However, the new Article 81(2)2 makes it clear that Russian territory that was not always part of the Russian Federation does not qualify as abroad; thus, anyone who lived in Crimea before 2014 is not excluded from becoming a Russian President just because Crimea became Russian only in 2014. Obviously, this rule is not designed to ease Putin's staying in office [17] but can only be interpreted as reinforcing Russia's claim for its 'new territories'.

Just as the amendments of the internal power arrangements, these amendments on Russia's position in the world are in line with traditional Russian state philosophy. This traditional view requires that Russia must not only be strong, but also be big. In order to protect the (ethnic) Russian core, the Russian state must possess or at least dominate a 'cordon sanitaire' of non-Russian territories which protects Russia against the outside world. This special understanding explains the peculiar nature of Russian colonialism. Russian colonies were not settlement colonies, or only to a very small extent in

[14] See Articles 68(1), (4) and 69(3) as amended.

[15] The general rule is laid down in Article 71 lit. t) as amended. Numerous provisions throughout the constitution specify these requirements for various public offices.

[16] These two units are the 'Republic of Crimea' and the 'City of Federal Importance Sevastopol', as enumerated in Article 65 (1) as amended in 2014.

[17] If the new Article 81(2)2 of the Constitution were taken seriously, Putin may be disqualified because of his former residence in East Germany in the 1980s: As a junior KGB officer, he resided several years in the GDR.

the narrow strip between the Central Asian drylands and the Siberian taiga forests. Nor were the colonies a target of economic exploitation. Russian colonies represented a third form of colonialism. Russia held its colonies for political and military domination, as a buffer zone against the outside world which, as described before, is seen as inimical and always conspiring to destroy Russia. Returning to this traditional Russian world interpretation, it is obvious that Russia wants to re-erect this buffer zone. This concerns mainly the 'near abroad', but extends beyond the former Soviet space, e.g., to Eastern Europe where Putin demands that all NATO troops should be removed.

2. How can we interpret the amendments?

Here again, we will compare what the two different lenses show.

(1) Democratic constitutionalism

In the perspective of democratic constitutionalism, the new text on Russia's position in the world has an isolationist tendency and thus opposes the post-authoritarian 'convergence' text of 1993. Stressing the continuity with the imperial and isolationist Soviet Union as well as Russia's sovereignty and territorial integrity and isolating the higher echelons of the public service from foreign economic and other contacts remove the country a bit from general international life. The rules on 'compatriots' seem to address residual questions of the dissolution of the Soviet Union into 15 successor states. Finally, strengthening the expansionist character of the federal constitution appears in the eyes of democratic constitutionalism as a violation of principles of international law, at least if the new territories are acquired against the will of the former possessor and/or the local populations.

Democratic constitutionalism cannot really explain why Russia finds it necessary to incorporate rules on state succession and 'compatriots' into its constitution three decades after the fact – especially since both the partial Russian succession into the position of the Soviet Union and Russia's care for co-ethnic and ex-Soviet groups had been settled satisfactorily for and by Russia right in 1991. Nor can it explain why Russia thinks it necessary to elevate the ban on foreign residency, money accounts etc for higher state officials from statute to a constitutional level; a constitutional interpretation might be that the constitutional amendments end the existing doubts about the constitutionality of the statutory provisions, but again, the question of 'why now' remains unanswered by democratic constitutionalism.

(2) Post-colonial theory

Post-colonial theory sees in the constitutional amendment a clear re-orientation of Russia's self-definition. Whereas the constitutional text of 1993 had defined Russia as a self-contained,

internationally integrated state that has accepted the loss of (part of) its colonial empire, the amendments of 2020 paint Russia as a state that wants to re-establish its old empire and perhaps even create a new and larger one. Therefore, it steps into the legal shoes of the old empire (Soviet Union) [18], uses 'compatriots' as a leverage to interfere into other states, especially the former colonies in the 'near abroad', and at the same time strongly opposes any foreign interference into internal Russian affairs. It isolates its leading civil service cast from foreign contacts to reduce the possibility of external influence on them.

In brief, these amendments as well serve to make Russia fit for its new role as an imperial centre. This also explains the timing: It is not unusual for former colonial centres to accept the loss of its empire in the first years or decades after this loss, but to revert to imperial nostalgia a generation later. This explains the timing of the Brexit as well as of the Russian wish to return to the glory of bygone imperialism.

VII. The link between the internal and the external legal world: the domestic position of international law

The third analytical group of constitutional amendments provides for the link between the previous two groups of the internal power architecture on the one hand and Russia's role in the world on the other hand: the rules on the position of international law within the Russian domestic legal system.

1. What do the amendments contain?

The 1993 Constitution accepts international law as a source of law of domestic relevance and integrates into the international community. This text is still there, but the 2020 amendments have added a new layer.

Article 79 as amended decrees the priority of domestic (Russian) over international law. If a decision of an international organ that that organ takes on the basis of an international treaty signed by the Russian Federation is contrary to the Russian constitution, this decision cannot be executed in Russia. This clause aims primarily at the European Court of Human Rights and its decisions, but it has already been applied in bilateral double taxation agreements as well. Russia notified its treaty partners

[18] In the Russian debate on the constitutional amendments, the argument of linking today's Russia to the imperial traditions of the Soviet Union by including text on the state succession into the constitution was used quite openly: Suren Adibekovič Avak'ân, "Das Wort 'Macht' sollte nicht erschrecken," *Jahrbuch für Ostrecht* 61 (2021): S.13–25, 17.

that it now claims to have the right to change these bilateral taxation agreements unilaterally, relying on the new powers given by Article 79 in its amended version [19]. The new rule reverses the role of national and international law, which ultimately questions the very existence of international law which can only exist if a 'domestic exception' is not allowed, not even in the case of domestic constitutional law.

The new Article 125(5.1) lit. b) formalises this priority of Russian constitutional over international law by making the Constitutional Court the watchdog. The Constitutional Court is given the power and the procedural rules to examine whether such a decision of an international organ is in contravention of a clause of the Russian Constitution. Since 2015, this power of the Constitutional Court has existed on statutory level [20].

2. How can we interpret the amendments?

(1) Democratic constitutionalism

In the traditional light of democratic constitutionalism, the amendments terminate Russia's integration into the rule-based international community. By allowing its constitution to override the obligations it assumed under international law, Russia questions the binding nature of international law and, finally, denies the rule-based character of international political life. Russia no longer feels bound by the international rules of the game but aspires to dictate its own rules to the world.

Democratic constitutionalism can state this fact and interpret is as another roll-back, this time not so much authoritarian but rather isolationist. But it cannot explain why Russia has decided to draw back from international legal life.

(2) Post-colonial theory

Post-colonial theory can offer additional insight. Russia wants to become an empire again. In order to do so, it concentrated state power in a 'strong man-president' and re-defined its political position in the world. As was seen before, all these measures can be read in the light of the endeavour to remove all obstacles that may stand in the way of the imperial aspirations of the Russian state and its leader.

[19] Javid Damirov, "Auswirkungen der Verfassungsreform und der Maßnahmen gegen die Covid-19-Pandemie auf das Steuersystem der RF," *Wirtschaft und Recht in Osteuropa* 29 (2020): S.328.

[20] Herbert Küpper, "Die Bedeutung der EMRK in Demokratien im Umbruch," in *Demokratie und Europäische Menschenrechts-konvention*, ed. Magdalena Pöschl and Ewald Wiederin (Vienna: Manz, 2019), S.119–181, 146–148.

The same pattern applies to the termination of the binding role of international law. International law, too, may be seen as an impediment to neo-imperial ambitions. International law is based on the formal equality and equal sovereignty of all states and protects the state's integrity against external interference. International law as it stands to-day is inherently inimical to a super-power status above the (international) law. It is certainly inimical to neo-colonialism and the definition of a certain region of the world as one state's exclusive zone of influence, as that state's own 'backyard', with limited sovereignty of the states therein and no rights of outside states to 'interfere' into this backyard by maintaining relationships with those states.

Therefore, international law has the tendency to restrict Russia's super-power and neo-colonial aspirations. As a consequence, the amendments subordinate it to Russian (constitutional) law. Now, Russia can formally do as it pleases because whenever international law protects the targets of Russian neo-imperial ambitions, Russia can rely on the constitutional provisions on the dynamic nature of its territory (i.e., on the possibility to accept new territories as federal units), on the protection of 'compatriots' or other provisions in order to put aside opposing international law. The price Russia pays is isolation, but isolationism has been an integral part of Russia's colonialism for most parts of Russian history.

VIII. Conclusion

The post-colonial lens that sees Russia as a country that once was an imperial centre and wants to return to this role, provides for a coherent reading of large parts of the 2020 constitutional amendments. Nevertheless, the post-colonial aspect is not the central or most important one to understand the Russian constitutional amendments. The amendments do not culminate all state power in a crown-president for the sole purpose of making Russia fit for neo-imperialism, but the presidential autocracy serves genuinely domestic purposes as well, such as to further consolidate President Putin's personal power base.

Yet, the post-colonial lens adds new aspects of understanding that classical constitutional theory cannot yield. It can explain why Russia reverts to old patterns of autocracy and reduces democratic constitutionalism, or why it finds it necessary to constitutionalise its so far unchallenged role as a successor of the Soviet Union thirty years after the fact.

The post-colonial lens may even shed some additional light on the amendments designed to strengthen the 'traditional' family structures. Obviously, the 'preservation of traditional family values',

as Article 114 lit v) (as amended) puts it, is not directly linked to reverting Russia into an imperial centre again. But it is a conscious abdication to 'modernity', to the 21st century, and at the same time a conscious turning towards times when (Tsarist, Soviet) Russia was imperial. The social structures of every-day life of the citizens, too, should go back to these times. Insofar, the 'traditional' family structures are part and parcel of the comprehensive anti-modernism that the 2020 amendments carry, and as such may reinforce the neo-colonial self-definition of becoming a colonial centre again – which as such may be qualified as an anti-modern anachronism in the early 21st century.

The post-colonial aspect is not something totally new and unprecedented in Russia's constitutional culture. Russia never gave up colonialism entirely, neither in or after 1991 nor in its constitution of 1993. Since the end of the Soviet Union and Russia's independence, an ethnic Russian centre has continued to dominate the non-Russian, subaltern periphery. The change that the 2020 amendments make is that Russia's colonial aspirations no longer remain within the borders of the Russian Federation but go to the outside, to the 'near abroad' – with a special target on Ukraine – and perhaps beyond, as Russia's involvement in, e.g., Syria and Libya illustrates. Insofar, the 2020 amendments and their colonial aspects are not entirely new, but are much rather an intensification and widening of tendencies that were never really abandoned. They are quantitative rather than qualitative.

As a conclusion, we can state that applying the post-colonial lens to Russia's constitution and its amendments adds more insight into the country's constitutional dynamics than the traditional lens of democratic constitutionalism yields. Mutatis mutandis, the analysis of the Russian case can add to the general post-colonial theory of constitutional dynamics because it is one more case-study of a former metropolis under the influence of its colonial past, with the most open and violent roll-back into neo-colonialism so far.

Bibliography:

Avak'ân, Suren Adibekovič. "Das Wort 'Macht' sollte nicht erschrecken." *Jahrbuch für Ostrecht* 61 (2021): 13–25.

Damirov, Javid. "Auswirkungen der Verfassungsreform und der Maßnahmen gegen die Covid-19-Pandemie auf das Steuersystem der RF," *Wirtschaft und Recht in Osteuropa* 29 (2020): 328.

European Commission for Democracy through Law (Venice Commission). *Russian Federation Interim Opinion on Constitutional Amendments and the Procedure for their Adoption*. (19–20 March 2021) CDL-AD(2021)005 Or. Engl.

Kangaspuro, Markku, ed. *Russia: More different than most*. Helsinki: Kikimora, 1999.

Küpper, Herbert. “Die Bedeutung der EMRK in Demokratien im Umbruch.” In *Demokratie und Europäische Menschenrechtskonvention*, edited by Magdalena Pöschl and Ewald Wiederin, 119–181. Vienna: Manz, 2019.

Küpper, Herbert, and Antje Himmelreich. “Article 132.” In *Handbuch der russischen Verfassung, Ergänzungsband*, edited by Bernd Wieser. Vienna, Verlag Österreich, 2022, forthcoming.

Luchterhand, Otto. “Präsident Putins Verfassungsänderungsvorschläge: Vorbereitung des leetzten Umbaus seines Regimes.” *Jahrbuch für Ostrecht* 60 (2020): 13–53.

Malfliet, Katlijn. *Rusland na de Sovjet-Unie: een normaal land?* Leuven: lannoo campus, 2004.

Partlett, William. “Russia’s 2020 Constitutional Amendments: A Comparative Analysis,” *Cambridge Yearbook of European Legal Studies* 23 (2021): 311–342.

Partlett, William. “Crown-Presidentialism,” *I·Con* (2022), forthcoming.

Partlett, William, and Herbert Küpper. *The Post-Soviet as Post-Colonial. A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire*. Cheltenham: Elgar, forthcoming.

Simon, Gerhard. “Die Russen und die Demokratie: Zur politischen Kultur in Rußland.” In *Politische und ökonomische Transformation in Osteuropa*, edited by Georg Brunner, 133-152. Berlin Verlag: Berlin, 3rd ed., 2000.

Steininger, Andreas, and Joachim Schramm. “Eine erste Einschätzung der Lage in Kasachstan: Demokratiebewegung oder der banale Kampf der Cliquen um die Macht.” *Wirtschaft und Recht in Osteuropa* 31, no. 2 (2022): 33-36.

Wedde, Rainer, ed. *Die Reform der russischen Verfassung*. Berlin: Berliner Wissenschafts-Verlag, 2020.Wedde, Rainer. “Russland: Die jüngsten Verfassungsänderungen und die Gewaltenteilung.” *Jahrbuch für Ostrecht* 61 (2021): 54–63.

【Research Article】

Present Trends of Authoritarian Legality in China: The Operational Constitution

Leigha C. Crout*

Abstract

In recent decades, democracy has struggled. The gradual erosion of checks and balances and institutional independence of former democratic leaders now threatens the maintenance of established universal values and the protection of fundamental human rights. Simultaneously, democratic retrogression is accompanied by autocratic growth, alongside a new and unprecedented investment in legalistic governance in autocracies, identified by some as the rise of globalised 'autocratic legalism'.

This Article argues that a new and important trend of this legalism is the autocrat's emphasis on 'constitutional law', and the development of a set of constitutional norms that are exempt from the influence of liberal constitutionalism. Autocratic leaders engage their state constitution in implementing amendments that entrench their authority, to declare martial law, and as a basis for legal rhetoric and policy implementation while engaging in legalistic language to promote the importance of the constitution. A top-down conceptualisation of constitutional law that is complex, self-referencing and relativistic is rapidly becoming a hallmark of sophisticated authoritarian regimes. This conceptualisation of constitutional law is termed here as the autocrat's *operational constitution*.

This Article endeavours to contribute insight on this new direction within the context of the People's Republic of China (the PRC or China). Namely, this work will propose an answer to the following question: what principles and ideas underline top-down conceptions of constitutional law embraced by the incumbent administration in China – or what is the operational constitution for the New Era? To understand the answer, it is necessary to go beyond the blackletter and discover which texts and principles underline this particular form of autocratic legalism.

Keywords: The People's Republic of China, constitutional law, autocracy

* J.D., LL.M., PhD Candidate at King's College London; Research Associate with Oxford University's China, Law and Development Project; William H. Hastie Fellow at the University of Wisconsin Law School. E-mail: leigha.crout@kcl.ac.uk. The author is exceptionally grateful for the comments and recommendations received during the Asian Law Junior Faculty Workshop held at the National University of Singapore's Centre for Asian Legal Studies.

