

[Research Article]

## Present Trends of Authoritarian Legality in China: The Operational Constitution

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### 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

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**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’.<sup>1</sup> 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;<sup>2</sup> for example, Ginsburg and Simpsen have argued that constitutions in some jurisdictions can operate as ‘window-dressing’, including various substantive and institutional

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<sup>1</sup> See e.g. Kim Lane Scheppele, *Autocratic Legalism* 85(2) U. Chi. L Rev. 545 (2018).

<sup>2</sup> *Id.* at 1-2.

protections to conceal the state's actual constitutional practices.<sup>3</sup> 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.<sup>4</sup>

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 Constitutionals 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.

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<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> The nation receives similar reviews from other like NGOs and is heavily criticized in international media for its rights record.<sup>11</sup> Despite this evidence, Party leadership insists

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

<sup>6</sup> 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.

<sup>7</sup> 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. Trevaske eds., Cambridge University Press 2020) (hereinafter Li, *The Organizational Weapon*).

<sup>8</sup> *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).

<sup>9</sup> 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](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=36&Lang=EN).

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

<sup>11</sup> "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/c22zywrvy0t/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*).<sup>12</sup>

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.<sup>13</sup>

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,

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<sup>12</sup> 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>.

<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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'.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> While China's upper socioeconomic echelon can in some cases circumvent these blocks by utilizing a VPN or similar technology, their use is criminalised.<sup>19</sup>

<sup>14</sup> 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).

<sup>15</sup> 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>.

<sup>16</sup> 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 education. Initially 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).

<sup>17</sup> 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").

<sup>18</sup> 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](https://wemp.app/posts/23513a3c-13db-4f44-b39f-07bae6a3a3ee?utm_source=bottom-latest-posts).

<sup>19</sup> 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 xinfā 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'.<sup>20</sup> Research grants from the state have been awarded in significant number to those studying and producing scholarship on these topics.<sup>21</sup> 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'<sup>22</sup> and 'Xi Jinping Thought on the socialist rule of law with Chinese characteristics'<sup>23</sup>, and a 5-year plan to develop the rule of law have been promoted nationally.<sup>24</sup>

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.<sup>25</sup> Several high-profile incidents implicating dissenting scholars are

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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](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 Under 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>.

<sup>20</sup> "Zhexue shehui kexue gongzuo zuotan hui fayan zhaibian," ("哲学社会科学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](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>.

<sup>21</sup> 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 fazhilun 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>.

<sup>22</sup> 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)

<sup>23</sup> 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>.

<sup>24</sup> 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](http://www.gov.cn/gongbao/content/2021/content_5633446.htm).

<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> During this time, a spirited debate began within Chinese academia concerning the need for constitutional rights protections and limitations on Party authority.<sup>31</sup> 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,<sup>32</sup> this view

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

<sup>26</sup> 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).

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

<sup>28</sup> "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>.

<sup>29</sup> Phillips, "It's getting worse": China's liberal academics fear growing censorship," *supra* n. 25.

<sup>30</sup> 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).

<sup>31</sup> 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.

<sup>32</sup> 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.<sup>33</sup> 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’.<sup>34</sup> 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.<sup>35</sup> These scholars are typically critical of liberalism and promote Party centralism as an ideal.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> Known as a prominent supporter of National Socialism, Schmitt introduced several theoretical tenets that gained popularity

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<sup>33</sup> *Id.* at 343-4.

<sup>34</sup> Lucas Brang, *The Dilemmas of Self-Assertion: Chinese Political Constitutionalism in a Globalized World* Mod. China 1, 2-4 (2021).

<sup>35</sup> 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.”

<sup>36</sup> 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/>.

<sup>37</sup> He Li, *China’s New Left in Political Thought and China’s Transformation: Politics and Development of Contemporary China* 46 (2015).

<sup>38</sup> 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 Constitutionals. 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.<sup>39</sup> To Schmitt, a state is composed of a majority of ‘friends’ who persecute their ‘enemies’.<sup>40</sup> As Political Constitutionals 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 Constitutionals, who reject liberal definitions of law as unsustainable for China based on its national history and current conditions.<sup>41</sup> 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.<sup>42</sup>

Schmitt proposed a highly contextualised and dualistic understanding of constitutional law which also resonated with Political Constitutionals 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.<sup>43</sup> 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’.<sup>44</sup> Political Constitutionals’ acclimation to this idea can be observed in their support of constitutional principles that are political in nature and exist external to the Constitution.<sup>45</sup>

Before proceeding, some context on the engagements between these types of scholars is helpful. Notably, those who can be identified as Liberal Constitutionals or possessing at least some of the key elements associated with this philosophy (e.g., judicial independence, the separation of powers) and Political Constitutionals 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:

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<sup>39</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 5 (George Schwab, trans., University of Chicago Press 2005 [1922]).

