

The Basis for the Legitimacy of the Chinese Political System: Whence and Whither? Dialogues among Western and Chinese Scholars, VII -- Editor's Introduction

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The issue under discussion in this symposium volume is the basis for the “legitimacy” 正当性 of the contemporary Chinese political system, from whence it came and whither it might go. As Max Weber observed, any sustained exercise of governmental authority or domination requires legitimacy in order to sustain its voluntary acceptance by the people. In Weber’s scheme of things, the legitimacy of the modern West’s political system stemmed from its “rationalization,” with the establishment of formal-rational law (i.e. unified by legal logic), rational bureaucracy, and democracy, all closely associated with capitalism and market economy (Weber, 1978: 212–15). He juxtaposed “formalist law” against “substantivist law” as the two main ideal-types of law. Like formalist law, substantive law may be “rational” or “irrational”: a substantive-irrational legal system is subject to the arbitrary powers of the ruler, while substantive-rational law is more consistent and predictable, but is guided by (substantive) moral values from outside the legal system rather than by legal logic. Although Weber used the seemingly value-neutral ideal-type of “substantive rationality” for socialist legal systems, he in fact

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leaned strongly toward rejection of them for being prone to interferences from outside authority. In his view, only formal-rational law is characterized by judicial autonomy, forming a logically consistent system unto itself that is staffed by specialists and resistant to outside interference (Weber, 1978: 212–15, 657–58, 812–13, 870–71; cf. Huang Zongzhi, n.d.: introduction to the three volumes). That set of Weberian views remains immensely influential both in the West and in China.

Today, one major form that influence takes is the belief in “constitutionalism,” most especially that of the United States. The U.S. constitution is held up as the final source for the legitimacy of the American political system, the expression of the will of the people, the embodiment of rights, elected government and a multi-party political system, and the three-way division of governmental power in the executive, the legislative, and the judicial. That text, along with its associated beliefs and practices, are seen as a model for the world. Its influence is such that, even in the eyes of many developing countries themselves, political legitimacy is often measured in terms of the extent to which a particular country’s constitution measures up to the standard set by the United States.

Within China, mainstream scholarship on constitutionalism largely works under such a framework, with some arguing for textual revisions in the Chinese constitution to more closely approximate the U.S. model, and others calling for institutional or other improvements to move Chinese constitutional practice toward the U.S. model. In the July 15, 2013 symposium discussion “Six Questions for ‘The Three Sides on Constitutionalism’” organized by the influential journal *Caijing* (财经, Finance and Economics), the first view is represented by He Weifang 贺卫方 of the Peking University Law School and the second by Tong Zhiwei 童之伟 of the Shanghai Jiaotong University Law School (Caijing, 2013).

Our picture of the major divisions of opinion over constitutionalism in China today is not complete, however, without considering also the third side, which might be called the “official view” (distinguished from the two mainstream academic views just outlined), also represented in the above symposium, but perhaps still better represented by the May 2013 essay by Yang Xiaoqing 杨晓青 of the Renmin University Law School that was published in the official party organ *Red Flag Presentation* 红旗文稿. That essay helped trigger the recent spate of discussions on constitutionalism. The article contends that “constitutionalism” à la the U.S. model is in the main a construction of the “bourgeois class,” and that despite its claims to universal representation of the people, it in fact stands for the ideology and interests of that class, for the property rights of capitalists and their domination-exploitation of the laboring people. The Chinese Communist Party and the Chinese

constitution, by contrast, stand for the true majority of the people, whose support was won through revolutionary struggle (Yang Xiaoqing, 2013).

The combination of the above “mainstream” and “official” views, despite the obvious contradictions between them, is what makes for a complex discursive environment for constitutionalism in present-day China, with all its internal contradictions and conflicting and confusing arguments. Yet it is also what makes for a fairly large discursive space for the issues of political legitimacy and constitutionalism.