Contents

I. Introduction

What is 'autocratic constitutional law'? An emphatic use and reliance upon the law and its institutions has become a hallmark of autocratic governance, a trend which has been coined as the growth of 'autocratic legalism'.[1] Within this new legality, constitutional law seems to occupy an especially pertinent and influential position. Observers have noted some shared constitutional trends among autocratic states;[2] for example, Ginsburg and Simpser have argued that constitutions in some jurisdictions can operate as 'window-dressing', including various substantive and institutional

[1] *See e.g.* Kim Lane Scheppele, *Autocratic Legalism* 85(2) U. Chi. L Rev. 545 (2018).

[2] *Id.* at 1-2.

protections to conceal the state's actual constitutional practices.[3] Likewise, Thomas Kellogg proposes autocratic constitution might also be or become a 'false blueprint', a constitution which contains seemingly achievable democratic goals, yet the state possesses no actionable intention to pursue them to fruition.[4]

This Article focuses on the constitutional law of one state, the People's Republic of China, and offers a novel descriptive and critical account of its nature. It argues that the state's authoritarian leadership are relying upon expansive and sophisticated definition of constitutional law which includes norms crafted from complementary texts, principles, internal documents, academic contributions, and speeches. Notably, this conception excludes the liberal content inbuilt within the Constitution and other legal texts, while still using similar or identical verbiage to build this body of alternative constitutional norms. Together, these documents and speeches form the basis of the constitutional narrative that is promoted by the administration and shared within the Party-state, or what I identify as the autocrat's *operational constitution*.

This Article will proceed in three parts. It will begin with a review of the Party-state's constitutional culture and describe the current administration's need for a normative system separate from global constitutionalism. It will then define the culture of information control and censorship surrounding constitutional law, which limits academic contributions from dissenting constitutional law scholars. The following section will engage prominent literature from Political Constitutionalists and the New Left that reveals highly salient developments to constitutional theory within the Party-state. Finally, this work will conclude with the identification of the most prominent textual sources and principles in the operational constitution.

This Article will introduce a novel method of understanding autocratic constitutionalism into the existing literature regarding authoritarian constitutional law and constitutional governance in China. This scholarship, and by extension this query into the character of China's Constitution, is especially relevant in the modern era of autocratic legality wherein autocratic leaders are increasingly utilizing the Constitution and other legal instruments to legitimize and further entrench their administrations.

[3] *Id.* at 1-2.

[4] Thomas E. Kellogg, Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the 'Urgency' of Political Reform, 11 U. PA. Asian L. Rev. 337, 337-338 (2016).

II. The Operational Constitution

1. The CCP and the Operational Constitution

The PRC was founded on October 1, 1949, by the Communist Party of China (the Party or the CCP) in the aftermath of their victory in the Chinese civil war.[5] The CCP according to the Party's first Chairman, Mao Zedong, was to operate as the Marxist-Leninist Vanguard Party; an elite class of lawful and morally upright citizens to guide the state towards a complete socialist transformation.[6] While the role of the Party has oscillated with China's internal strife during its early years, its leadership has remained a relatively steadfast characteristic, and its integration into major state functions has proliferated since the nation's founding.[7] While China still possesses some characteristics of its Communist heritage, today it is recognized as an autocratic state.

Since 1949, the PRC has enacted four distinct constitutions, the last of which was promulgated in 1982 and serves as the present Constitution, including the several revisions and amendments which follow.[8] While the Party's leadership has remained a constant, the Party-state has often been criticized domestically and abroad for their lack of alignment with the Constitution and the international legal instruments which they have ratified.[9] This is especially true of the current administration. Freedom House, an international NGO which closely monitors political rights and civil liberties worldwide, rated the PRC as Not Free (9/100) in 2021, meaning that the state has almost wholly failed to uphold fundamental freedoms.[10] The nation receives similar reviews from other like NGOs and is heavily criticized in international media for its rights record.[11] Despite this evidence, Party leadership insists

---

[5] "China Profile – Timeline," BBC News (July 2019), https://www.bbc.com/news/world-asia-pacific-13017882.

[6] Mao Zedong, The Selected Works of Mao Tse-Tung, 102, 148, 312 (Vol. 5, Pergamon Press 1977). These pages include writings entitled *The Party's General Line for the Transition Period* (Aug. 1953), *Strive to Build a Great Socialist Country* (Sept. 1954), *Strengthen Party Unity and Carry Forward Party Traditions* (Aug. 1956), respectively.

[7] See e.g. Li Ling, The "Organisational Weapon" of the Chinese Communist Party - China's *Disciplinary Regime from Mao to Xi Jinping* in Law and the Party in China: Ideology and Organisation at 6 (R. Creemers & S. Trevaskes eds., Cambridge University Press 2020) (hereinafter Li, *The Organizational Weapon*).

[8] Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) (Constitution of the People's Republic of China) 1954; Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) (Constitution of the People's Republic of China) 1975; Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) (Constitution of the People's Republic of China) 1978; The previous Constitutions contained various different commitments to rights and philosophies, largely representative of different eras of Maoist governance. The 1975 and 1978 Constitutions, for example, marked the onset and conclusion of the disastrous Cultural Revolution, respectively. *See also* Leigha Crout, *The Evolution of Constitutionalism in the People's Republic of China* 36 Ind. Int'l & Comp. L. Rev. 351 (2021).

[9] *See e.g.* "China," Human Rights Watch (2022), https://www.hrw.org/world-report/2022/country-chapters/china-and-tibet. China has ratified 8 international human rights treaties. "Ratification Status for China," United Nations Office of the High Commissioner for Human Rights (2022), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=36&Lang=EN.

[10] This notably excludes both Hong Kong and Tibet. "China," Freedom House (2022), https://freedomhouse.org/country/china/freedom-world/2022.

[11] "China," Amnesty International (2022), https://www.amnesty.org/en/location/asia-and-the-pacific/east-asia/china/report-china/; *see also* "Human Rights in China," BBC News (2022), https://www.bbc.com/news/topics/c22yzywrvy0t/human-rights-in-china.

on its status as a constitutional and democratic state on par with that of liberal nations, and emphasizes the current administration as a regime committed to 'govern the country by law' (*yifa zhiguo*).[12]

As referenced in the Introduction, autocratic states have seen the merit in engaging legality and constitutional law within their polities. However, China's Party-state presents an especially vivid illustration of this principle through its *use* of the Constitution. Neil Damant aptly describes this in the following way:

> Chinese constitutions must be understood beyond their textual forms… [M]any state officials did not understand constitutions, did not accept their underlying rationale, or even cursed them—but still found these documents useful as words that could…intensify social divisions; and help push through unpopular policies. Constitutions were also useful as brute displays of political power: despite knowing that people at home and abroad knew that these documents had a problematic relationship with truth, the government promulgated and discussed them anyway.[13]

As Damant concludes, the Constitution is in part an autocratic tool. However, this tool exists within a difficult – yet intentional – stasis. First, the Constitution embraces the common values promoted by normative, global constitutionalism, including human rights, judicial independence and the rule of law. It then places strict limitations on many of those elements. For example, the Chinese Constitution requires that the enjoyment of enumerated rights not coincide with the 'interests of the state', a vague phrase which leaves these limitations open to interpretation. These conflicting ideals are not uncommon in autocratic constitutions, but their inclusion presents questions; first, why include liberal elements at all, if only to limit or challenge them. Notably, the incorporation of rights has a negative correlation with their fulfilment in autocratic states. Second, and more relevant to this inquiry, why intentionally contradict this liberal content within the Constitution with markedly illiberal limitations?

This Article urges a closer look at one aspect that might influence the administration's choice to intentionally adopt and continuously accept the existence of conflicting normative principles within China's Constitution. In particular, it analyses the rationale behind developing the limitations on the Constitution's liberal provisions, rather than just ignoring these mandates. In the era of autocratic legalism, which stresses the relevance of legal instruments generally and the Constitution specifically,

---

[12] *See e.g.*. "Democracy Not a 'Patent' of the West: US democracy summit a 'huge irony' aiming to split world: senior CPC official," The Global Times (Nov. 2021), https://www.globaltimes.cn/page/202111/1238822.shtml.

[13] Neil Damant, Useful Bullshit 2 (Cornell University Press 2022).

adopting this liberal content without limitations produces a potential problem. Namely that if wholly ignored, the chasm between constitutional text and practice might work to gradually erode the regime's social legitimacy, since the current administration is quite entrenched in promoting legality. Including limitations on rights represents the difference between ignoring the Constitutional text completely, and providing a 'legal' basis (however valid) for suspending a Constitutional guarantee.

To avoid such a direct repudiation of the Constitution, the inclusion of special limitations on enumerated freedoms are required. These limitations cannot be based in a liberal conception of law, which would not permit the suspension of (for example) *jus cogens* rights within the Chinese Constitution. Marxism alone, which was influential at the nation's founding, is no longer an appropriate choice for the Party-state, either. For a regime like the CCP concerned with its legitimacy and longevity, developing a domestic constitutional theory that can justify these rights limitations and other constitutional practices therefore becomes an imperative. In a word, this requires the development of an operational constitution.

This 'alternative' constitutional law is supported by three primary pillars – illiberal norms introduced within legal instruments, political rhetoric that develops illiberal constitutional principles, and academic contributions that extrapolate on the former. The final category is an especially important piece of the puzzle, as it often provides reasoned bases and law-based arguments for sometimes-vague political statements. While this is only one proposed rationale for the inclusion of such limitations, it is a persuasive one when considering that the Party-state has vested significant rhetorical and academic capital into the development of 'domestic' constitutional law and theory, and one which merits further investigation.

As this Article will illustrate, political rhetoric and scholarship suggests that even if the Constitution has become an autocratic tool, as Damant suggests, it far more complex than a convenient vector for legitimacy. The Party-state has fostered an academic environment that rejects liberal conceptions of law and embraces a contextualised, 'domestic' approach. Party leadership as the nation's 'real constitution' has become a significant theme in academia, and scholarship supporting this idea has become a cornerstone of new developments in constitutional law and practice. The following section will briefly establish how these narratives surrounding the operational constitution have proliferated, particularly within the last few decades. Because legal scholarship plays an essential role in the creation and support of the operational constitution, this portion will primarily focus on scholarly contributions to constitutional law perspectives rather than general engagement with the concept of constitutional governance.

2. Constitutional Censorship

The PRC has been widely criticized today for its comprehensive information control and censorship both on an offline. However, censorship of constitutional language in fact predated the internet; the PRC's first administration under Chairman Mao banned the use of the word 'constitutionalism' within the regime.[14] While such strict prohibitions on the use of terms associated with constitutional governance are no longer in place, publicly shared thoughts and opinions on these matters are highly regulated.[15] Online discussion of constitutional law and rights language today is generally monitored by the 'Great Firewall' (防火长城), which limits content deemed incompatible with the 'interests of the nation'.[16] As a combination of legislation and sophisticated censorship technology, the Great Firewall generally works to prevent alternative viewpoints that might threaten the state-sanctioned narrative.[17] This censorship is not only limited to topics however, but also extends to sites or platforms like Facebook, services provided by Google or that utilize Google's search technology, and Twitter.[18] While China's upper socioeconomic echelon can in some cases circumvent these blocks by utilizing a VPN or similar technology, their use is criminalised.[19]

---

[14] The concept of *xianzheng* (宪政, constitutionalism) first appeared in the Qing Dynasty of China before becoming banned by the Mao administration, and only reemerged during the drafting and promulgation of the nation's current 1982 Constitution. H. Li, *Chinese Constitutionalism on Discourse and Its Impact on Reforms* 22 J. of Chinese Pol. Sci. 407, 407 (2017).

[15] *See e.g.* "Document 9: A ChinaFile Translation: How Much Is a Hardline Party Directive Shaping China's Current Political Climate?" ChinaFile (Nov. 2013), https://www.chinafile.com/document-9-chinafile-translation#start.

[16] Congressional-Executive Commission on China, "Measure for the Administration of Internet Information Services (Chinese Text and CECC Partial Translation," (Sept. 2000), https://www.cecc.gov/resources/legal-provisions/measures-for-the-administration-of-internet-information-services-cecc. The reference of the Constitution is also closely monitored within legal institutions. The judiciary is particularly illustrative, as the PRC's state Constitution has only sparingly been referenced in the courtroom. The case most representative of this is *Qi Yuling*, wherein the SPC was pressured to withdraw a ruling it had issued that enforced the Constitutional guarantee of the right to educationInitially called China's *Marbury v. Madison*, many China scholars marked this as a new age of constitutional law in China. Thomas Kellogg, "The Death of Constitutional Litigation in China," The Jamestown Foundation (April 2009), https://jamestown.org/program/the-death-of-constitutional-litigation-in-china/. *See generally* Huiping Iler (trans.), *Qi Yuling v. Chen Xiaoqi et al.* 39 Chinese Educ & Soc'y 58-74 (2006).

[17] *See, e.g.* Zhonghua renmin gonghehuo wangluo anquan fa (中华人民共和国网络安全法) (Cybersecurity Law of the People's Republic of China) Art. 12 (promulgated by the Standing Comm. Ntn'l People's Cong. Nov. 7, 2016, effective June 1, 2017) (prohibiting online activities from "harming national unity").

[18] For a list of prohibited websites, *see* "GreatFire: Blocky," (Jan. 2022), https://blocky.greatfire.org/. Interestingly, some high-ranking Party members and state officials still participate on Twitter – often aggressively criticizing Western liberalism or promoting a pro-CCP narrative. *See* Jessica Brandt and Bret Schafer, "How China's Diplomats Use and Abuse Twitter," Brookings Institute (2020), https://www.brookings.edu/techstream/how-chinas-wolf-warrior-diplomats-use-and-abuse-twitter/. *See also* "Zhuming guoji zhengzhi zhuanjia xiang lan xin jiaoshou: Fansi zhan lang wenhua, huhuan wenming goutong," (著名国际政治专家相蓝欣教授：反思战狼文化，呼唤文明沟通) (Interview with Well-Known International Politics Expert, Professor Xiang Lanxin: Reflecting on Wolf Warrior Culture, and Calling for Civilized Communication) (Apr. 2020), https://wemp.app/posts/23513a3c-13db-4f44-b39f-07bae6a3a3ee?utm_source=bottom-latest-posts.

[19] The use of VPNs is treated somewhat irregularly via civil fines and criminal arrests, although a set of proposed regulations on the subject seems to favor fines over imprisonment. *See* 江真(Jiang Zhen), "Zhongguo ni tui xinfa jiagu xinxi fanghuoqiang, fan qiang zhe mianlin yancheng," (中国拟推新法加固信息防火墙，翻墙这面临严惩) [China plans to introduce a new law to strengthen the information firewall, and those who climb the wall face severe punishment] Voice of America (Nov. 2021), https://www.voachinese.com/a/china-gargets-vpn-providers-in-the-coming-laws-those-who-help-others-jump-over-great-fire-wall-

This censorship takes place in the context of a top-down initiative to develop domestic legal theories which reject liberal influence in favour of a contextualised approach that incorporates the PRC's 'shared history' and values. This objective is shared by the nation's highest offices; in 2016, Xi Jinping, the current President of China and General Secretary of the CCP, met with legal scholars and social scientists and encouraged them to develop legal theories that were suitable for 'China's practical conditions'.[20] Research grants from the state have been awarded in significant number to those studying and producing scholarship on these topics.[21] Concurrently, ideologies that are intended to supplement their liberal counterparts have already been promoted. For example, on the rule of law, theories like the 'socialist rule of law with Chinese characteristics'[22] and 'Xi Jinping Thought on the socialist rule of law with Chinese characteristics'[23], and a 5-year plan to develop the rule of law have been promoted nationally.[24]

Legal scholarship and other publications that contradict this narrative are swiftly removed, and the targeted censorship and punishment of liberal legal professionals has significantly increased within the current administration.[25] Several high-profile incidents implicating dissenting scholars are

---

are-guilty-20211129/6327788.html; *see also* "Guojia hulianwang xinxi bangongshi guanyu 'wangluo shuju anquan guanli tiaoli (zhangyou yijian gao)' gongkai zhangqiu yijian de tongzhi," (国家互联网信息办公室关于《网络数据安全管理条例（征求意见稿）》公开征求意见的通知) [Notice of the Cyberspace Administration of China on Public Comments on the "Regulations on the Administration of Network Data Security (Draft for Comment)"] Cyberspace Administration of China (Nov. 2021), http://www.cac.gov.cn/2021-11/14/c_1638501991577898.htm.; *see also* Coco Feng, "China's VPN Providers Face Harsher Punishment for Scaling the Great Firewall Univer New Data Regulation," South China Morning Post (Nov. 2021), https://www.scmp.com/tech/policy/article/3156095/chinas-vpn-providers-face-harsher-punishment-scaling-great-firewall.

