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# **“BUILDING UP” CHINA’S CONSTITUTION: CULTURE, MARXISM, AND THE WTO RULES**

*M. Ulric Killion\**

## I. INTRODUCTION “SOME” RESOURCES FOR “SOME” REFORMS

During the late Qing Dynasty (1636–1911), China struggled with the debate of reformist policy versus dynastic rule. Then, during the post-Qing period, the debate evolved to one that centered on reformist policy versus revolution.<sup>1</sup> Following the 1949 founding of the People’s Republic of China, the prominent issue became economic construction or reforms. During these debates, the issue of legal reforms, like traditional culture and society, suffered relegation to minimum importance.<sup>2</sup>

It would not be until the eve of the infamous Great Cultural Revolution (1966–1976) that China’s polity, the Chinese Communist Party (“CCP”), would give serious consideration to modernizing China’s legal system or implementing legal reforms in addition to economic reforms.<sup>3</sup> In 1978, the Third Plenary Session of the 11th Committee of the Communist Party Congress (“CPC”) adopted a policy of restoring the construction of a socialist legal system and democracy.<sup>4</sup> However, unlike the proposed economic reform and opening of the economic infrastructure, the reform of China’s legal

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1. See generally Wang Qisheng, “*Revolution*” and “*Counter-Revolution*”: Interaction Among the Three Major Political Parties in China in the 1920s, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Winter 2004, at 79 (discussing the revolutionary discourse advanced by the three major political parties during the post-Qing period).

2. See Chen Sixi, *The Gradual Reform of the Electoral System in China*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Spring 2004, at 95.

3. *Id.*

4. *Id.*

system and democracy would experience a delay as China's polity prioritized economic reforms.<sup>5</sup>

China's accession to the World Trade Organization ("WTO")<sup>6</sup> would again direct attention toward legal reforms. Although China now recognizes an obligation and need to reform its legal system, a well-established socialist market economic system requires a well-established socialist market legal system or socialist market economic legal system.<sup>7</sup>

The policy of restoring the construction of a socialist legal system corresponds with the early Chinese Communists (commencing in the 1920s) and now the CCP's attempt to finalize the localization of Marxism to the realities of traditional culture and society.<sup>8</sup> This, however, presents issues of a modern China; although China appears willing to commit to legal reforms, it is only committing "some" resources for "some" legal reforms such as "some" new legal propositions or laws.<sup>9</sup> These reforms all challenge ideal constitutionalism, rule of law, independent judicial review, WTO rules and standards, and traditional culture and society (predominantly traditional Confucianism).

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5. See, e.g., Edward Cody, *China's Premier Calls Democracy a Distant Goal*, WASH. POST, Feb. 28, 2007, at A13; Li YongYan, *China Ready for Democracy in 1940s, Not Today*, ASIAN TIMES ONLINE, May 11, 2004, <http://www.atimes.com/atimes/China/FE11Ad04.html> (arguing that despite China's economic modernization, Chinese government officials refuse to adopt a system of universal suffrage).

6. *Protocol on the Accession of the People's Republic of China*, WT/L/432 (Nov. 10, 2001) [hereinafter *Protocol on Accession*].

7. Wang Baoshu, *China's Accession to the WTO and the Building of a Socialist Market Economic Legal System*, in CHINA: ACCESSION TO THE WTO AND ECONOMIC REFORM 338 (Wang Mengkui ed., Foreign Language Press 2002).

8. *Religious Freedom in China: Hearing Before the Cong.-Executive Commission on China*, 108th Cong. 14–15, 24 (2004); Dep't of Propaganda of the Cent. Comm. of the Chinese Communist Party, No. 13, Notice on Further Strengthening Marxist Atheism Research, Propaganda and Education (May 27, 2004), available at <http://www.cecc.gov/pages/hearings/111804/Fu.php>; Zou Shipeng, *Localization of Marxism in China and the Construction of China's Modernity*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Summer 2005, at 12; *Marxist Academy Founded in China*, CHINA DAILY, Dec. 27, 2005, at 2; *New Learning Center to Promote Marxist Theory, Cultural Liberalization Inches Forward*, CHINA REFORM MONITOR (Am. Foreign Policy Council, Wash., D.C.), Jan. 13, 2006, available at <http://www.afpc.org/crm/crm612.shtml>.