Jiang Shigong and Larry Catá Backer

Jiang Shigong and Larry Catá Backer are agreed that we must move beyond the “mainstream” academic framework and, without saying so, also the “official” line to grasp what is truly distinctive about Chinese constitutionalism. They are agreed that constitutional scholarship must not be limited to the mere recounting of multiple Chinese inadequacies when measured against the U.S. model, whether in text or in practice. They are agreed that we must seek to understand Chinese constitutionalism on its own terms, by its own logic.

To set a framework for a different approach, Jiang, in an article featured in an earlier special issue in this journal (Jiang, 2010), took as his point of departure the two prominent constitutional law scholars A. V. Dicey’s and K. C. Wheare’s studies of the “unwritten constitution” of Britain, which they contrasted with the “written constitution” of the United States. Chinese constitutionalism, Jiang argued, similarly needs to be understood not just in terms of the formal text of its written constitution, but also in terms of its “unwritten constitution.” Jiang’s was clearly a deliberate attempt to open up discursive space for the study of Chinese constitutionalism, and to try to make the Chinese Communist Party’s distinctive way of thinking about constitutionalism understandable to a Western and Western-dominated Chinese audience.

In Jiang’s view, the formal written constitution 宪法 (namely, the constitution of the People’s Republic of China of 1954, revised in 1975, 1978, 1982, 1988, 1993, 1999, and 2004), to some degree modeled after the U.S. constitution, must be considered in conjunction with the “unwritten constitution”—comprising first and foremost the “constitutional charter” 党章 of the Chinese Communist Party (albeit with a full text), as well as a number of major constitutional principles (fundamental laws and conventions) formed over time. The Party, Jiang argued, had acquired its political legitimacy not by elections but by winning against overwhelming odds in protracted revolutionary struggle. That background, in Jiang’s view, is what makes for the truly “fundamental law” of Chinese constitutionalism. Only from such a point of view can we

understand the actual governing principles and operations of Chinese constitutionalism.

In addition, Jiang argued, there are other elements of an “unwritten constitution” framed over the course of actual constitutional practices during the People’s Republic. Those include the now-fixed “convention” that the three top key positions (“trinity”)—general secretary of the Party, head of state, and chairman of the Military Affairs Commission—be united in a single individual, something arrived at through practical experience for the sake of averting intensification of partisan strife within the Party on account of divided authority; the “initiatives from two sources” 两个积极性, the central and the local governments, traceable to both Mao Zedong and Deng Xiaoping, which has formed a distinctive characteristic and major dynamic for Chinese development in the Reform era; and finally, the “one country two systems” constitutional principle to re-incorporate Hong Kong with its very different political system into China.

As shown in Larry Backer’s comment with which we begin this special issue, Backer is largely sympathetic to the main lines of these arguments, but he employs a different conceptual framework: the Chinese Communist Party, he points out, unlike political parties as they are commonly understood in the West, sees itself as representing the will of society and standing above the state or government, which is seen as merely the administrative arm of the Party. This is the opposite of the U.S. view, which sees political parties as representing interest groups and partisan factions and the state and its constitution as standing above the parties.

In Backer’s terms, the Chinese Communist Party embodies the “substantive constitution” (of higher moral and political values) of China, while the 1954 constitution, and its multiple revisions since, is but the “formal constitution” (of administrative principles and procedures) for the government. Behind this view is Backer’s comparative analysis of different varieties of constitutionalism in the world today, summarized by Jiang in his article introducing Backer’s work to a Chinese audience (presented here as the second article of the special issue): in a global comparative perspective, in addition to the “mainstream” U.S. model outlined above, there are theocratic constitutions (as in Iran) and party-state constitutions, as in the former Soviet Union and the People’s Republic of China (PRC). The latter two countries were alike in their Leninist origins, in which “states” are seen as instruments of class oppression, while the Leninist revolutionary party stands separate and apart from the state. With the seizure of power, however, the party became the “party-state.” In Lenin’s original vision, the socialist party-state would use the administrative organs and powers of the state for transition purposes until the government, and finally also the party, would wither away in communist

society. The problem with the Soviet Union was that the party became lost in the state apparatus, giving way to autocratic rule and an oppressive, totalitarian system. China, by contrast, stands for a different possibility, of a party that would continue to represent high-minded political values and guide China toward a “single-party constitutionalist state.”