[20] "Zhexue shehui kexue gongzuo zuotan hui fayan zhaibian,' ("哲学社会科协工作座谈会发言摘编") ["Excerpts from the Symposium on Philosophy and Social Sciences"] Xinhua (新华) (May 2016), http://www.xinhuanet.com//politics/2016-05/18/c_128992743.htm; *see also* Samuli Seppänen, *Anti-formalism and the Preordained Birth of Chinese Jurisprudence* 4 China Perspectives 31, 31 (2018), https://journals.openedition.org/chinaperspectives/8446.

[21] Seppänen, *Anti-formalism and the Preordained Birth of Chinese Jurisprudence supra* n. 20 at 31. *See also* "Zhongguo fa xuehui 2017 niandu bu ji zhuanxiang keti shenbao gonggao (Dongbiwu faxue sixiang he zhongguo tese shehui zhuyi fazhililun yanjiu)," ("中国法学会 2017 年度部级专项课题申报公告 (董必武法学思想和中国特色社会主义法治理论研究") ["China Law Society Announcement on the 2017 Ministry-level Special Projects (Research on Dong Biwu's Legal Thought and Theory of Socialist Rule of Law with Chinese Characteristics)"] Hebei sheng fa xuehui (河北省法学会) (Jul. 2017), http://www.hbsfxh.org.cn/index.php?m=content&c=index&a=show&catid=172&id=144.

[22] Glenn Tiffert, *Socialist Rule of Law with Chinese Characteristics: a New Genealogy* in Socialist Law in Socialist East Asia 72 (Hualing Fu, John Gillespie, Pip Nicholson and William Edmund Partlett eds. Cambridge Press 2018)

[23] 徐显明(Xu Xianming), "Xi Jinping fazhi sixiang de hexin yaoyi," (习近平法治思想的核心要义) [The Core Essence of Xi Jinping Thought on the Rule of Law] Quanguo renmin daibiao dahui (全国人民代表大会) (Sept. 2021), http://www.npc.gov.cn/npc/c30834/202109/832bbd4bfb52407c8ee2a61f6d7d2dfa.shtml.

[24] This 5 Year Plan, among other principles, aims to 'strengthen the rule of law government with Chinese characteristics' while 'adhering to the leadership of the Party to ensure the correct direction for the construction of a government under the rule of law'. "Fazhi Zhengfu jianshe shishi gangyao (2021-2025 nian)" (法治政府建设实施纲要（2021-2025 年）[Implementation Outline for the Construction of a Government Ruled by Law (2021-2025) Xinhua (新华) (Aug. 2021), http://www.gov.cn/gongbao/content/2021/content_5633446.htm.

[25] *See e.g.* Tom Phillips, "It's getting worse': China's liberal academics fear growing censorship," South China Morning Post (Aug. 2015), https://www.theguardian.com/world/2015/aug/06/china-xi-jinping-crackdown-liberal-academics-minor-cultural-revolution; *see also* "China: On "709" Anniversary, Legal Crackdown Continues Repression of Rule of Law Advocates Includes Torture and

indicative of this growing trend. In 2018, Yu Wensheng, a human rights advocate, was arrested for the publication of an open letter addressed to the Party suggesting the elimination of the Constitution's Preamble and the introduction of democratic elections for the nation's highest office.[26] In 2020, Xu Zhiyong, a liberal scholar in China, was detained after publishing a reformed Constitution proposal suggesting that the Party cede its control in favour of a democratic state.[27] In Hong Kong, established constitutional law scholar and Dean of Hong Kong University School of Law Fu Hualing has been disparaged in state-backed media for, among other accusations, accepting grants from international organizations and promoting anti-China scholarship.[28] Other critical scholars have been subjected to different means of control, including forced removal from prominent academic positions and daily surveillance of themselves and family members.[29]

While some scholars continue to promote liberal-style constitutionalism, these detainments and surveillance have evoked a chilling effect. In this way, more moderate constitutional law scholars and supporters of the operational constitution are granted more ideological bandwidth. This broader trend once was observed on a smaller scale within the PRC in 2013, a significant year which marked a distinct turn in the development of Chinese law.[30] During this time, a spirited debate began within Chinese academia concerning the need for constitutional rights protections and limitations on Party authority.[31] While views supporting a strong Party-state were initially dismissed as extremist and criticised as 'driving a wedge' between the Party, Chinese intelligentsia and the people,[32] this view

---

Family Harassment," Human Rights Watch (Jul. 2017), https://www.hrw.org/news/2017/07/07/china-709-anniversary-legal-crackdown-continues.

[26] Steven Lee Meyers, "China Rights Lawyer Detained After Posting Pro-Democracy Appeal," The New York Times (Jan. 2018), https://www.nytimes.com/2018/01/19/world/asia/china-yu-wensheng-rights-lawyer.html; *see also* Eva Pils, *China's Dual State Revival* (Draft Manuscript).

[27] "China: Free Human Rights Advocate," Human Rights Watch (2020), https://www.hrw.org/news/2020/02/18/china-free-prominent-legal-advocate#.

[28] "Jiao zi hui heimu,"(教資會黑幕) [The University Grants Committee is Shady] (Feb. 2022), http://www.takungpao.com.hk/news/232109/2022/0208/684110.html.

[29] Phillips, "It's getting worse': China's liberal academics fear growing censorship," *supra* n. 25.

[30] *See e.g.* Sebastian Veg, "China's Political Spectrum Under Xi Jinping," The Diplomat (Aug. 2014), https://thediplomat.com/2014/08/chinas-political-spectrum-under-xi-jinping/.; Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the 'Urgency' of Political Reform*, 11 U. PA. Asian L. Rev. 337 at VI (2016).

[31] This originated from the accusation, detention, and torture of a Former Wenzhou City Vice-Mayor Ye Jiren. Although a prominent governmental figure, he was held incommunicado and without access to an attorney. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the 'Urgency' of Political Reform supra* n. 30 at 339-40.

[32] Hua Bingxiao (华炳啸), Lun fanxianzheng de wuchi yu qienuo: huiying fanxianzheng guandian xilie zhi er (论反宪政的无耻与怯懦:回应反宪政观点系列之二) [On the Shamelessness and Gutlessness of the Anti-Constitutionalist Faction: Responding to the Anti-Constitutionalist Views, Part Two in a Series], Hua Bingxiao de Boke (花炳啸的博客) [Hua Bingxiao Blog] (Jul. 2013), http://huabingxiao.blog.caixin. com/archives/58851. *See also* Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the 'Urgency' of Political Reform supra* n. 30 at 399.

began to take precedence as censorship controls dominated discussion fora.[33] Since this debate, this trend of targeted censorship has continued, and supporters of a strong Party-state occupied an important ideological space as essential contributors to the operational constitution.

The following section will define the strong Party-state (or 'Political Constitutionalist') scholarship which provides content to the operational constitution. It will begin with an overview of the primary groupings of scholars within China and the major trends which shape their contributions, an account which is necessary for understanding the context within which the operational constitution is developed. It will then transition into an account of works from well-known academics that support a strong Party-state, and extract notable principles of the operational constitution from these works.

3. The Operational Constitution – Law, Theory and Political Constitutionalists

The term 'Political Constitutionalists' is used to refer to a prominent group of scholars who argue that a constitutional state should be centred on the 'legal and political realities of China' rather than normative constitutionalism, which elicits condemnation from these critics as unsuitably Western or 'nationalistic'.[34] A prominent sub-group of this broad category is a collection of scholars often referred to as the New Left (or neo-conservatives), who contribute to the development of the China Model, or a method of governance that can elicit prosperity in the absence of a liberal state.[35] These scholars are typically critical of liberalism and promote Party centralism as an ideal.[36] Whereas it could have once been identified as a fringe movement in earlier decades, Political Constitutionalists (and the New Left) now occupy a significant role in domestic scholarship.[37] This scholarship provides some valuable understanding into many essential principles that define the operational constitution.

Notably, the main tenets of Political Constitutionalism can be traced to a well-known jurist, Carl Schmitt, who has gained influence within the PRC since the early 2000s.[38] Known as a prominent supporter of National Socialism, Schmitt introduced several theoretical tenets that gained popularity

---

[33] *Id.* at 343-4.

[34] Lucas Brang, The Dilemmas of Self-Assertion: Chinese Political Constitutionalism in a Globalized World Mod. China 1, 2-4 (2021).

[35] *See generally* He Yafei, "Will China and the U.S. Enter a New Cold War?" ChinaDaily (Jul. 2018), http://usa.chinadaily.com.cn/a/201807/09/WS5b42a4f8a3103349141e16d7.html. While the China model has been granted numerous definitions, it is most often referred to by way of comparison to Western states. The author of this article, He Yafei, is a former Vice-Minister of Foreign Affairs. He expounds on the value of the "China model" as an alternative to the "U.S. model."

[36] *See* Sebastian Veg, "China's Political Spectrum Under Xi Jinping," The Diplomat (Aug. 2014), https://thediplomat.com/2014/08/chinas-political-spectrum-under-xi-jinping/.

[37] He Li, *China's New Left* in Political Thought and China's Transformation: Politics and Development of Contemporary China 46 (2015).

[38] Xie Libin and Haig Patapan, Schmitt Fever: The Use and Abuse of Carl Schmitt in Contemporary China 18 I•CON 130-146, 132 (2020).

with Political Constitutionalists. This includes a conceptualisation of sovereignty which maintains that a sovereign is they who have the authority to declare a 'state of exception' that suspends the ordinary application of law.[39] To Schmitt, a state is composed of a majority of 'friends' who persecute their 'enemies'.[40] As Political Constitutionalists have noted, this concept has resonance in China's self-description as the People's Democratic Dictatorship, to be discussed in Section 5.2. His condemnation of liberalism similarly gained favour within the Political Constitutionalists, who reject liberal definitions of law as unsustainable for China based on its national history and current conditions.[41] Particularly, his argument that a society might be illiberal while simultaneously remaining democratic is also a defining characteristic of the Party-state's self-description of the PRC's political system.[42]

Schmitt proposed a highly contextualised and dualistic understanding of constitutional law which also resonated with Political Constitutionalists and the New Left. Specifically, he argued that a constitution is best understood by the juxtaposition of the text with the sovereign's decision-making, or how the incumbent regime practices constitutional law.[43] He argues that, 'A state does not have a constitution 'according to which' its will is formed and functions, but rather a state is a constitution, i.e. an existential condition, a status of unity and order'.[44] Political Constitutionalists' acclimation to this idea can be observed in their support of constitutional principles that are political in nature and exist external to the Constitution.[45]

Before proceeding, some context on the engagements between these types of scholars is helpful. Notably, those who can be identified as Liberal Constitutionalists or possessing at least some of the key elements associated with this philosophy (e.g., judicial independence, the separation of powers) and Political Constitutionalists are, in a word, often diametrically opposed. This is especially true in relation to constitutional law and constitutionalism. A summary of these differences created by Gao Quanxi provides further context on this matter:

[39] Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 5 (George Schwab, trans., University of Chicago Press 2005 [1922]).
[40] Carl Schmitt, The Concept of the Political 26 (trans. Leo Strauss, The University of Chicago Press 2007).
[41] *See infra* Section II(2).
[42] Carl Schmitt, Constitutional Theory 265-266 (Jeffrey Seitzer, trans. Duke University Press 2008)
[43] *Id*. at § 1.
[44] *Id*. at § 1.
[45] *See infra* Section II(2).

Political Constitutionalism	**Normative (Liberal) Constitutionalism**
Realism (现实主义)	Utopianism (理想主义)
Sovereignty/Constituent Power (制宪权)	Judicial Review (违宪审查)
State of Exception (非常时刻)	State of 'Normalcy' (平常时刻)
Historicity (历史观) of the Constitution	Historicity in Interpretation
Contextualism (unwritten political conditions)	Textualism (written constitution)
Organic (有机) Understanding of Law	Mechanical Understanding of Law
Emphasis on the Preamble (序言)	Emphasis on Fundamental Rights

(Chart translation and adaption from Lucas Brang's *Carl Schmitt and the Evolution of Chinese Constitutional Theory*[46])

At a glance, it is clear that these themes share very little common theoretical grounding. At least as contemplated by Gao, the core of Political Constitutionalism displays a firm alignment with many Schmittian principles referenced above, including the state of 'exceptionalism' and contextualism. Conversely, Liberal Constitutionalists in this description mostly rely on traditional liberal theory, which incorporates judicial review and an emphasis on fundamental rights. Cross-rejection of the validity of these theories often frustrates meaningful discussion. For example, some Liberals repudiate any reliance on Schmitt in light of the influence of his scholarship in Nazi Germany.[47] Likewise, many Political Constitutionalists reject liberal theory as inappropriate for the Chinese context.

Moreover, the principles themselves cannot easily be squared. 'Realism' or understanding law in a way that is consistent with national realities cannot find resonance within textualism and a formalist, 'mechanical' understanding of the law. This also complicates productive engagement, especially when considered in the context of the present administration's censorship of Liberal Constitutionalists. Discussion of Party leadership, or the 'Sovereignty' tenet in Gao's chart is illustrative; while Party Leadership is a central principle of law to Political Constitutionalists, Liberals either do not or cannot address this reality in constitutional terms given the culture of censorship.[48] This is representative of the dual nature of the Constitution, and the inherent conflict between the normative principles it embraces.

[46] Lucas Brang, Carl Schmitt and the Evolution of Chinese Constitutional Theory: Conceptual Transfer and the Unexpected Paths of Legal Globalisation in Global Constitutionalism 117, 134 (Cambridge University Press 2019).
[47] *Id.* at 127.
[48] See infra II.