<sup>40</sup> Carl Schmitt, *The Concept of the Political* 26 (trans. Leo Strauss, The University of Chicago Press 2007).

<sup>41</sup> See *infra* Section II(2).

<sup>42</sup> Carl Schmitt, *Constitutional Theory* 265-266 (Jeffrey Seitzer, trans. Duke University Press 2008)

<sup>43</sup> *Id.* at § 1.

<sup>44</sup> *Id.* at § 1.

<sup>45</sup> 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*<sup>46</sup>)

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.<sup>47</sup> 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.<sup>48</sup> This is representative of the dual nature of the Constitution, and the inherent conflict between the normative principles it embraces.

<sup>46</sup> 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).

<sup>47</sup> *Id.* at 127.

<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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 Constitutionlists.<sup>53</sup>

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.<sup>54</sup> He continues by representing constitutional governance as possessing two sources – the CCP and the NPC.<sup>55</sup> The CCP and ‘other democratic parties’ represent those with the authority to

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<sup>49</sup> 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).

<sup>50</sup> Jiang Shigong, *Written and Unwritten Constitutions*, 36 *Mod. China* 12-46, 12 (2010).

<sup>51</sup> *Id.* at 12.

<sup>52</sup> *Id.* at 23-4.

<sup>53</sup> *Id.* at 12, 15.

<sup>54</sup> *Id.* at 23-4.

<sup>55</sup> 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’.<sup>56</sup> The NPC, on the other hand, are ‘members...democratically elected through a legal process’<sup>57</sup> whose task is to nationalize and legitimize the political decisions of the CCP.<sup>58</sup> 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’.<sup>59</sup> Scholarship promotes the idea that constitutional law-making generally follows this structure.<sup>60</sup>

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.<sup>61</sup> 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.<sup>62</sup> 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’.<sup>63</sup> Here, Chen openly invokes a Schmittian conception of constitutional legality; that the distribution of power and the leadership of the Communist Party is

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<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.* at 24.

<sup>58</sup> *Id.* at 24.

<sup>59</sup> *Id.* at 24.

<sup>60</sup> 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, *Making Autocracy Work: Representation and its Limits in Modern China* 99-100 (Cambridge University Press 2016).

<sup>61</sup> 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*).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

part of the state's 'absolute' or 'real' constitution.<sup>64</sup> 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'.<sup>65</sup>

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'.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup>

### 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 Constitutionalist 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

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<sup>64</sup> *Id.* See also Carl Schmitt, *Constitutional Theory* 59-60 (Jeffrey Seitzer trans. Duke University Press 2008).

<sup>65</sup> Chen, *The Constitution as the Fundamental Law* *supra* n. 61.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Democratic centralism is itself included within the Constitution, within Article 3. See Xianfa *supra* n. 8 at Art. 3.

<sup>68</sup> 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.

<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> 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.<sup>72</sup> 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'.<sup>73</sup>

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

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<sup>70</sup> 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).

<sup>71</sup> *Id.* at 202-3.

<sup>72</sup> 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://lbackerblog.blogspot.com/2017/11/chinese-constitutionalism-after-19th.html>.

<sup>73</sup> 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.<sup>74</sup> *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.<sup>75</sup> 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,<sup>76</sup> 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.<sup>77</sup>

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.

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<sup>74</sup> 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).

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

<sup>76</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2682609).

<sup>77</sup> 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.<sup>78</sup> While the Party Constitution is not often invoked in public fora, it is elevated in Party meetings and congresses.<sup>79</sup> 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.<sup>80</sup>

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

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<sup>78</sup> 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](http://www.xinhuanet.com/english/download/Constitution_of_the_Communist_Party_of_China.pdf) (hereinafter CCP Constitution).

<sup>79</sup> 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](http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf).

<sup>80</sup> CCP Constitution *supra* n. 78 at Art. 3.

introduced in Article 2.<sup>81</sup> 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’.<sup>82</sup> 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’<sup>83</sup> – principles also included within the state Constitution.<sup>84</sup>

Secondly, sub-Article 2 and 3, which together emphasize Party regulations over legal rules.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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

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<sup>81</sup> *Id.* at Arts. 1-4.