9. WTO Secretariat, *Trade Policy Review: People's Republic of China*, at 34 n. 24, delivered to the Trade Policy Review Body, WT/TPR/S/161 (Feb. 28, 2006) [hereinafter *Trade Policy Review Report*] ("[B]etween 1999 and 2003, 17 laws were revised; 63 administrative regulations were issued, amended or abolished; and 34 State Council decrees were abolished.").

Western experts who praise China's progress in modern legal reforms are either unaware or willing to deny that Marxism is still the subject of theoretical discourse within and without the halls of both Chinese academia and Western academia.<sup>10</sup> In terms of ideal constitutionalism, legal reforms that focus on Marxism rather than on the domestic needs of China's citizenry result in a policy of pursuing minimum compliance with the WTO standards, such as the WTO rules and Trade Policy Review Mechanism ("TPRM") intended to promote the development of a sound legal system, including judicial review.<sup>11</sup> The localization of Marxism presents issues of whether China's model of constitutional government rises to the level of a stage of legality where citizens and other legal persons, such as foreign exporters, investors, and transnational corporations, are protected from the arbitrary exercise of government power, while also enjoying legally based civil, both economic and non economic, liberties that can be enforced pursuant to the rule of law in a court of law. The measure of constitutionalism or the state of legality may ultimately be contingent on a policy of committing "some" resources for "some" legal reforms, such as "some" new legal propositions or laws.

Part II of this Article presents an introduction to the Western ideal constitutional state, rule of law state, and state of legality as well as an introduction to the WTO rules and standards for sound legal systems and judicial review. Part II continues by introducing the history of traditional culture and law by focusing on the influence of traditional culture (predominantly traditional Confucianism and legalism) on an earlier development and evolution of positive law in antiquity. This Article then briefly introduces the Constitution of the

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10. See, e.g., Brett Williams, *The Influence and Lack of Influence of Principles in the Negotiation for China's Accession to the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 791, 799 (2001) (demonstrating that although Marxist ideologies have become less important in the new era, students "are still well educated in Marxism and Leninism").

11. *Protocol on Accession*, *supra* note 6, at paras. 2(A)3, 2(D); General Agreement on Tariffs and Trade art. X, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 13, available at [http://wto.org/English/docs\\_e/legal\\_e19-adp.pdf](http://wto.org/English/docs_e/legal_e19-adp.pdf) (Judicial Review); Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 [hereinafter WTO Agreement]; Agreement Establishing the Trade Policy Review Mechanism, Annex 3, WTO Agreement *supra* [hereinafter TPRM]. The Transitional Review Mechanism or process is unique to China and is also required by paragraph 18 of the Protocol on Accession. *Protocol on Accession*, *supra* note 6, para. 18.

People's Republic of China ("1982 Constitution"),<sup>12</sup> Chinese constitutionalism, and some of the problems associated with China's model of constitutional government.

Part III of the Article analyzes the problems associated with China's 1982 Constitution, the constitution in action and constitution in text, extra-constitutionalism in practice, Marxism and economic determinism, Marxism as the path to modern legal reforms, and China's attempts to finalize the localization of Marxism to the realities of traditional culture and society. This Article concludes with a discussion of the inadequacies of Marxism and economic determinism, as opposed to the WTO rules and standards or even traditional culture and society, in promoting in China a more Western constitutional design, rule of law, and independent judiciary.

## II. CONSTITUTIONS, RULE OF LAW AND CULTURE

### A. Modern States of Legality

The rule of law is neither a rule nor a law, rather "a doctrine of political morality which concentrates on the role of law in securing the correct balance of rights and powers between individuals and the state in free and civilized societies."<sup>13</sup> In terms of the Western Enlightenment, and its subsequent interpretations, the potential of democracy is contingent on a state embracing the rule of law or state of legality. Democracy, as the presumed greater good, can only develop to the extent that law guarantees the rights of citizens, such as civil rights and political freedoms. The road to justice depends on the ability of citizens of a state to speak freely and publicly about any experiences of injustice. For instance, in Germany, a state of legality is a *Rechtsstaat* (literally, a law-based state, constitutional state, or state of legality), where the rule of law restrains the exercise of state power or government power.<sup>14</sup> In 1832, the concept of *Rechtsstaat*

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12. XIAN FA (1982) (P.R.C.).