Whereas Jiang (in his original article) envisaged something like a balance between the two “sovereignties” of the National People’s Congress (NPC) and the Party, and a path of constitutional development in which the NPC and its constitution would come to serve more and more as a check on the Party’s absolute power, Backer would look instead to changes within the Party itself for such a balance. Backer develops in his analysis a dualistic framework for understanding Chinese constitutionalism: the Party is the guardian of the ultimate political values and stands in that respect above the state apparatus which is but the administrative arm of the Party. Thus does the Party and its constitution represent the “substantive constitution,” while the state and its formal constitution represent the “procedural constitution.”

To Backer, that dualistic structure is the key to the Chinese version of a division of power, not between the executive, the legislative, and the judicial as in the Western model of constitutionalism, but between the political authority of the Party and the administrative authority of the government. Constitutional change and democratization must come from within the Chinese Communist Party itself, not via a body such as the National People’s Congress, as Jiang envisions. On the issue of “judicial review” (in the United States, the authority of federal courts to rule on the constitutionality of governmental actions), what Backer calls for is not an entity outside the Party (like the NPC, the Supreme Court, or a constitutional court) to conduct the constitutional review, but an entity to be created within the Party itself.

In Backer’s analysis, the crucial turning point in Chinese constitutionalism came with the constitutional revisions of 1982. That text began to address the issue of the separation between Party and government and between Party and the law. Backer places special emphasis also on the 2004 revision, which added the new constitutional principle of “the three represents”—that is, the Party is to represent the “developmental drive of the advanced productive forces” 先进生产力的发展要求, “advanced culture” 先进文化, and “the fundamental interests of the greatest majority of the people” 最大多数人民的基本利益. By that formulation, the Party has sought to evolve with changing social-economic realities, by leaving behind the “dictatorship of the proletariat” principle and making virtually everyone in society eligible for membership in the organization, including capitalists. To Backer, these were important initial steps in China’s efforts to construct a “single-party constitutionalist state.”

Jiang is in substantial agreement with these views of Backer, as his article introducing Backer's previous work makes clear in the summary above. Outside of presenting Backer's views, Jiang elaborates a bit more on the differences between China and the Soviet Union, pointing most especially to the Chinese Communist Party's "mass line" policies and the considerable mass support it continues to enjoy today. His main point of disagreement with Backer has to do with the latter's suggestion for a body within the Party to serve the function of "judicial review." In Jiang's view, that would be a futile approach:

... Backer has overlooked the possibility that under his Chinese "constitutional court" proposal, there may never be any constitutional issues to review at all—just like the fact that no case of unconstitutionality has ever been found since the inception of the PRC. (Jiang's article in this special issue; cf. Jiang, 2012: 971).

As we move into the second round of the exchange between Jiang and Backer, the focus of the discussion moves from fundamental principles and institutional structures to the question of how to operationalize their visions for the development of Chinese constitutionalism. To reiterate his view of things and perhaps also to synthesize his own and Jiang's views, Backer highlights now the problem of form versus function, and emphasizes once more the separation in Chinese constitutionalism between the (substantive) "political" and the (formal) "administrative," as opposed to the Western construction in which the political and the administrative are seen as one in the state/government, with state powers standing above party interests but separated and checked through a three-way division of power. Once again, Backer's emphasis is that the Western model must not be seen as the only possible or legitimate one, and that Chinese constitutional principles should be understood and valued on their own terms.