The following section serves three functions – it provides insight into some themes of Political Constitutionalism scholarship as defined by prominent Political Constitutionalist Gao Quanxi, namely Realism, Sovereignty/Constitutional Power, State of Exception, Historicity of the Constitution, Contextualism, and an Emphasis on the Preamble.[49] It also introduces some of the most prominent theorists within the New Left camp and includes their major contributions to the field of political constitutionalism. Finally, through this discussion, this portion will provide a foundation of understanding for this Article's analysis of what texts and principles compose the operational constitution.

a. Realism and Sovereignty/Constituent Power

Jiang Shigong (强世功) is a prominent Political Constitutionalist and New Left scholar of constitutional law. In his article *Written and Unwritten Constitutions,* Jiang argues that 'both a written constitution and an unwritten constitution are basic features of any constitutional state', and China's constitutional order can only be wholly understood if the PRC's unwritten constitution is included.[50] In this contextualised account, he indicates that in practice the Chinese constitution has four distinct sources: the CCP's own Constitution, constitutional conventions, constitutional doctrine, and constitutional statutes.[51] He emphasizes that one must escape the confines of formalism and use an 'empirical-historical perspective', or the history of the state as one initially founded and organized by the Communist Party. Jiang presents this as a basis for the state to maintain and advance the centralism of the CCP.[52] To Jiang, it is also essential to '[take] into account China's unique political tradition and reality' to better comprehend the PRC's constitutional culture, a view which is shared with other Political Constitutionalists.[53]

Jiang describes the NPC and Standing Committee's roles as a functional 'rubberstamp' for Party initiatives, as an extension of the fact that the CCP is the historical founder and continued sovereign of the state.[54] He continues by representing constitutional governance as possessing two sources – the CCP and the NPC.[55] The CCP and 'other democratic parties' represent those with the authority to

[49] See Lucas Brang, Carl Schmitt and the Evolution of Chinese Constitutional Theory: Conceptual Transfer and the Unexpected Paths of Legal Globalisation in Global Constitutionalism 117, 134 (Cambridge University Press 2019).
[50] Jiang Shigong, *Written and Unwritten Constitutions*, 36 Mod. China 12-46, 12 (2010).
[51] *Id.* at 12.
[52] *Id.* at 23-4.
[53] *Id.* at 12, 15.
[54] *Id.* at 23-4.
[55] In support of these ideas, Jiang strangely quotes former national leader Deng Xiaoping, who was well-known to support the separation of the Party and state institutions. *Id.* at 26; Li Ling, *"Rule of Law" in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China* 2(1) Asian J. of Law and Soc'y 93, 110 (2015).

undergo 'substantive political decision making'.[56] The NPC, on the other hand, are 'members…democratically elected through a legal process'[57] whose task is to nationalize and legitimize the political decisions of the CCP.[58] To Jiang, these units work in tandem and form a distinctive constitutional order, for 'at the heart of China's constitutional regime lies a unique interactive connection between the party and the state'.[59] Scholarship promotes the idea that constitutional law-making generally follows this structure.[60]

While initially a controversial piece, *Unwritten Constitutions* became an essential piece of a larger body of scholarship that expounded on the role of the Party and the value of the China model, especially within the New Left.

b. Contextualism and the State of Exception

Chen Duanhong, a colleague of Jiang at Peking University and a New Left theorist, offers further insight into the field of political constitutionalism in China. Like Jiang, Chen advocates a departure from formalist Constitutional text into a more relativistic application – a 'law of survival' for the state.[61]. A constitution, Chen argues, should adapt to the needs of the time to best serve the people; from the centralism of the revolution to the economic growth stimulated by the Reform and Opening Up Period.[62] From this understanding of constitutional law, Chen stipulates that China's Constitution is actually composed of five essential rules or principles, 'in order of priority': 'the Chinese people under the leadership of the Communist Party of China, socialism, democratic centralism, modernization, and protection of basic rights'.[63] Here, Chen openly invokes a Schmittian conception of constitutional legality; that the distribution of power and the leadership of the Communist Party is

[56] *Id.* at 24.
[57] *Id.* at 24.
[58] *Id.* at 24.
[59] *Id.* at 24.
[60]While he references the NPC as an institution that is 'checking and balancing' the CCP, it is clear that this is not meant in the same way as a legislative branch might check executive overreach; following the logic of this theory, a 'check' would divest the NPC of its role of a 'rubberstamp' *Id.* at 23-4; *see also* Rory Truex, Makning Autocracy Work: Representation and its Limits in Modern China 99-100 (Cambridge University Press 2016).
[61] 陈端洪(Chen Duanhong), "Chen Duanhong: lun xianfa zuowei guojia de genbenfa yu gaoji fa," (陈端洪：论宪法作为国家的根本法与高级法) [Chen Duanhong: The Constitution as the Fundamental Law and Highest Law of the Country] Public Law Research Center of Renmin University (2008), http://www.calaw.cn/article/default.asp?id=1210 (hereinafter Chen, The Constitution as the Fundamental Law).
[62] *Id*.
[63] *Id.*

part of the state's 'absolute' or 'real' constitution.[64] Pointedly, he notes that 'As long as the ruling class remains the ruling class, the fact of power proves itself, and politics itself is the constitution'.[65]

Chen introduces principles aside from Party leadership and socialism that merit further consideration given the frequency of their occurrence in both Party-state rhetoric and legal instruments. Like other New Left scholars, Chen draws this content from the Preamble of the state Constitution. Namely, 'democratic centralism, modernization, and protection of basic rights.'[66] While the inclusion of modernization and basic rights represent an interesting divergence from New Left literature, which emphasises the inherent imperialism in rights language, democratic centralism is a more recurring element in scholarship.[67] In his work *The Constitution as the Fundamental Law and Highest Law of the Country*, Chen describes democratic centralism as comparable with the West's separation of powers in that it establishes a basis for relationships between institutions. In lieu of the hard division of labour in the latter, democratic centralism instead emphasizes cooperation and 'eventual unity' between organs of the state. In the event of a dispute, state organs are to look to the central government and rely on political power reorganization to set a resolution that adequately considers the overall character of the conflict.[68] Democratic centralism is not a new or original principle in the Party-state, but this definition does suggest an interesting departure from its Constitutional meaning, which prescribes a primarily structural rather than substantive deference to the NPC.[69]

c. Emphasis on the Preamble and Common Threads

Of particular note in the Political Constitutionalist and New Left literature is the treatment of the Constitution's Preamble as controlling. Western constitutional law scholarship would aver that the Preamble, as the preface to most Constitutions, is generally non-binding. While China's Preamble replicates others states' in its content and the absence of prescriptive language, Political Constitutionalists argue that its status should be binding within the legal system. In some cases, scholars have maintained that in the event of a conflict between the text of the Constitution and the

[64] *Id. See also* Carl Schmitt, Constitutional Theory 59-60 (Jeffrey Seitzer trans. Duke University Press 2008).
[65] Chen, The Constitution as the Fundamental Law *supra* n. 61.
[66] *Id.*
[67] *Id.* Democratic centralism is itself included within the Constitution, within Article 3. *See* Xianfa *supra* n. 8 at Art. 3.
[68] In terms of modernization and basic rights, whereas the former seems to represent a more general idea of development in accordance with the times, the latter is quite clear in its proposal to amend the Preamble. Basic rights, Chen argues, are the fundamental reason why the Constitution has become higher law; therefore, they should receive further protection. Although Chen does not define basic rights, he recommends the inclusion of the 2004 amendments to Article 33 the Constitution to be included within the Preamble, namely, that "the state shall respect and protect human rights." *See* Chen, The Constitution as the Fundamental Law *supra* n. 61; *see also* Xianfa *supra* n. 8 at Art. 33.
[69] Xianfa *supra* n. 8 at Art. 3.

Preamble, the Preamble would be controlling; others have projected that the state Constitution is a framework for what could become law. A more extreme view espoused by Jiao Shilei, according to scholar Jean Mittelstaedt, is that the Preamble is the only portion of the Constitution which should be considered legally binding.

The common thread uniting these perspectives is the intended legitimation of the political commitments, particularly those in the Preamble, superseding the Constitutional text. Schmitt's influence is apparent, either through explicit reference or theoretical alignment; many major tenets discussed above have some basis within Schmittian theory. Interesting, here, is precisely how this applies within the China context. Political Constitutionalist literature elevates the idea of the political – the leadership of the Party – as functionally supreme. Party leadership appears as an immutable constitutional characteristic, supported by other complementary principles. According to this understanding, the political will of the people, expressed through Party-state leadership and constitutional law-making, is both democratic and the most suitable model for China's realities.

Notably, rhetoric, the other source of the operational constitution, does not align perfectly with Political Constitutionalist and New Left literature. While the Party Constitution and rhetoric might promote the Party-state's subordination to legal instruments, this is not consistent with either the primary narrative nor practice. The following section will build on these observations, identifying collective principles and key constitutional elements of the operational constitution included within New Left literature, and defining their sources in law and policy.

4. The Operational Constitution – Sources

As referenced in the Introduction, the sources of the operational constitution can be separated into three pillars of support – illiberal norms introduced within legal instruments, political rhetoric that develops illiberal constitutional principles, and academic contributions that extrapolate on the former. Since academic contributions were discussed in the previous section they will not be included here. For simplicity, the remaining categories will be reduced into two interrelated and self-referencing groupings: texts and principles. This final section will begin with an account of the textual sources, and transition into a description of the most influential principles for the operational constitution. The below is by no means a comprehensive list of texts and principles, but rather a reasoned analysis of some of the key features of authoritarian constitutional governance in the Party-state

a. The Constitution

The relevance of the Constitution to the operational constitution has already been touched upon in this Article, but further elaboration is helpful in contextualising its role in the Party-state. Larry Backer has undergone an impressive study of the Constitution in modern Party congresses, meetings of the CCP's members which occur every five years and determine the CCP's new leadership. By reviewing documentation acquired from the congresses and analysing the method in which it has been referenced, there are some observable changes in the role of the Constitution in the current administration. From Backer's estimation, the Constitution has been referenced in political channels in three distinct ways: first, as a basis to legitimise external policies such as 'one country, two systems'; next, as a vehicle for the 'guiding ideology' and framing the Party-state's institutional systems; and as a term used to represent the Party-state as 'paramount' within the normative order.[70]

Ultimately, however, and as Backer notes, the state Constitution has experienced a 'downshifting' in favour of political constitutionalism which instead emphasizes the relevance of the Party Constitution and CCP leadership.[71] This comports with a general trend noted by Flora Sapio, who writes that within subsequent Working Reports on Party congresses, the idea that the Party 'defines and leads all those political processes which are then concretely realized by organs of the State' has become gradually more pronounced.[72] This 'use' of the Constitution as a tool and its comparative downshifting is illustrative of modern efforts to further centralise the legal system under the Party-state while still developing the functionality of legal institutions. As noted by Ginsburg and Zhang, the Party-state may be entering an era wherein 'law plays a greater, not lesser, socio-political role in a consolidated authoritarian regime'.[73]

While its inconsistent legal enforcement can be questioned, it should be noted here that the Constitution possesses important and 'latent' normative content, meaning that it occupies an essential role as a potential avenue for reform. The inclusion of more liberal content such as human rights and judicial independence represent an opportunity to effectuate those principles. Authoritarian scholarship has acknowledged that the forum of the courts is an important venue for implementing

[70] Larry Catá Backer, Chinese Constitutionalism in the "New Era": The Constitution in Emerging Idea and Practice 33 Conn. J. Int'l L. 162, 199 (2018).
[71] *Id.* at 202-3.
[72] Flora Sapio, "Chinese Constitutionalism After the 19th CPC Congress: Flora Sapio on 'Chinese Constitutionalism in Work Reports to the CCP Congress 1949 – 2012'" Law at the End of the Day (Nov. 2017), https://lcbackerblog.blogspot.com/2017/11/chinese-constitutionalism-after-19th.html.
[73] Zhang & Ginsburg, *China's "Turn Towards Law," supra* n. 13 at 310.

political and legal change, and the PRC has notable precedent of the success using this avenue.[74] *Weiquan* lawyers have successfully used the Constitution in the past to change national legislation, demand social change, and in the case of *Qi Yuling,* judicialize the constitution.[75] While activism is more suppressed in this new era, the Constitution still represents an important tool.

As indicated in the previous section, the Preamble also plays an essential role in the articulating the key principles and schools of thought which influence the operational constitution. While not the only binding section of the Constitution as suggested by some New Left scholarship,[76] its contents are heavily drawn upon in practice. The most important and influential principle being, in this case, Party leadership. Beyond this, the Preamble also includes the following:

> Our country will long remain in the primary stage of socialism. The fundamental task for our country is to concentrate on achieving socialist modernization along the road of socialism with Chinese characteristics. We the Chinese people of all ethnic groups will continue, under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the Theory of Three Represents, the Scientific Outlook on Development and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, to uphold the people's democratic dictatorship, [and] stay on the socialist road.[77]

Of this important paragraph, aside from the leadership of the CCP the most salient principles for the operational constitution are socialism with Chinese characteristics, Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era (hereinafter Xi Jinping Thought), and the people's democratic dictatorship. These are also highlighted in the Party's own constitution, and will be discussed in the following section on the 'principles' of the operational constitution.

In sum, the state Constitution assumes a complicated role in the Chinese legal system. In the operational constitution, it serves first as a source of principles as described within the Preamble and as a forum for further centralisation efforts, as evidenced by the 2018 amendments. In the latent constitution, the content that aligns with global constitutionalism provides a potential source of reform.

---

[74] Tamir Moustafa and Tom Ginsburg, *Introduction: The Function of Courts in Authoritarian Politics* 2-3 in Rule by Law: the Politics of Courts in Authoritarian Regimes (Tom Ginsburg & Aziz Huq, eds. Cambridge University Press 2008).

[75] *See generally* Huiping Iler (trans), *Qi Yuling v. Chen Xiaoqi et al.* 39 Chinese Educ & Soc'y 58-74 (2006).

[76] Jean Christopher Mittelstaedt, *Understanding China's Two Constitutions: Reassessing the Role of the Chinese Communist Party* 10th ECLS Conference on "New Perspectives on the Development of Law in China" Institute of East Asian Studies, University of Cologne 3-7 (Sept. 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2682609.

[77] Xianfa *supra* n. 8 at Preamble.

Whereas more illiberal developments in recent years seem to suggest a full repudiation of true normative constitutionalism, the elevation of the Constitution create a distinct tension between Constitutional text and the state's realities.

b. The Party Constitution

One of the most important documents for the operative constitution is the Party's own constitution. This Constitution, like its state counterpart, serves to organize the basic functions of the CCP and its responsibilities.[78] While the Party Constitution is not often invoked in public fora, it is elevated in Party meetings and congresses.[79] As the day-to-day operations of the Party primarily extend beyond the scope of this work, this section will focus on the inclusion of those principles that contribute further insight into what the Party-state might consider to be key constitutional features. While many ideals are repeated within the state Constitution, discussed above, the CCP Constitution possesses some original content that is significant to this query. The sections that contribute the most to this idea are Article 3 and the Constitution's Preamble, which respectively outline the responsibilities of Party members and provide more tangible content to vague principles that are referenced in official statements and rhetoric. In relevant part, Article 3 reads:

> Party members must fulfill the following obligations: 1) Conscientiously study Marxism-Leninism, Mao Zedong Thought… and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era, study the Party's lines, principles, policies, and resolutions… 2) Implement the Party's basic line… 3) Adhere to the principle that the interests of the Party and the people come before all else… 4) Consciously observe Party discipline, with utmost emphasis placed on the Party's political discipline and rules, set a fine example in abiding by the laws and regulations of the state.[80]

Two observations are outstanding from this passage. Beyond the reassertion of the principle of Party leadership in sub-Articles 1, 3, and 4, a new principle to this study, the Party's basic line, is

---

[78] *See generally* "Constitution of the Communist Party of China," Xinhua (2018), http://www.xinhuanet.com/english/download/Constitution_of_the_Communist_Party_of_China.pdf (hereinafter CCP Constitution).