<sup>82</sup> *Id.* at General Program.

<sup>83</sup> *Id.* at General Program.

<sup>84</sup> *Id.* at General Program; Xianfa *supra* n. 8 at Preamble.

<sup>85</sup> CCP Constitution *supra* n. 78 at Arts. 2-3.

<sup>86</sup> Backer, Chinese Constitutionalism in the “New Era”: The Constitution in Emerging Idea and Practice *supra* n. 70 at 202-3.

<sup>87</sup> 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 Communiqué on the Current State of the Ideological Sphere, more commonly known as Document Number 9 (hereinafter Document no. 9).<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

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

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<sup>88</sup> It was identified as Document Number 9 because 9 previous communiqués had been distributed prior to this one. “Document 9: A ChinaFile Translation,” *supra* n. 15.

<sup>89</sup> *Id.*

<sup>90</sup> *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.<sup>91</sup>

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’.<sup>92</sup> 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.

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<sup>91</sup> *Id.*

<sup>92</sup> 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’.<sup>93</sup> 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’<sup>94</sup>, and is consistent with a global trend towards autocratic and legalistic rule.<sup>95</sup>

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.<sup>96</sup> 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

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<sup>93</sup> 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).

<sup>94</sup> Taisu Zhang & Thomas Ginsburg, *China’s “Turn Towards Law,”* 59(2) *Va. J. Int’l L.* 307, 307 (2019).

<sup>95</sup> *Id.*

<sup>96</sup> 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.<sup>97</sup> 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*)<sup>98</sup>

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.<sup>99</sup>

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

<sup>97</sup> Xianfa *supra* n. 8 at Preamble.

<sup>98</sup> 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).

<sup>99</sup> *Id.*

<sup>100</sup> 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 14<sup>th</sup> 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](http://www.gov.cn/xinwen/2021-03/13/content_5592681.htm).



characteristics'<sup>101</sup> and 'Xi Jinping Thought on the rule of law'.<sup>102</sup> A 5 Year Plan on the development on the rule of law was also recently promoted.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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',<sup>106</sup> 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.<sup>107</sup> 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

<sup>101</sup> 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).

<sup>102</sup> 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>.

<sup>103</sup> 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](http://www.gov.cn/gongbao/content/2021/content_5633446.htm).

<sup>104</sup> "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](http://www.gov.cn/zhengce/2014-10/28/content_2771946.htm).

<sup>105</sup> "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](http://www.xinhuanet.com/politics/leaders/2020-11/17/c_1126752218.htm).

<sup>106</sup> See Xianfa *supra* n. 8 at Preamble.

<sup>107</sup> 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* (3<sup>rd</sup> ed.) 58-60 (New York Free Press 1999).

initial formulation and occurs frequently in legal instruments.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

In 2014, the term was the topic of a surprising amount of scholastic attention that featured heavily in academic journals.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

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).<sup>115</sup> 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

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<sup>108</sup> See, e.g. *id.*

<sup>109</sup> Carl Schmitt, *THE CONCEPT OF THE POLITICAL* 26 (trans. Leo Strauss, The University of Chicago Press 2007).

<sup>110</sup> *Id.*

<sup>111</sup> “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](http://m.thepaper.cn/renmin_prom.jsp?contid=1270187&from=renmin).

<sup>112</sup> *Id.*

<sup>113</sup> *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](http://www.china.com.cn/opinion/think/2014-09/25/content_33606904.htm).

<sup>114</sup> *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>.

<sup>115</sup> Schmitt, *The Concept of the Political* *supra* n. 10940 at 26.

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

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'.<sup>118</sup> 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 19<sup>th</sup> Congress.<sup>119</sup> Xi Thought was itself the focus of the 2018 Constitutional amendments as it was appended to the Preamble.<sup>120</sup> 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.<sup>121</sup> 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

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<sup>116</sup> "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>.

<sup>117</sup> *Id.*

<sup>118</sup> Xianfa *supra* n. 8 at Art. 1.

<sup>119</sup> 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.

<sup>120</sup> Xianfa *supra* n. 8 at Preamble.

<sup>121</sup> *Id.* at Preamble.

renown.<sup>122</sup> 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-referencing 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 Constitutionals 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.

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<sup>122</sup> 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>.