In his round two contribution (the third article of this special issue), Backer calls attention to what Jiang himself as an educational administrator (at Peking University) has supported in the way of legal education reform. Currently, the mainstream idea, imported from the United States, is to see law schools as the centers for training lawyers in the American vision—namely, as defenders of individual freedom and human rights. Jiang, however, agrees instead with the view that the focus of the law schools become the training of administrators, while the party schools train political cadres. In Backer's view, perhaps, such ideas on legal education serve to underscore the point Backer himself had made earlier about Chinese constitutionalism: a fundamental separation between the Party, representing the will of the people, and the state, the administrative arm of the Party. For Backer, the big question for

the future is how to develop that separation in a direction that would bring closer congruence between political ideals and administrative function. Jiang would emphasize political/civic education in the ideals of constitutionalism, with which Backer would not disagree. Backer would call for further elaboration of the Party's political values and democratization of the Party organization to bring governmental administration into closer alignment with the Party's political values.

Jiang's final response (the fourth article here) to Backer's second comment emphasizes first the commonalities between Backer and himself: both are opposed to the mainstream Chinese academic view, which they see as fundamentally that of the post-World War II ideology championed by the United States and the West. Both emphasize that the Party must be seen as integral to Chinese constitutionalism, not as an autocratic entity completely opposed to it as in much of the mainstream scholarship on constitutionalism. Both emphasize that Chinese constitutionalism's dualistic combination of the Party and the government is a combining of the substantive with the formal-procedural. Above all, both are agreed that Chinese efforts toward developing a single-party constitutionalist state, by bringing both party and government under the "rule of law" and constitutionalism, cannot be understood and appreciated without seeing the distinctive and integral role of the Party.

Jiang's final comment further approaches the question of the special issue from the standpoint of a clarification of the source of sovereign power 主权性权力 in Chinese constitutionalism. The Party is the body that wields this sovereign power, this in clear contrast to U.S. constitutionalism, which has witnessed the "judicialization" of sovereign power 主权司法化 with the coming of the system of "judicial review" by federal courts of the constitutionality of governmental actions, which provides in effect for "judicial sovereignty" 司法主权. In Chinese constitutionalism, by contrast, the courts have always been seen as just the administrators of law, not the sovereign source of law. The U.S. view is part of what leads to the mainstream view that sees the Chinese Communist Party as an intrusion against constitutionalism, rather than as integral to constitutionalism.

In addition, Jiang brings in the notion that Rousseau's Enlightenment modernist understanding of sovereignty needs to be combined today with Foucault's postmodernist insights into the diffused, invisible, and micro-level domination (or discipline) over individuals through knowledge-power (for example, in defining what constitutes the "normal"). On the question of legal education, Jiang adds the observation that the Western Common Law and Continental Law traditions might be usefully combined—the Common Law tradition, which allows judges more room to make law, is more suitable for economic and commercial law, whereas Continental Law, with its greater

emphasis on the supremacy of statutory law, is more suitable for civil and penal law.

But most important, perhaps, is what Jiang's concluding comment shows about an underlying division of perspective between Jiang and Backer, which this special issue does not discuss fully. Jiang's views are finally those of a legal historian, who emphasizes historical context and particularities (national differences) more than (transnational) universals, and actual practice more than normative depictions. Jiang's picture of whether Chinese constitutionalism might develop is shaped above all by his picture of from whence it came, not just China's modern revolutionary tradition, but also the long span of Chinese history. He is insistent about developing a distinctive Chinese constitutionalism that would be connected to China's historical traditions. Backer, by contrast, is more normative than historical. He expressed (lightly) his critical questioning of what he calls Jiang's "historicism" — a tendency to conflate the normative with the historical (whereas Jiang refers with an equally lightly phrased questioning of Backer's "value-neutral" posture, even as Backer in fact searches for universals in constitutionalism). These, of course, are tensions similar to what we can discern between Weber's ideal-types and his historical narrative-analysis of the formal-rational vs. the substantive-rational, as well as between his legitimacy and authority ideal-types and his historical narratives of those.