13. ALEX CARROLL, CONSTITUTIONAL AND ADMINISTRATIVE LAW 18 (Law Press 2002); see also Martin Kriele, *Human Rights and the Separation of Powers*, in THE RULE OF LAW 232 (Josef Thesing ed., 1997); Jiang Shigong, *The End of Legal Transplantation*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Autumn 2004, at 160.

14. See, e.g., Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1318–19 (2001).

first appeared in the German context in contrast to an autocratic police state.<sup>15</sup> A state of legality is also characteristic of other Western legal systems, such as the Anglo-American rule of law and the French *État de droit*. Germany provides a model constitution for the world because its courts have exclusive power to invalidate laws on constitutional grounds.<sup>16</sup> Citizens receive protection from the arbitrary exercise of government power or authority, while also enjoying legally based civil liberties and freedoms that are enforceable pursuant to the rule of law in a court of law. All are characteristics of a state of legality.<sup>17</sup> A country is hardly describable as a liberal democracy if it fails the test of being a constitutional state or state of legality. For this reason, *Rechtsstaat* is also describable as rule of law, limited government, substantive due process, reasonableness, equal protection, and full and fair hearing, which is equally true of Anglo-American rule of law and French *État de droit*.<sup>18</sup>

In a globalizing multicultural world, there have been problems in defining the rule of law, mostly attributable to problems of constitutionalism and democratic transition. In a post-Cold War era (i.e., after 1991), conceptual stretching is an increasing phenomenon.<sup>19</sup> In non-Western and developing countries, there is a proclivity to employ Western notions of democracy and constitutionalism to describe a diverse range of social and political phenomena, including different theoretical approaches and models.<sup>20</sup> The multifarious nature of rule of law has been lent to different meanings in different contexts and in different legal systems because

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15. See ROBERT VON MOHL, *DIE DEUTSCHE POLIZEIWISSENSCHAFT NACH DEN GRUNDSÄTZEN DES RECHTSSTAATES* [GERMAN POLICE SCIENCE AFTER THE PRINCIPLES OF THE RIGHT STATE] (1866).

16. See M. Ulric Killion, *Post-WTO China and Independent Judicial Review*, 26 *HOUS. J. INT'L L.* 507, 532 n.131 (2004).

17. LUC HEUSCHLING, *ÉTAT DE DROIT, RECHSTAAT, RULE OF LAW*, (Daloz 2002); Ulrich Karpen, *Conditions of 'Rechtsstaat' Efficiency Particularly in Developing and Newly Industrialising Countries*, in *THE RULE OF LAW*, *supra* note 13, at 263; Rosenfeld, *supra* note 14, at 1308–09.

18. See HEUSCHLING, *supra* note 17.

19. Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 *AM. POL. SCI. REV.* 1033, 1041 (1970).

20. *Id.*

there is neither consensus on what the rule of law means nor what it stands against.<sup>21</sup>

Enhancing the difficulty of defining the rule of law is that it has both a descriptive and prescriptive content, as true of concepts such as liberty and equality. These descriptive meanings are contingent on prescriptive meanings or norms of a culture and society.<sup>22</sup>

The rule of law has come to mean different things for different legal traditions.<sup>23</sup> For example, the American appellate review structure, and its activism and powers of constitutional review, characterize a judicial pyramid structure in the placements of power, adjudication, and review.<sup>24</sup> American courts generally focus on the legal rights of parties because, as observed by Chief Justice Marshall in *Marbury v. Madison*, a primary task of the American courts has always been “to say what the law is.”<sup>25</sup>