[79] *See e.g.* Xi Jinping, "Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era," (Oct. 2017), http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

[80] CCP Constitution *supra* n. 78 at Art. 3.

introduced in Article 2.[81] As defined in the General Program (or Preamble), the 'basic line' is to 'lead all the people of China together in a self-reliant and pioneering effort, making economic development the central task, upholding the Four Cardinal Principles, and remaining committed to reform and opening up, so as to see China becomes a great modern socialist country'.[82] Most of this is immediately clear with the exception of the Four Cardinal Principles, which are defined later in the General Program as the obligations to 'keep to the path of socialism, to uphold the people's democratic dictatorship, to uphold the leadership of the Communist Party of China, and to uphold Marxism-Leninism and Mao Zedong Thought'[83] – principles also included within the state Constitution.[84]

Secondly, sub-Article 2 and 3, which together emphasize Party regulations over legal rules.[85] When considered with the fact that Party regulations always precede the mention of 'state laws' throughout the text, a distinct impression is formed on the relative importance of the two instruments. Without further detail, of course, this observation could be attributed to the fact that this is the CCP Constitution, and therefore Party regulations would naturally be listed first. However, when combined with observations of practice, modern legal developments and Party-state rhetoric that elevate the political, this phrasing seems slightly more intentional or instructive. For example, in his study of constitutional references in the latest CCP Congress, Backer notes that the CCP Constitution is mentioned more often than its state counterpart, as a key indicator of the modern emphasis of its importance.[86] This ordering is also consistent with the principle of 'use law to govern the country, use internal regulations to govern the Party' as noted by Minzer.[87] Although it is ultimately speculation whether this was an intentional impression contemplated by the drafters, the ordering of these principles has some bearing in practice.

c. Internal Party Documents

Further data suggest that internal documents such as Party communiques also play a distinct role in the operative Constitution. Most are not available to the public and are sometimes considered 'state secrets', but those that have been released or leaked grant more nuanced insight into specific policy objectives or mandates that are especially sensitive or important to Party-state governance. By way of

[81] *Id.* at Arts. 1-4.
[82] *Id.* at General Program.
[83] *Id.* at General Program.
[84] *Id.* at General Program; Xianfa *supra* n. 8 at Preamble.
[85] CCP Constitution *supra* n. 78 at Arts. 2-3.
[86] Backer, Chinese Constitutionalism in the "New Era": The Constitution in Emerging Idea and Practice supra n. 70 at 202-3.
[87] Carl Minzer, End of an Era: How China's Authoritarian Revival is Undermining its Rise 8 (Oxford University Press 2018).

example, one such text is the Communique on the Current State of the Ideological Sphere, more commonly known as Document Number 9 (hereinafter Document no. 9).[88] Document no. 9 contains a list of ideological 'problems' that threaten socialism with Chinese characteristics which, the text suggests, should be carefully censored or eradicated.[89] These 'problems' include:

> 1. Promoting Western Constitutional Democracy: An attempt to undermine the current leadership and the socialism with Chinese characteristics system of governance 2. Promoting "universal values" in an attempt to weaken the theoretical foundations of the Party's leadership. 3. Promoting civil society in an attempt to dismantle the ruling party's social foundation. 4. Promoting Neoliberalism 5. Promoting the West's idea of journalism, challenging China's principle that the media and publishing system should be subject to Party discipline. 6. Promoting historical nihilism, trying to undermine the history of the CCP and of New China. 7. Questioning Reform and Opening and the socialist nature of socialism with Chinese characteristics.[90]

Notable from this passage is the targeted language criticizing human rights language and the distinctive 'othering' of Western thought. Note 1 on Western constitutional democracy continues:

> Western Constitutional Democracy has distinct political properties and aims. Among these are the separation of powers, the multi-party system, general elections, independent judiciaries, nationalized armies, and other characteristics. These are the capitalist class' concepts of a nation, political model, and system design. The concept of constitutional democracy originated a long time ago, and recently the idea has been hyped ever more frequently. This is mainly expressed the following ways: In commemorating the thirtieth anniversary of the enactment of the [Chinese] Constitution, [some people] hold up the banners of "defending the constitution" and "rule of law." They attack the Party's leaders for placing themselves above the constitution, saying China "has a constitution but no constitutional government."
>
> Some people still use the phrase "constitutional dream" to distort the Chinese dream of the great rejuvenation of the Chinese nation, saying things like "constitutional democracy is the only

[88] It was identified as Document Number 9 because 9 previous communiques had been distributed prior to this one. "Document 9: A ChinaFile Translation," *supra* n. 15.
[89] *Id*.
[90] *Id*.

> way out" and "China should catch up with the rest of the world's trend toward constitutional governance." The point of publicly proclaiming Western constitutional democracy's key points is to oppose the party's leadership and implementation of its constitution and laws. Their goal is to use Western constitutional democracy to undermine the Party's leadership, abolish the People's Democracy, negate our country's constitution as well as our established system and principles, and bring about a change of allegiance by bringing Western political systems to China.[91]

From this excerpt, it is clear that there is a direct repudiation of elements such as a multi-party system, judicial independence, and general elections – all of which have to some extent been introduced into constitutional texts or practice. For example, as discussed in the first section of this chapter, Article 131 of the state Constitution requires that the judiciary function independently. Moreover, the Party has consistently publicly presented itself as under the law – yet Document no. 9 seems to suggest that the Party exists beyond this framework, corroborating other sources which suggest this structure is accurate. While it is difficult to know which interpretation is the 'most' correct given the limited information available from the autocratic state, internal communique can provide some further insight into the constitutional culture of the Party-state.

Ultimately, this is a very limited example. It is not possible to know what is within these internal Party-state memoranda given the closed nature of the organization. The journalist that was found responsible for 'leaking' this document, then-71-year-old Gao Yu, was sentenced to serve seven years in prison for the release of 'state secrets'.[92] This was a strong signal that suggested future dissemination of such texts would not be tolerated. However, a thorough study of the operational constitution can still be made in the absence of these sources; it is clear from the example of Document no. 9 that constitutional texts and the principles of the operational constitution often frame their content. Document no. 9's elevation of Party leadership, socialism with Chinese characteristics, and ideologies such as Deng Xiaoping's Reform and Opening Up, which are key principles of the operational constitution, provide some support for this.

---

[91] *Id*.

[92] Chris Buckley, "Chinese Journalist Sentenced to 7 Years on Charges of Leaking State Secrets," The New York Times (Apr. 2015), https://www.nytimes.com/2015/04/17/world/asia/china-journalist-gao-yu-gets-7-year-sentence.html. Her sentence was later reduced to 5 years due to health concerns, and she served most of this time under house arrest. "Gao Yu" IFEX (Apr. 2020), https://ifex.org/faces/gao-yu/.

The following section will provide further elaboration on some of the most salient principles which underline the operational constitution, with a special emphasis on those mentioned frequently within the textual sources included here.

5. The Operational Constitution – Principles

As with textual sources, principles occupy an important role in the operational constitution and contribute content to the constitutional norms cultivated by the Party-state. Referenced often as legally authoritative, these principles underline modern legal developments and are often described as the prerogatives behind some Constitutional amendments.

a. Party Leadership

As this principle has been emphasized in both the literature overview as well as within the textual sources of this work, the significance of Party leadership in law and in theory is (hopefully) evident. Conservative as well as more critical liberal scholars, like Zhang Qianfan, seem to acknowledge that 'In practice the most important and perhaps the only relevant principle [of the Constitution] today is the CCP leadership'.[93] Since 2013, the expansion of the CCP's oversight and management of legal affairs has become more entrenched, such that the Party has become an essential piece of the legal system, arguably while still itself remaining outside its regulations. This is consistent with the Party-state's 'turn towards law'[94], and is consistent with a global trend towards autocratic and legalistic rule.[95]

While this chapter primarily includes sources from the New Left that support this idea, the principle of Party leadership as a constitutional element is not an uncontested one, including within the New Left itself. Much debate exists on how the Party should perform its role, whether it should be included within the constitution to bring itself under the purview of the law, and whether all liberal ideals are necessarily antagonistic to socialism with Chinese characteristics.[96] However, the conceptualisation of Party leadership as the core of the constitutional rule seems to be most consistent with texts and modern developments, including the placement of 'Party Leadership' within the

[93] Qianfan Zhang, *China's Constitution* in The Cambridge Companion to Comparative Constitutional Law 171-197, 179 (Roger Masterman and Robert Schütze eds., Cambridge University Press 2019).
[94] Taisu Zhang & Thomas Ginsburg, *China's "Turn Towards Law,"* 59(2) Va. J. Int'l L. 307, 307 (2019).
[95] *Id*.
[96] *See, e.g.* Chen, The Constitution as the Fundamental Law *supra* n. 61; Mittelstaedt, *Understanding China's Two Constitutions: Reassessing the Role of the Chinese Communist Party supra* n. 76.

Preamble of the Constitution in 2018.[97] In light of these elements, one can conclude that Party leadership is the most essential feature of the operational constitution.

b. Yifa zhiguo (依法治国) or Rule by Law

The principle of *yifa zhiguo* ('governing the country in accordance with the law', often referred to as the rule of law or rule by law), like other principles within this section, possesses a dual character in the operational constitution as an objective to be attained and as an integral facet of Chinese law and society. *Yifa zhiguo* cannot truly be understood in terms of the rule of law, as this requires a certain commitment to a number of liberal principles which the Party-state rejects, including entrenched or immutable limitations on sovereign authority. Rather, it seems to represent law-based governance, without the normative content typically associated with the rule of law. On the subject, Xi Jinping in 2015 noted the following:

> We must keep in mind that Party leadership is the soul of Socialist Rule of Law with Chinese Characteristics, and that this is the greatest difference between our rule of law and western capitalist countries' rule of law. ... Comprehensively promoting Ruling the Country in Accordance with Law (yi fa zhi guo) does not mean to blur or weaken or indeed deny the Party's leadership; rather, it means further to consolidate the party's governing status, improve the Party's governance methods, raise the Party's governance capacity, and ensure long-term stability of the Party and State. (trans. in Pils, *The Party and the Law*)[98]

From this, it appears that *yifa zhiguo* and Party leadership are functionally intertwined, which is contrary to the bifurcation of law and persons that the Western rule of law embraces. In other words, that governing the country by law is also governing the country by the Party.[99]

Yifa zhiguo has been a strong focus of the Party-state within the latest administrations.[100] Two ideologies on the subject have been developed, namely the 'socialist rule of law with Chinese

[97] Xianfa *supra* n. 8 at Preamble.

[98] Eva Pils, *The Party and the Law* 248 in Routledge Handbook of the Chinese Communist Party (Willy Wo-Lap Lam, ed., Taylor and Francis 2017); *see also* Xi Jinping (习近平), Xi Jinping: guanyu quanmian yifa zhi guo lunshu zhaibian (习近平关于全面依法治国论述摘编) [Excerpts from Xi Jinping Treatise on Comprehensively Governing the Country by Law] (April 2015).

[99] *Id*.

[100] The concept features prominently, alongside the promotion of the Constitution and legal awareness, in the latest 5 Year Plan for National Economic and Social Development. "Zhonghua renmin gongheguo guomin jingji he shehui fazhan de shisi ge wu nian guihua he 2035 nian yuanjing mubiao gangyao (中华人民共和国国民经济和社会发展第十四个五年规划和 2035 年远景目标纲要) [The 14th Five-Year Plan for National Economic and Social Development of the People's Republic of China and Outline of the Vision for 2035] Xinhua (新华) (Mar. 13, 2021), http://www.gov.cn/xinwen/2021-03/13/content_5592681.htm.

characteristics'[101] and 'Xi Jinping Thought on the rule of law'.[102] A 5 Year Plan on the development on the rule of law was also recently promoted.[103] On the socialist rule of law with Chinese characteristics, the primary bases seem to be that the rule of law must be infused with 'morality' and (non-foreign) socialist principles, under the leadership of the CCP.[104] On Xi Jinping Thought on the rule of law, Xi has articulated 11 bases upon which this theory rests, including: 'upholding Party leadership on law-based governance, adhering to a Constitution-based government, staying on the path of the socialist rule of law with Chinese characteristics', among other tenets.[105] Given this emphasis, as well as its inclusion in the 2018 amendments as a new part of the Preamble, the concept of *yifa zhiguo* must be considered a significant element of the operational constitution.

c. The People's Democratic Dictatorship

The People's Democratic Dictatorship or the dictatorship of the proletariat, was introduced by the first CCP Chairman, Mao Zedong. Mao formally identified the nation as a socialist state under the people's democratic dictatorship',[106] meaning that the state serves as a socialist democracy for its citizens and a 'dictatorship' towards the enemies of the people – to violently deprive them of democratic rights to ensure the continuity of the state.[107] While the concept has evolved to represent different meanings over time, the use of the term in recent years has seemed to align more with its

---

[101] Glenn Tiffert, *Socialist Rule of Law with Chinese Characteristics: a New Genealogy* in Socialist Law in Socialist East Asia 72 (Hualing Fu, John Gillespie, Pip Nicholson and William Edmund Partlett eds. Cambridge Press 2018).

[102] 徐显明(Xu Xianming), "Xi Jinping fazhi sixiang de hexin yaoyi," (习近平法治思想的核心要义) [The Core Essence of Xi Jinping Thought on the Rule of Law] Quanguo renmin daibiao dahui (全国人民代表大会) (Sept. 2021), http://www.npc.gov.cn/npc/c30834/202109/832bbd4bfb52407c8ee2a61f6d7d2dfa.shtml.

[103] This 5 Year Plan, among other principles, aims to 'strengthen the rule of law government with Chinese characteristics' while 'adhering to the leadership of the Party to ensure the correct direction for the construction of a government under the rule of law'. "Fazhi Zhengfu jianshe shishi gangyao (2021-2025 nian)" (法治政府建设实施纲要（2021-2025 年）[Implementation Outline for the Construction of a Government Ruled by Law (2021-2025) Xinhua (新华) (Aug. 2021), http://www.gov.cn/gongbao/content/2021/content_5633446.htm.

[104] "Zhonggong Zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jueding," (中共中央关于全面推进依法治国若干重大问题的决定) (Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensively Promoting the Rule of Law) Xinhua (新华) (Oct. 2014), http://www.gov.cn/zhengce/2014-10/28/content_2771946.htm.

[105] "Quanmian yifa zhiguo gai za gan? Zong shuji zhe 'shiyi ge jianchi' yao fangxin jian!" (全面依法治国该咋干？总书记这"是一个坚持"要放心间!) [What should we do to fully rule the country by law? The General Secretary's "Eleven Upholds" must rest assured!] Xinhua (新华) (Nov. 2020), http://www.xinhuanet.com/politics/leaders/2020-11/17/c_1126752218.htm.

[106] *See* Xianfa *supra* n. 8 at Preamble.

[107] What specifically constitutes a 'democracy' for the people according to Mao is quite murky and seems to represent the rights or freedoms that the people are granted so long as they are not enemies of the state. Mao Tse-tung [Mao Zedong], On the People's Democratic Dictatorship 10-15 (Peking Foreign Language Press 1967). *See also* Maurice Meisner, Mao's China and After: A History of the People's Republic of China (3rd ed.) 58-60 (New York Free Press 1999).

initial formulation and occurs frequently in legal instruments.[108] While inherited from Lenin, this idea was adopted by Chairman Mao and displays distinctive parallels with the theories promoted by Carl Schmitt, who believed that the essence of a state could only truly be understood through a unified vision of who or what represents its enemy.[109] It is possible to speculate that this idea might gain more traction in constitutional law or policy given the modern intellectual revival in the New Left which emphasizes the Schmittian 'friend-enemy' dichotomy.[110]

In 2014, the term was the topic of a surprising amount of scholastic attention that featured heavily in academic journals.[111] One source notes that at least 10 speeches and articles appeared online within the span of two months, September and October, around the PRC's National Day.[112] Much of the focus seemed to be on the modernization of the term, and its argued compatibility with the nation's Reform and Opening Up Period and continued relevance during the nation's general advancement since the term's conception.[113] Like the New Left scholarship, these works that argued its applicability also emphasized the term's original meaning, which seems to embrace the 'friend-enemy' dichotomy.[114]

The re-emergence of this principle has important normative implications at the national level. 'Enemies' according to Schmitt and Mao did not exclusively refer other nation-states, but is a more expansive term that generally includes people, groups, or entities that reject or disagree with the sovereign body and its supporters (the state).[115] This includes dissenters domestically as well as internationally. Therefore, the mission of identifying and persecuting the state's 'enemies', 'violently' depriving them of democratic rights, has worrisome implications. An example of this can be observed in the Xi administration's persecution of outspoken Liberal Constitutionalists. It can also be seen in

---

[108] See, e.g. *id*.