The acid test for either view, we might suggest, is whether and how the absolute authority of the Party as a ruling entity might be checked in actual operation. As Jiang points out in his final comment, this can be seen as part and parcel of the ages-old Chinese political problem of how the absolute authority of the ruler, even in the idealized vision of the emperor as the "son of heaven" 天子 representing heaven's abiding principles and moral values, could be checked by the division of authority between the ruler as moral guardian and the officials as administrators of the state. This is a problem that requires both historical perspective and creative innovation to address.

Wang Hui

From an entirely different perspective, Wang Hui's essay in this special issue is also concerned with the fundamental issue of legitimacy. First of all, in Wang's analysis, the world at present is witnessing a global "crisis of representativeness" 代表性危机, as Western political parties increasingly lose touch with their constituencies and social bases, a phenomenon that he terms the "fracture of representativeness" 代表性断裂). The old distinctions between the Right and the Left have ceased to have any real meaning. Wang Hui, we might say, is arguing that in Weber's terms, political systems in the West find themselves today in a crisis of legitimacy.

In China, (modern) “politics” had from the start a different meaning from that of the West. The Chinese Communist Party as a “political party” was forged in revolutionary war. The “will of the people” was not forged or tested in elections but by fire, the legitimacy of the Party gained not through elections but through revolution and “people’s war.” The Chinese Communist Party became much more than a political party, in the sense of Western party politics originating in the nineteenth century, which briefly occupied center stage in Chinese history in the immediate aftermath of the 1911 Revolution. But as early Republican politics devolved into partisan strife of little real meaning before the reality of military rule, the search came for an entirely different kind of party—the single, unified “super party” 超级政党. Both the Guomindang and the Chinese Communist Party claimed for themselves representation of the will of the people above partisan interests, as a “supra party” 超政党.

In the protracted revolutionary wars to follow, the Chinese Communist Party was forged and shaped through a distinctive process of the mass line, in which the Party repeatedly tested itself against the will and support of the people, seeking to adjust and alter itself through revolutionary praxis. The successive “line struggles” in the Party’s history reflect precisely such adjustments through practice. For Wang Hui, the “mass line” is perhaps most graphically expressed through the historical fact of “people’s war,” in which communist intellectuals and the people, party and army and guerrillas and mass organizations, politics and art and war and revolution-making, all came to be mobilized for the single effort of “people’s war” under the leadership of the “super party” with its “supra party” politics and culture.

That twentieth-century revolutionary tradition of “politics” 政治 has, however, been lost with the taking of power by the Chinese Communist Party and its subsequent bureaucratization, as the revolutionary party gave way to the governing “party-state” 党国—or, even more than that, to a statified party that might simply be termed the “state party” 国党, according to Wang Hui. Politics no longer has the meaning either of its origins in nineteenth-century European political parties or of twentieth-century China’s supra party politics, but has in the twenty-first century become a mere matter of bureaucratic governance and management. That, in Wang Hui’s terms, is the “depoliticization of politics” 去政治化的政治.

Globally, then, states and political parties and state-parties no longer possess the legitimacy of genuine “representativeness,” as the world finds itself in the condition of depoliticized politics. In looking to the future, what is needed is to think about and search for what Wang calls a “post-party politics” 后政党政治, not merely a return to the past forms of politics originating in the nineteenth-century West and the twentieth-century Chinese Revolution, but new forms of politics to restore representativeness/legitimacy in government.

In such a view, constitutions and laws constitute only one part of a larger picture. Wang Hui would look rather to possible new inventions from the legacy of the “mass line” 群众路线, even though it must take on new meaning and form now that the political context of revolutionary war is no more. New modes of representativeness and legitimacy need to be constituted in a world greatly altered by globalization and by the distinctive Chinese political economy that has emerged in recent decades. Yes, the party’s absolute authority needs to be checked by freer expressions of public opinion and by genuinely representative entities, such as workers’ unions and peasant associations organized from below. And there needs to be a media that can express the interests of such entities, not just the current media dominated by capital and/or government. Wang Hui’s is, in a word, a very different vision that represents both an affirmation of and a challenge to the entire debate over the meaning of Chinese constitutionalism and “rule of law.”