A distinguishing feature of American courts is the authority to rule on the constitutionality of a law while also fashioning appropriate legal relief for parties.<sup>26</sup> It is a judicial model that designedly promotes legal accountability rather than political accountability.<sup>27</sup> There are also other Western models, such as the revision model of Germany’s Federal Constitutional Court, the cassation models of France’s Court of Cassation, and Italy’s Constitutional Court.<sup>28</sup>

The efficiencies of the rule of law—civil law versus rule of law—common law systems, admittedly, have been the subject of debate. During the late 1990s, a group of economists conducting cross-country research concerning legal rules and economic growth concluded that “countries whose legal systems originated in the English common law have enjoyed superior per capita income

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21. Rosenfeld, *supra* note 14, at 1308.

22. *Id.*

23. *Id.* at 1309.

24. Fu Yulin, *Comparative Research on Judicial Hierarchy*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Spring 2003, at 39, 41; *see also* CIVIL APPEAL PROCEDURES WORLDWIDE 327 (Charles Platto ed. 1992).

25. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

26. William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1, 38 n.119 (2000).

27. Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 16 (2001).

28. Fu Yulin, *supra* note 24, at 39–40; Nardini, *supra* note 26, at 5, 16–18.

growth compared with so-called civil law countries, whose law is based on European codes, especially those countries whose law is based on the Napoleonic codes and hence on French law.”<sup>29</sup> Many would disagree and, instead, hail the superiority of civil law systems, because the civil-common law dichotomy has been the subject of debate for a substantial period.<sup>30</sup>

For instance, on the European continent, Germanists, or Germanist jurists and legal historians such as Otto Friedrich von Gierke (1841–1921), searched for guidance from sources of Roman law.<sup>31</sup> Sources ranged from the juristic science of the Roman *pontifices* in prehistoric times, the Law of the Twelve Tables (published 451–450 B.C.), the Code of Justinian (*Corpus Juris Civilis*, compiled A.D. 529–565), to later students of Roman law and written commentaries on praetor’s edicts of Roman jurisconsults.<sup>32</sup> They did so for purposes of interpreting the development and meaning of German law, as did studies of the antecedents to German law influence Herr von Gierke’s views on *Rechtsstaat* and the federal nature of medieval states, which led him to become an early opponent of civil law systems.<sup>33</sup>

However, for countries sharing common universal values, in the sense of the Platonic idea or Aristotelian form and its progeny of Western legal tradition or common Western legal civilization, there is the commonality of the Enlightenment and its subsequent interpretations, especially the high ideal of a liberal democracy. In addition, the different Western models of constitutional or judicial review, such as the appeal, revision, and cassation models, eventually converge to a three-tier pyramid structure despite their diverging and distinctive histories and procedural structures.<sup>34</sup> It now seems a tacit assumption that though there may be inherent problems

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29. KENNETH W. DAM, *THE LAW-GROWTH NEXUS* 5 (2006).

30. See, e.g., Robert Adriaansen, *At the Edges of the Law: Civil Law v. Common Law: A Response to Professor Richard B. Cappalli*, 12 *TEMP. INT’L & COMP. L.J.* 107 (evaluating the various benefits and limitations of the common and civil legal systems).

31. See, e.g., SOBEI MOGI, *OTTO VON GEIRKE: HIS POLITICAL TEACHINGS AND JURISPRUDENCE* (1932); BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* (1992); FRITZ SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* (1967).

32. See MOGI, *supra* note 31; NICHOLS, *supra* note 31; SCHULZ, *supra* note 31.

33. RUDOLF HUBNER, *A HISTORY OF GERMANIC PRIVATE LAW* 156–58 (2000) (discussing Gierke’s elaboration of “associational theory” as clearing the way for an understanding of German law).

34. Yulin Fu, *supra* note 24, at 39, 43–44 (discussing the judicial pyramid).



in both rule of law systems, rule of law systems are superior to non-rule of law systems because they promote democracy, greater predictability, and stability.