[109] Carl Schmitt, THE CONCEPT OF THE POLITICAL 26 (trans. Leo Strauss, The University of Chicago Press 2007).

[110] *Id*.

[111] "She ke xitong jinqi xueshu lunzhan renmin minzhu zhuanzheng, wangzhan baozhi pin kan wen," (社科系统近期学术论战人民民主专政，网站报纸频刊文) [The recent academic debates in the social science system about the people's democratic dictatorship, websites and newspapers frequently publish articles] Pengpai xinwen wang (shanghai) (澎湃新闻网(上海)) [The Paper (Shanghai)] (Oct. 2014), http://m.thepaper.cn/renmin_prom.jsp?contid=1270187&from=renmin.

[112] *Id*.

[113] *Id.*; *see e.g.* Wang Weiguang (王伟光), "Wang Weiguang: Jianchi renmin minzhu zhuanzheng, bing bu shu li," ("王伟光: 坚持人民民主专政，并不输理) [Wang Weiguang: Adhering to the People's Democratic Dictatorship is Not Unreasonable] Hongqi Wengao (红旗文稿) [Red Flag Manuscript] (Sept. 2014), http://www.china.com.cn/opinion/think/2014-09/25/content_33606904.htm.

[114] *Id. See also* "Wang Guang (王广), "Zhongguo she ke bao: Renmin minzhi zhuanzheng yu gaige kaifang xiangfuxiangcheng," ("中国社科报：人民民主专政与改革开放相辅相成,") [China Social Science News: People's Democratic Dictatorship and Reform and Opening up Complement Each Other] Sina News (Oct. 2014), https://news.sina.com.cn/c/2014-10-08/164130958559.shtml.

[115] Schmitt, The Concept of the Political *supra* n. 10940 at 26.

the Party's targeted campaign against its own members accused of corruption,[116] within which extra-legal detention, torture, and refusal of legal counsel has been reported.[117]

While not emphasized as much as the principle of Party leadership, People's Democratic Dictatorship's two-fold academic revival, frequent occurrence in textual sources of the operational constitution, and resonance in the repression of Party-state dissenters indicates its continued relevance as a key constitutional element.

d. Socialism with Chinese Characteristics/Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era (Xi Jinping Thought)

Socialism with Chinese Characteristics and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era (Xi Jinping Thought) are prominent terms in modern constitutional rhetoric. An aspect of socialism with Chinese characteristics unique to this present regime is its explicit ties to Party leadership. This was evidenced in the 2018 Constitutional amendments which edited Article 1 to read, 'Leadership by the Communist Party of China is the defining feature of socialism with Chinese characteristics'.[118] While the connection between these two concepts was referenced previously in speeches and literature, this legal confirmation in the Constitution represents a new level of emphasis of both principles.

Xi Jinping Thought has also become a key feature of Party-state constitutional discourse. Like socialism with Chinese characteristics, Xi Jinping Thought embraces a number of key topics and 'clarifications', defined in his report to the CCP's 19th Congress.[119] Xi Thought was itself the focus of the 2018 Constitutional amendments as it was appended to the Preamble.[120] This addition was significant. 'Xi Jinping Thought' was appended to the list of theories including Deng Xiaoping Theory and Mao Zedong Thought which, among others, constitute 'guidance' for realising the 'China dream' of national rejuvenation.[121] More critical reports, primarily from the West, indicated that the move was equivalent to elevating Xi's achievements during his leadership with its former leaders of great

[116] "China: Secretive Detention System Mars Anti-Corruption Campaign," Human Rights Watch (Dec. 2016), https://www.hrw.org/news/2016/12/06/china-secretive-detention-system-mars-anti-corruption-campaign.
[117] *Id*.
[118] Xianfa *supra* n. 8 at Art. 1.
[119] Xi, "Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era" *supra* n. 79.
[120] Xianfa *supra* n. 8 at Preamble.
[121] *Id.* at Preamble.

renown.[122] While a bit oversimplistic, the new constitutional character of Xi's theory and leadership denote its significance to the operational constitution.

III. Conclusion

This Article focused on the authoritarian constitutional law and norms as embraced by the Party-state. It proposed a novel method of conceptualizing authoritarian constitutional law within China known as the 'operational constitution', which represents the autocratic regime's complex, self-refencing and relativistic conceptualisation of constitutional law. This work began with a review of the Party-state's constitutional culture and described the current administration's need for a normative system separate from global constitutionalism. It then described the culture of information control and censorship surrounding constitutional law, which limits academic contributions from liberal constitutional law scholars. The following section engaged prominent literature from Political Constitutionalists and the New Left that reveals highly salient constitutional trends within the Party-state. Finally, this work concluded with the identification of the most prominent textual sources and principles in the operational constitution.

While uncovering the operational constitution and autocratic constitutional norms within China represents significant progress into understanding the autocratic regime's utilisation of the Constitution, it is important to note that this represents only a limited perspective of the Chinese Constitution. The Constitution's liberal provisions – and the use of the Constitution as a tool for grassroots constitutional change – is missing from this account. However, understanding authoritarian constitutional law in China, and its use by the current administration, is an important first step in better conceptualising the growth of the Party-state in this era of autocratic legality.

[122] *See e.g.* Chris Buckley, "Xi Jinping Thought Explained: A New Ideology for a New Era," The New York Times (Feb. 26, 2018), https://www.nytimes.com/2018/02/26/world/asia/xi-jinping-thought-explained-a-new-ideology-for-a-new-era.html.

個別論題

Thematic Papers

【Research Note】

Improving the Conditions of Sex Workers in Mongolia:
A Comparative Study of Legalized Prostitution

By Ranson Paul Lege* and Munkhnaran Munkhtuvshin**

Abstract

At present, Mongolia criminalizes the sex industry. Social outcasts and unprotected by law, workers in this sector suffer from multiple health issues, violence, and poverty. Using the functional approach to comparative law, this article describes the extent of the problem in Mongolia, compares the main legal approaches to controlling the sex industry, and suggests that a modified version of the Nevada Model might assist Mongolia to respond to the present failures. While some research on prostitution in Mongolia was conducted between 2010 and 2015, much of this was the result of the mining industry's concerns over sexually transmitted diseases. As a result, some legislative action was taken to curtail the health crisis and problems associated with human trafficking while maintaining the idea that the law could abolish the trade. Since then, there has been a paucity of attention on the subject though enough evidence exists that shows individuals forced into this trade are suffering from many health issues, violence, and poverty. This paper will establish that there is a need to shift the approach away from the idea of complete prohibition to some form of regulatory control to improve the conditions of those who work in this trade. A modified form of the Nevada Model provides a solution in that it is suited to the mining tradition, allows for public scrutiny of the industry, and affords the sex worker a violent-free environment and a chance to escape poverty.

Contents

* Paul Lege, PhD: ASCI, Graduate School of Law, Nagoya University xrplege@law.nagoya-u.ac.jp
** Munkhnaran Munkhtuvshin: Doctoral Candidate, Graduate School of Law, Nagoya University; Adjunct Professor at the University of Finance and Economics (Mongolia) munkhnaran.m@ufe.edu.mn

I. Introduction

Due to the complex nature of commercial sex, many nations have taken on different approaches to regulating or prohibiting sex work. However, over the last fifty years, many nations have changed their viewpoint on sex from attempting to control or abolish it to a more flexible, legalizing approach or even complete decriminalization. The terms legalization or decriminalization of prostitution can be confusing. Legal scholar Donna Hughes (who opposed decriminalization) explained that legalization of prostitution referred to any regulations that allow the sex trade to operate but under various restrictions (where, when, and how). In contrast, decriminalization eliminated all laws against such trade and prohibited the government from intervening in any such activities.[1]

Comparatively speaking, regardless of legal system (Continental Law, Common Law, *etc.),* legalization and decriminalization represent an advancement over attempts to completely abolish or prohibit such human interaction as has been the case in Mongolia. Since 1998, Mongolia criminalized and prohibited all forms of sex work by its Law on Combating Licentiousness (Prostitution and Pornography). As of 2016, 127 countries had criminalized this activity (including the United States and Mongolia), 86 countries had legalized it to some degree (Argentina to Sweden), while only two had decriminalized the industry (New Zealand and parts of Australia).[2] The movement to either legalize or decriminalize this industry has gained momentum, but many countries in Asia and the Pacific region have lagged in their approach to such commercial activity, especially in Mongolia. One of the key rationalizations for taking a more progressive approach to this industry has been that legalization or decriminalization helps to reduce the violence associated with the activity and can improve the health and economic conditions of the sex worker.

In 2012, the United Nations released a detailed and lengthy report that recommended the decriminalization of sex work as a way to reduce the violence, abuse, and exploitation of people whose basic human rights were violated in such an industry in Asia and the Pacific region.[3] This report led to further investigation and study into the extent to which violence was perpetrated against individuals, particularly women, who participated in the sex industry. For example, in 2014, Deering *et al* conducted a systematic review of over 1500 articles that found a strong relationship between various forms of violence and sex work.[4] Furthermore, the sex worker could expect violence not only from a pimp, client, but also from the

[1] Donna M. Hughes, "Women's Wrongs," National Review, (October, 2004), https://www.nationalreview.com/2004/10/womens-wrongs-donna-m-hughes/

[2] ChartsBin.com, "The Status of Sex Work Laws by Country 2016," (n.d.). http://chartsbin.com/view/43108

[3] John Godwin, "Sex Work and the Law in Asia and the Pacific: Laws, HIV and human rights in the context of sex work," *United Nations Development Programme (UNDP) Report*, (Oct. 2012): 21-40. https://www.undp.org/sites/g/files/zskgke326/files/publications/HIV-2012-SexWorkAndLaw.pdf

[4] Kathleen N. Deering, et al. (2014) "A Systematic Review of the Correlates of Violence Against Sex Workers," *American Journal of Public Health*, 104 (5): e42-54. https://doi.org/10.2105/AJPH.2014.301909

police or an intimate partner. Likewise, in Mongolia, attempts to abolish prostitution have not only resulted in a rise in the activity but the amount of direct and indirect violence aimed at the sex worker and client has also increased.[5] In the case of Mongolia, the government maintained the old Soviet view of strict control over the sex trade with the aim of abashing it, but since independence and the opening of the marketplace, both prostitution and violence against such workers as seen a rise.[6]

Though the Mongolian government convened several times between 2010 and 2015 to assess some of the health issues associated with sex work, legislators have remained firm that the nature of such an industry should be illegal. The Mongolian government has done little to improve the conditions of those who not only suffer such violence but may face discrimination when seeking treatment for their injuries or for dealing with sexually transmitted diseases.[7] This article aims to describe the problems for those who work in the sex industry in Mongolia, evaluate the current legislative approach to sex industry in the country, and provide a legal solution via a comparative analysis with the Nevada Model that has legalized this activity. The method of the research is to review relevant literature on different legal approaches to sex industry, and examine the effect of current Mongolian legislation. (The methods include an archival search of the data, literature, and legal documents available in English and Mongolian, and Turkish as part of an exploratory search into ways to improve the working conditions of sex workers in Mongolia.)

II. Criminalization of prostitution and violence against sex workers in Mongolia

In Mongolia, numerous laws are on the books that criminalize the sex industry. In fact, concerning this issue, the UN considers Mongolia an "abolitionist" state. In 1998, the government passed a stringent bill entitled *The Law on Combating Licentiousness* (Prostitution and Pornography) which prohibited all forms of sex work, soliciting, and brothels as well as the making and distribution of pornography. In addition, Article 12.6 of the Criminal Law of Mongolia (2015) and Article 6.18 of the Infringement Law (2017) sought to criminalize the organization of sexual services and pimping.

The *Criminal* and *Infringement* laws also provide penalties for engaging in the sex trade. Article 12.6 of the *Criminal Law* provides penalties that restrict travel and 6 months to 3 years of imprisonment for pimping, persuading, or encouraging someone into prostitution (to sell sex) and punishment or 5 years of restrictive travel or 1-5 years confinement for any form of accommodation (hosting, financial support or establishing a brothel) for such a trade.[8] Meanwhile, Article 6.18, paragraph 4 of the *Infringement Law*

[5] Meghan Davidson Ladly, "Mongolia's prostitution zones, where women trade sex for fuel in sub-zero temperatures," (February 19, 2019) https://www.telegraph.co.uk/global-health/women-and-girls/mongolias-prostitution-zones-women-trade-sex-fuel-sub-zero-temperatures/

[6] See Enkhnasan J., Usukh Kh., and Amarjargal G., "Report on Enforcement on Anti-prostitution Law and improving its regulations" Published by National Legal Institute of Mongolia, Ulaanbaatar, 2011, at p. 10. (Ж.Энхнасан, Х.Өсөх, Г.Амаржаргал, "Садар самуун явдалтай тэмцэх тухай хуулийн хэрэгжилт, эрх зүйн зохицуулалтыг сайжруулах тухай тайлан", ХЗҮХ, УБ. 2011 он, 10 дахь тал.); and Bulgamaa B. (2009) Report: Mongolian Sex Workers Becoming Younger, Worse off, UB Post, 15 January 2009, which reports that the National Network of Mongolian Women's Organizations prepared the Country Gender Assessment 2008, as cited in Godwin, "Sex Work," (2012), 107.

[7] Angela M. Parcesepe, et al."Physical and sexual violence, childhood sexual abuse and HIV/STI risk behaviour among alcohol-using women engaged in sex work in Mongolia," *Global Public Health* 10 (2015): 88–102. http://doi:10.1080/17441692.2014.976240; National Committee on HIV/AIDS, Mongolia, *Mongolian National Strategic Plan on HIV, AIDS and STIs 2010-2015,* (February 2015). https://extranet.who.int/countryplanningcycles/sites/default/files/planning_cycle_repository/mongolia/hiv_plan_mongolia.pdf

[8] Article 12.6, *Criminal Law of Mongolia*, (2015) see the law from the Unified Legal Information System of Mongolia, (June 26, 2022) https://legalinfo.mn/mn/detail/11634

affirms that: "If someone engaged in prostitution (sold sex service to others or buys sex service from others), the illegal income gained from the illegal activity of prostitution will be taken by the state and the person will be punished by a fine of 100,000 Mongolian Tugrug [4,350 yen]."[9]

Together, these three laws equip the state with a set of eradication tools that has been failing. While data on the sex trade in Mongolia remains sparse, the Global AIDS Response Progress Reporting (GARPR) estimated that the number of individuals engaging in such work was around 19,000 in 2012.[10] This number was significant given that the population of Mongolia at the time was 2.7 million which meant that about 1 in every 70 females may have engaged in the trade along with the expansion of the mining industry.[11] The main reason for the UN studies at this time resulted from concerns of the mining executives over the rise of sexually transmitted infections or diseases (STI/STDs) among their workers. Though the government has responded to some of these health concerns, the sex trade continued to increase alongside mining development and may have spiked during Covid.[12] The relationship between the mining industry and prostitution is well documented.[13] While no updated data is available, the present number working in the sex trade could be estimated using demographic data for 2020 showing a possibility that over 23,100 women engaged in such work.[14]

Meanwhile, violence perpetrated against women as a whole and those who work in the sex trade has risen proportionally. According to Duin, Mongolia continues to have some of the worst rates of sexual violence among all Asian countries where nearly 1 in 3 women have reported being assaulted by a male.[15] Furthermore, evidence indicates that sex workers often suffer from a multitude of crimes from clientele, police, and intimate partners while expecting less access to justice system. Carlson *et al* found that the percentage of such workers who suffered violence from paying customers could have been as high as 84% and from intimate partners at 59%.[16] In 2010, the government surveyed 4680 sex workers (40 were male) in the capital city of Ulaanbaatar and found that 63.4% stated that they had been assaulted by the clientele and 52.7% were reluctant to report such violence due to a lack of faith in the legal system or out of fear of further retribution.[17] Such violence includes various forms of coercion and intimidation, harassment and abuse, physical assault, forced confinement, violence with a weapon, and rape.