Concluding Observations

Even so, Wang Hui shares with Jiang and with Backer his view of the distinctive source of legitimacy of the Chinese Communist Party, and hence also of answers that are different from the mainstream constitutionalism view’s answer to the question of whence and whither the basis of Chinese political legitimacy. To some extent, all three authors share something in common with the “official line” on this point.

Here one might observe further that the “official line’s” class analysis of constitutionalism, which on the face of things sounds like just so much propagandistic jargon, could actually have some genuine meaning for China if formulaic and ideological expressions were set aside. If one were to ask the academic question of just what might make up the “social basis” of constitutionalism in present-day China, one would perhaps find it mainly in the new urban “middle classes” who have come to resemble more and more the global urban middle classes in lifestyles, tastes, and values. But they total merely about one-sixth of the entire labor force (for detailed analyses, see Huang, 2013; Huang Zongzhi, 2013a, 2013b). For the majority of the people, most especially, the 900 million peasants and peasant-workers who work as second-class citizens and live in a very different world, gaining the same privileges and status as urban residents might seem more urgent than issues of constitutionalism and three-way divisions of governmental authority. To that extent, there might be something of a valid core insight in the official class analysis view of constitutionalism.

This special issue does not propose answers so much as pose questions, by clarifying the historical origins of Chinese constitutionalism, by challenging

mainstream opinion on legitimacy and constitutionalism for its disregard of the Chinese context, by outlining different visions for what might be done outside the scope of “mainstream” opinion, as well as suggesting new kinds of politics that might reconnect the party with its history and with Chinese society, the constitution and the laws with the people.

At the end of these illuminating exchanges of views, we might summarize the heart of the issue this way: China in the past century saw the rise of a Leninist revolutionary party, whose legitimacy was demonstrated by triumph in protracted struggle against overwhelming odds because of massive popular support—which by any measure of legitimacy must be considered as great as any election can confer. At the same time, Chinese constitutionalism for a century has adopted many of the ideals—for example, freedom of speech and assembly, other citizens’ rights, and democracy—and some of the practices of Western constitutional government, such as a republican polity and the three-way division of governmental authority. The result is unavoidable tensions between the two legacies, evidenced most especially in the relationship between the Party, still organized by Leninist principles to a considerable extent, and the state apparatus, which has quite a few of the features of the Western constitutional state.

In a still longer historical perspective, the combining of the two Weberian legal ideal-types of the substantive-rational and the formal-rational, and of the tensions between them, must be seen as very much a historically given reality in Chinese constitutionalism. Imperial Chinese law, as I have argued elsewhere, is perhaps best characterized as substantive-rational in Weberian terms, because of its emphasis on moral values and its consistency, and also because it places the “substantive truth” (the real truth) above the courtroom’s procedural truth (the truth that is demonstrated within the boundaries of established courtroom procedures). The substantivist dimension is also clearly evident in China’s long and still vibrant tradition of community and kin mediation and, with the coming of Communist rule, also of court mediation—for their moral ideals of humaneness and harmony rather than individual rights, and for their sensible recognition of the simple reality that many disputes in fact do not involve simple right and wrong, and are therefore better handled by mediation and conciliation, rather than through the formal-rational emphasis on legal right and wrong that pushes even faultless disputes toward adversarial resolution (for detailed discussions, see Huang, 1996: esp. chap. 9; Huang, 2010; cf. Huang Zongzhi, n.d.: introduction to the three volumes). China’s modern century, however, has witnessed a great deal of importation of formalist principles and laws from the West. Just how the two will be combined and the relationship between them worked out remains to be seen, but the combination, we might suggest, may be not only a burden full of tensions but also a creative opportunity with unrealized potential.

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