---

[9] Article 6.18, paragraph 4, *Infringement Law of Mongolia*,(2017), see the law from the Unified Legal Information System of Mongolia, (June 26, 2022) https://legalinfo.mn/mn/detail/12695

[10] UN AIDS Data, "Sex workers, population size estimate," *Joint United Nations Programme on HIV/AIDS* (2013). https://data.un.org/Data.aspx?d=UNAIDS&f=inID%3A111

[11] Arab Today "Mongolia mining success brings booming sex trade," (July 11, 2011). https://www.arabstoday.net/en/337/mongolia-mining-success-brings-booming-sex-trade

[12] Ladly, "Mongolia's prostitution zones," *The Telegraph* (2019).

[13] Julia Ann Laite, "Historical Perspectives on Industrial Development, Mining, and Prostitution." The Historical Journal, 52 (3), (2009): 739-761.

[14] This number is calculated by combining the data of 2020 demographics for Mongolia, see: Central Intelligence Agency, "Mongolia Age Structure", *CIA Worldfact Book* (2021). https://www.cia.gov/the-world-factbook/countries/mongolia/ with the formula used by Jan Vandepitte, Lyerla, R., Dallabetta, G., Crabbé, F., Alary, M.,and Buvé, A., "Estimates of the number of female sex workers in different regions of the world." Sexually transmitted infections, 82 (3), (2006) iii18–iii25. https://doi.org/10.1136/sti.2006.020081

[15] Julia Duin, "Living While Female in Mongolia," *Foreign Policy,* (February 14, 2022). https://foreignpolicy.com/2020/02/14/living-while-female-in-mongolia/

[16] Catherine Carlson, Chen J, Chang M, Batsukh A, Toivgoo A, Riedel M, and Witte SS, "Reducing intimate and paying partner violence against women who exchange sex in Mongolia: results from a randomized clinical trial." *Journal of Interpersonal Violence,* 27(10) (2012):1911-1931. DOI: 10.1177/0886260511431439.

[17] International Labor Organization and the National Statistics Office of Mongolia, "Research on Sex workers and molested children," Ulaanbaatar, 2010, at 49-50. (Монгол Улсын Үндэсний Статистикийн Хороо, Олон Улсын Хөдөлмөрийн байгууллага, "Биеэ Үнэлэгч Болон Бэлгийн Мөлжлөгт Өртсөн Хүүхдийн Судалгаа", УБ. 2010 он, 49-50 дахь тал.)

Moreover, the violence against sex workers does not end with the clientele's brutality or from an intimate partner. Public stigma, the justice system, and police officers also add to the violence. For example, news agencies sometimes publicly berate and humiliate both the worker and client who have been caught, and nationalist groups often shorn the hair of women caught having sex with foreign men.[18] Frequently, police officers beat sex workers, extort money, or force them into unwanted sexual activity.[19] Some Mongolian legal scholars have emphasized that such social and judicial violence increases the vulnerability of sex workers and decreases their faith in the legal system so that those in this profession may continue to tolerate the violence against them by clients and others.[20]

In total, then, Mongolia's attempt to abolish the sex trade is having a deleterious effect on human rights not just of the sex worker but the client as well. For example, criminalizing this activity through law and social intimidation has led to violations of the clients' privacy issues. In some incidents, reporters and police officers force the clients to give public interviews explaining why they choose to engage in sex services. These interviews are broadcast nationally without a change of voice or a covering of the face. While the person is assaulted with personal questions, there is little concern for their rights. Such forced interviews infringe on the clients' privacy as well as the sex workers who both suffer from continuous humiliation and ridicule after they are posted on social media platforms. As a result of the increasing violence against sex workers and the infringements on the privacy of the clients in Mongolia, the government should consider a new approach to tackling how to regulate this trade.

III. Approaches to Prostitution

As mentioned above, in the legal world, three general paths exist in which a society may approach prostitution: criminalization, legalization, and decriminalization. Within such classifications, numerous models have risen depending on tradition as well as socio-economic factors in each country. The four briefly described here include the abolitionist, regulatory, Nordic, and Nevada models and their relation to violence. Succinctly, the abolitionist approach seeks to prohibit and criminalize all sex work; the regulatory approach legalizes both private and brothel sex services; the Nordic model focuses on punishing those who seek out paid sex, and the Nevada model allows sex work only in state-licensed brothels.

[18] Frank Bille, "Nationalism, sexuality and dissidence in Mongolia," in *Routledge Handbook of Sexuality Studies in East Asia*, Mark McLelland, Vera Mackie eds (London: Routledge, 2015), pp.162-173.
[19] See Bulgamaa B. (2009) Report: Mongolian Sex Workers Becoming Younger, Worse off, UB Post, 15 January 2009, which reports that the National Network of Mongolian Women's Organizations prepared the Country Gender Assessment 2008, as cited in Godwin, "Sex Work," (2012), 107.
[20] Enkhnasan Jamsran, Usukh Kh., and Amarjargal G., "Report on Enforcement on Anti-prostitution Law and improving its regulations" Published by National Legal Institute of Mongolia, Ulaanbaatar, 2011, at p. 10. (Ж.Энхнасан, Х.Өсөх, Г.Амаржаргал, "Садар самуун явдалтай тэмцэх тухай хуулийн хэрэгжилт, эрх зүйн зохицуулалтыг сайжруулах тухай тайлан", ХЗҮХ, УБ. 2011 он, 10 дахь тал.)

a. Abolitionist approach

This approach seeks to either eliminate the practice of the sex trade or constrain it through criminalization. As a result, the impact on the people who engage in the activity can be severe via indirect or direct legal and social violence, as shown in Mongolia. Other Asian countries, such as Afghanistan, Bhutan, China, Cambodia, Iran, Iraq, and Pakistan take an abolitionist approach and report having similar health concerns and issues of violence against sex workers.[21] Moreover, while some of these countries show signs of reducing human trafficking, this comes at a high social cost.[22] For example, in some of these Asian countries, acts of violence against minority sex workers including homosexual and transgender individuals can be even more severe depending upon a nation's particular traditional and religious approach to law.[23]

b. Regulatory approach

Several countries have taken a regulatory approach which could include partial legalization to complete decriminalization. Such an approach accepts that the sex trade will not simply disappear and that heavy-handed law only compounds the social problem by driving it underground where health issues and violence become a plague on society. While such countries have been successful in reducing violence against sex workers and improving their health conditions, they have also become magnets for human traffickers.[24] Countries such as Argentina, Canada, France, the Netherlands, and New Zealand have experimented with various forms of this regulatory approach. In 2003, New Zealand adopted the *Prostitution Reform Act* which decriminalized prostitution and declared that it is a legitimate commercial service. While controversial, the purpose of this act was not to endorse or morally sanction prostitution but to create a framework that secures the human rights of sex workers, promotes their health and safety, is conducive to public health, and prohibits the exploitation of children.[25]

c. Nordic Model

The Nordic Model legalizes the selling of sexual services but criminalizes the buyers of such services. The approach consists of four elements: 1) the decriminalization of sex workers; 2) it provides support for those leaving the trade; 3) education and prevention; and 4) criminalizing those who buy and profit in the trade. While this model has become popular in Europe, international human rights organizations have criticized the approach. For example, Amnesty International warned that the Nordic Model might be increasing forced prostitution and human trafficking.[26] Scholars such as Fox opined that governments using the Nordic Model do not offer evidence that the change in the number of exploited sex workers or the victims

[21] Henrik Karlsson,."Sex Work Policy Worldwide: A Scoping Review. Sexuality & Culture" (2022). https://doi.org/10.1007/s12119-022-09983-5

[22] Seo-Young Cho, Axel Dreher, and Eric Neumayer, "Does Legalized Prostitution Increase Human Trafficking?" *World Development*, 41 (1), 2013: pp. 67-82, http://dx.doi.org/10.2139/ssrn.1986065

[23] John Godwin, "Sex Work and the Law in Asia and the Pacific Laws, HIV and Human Rights in the Context of Sex Work." (October 2012), 82.

[24] "Does Legalized Prostitution Increase Human Trafficking?" *Harvard Law and International Development Society,* (June 12, 2014), https://orgs.law.harvard.edu/lids/2014/06/12/does-legalized-prostitution-increase-human-trafficking/

[25] New Zealand Parliament, Prostitution Reform Act, (2003), see https://www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815.html

[26] Amnesty International, Report, "The Human Cost of 'Crushing' The Market, Criminalization of Sex Work in Norway", 2016, (June 15, 2022) https://www.amnestyusa.org/files/norway_report_-_sex_workers_rights_-_embargoed_-_final.pdf

of sex trafficking.[27] Meanwhile, Kraus dispelled many of these criticisms by showing that the number seeking such sex services has decreased by 70% over the last few decades in the Nordic Model countries.[28]

d. Nevada Model

While the US generally criminalizes commercial sex, the Nevada Model arose out of the unique mining culture that emerged in this state.[29] At present, 10 of 16 counties in Nevada allow for the legal operation of the sex trade, but this only represents about 10% of the actual amount in the state. Nevertheless, licensed brothels operate legally and the state considers anything outside this framework as illegal. Some scholars view this as a good model that promotes human rights as guaranteed by international law.[30] However, Bingham has argued that such operations result in state-controlled exploitation because of all the overhead costs, taxes, and percent they must pay the owners so the workers barely earn a living.[31]

Indeed in some countries that use this approach, the brothel sex workers earn significantly less income than those in any other area. For example, in Turkey, commercial sex services operate as state brothels called *Genel Ev* (meaning home for anyone in Turkish). Similar to the Nevada approach, *The State Brothel Law of Turkey* (1961) requires sex workers to pay a large amount in taxes, remuneration, and accommodation fees to the state and brothel owners, in addition to the payments for their regular medical check-ups. [32] As a result, the *Genel Ev* sex workers receive significantly less income. Ayse, a former worker in *Genel Ev*, explained that workers in this trade receive only about 27% of what the clients actually paid.[33]

IV. International law and rationale for introducing the Nevada Model to Mongolia

Article 6 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) urges state parties to "take all appropriate measures ... to suppress all forms of traffic in women and exploitation of the prostitution of women."[34] Passed in 1979, this convention has come under criticism for taking an abolitionist approach without considering all aspects of human rights connected with such activity. International human rights organizations and advocates of sex workers have pointed out that this narrow view only enhanced the public stigma that sex workers experience due to the view that such a trade was illegitimate and increased the violence against sex workers, who were often among the most vulnerable.

---

[27] Joshua A. Fox, "International Law After Dark: How Legalized Sex Work Can Comport with International and Human Rights Law," Chicago Journal of International law, Volume 22, No.1, (June 2021): 204.
[28] Ingeborg Kraus, "The Nordic Model of Prostitution: A change in perspective in protection of human dignity," *Trauma and Prostitution: Scientists for a World without Prostitution*, (September 18, 2021). https://nordicmodelnow.org/wp-content/uploads/2021/09/the-nordic-model-on-prostitution-englisch-pdf.pdf
[29] Robert D. McCracken, *A History of Prostitution in Nye County, Nevada*, (Reno: McCracken: 2019), 5-10.
[30] Joshua A. Fox, "International Law After Dark: How Legalized Sex Work Can Comport with International and Human Rights Law," *Chicago Journal of International Law*, Volume 22, No.1, (June 2021): 204
[31] Nicole Bingham, "Nevada Sex Trade: A Gamble for the Workers," *Yale Journal of Law and Feminism,* 10(1) (1998): 96.
[32] *The State Brothel Law of Turkey* (1961), (Genel Kadınlar Ve Genelevlerin Tabi Olacakları Hükümler Ve Fuhuş Yüzünden Bulaşan Zührevi Hastalıklarla Mücadele Tüzüğü, Bakanlar Kurulu Kararının Tarihi): 30.3.1961, No: 5/984, Dayandığı Kanunun Tarihi : 24.4.1930, No: 1593, Yayımlandığı R. Gazetenin Tarihi : 19.4,1961.
[33] Alper Uyus, Hayatsız Kadın Ayşe Bir Kadının Genelev Yaşamı, (2008); Interview of Ayse Tukrukcu in the Katarsis X-TRA Show, Turkey (2019), see the interview (in Turkish) (June 15, 2022) https://www.youtube.com/watch?v=HNtLG6M7HNU
[34] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, United Nations, Treaty Series, vol. 1249, 13.

Due to the complexity of the problem, the United Nations has avoided taking an overt side of connecting sex work and human rights.[35] As a result, few internationally recognized acts on protecting sex workers exist, making it difficult for countries such as Mongolia to consider the human rights of people in this profession.

Compared to Asia, however, the European Union has a more supportive approach to protecting the human rights of those engaged in commercial sex. In 2005, the International Committee on the Rights of Sex Workers in Europe (ICRSE) adopted the *Declaration on the Rights of Sex Workers in Europe*. While non-binding, this act recognizes that sex workers experience many violations due to the nature of their work and urges more progressive legalization that would offer a safer working environment. Avoiding the issue exposes women in this environment to both physical and mental abuse which can have dire consequences including increased exposure to sexually transmitted diseases, drug and alcohol addiction, unwanted pregnancy, and other physical injuries as well as anxiety, depression, post-traumatic disorders, and suicide.[36] Unfortunately, many countries like Mongolia fail to assess such an environment until it is too late.

As noted above, the mining industry in Mongolia began to put some pressure on the government in 2009 after their workers were showing increased signs of being HIV positive and suffering from various sexual diseases after paying for sex.[37] The government did make some effort to address the health issues, and with the help of international grants, experimented with micro-financing interventions to possibly improve the economic condition of women in this industry. Basically, the idea was that an organization (private or public) would match 1:1 whatever a sex worker put into a particular savings account protected by the state.[38] The results from such a social experiment were mixed, and while there may have been some improvement in the health conditions, little improved in terms of the violence aimed at sex workers.[39] This research argues that Mongolia may need to move away from the idea of abolishment to a more legalized form of the sex industry for humane reasons.

Ideally, decriminalization would be preferable but several critical aspects of this issue would prevent its realization in Mongolia. First, while international law appears to be moving in the direction of decriminalization, most countries still prefer some form of regulatory control.[40] Second, the countries that have advanced or more progressive legal controls now face issues with increased human trafficking (though with improved conditions for the sex workers).[41] Up to now, Mongolia has done a decent job in controlling human trafficking and cannot afford to simply open the gates to such trafficking, even if for good reasons.[42]

---

[35] Barbara Crossette, "UN Women Is Criticized for Appearing to Take Sides on Decriminalizing 'Sex Work'," (October, 2019), https://www.passblue.com/2019/10/17/un-women-is-criticized-for-appearing-to-take-sides-on-decriminalizing-sex-work/

[36] Laura Cordisco Tsai, Catherine E Carlson, Toivgoo Aira and Susan S Witte, "Risks and resiliency of women engaged in sex work in Mongolia," in *Routledge Handbook of Sexuality Studies in East Asia,* edited by *Mark* McLelland, and Vera Mackie (London: Routledge, 2014), 305-315.

[37] G. Nergui, "As mining booms in Mongolia, so does sex trade," *News.mn*, (July 18, 2011). https://news.mn/en/74534/

[38] Laura Cordisco Tsai, Catherine E Carlson, Toivgoo Aira, Andrea Norcini Pala, Marion Riedel, Susan S Witte, "The impact of a microsavings intervention on reducing violence against women engaged in sex work: a randomized controlled study," *BMC International Health and Human Rights*, 16(1) (2016): 27 https://pubmed.ncbi.nlm.nih.gov/27793147/

[39] *Ibid*

[40] Seo-Young Cho and Dreher, Axel and Neumayer, Eric, "Does Legalized Prostitution Increase Human Trafficking?" *World Development*, 41 (1), (2013): 67-82. http://dx.doi.org/10.2139/ssrn.1986065

[41] Eva Cukier, "Sex workers defend UN recommendations," *Red Umbrella Fund* (October 2017). https://www.redumbrellafund.org/sex-workers-defend-un-recommendations/

[42] US Department of State, "2017 Trafficking in Persons Report: Mongolia Tier 2," *Office To Monitor and Combat Trafficking in Persons*, (June 28, 2017).https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271245.htm

Third, the Nordic Model would never work because of the mining culture and its strong associative demand for commercial sex operations.[43] Even today, the government cannot afford to ignore the mining interests and companies as this sector represents over 20% of the GDP and brings in 22.5% of the revenue for the state.[44] Fourth, Mongolia remains rather conservative concerning women's role in society and domestic violence continues to be a prevalent problem.[45] In sum, a modified form of the Nevada approach might be a more practical solution compared to more progressive legalization or decriminalization.

This paper suggests that a modified form of the Nevada Model would be a practical step forward in the legalization of sex work in Mongolia. The point of suggesting this model is not to promote prostitution but to reduce the violence against such workers, improve the working environment, and increase their share of the exchange. Such a model is well-suited to acceptability in traditional rural cultures and can be maintained by local ordinances.[46] This model serves as a controlling mechanism that requires public scrutiny so that both the spread of STI/STD's and violence against the sex worker can be mitigated and reduced. While not perfect, the Nevada approach has succeeded in these two areas.[47] In addition, the government should limit taxation and overhead charges and encourage the mining industry to play a role in the micro-financing concept so that such workers can rise out of poverty. Without such modifications, the approach could merely regress into state-controlled exploitation as in Turkey. In sum, by adopting this model, Mongolia would move a step closer to legalization while promoting the protection of human rights for vulnerable women in such a trade.

V. Conclusion

At present, the commercial sale of sex remains illegal in Mongolia. The government was forced to consider reviewing this approach mainly due to health concerns in the mining sector in 2010. Since then, not much has been done to improve the human rights of those in the sex trade. Mongolia remains frozen in a sub-arctic stupor in which a misguided abolishment policy only drives sex workers further into despair. Health issues, violence, and poverty follow in the wake of not confronting this reality. Though some government officials recognize the need for change in light of the international trend toward decriminalization, tradition and culture still play a role in stigmatizing this trade. In addition, because Mongolia has been successful in restricting human trafficking there has been some concern that legalization

[43] Julia Ann Laite, "Historical Perspectives on Industrial Development, Mining, and Prostitution." *The Historical Journal* 52(3) (2009): 739–61. http://www.jstor.org/stable/40264198

[44] Ministry of Mining and Heavy Industry of Mongolia, *Mining Sector Statistics 2022 I-V*, (June 22, 2022), 2, https://mmhi.gov.mn/2022/05/31/эрдэс-баялгийн-салбарын-статистик-мэ-4/

[45] A survey conducted in Mongolia in 2017 found that 1 in 4 women, regardless of socio-economic status, felt that a husband has a right to beat his wife. National Statistics Office and the UN Population Fund, 2017 *National Study on Gender-based Violence in Mongolia: Breaking the Silence for Equality*, (UNFP Mongolia, June 2018), 14-15.

[46] Bingham, "Nevada Sex Trade," (1998): 85; Daria Snadowsky, "The best little whorehouse is not in Texas: How Nevada's prostitution laws serve public policy, and how those laws may be improved." *Nevada Law Journal*, 6(1) (2005): 217-247.

[47] Barbara G. Brent and Kathryn Hausbeck, " Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy," *Journal of Interpersonal Violence*, 20(3) (2005): 263-269 https://doi.org/10.1177/0886260504270333

could lead to a flood of such illegal activity which could overwhelm the enforcement system. Solutions to this problem are needed.

This paper describes the problem, compares various options to the present abolishment approach, and provides a potential solution. With the proper modifications, the Nevada Model offers a potential win/win solution because it is suited to the mining culture that is so dominant in Mongolia today. This modified form of regulatory control would oversee the health conditions of the industry, reduce violence, and ensure that workers earn more. At the minimum, such an approach aims to assure that the sex worker need not work in fear of their life. In turn, this approach might thaw the hardened view that many people have about gender-based violence in Mongolia, which should be the ultimate aim of the rule of law.

Nagoya University Asian Law Bulletin 執筆要領

2021 年 8 月 30 日
編集委員会

本誌は、比較法学・比較政治学、法整備支援および日本語による法学教育を含むアジア諸国の法・政治に関する学術研究の成果として国内外から寄せられた原稿を掲載する。ただし、大学院生を除く学生からの投稿は、受け付けない。

本誌には、「論説」、「研究ノート」、「判例評釈」、「書評」、「資料」および「翻訳論文」等を掲載する。これらの原稿は、「翻訳論文」の場合における原典を除き、未発表であることを要する。本誌は、新たな学問的方法を導入し、比較分析手法を用い、十分に根拠のある議論や結論を提供し、および学術的出版物の国際的な標準に合致する研究成果を優先する。

原稿中では、次の諸点を明示することが期待される。
- 既存の理論上または実務上の問題についての詳細
- 一貫性のある分析手法および解決策の提示
- 先行研究および事例を踏まえた十分に根拠のある議論または提案
- 関係する書誌情報

I. 使用言語

本文の使用言語は、日本語または英語とする（日本語は横組みとする）。
「論説」および「研究ノート」には、本文の使用言語に関わらず、300 語程度の英文要旨を添付する。

II. 字数

1. 和文原稿の場合、「論説」は 2 万字程度、「研究ノート」等その他は 1 万字程度とする。英文原稿の場合、「論説」は 8 千語程度、「研究ノート」等その他は 4 千語程度とする。（図表、脚注、参考文献を含む。）
2. 「研究ノート」等その他であっても、貴重な資料を紹介する等の理由により、内容の性質上必要であると編集委員会が認める場合は、和文原稿は 2 万字程度まで、英文原稿は 8 千字程度まで掲載できるものとする。
3. 研究報告等の記録については、字数制限を設けない。

III. 執筆要領

1. 原稿の第 1 ページ上部には、表題、執筆者名を記載し、続いて要旨（「論説」および「研究ノート」のみ）および目次を記載する。メールアドレスおよび所属を最初の脚注に記載する。
2. 見出し番号は、以下に統一する。

章　I、II、III、……
節　1、2、3、……
項　(1)、(2)、(3)、……
目　(a)、(b)、(c)、……

3. 原稿は、原則として、Microsoft Word で作成する。それ以外のソフトを使用する場合は、事前に編集委員会に問い合わせること。
4. フォーマットは、以下の通りとする。

(1) 用紙サイズ：A4
(2) 余白：上 35mm、下 30mm、左 30mm、右 30mm
(3) 1 ページの文字数：横 40 字、縦 35 行（日本語）、縦 32 行（英語）
(4) 文字の大きさ：10.5 ポイント（日本語・英語）
(5) 文字の種類：MS 明朝（日本語）、Times New Roman（英数字）

5. 脚注は、以下の通りとする。

(1) 脚注はページの末尾に挿入する。（文末脚注ではない。）
(2) 文字の大きさ：8 ポイント（日本語・英語）とする。
(3) 文字の種類：本文と同様

6. 参考文献の表記方法については、著者の使い慣れたスタイル（日本語）または Chicago Manual of Style 17th Edition（英語）にしたがうこと。ただし、編集の過程で、編集委員会が調整を行う場合がある。
7. 図および表を挿入するときは、別紙に記載して提出する。図および表の見出しには通し番号を付し、挿入場所を指定する。

IV. 投稿

投稿希望者は、指定された締切までに、編集委員会にメールで投稿申請書および完成原稿を送付する。（送付先：cale-publication@law.nagoya-u.ac.jp）

V. 審査

1. 原稿は、招待原稿も含めて、編集委員会において一定の審査をおこなったうえで掲載する。
2. 投稿原稿については、内容・テーマ等を考慮し、編集委員会が 1 名または 2 名の査読者を選任することができる。
3. 編集委員会は、査読者の意見をふまえて、掲載の可否を決定する。掲載の可否は、メールで投稿者に通知する。

VI. 校正

初校のみを著者校正とし、その時点での大幅な加筆・修正は原則として認められない。

VII. 発行

1. 本誌は、原則として年 2 回発行する。
2. 本誌は、PDF 版を法政国際教育協力研究センター（CALE）ホームページに掲載する。

以上

Nagoya University Asian Law Bulletin –Instructions to Authors

August 30, 2021
Editorial Board

We invite domestic and foreign authors to submit for publication their academic research on topics related to law and politics in Asia, including comparative studies, legal and rule of law development assistance, or Japanese language for legal studies. ALB will not consider submissions from students, except for those enrolled into graduate level.

ALB publishes research articles, research notes, case analyses, book reviews, documentation, and translated articles. We consider only those submissions which were not published previously, except for translated articles. ALB gives a preference to research that introduces new scientific methods, broadly utilizes a comparative analysis model, presents well-grounded arguments and conclusion, and complies with international standards of academic publications.

Authors are expected to demonstrate the following necessary moments in their submissions:
- Description of existing theoretical or practical problem;
- Coherent analysis design and offered solutions;
- Well-grounded arguments or recommendations, including those which refer to empirical findings and specific cases;
- Contextual scientific bibliography.

I. Language

The articles must be submitted in English or Japanese. (The Japanese scripts to be published in horizontal alignment.) Notwithstanding the language of the submission, a research article or a research note must be accompanied by a 300-words abstract in English.

II. Length

1. For submission in English, a research article shall be of about 8,000 words. A research note or other types of articles shall be of about 4,000 words. For submission in Japanese, a research article shall be of about 20,000 characters. A research note or other types of articles shall be of about 10,000 characters. (These lengths are inclusive of graphics, footnotes and bibliography)
2. For reasons deemed by the editorial board to be substantively relevant to the revelation of valuable data or documents, a research note etc. may be published up to the length of 8,000 words in English or 20,000 characters in Japanese.
3. There is no length limits for records or proceedings related to a research report..

III. Technical Instructions to Authors

1. The title of the paper, the full name should be written on the top of the first page. Abstract (only for research articles and research notes) and contents should be followed. Working email and affiliation of the author should be written in the first footnote.
2. Heading and subheadings are expected to adopt the following orders:

Chapter – I, II, III, …
Section – 1, 2, 3, …
Paragraph – (1), (2), (3), …
Clause – (a), (b), (c), …

3. The paper should be in principle written in Microsoft Word. In case of different software being used, the author must consult with the editorial board in advance.
4. The page layout of the article must conform with the following details:

(1) Paper size: A4
(2) Margins: 35mm (top) and 30mm (bottom, left and right)
(3) Number of characters and lines: (For Japanese) horizontally 40 characters on each line and vertically 35 lines; (For English) 32 lines.
(4) Word size: 10.5 pt (Japanese/ English).
(5) Word font: MS Mincho (Japanese); Times New Roman (English).

5. Footnotes should be set as follows:

(1) Footnotes at the end of the relevant pages, not endnotes.
(2) Word size: 8 pt (Japanese/ English).
(3) Word font: Consistent with the main text.

6. Authors writing in English are required to provide the bibliography according to the Chicago Manual of Style 17th Edition. Authors writing in Japanese are expected to prepare the bibliography following the style which they are familiar with.
7. Graphics, pictures or tables should be submitted in a separate file. Captions for these graphics, pictures or tables should be properly numbered with specific indication of the place to which they are expected to belong in the final published version.

IV. Submission Process

Authors are requested to submit the application form and full paper to the editorial board (email address cale-publication@law.nagoya-u.ac.jp) by the designated deadline.

V. Peer-Review Process

1. The full papers, including those invited for special or other features, will be published only after having gone through deliberations by the editorial board.

2. The editorial board may decide to appoint either one or two referees to review submitted papers other than those invited for special or other features, taking into consideration its contents and theme(s) etc.
3. The editorial board will decide on acceptance (or condition acceptance) or rejection of the submission based on any comments made by the referee(s). The final decision will be notified to the author by email.

VI. Revisions

The author is allowed to revise only the first draft of the full paper. However, as a matter of principle, any major revisions or additions even to the first draft are not acceptable.

VII. Publication

1. In principle, the Bulletin is published twice every year.
2. The Bulletin is published in PDF form on the website of the Center for Asian Legal Exchange.

～ 編集後記 ～

この度、ALB(Asian Law Bulletin)第 8 号をお届けいたします。本号は、2022 年 2 月に開催された CALE 年次国際会議(Annual Conference)"The Identity and Dynamics of Contemporary Asian Constitutionalism in the Context of Globalization"で行われた報告に基づいた寄稿論文を特集として掲載し、さらに個別論文として、アジアの国々の法制度や社会の発展を企図する力強い論考を掲載しております。執筆者の方々、また寄稿論文の基礎となった年次国際会議にご参加いただいた方々に改めて感謝申し上げます。

2022 年度より、これまで CALE が行ってきた活動は、CALE と日本法教育研究センター(CJL)の二つの組織が協力して行うようになりました。これまでの組織が二つに分かれ、村上正子 CALE センター長と松尾陽 CJL センター長とを筆頭に、それぞれが研究と教育を担いつつもアジアの法発展という共通の目標に向けて一体として活動する体制が整いました。今、名古屋大学のアジア法研究は新たな段階へ進もうとしています。本号はこの新体制になって初めての ALB 刊行となりますが、今後のアジア法研究を展望するような数々の労作をここに収録できることを心より嬉しく思います。

ここ数年、世界は数々の大きな予期せぬ出来事に直面しています。このような不確実な状況下で、法はいかなる役割を果たすことができるのか。本号に収録された論考を読みながら、かかる問いを追求する CALE および CJL の活動の一環として、本誌がその一翼を担っていくことを願ってやみません。

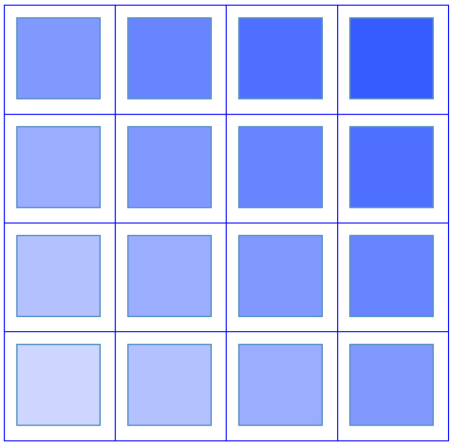
ALB 編集委員長

松田貴文(名古屋大学法政国際教育協力研究センター副センター長)

Nagoya University Asian Law Bulletin　第 8 号

編集委員会　松田 貴文（委員長）／村上 正子／松尾 陽／
傘谷 祐之／イスマトフ アジズ／牧野 絵美
編集補助　松山 聡史／鬼頭 昌隆
表紙デザイン　傘谷 祐之
発行　名古屋大学法政国際教育協力研究センター（CALE）
〒464-8601　名古屋市千種区不老町
電話：+81(0)52-789-2325　Fax：+81(0)52-789-4902
Email：cale-publication@law.nagoya-u.ac.jp
URL : http://cale.law.nagoya-u.ac.jp
発行日　2023 年 2 月 28 日
ISSN　2188 – 1952

Nagoya University
Asian Law Bulletin



Center for Asian Legal Exchange