Perhaps as a matter of public choice theory, though primarily concerned with the economic analysis of political choice, rather than market choice, individuals generally choose to have government, rather than not have government and return to the state of nature. Individuals manifest this choice by surrendering a portion of their individual liberties as a necessary part of the social contract with others similarly situated.<sup>35</sup> Individuals that consent to government under a constitutional state, rule of law state, or state of legality are better off because it is the social contract and not anarchic society serving the greater interest of civil individuals.<sup>36</sup>

### *B. The WTO Rules and Standards*

Notwithstanding democracy, predictability, and stability, modern states of legality also promote a more liberal international economic order based on a market system, sound money, and the rule of law.<sup>37</sup> Due to economic reforms and a goal of participating in the new global market or liberal market economy, membership status in the General Agreement on Tariffs and Trade (“GATT”) and WTO has influenced, and continues to influence, legal reforms. Such influence is recognizable from the Republic of China’s (“ROC”) 1947 GATT membership and subsequent resignation, to China’s 1986 application for renewal of or resuming GATT membership, to China’s 2001 accession to the WTO.<sup>38</sup> The United States and other WTO members scrutinized China’s application to the WTO because

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35. See, e.g., KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 1–2 (1963); JEFFREY L. HARRISON, LAW AND ECONOMICS 291–99 (2000); IAIN MCLEAN, PUBLIC CHOICE: AN INTRODUCTION (1987); *China’s Financial System and Monetary Policies: The Impact on U.S. Exchange Rates, Capital Markets, and Interest Rates: Hearing on U.S.-China Economic and Security Review Commission*, 109th Cong. (2006) (statement of James A. Dorn, Vice President for Academic Affairs, CATO Institute).

36. See, e.g., THOMAS HOBBS, LEVIATHAN (J.M. Dent & Sons Ltd. 1962) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge U. Press 1988) (1689); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS (Victor Gourevitch ed., 1997) (1762).

37. Gerard Alexander, *Institutionalized Uncertainty, The Rule of Law, and The Sources of Democratic Stability*, 10 COMP. POL. STUD. 1145 (2002).

38. See WANG YI, GATT & WTO—LAW AND RULES FOR WORLD TRADE 168–74 (1998); Penelope B. Prime, *China Joins the WTO: How, Why, and What Now? The Overall, Long-Term, Effects Should Be Positive, but Don’t Expect Too Much, Too Soon*, BUS. ECON., Apr. 2002, at 26.

an earlier WTO report confirmed that members must establish sound legal mechanisms for implementing their obligations under the WTO Agreement. For China, accession represented a prescription for broad systemic reforms in the areas of transparency, fairness, and independent judicial review.<sup>39</sup>

A commitment to legal reforms, generally, derives from China's acceptance of key provisions in the Protocol on Accession and other WTO rules.<sup>40</sup> Article 2(A)2 of the Protocol on Accession reads, "China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures . . . pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange."<sup>41</sup> The Protocol on Accession, at Article 2(D), further specifies judicial review in the administration of the trade regime.<sup>42</sup>

Judicial review is also a requirement of Article X of GATT, on the publication and administration of trade regulations, and reads, "Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters."<sup>43</sup> Similarly, the amended Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, at Article 13, on Judicial Review, requires:

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the

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39. See, e.g., Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶¶ 57–58, WT/DS50/AB/R (Dec. 19, 1997).

40. *Protocols on Accession*, *supra* note 6, paras. 2(A)(2), 2(D).

41. *Id.*

42. *Id.*

43. GATT, *supra* note 11, art. X.

authorities responsible for the determination or review in question.<sup>44</sup>

The inherent vagueness and generalities of the WTO rules and standards is problematic because they limit their potential in promoting a more Western model of constitutionalism or state of legality, including rule of law and judicial review. The review requirement could be met through judicial, arbitral, or administrative review since the WTO rules only require judicial review, which is a review mechanism independent of the authorities responsible for the determination or review in question.<sup>45</sup>

Notwithstanding an amendment of the WTO rules and explicit language requiring independent judicial review, the rules allow for traditional rather than independent judicial review,<sup>46</sup> which could encompass a problematic Marxist legal theory or socialist jurisprudence. China's attempt to finalize the localization of Marxism enhances the potential for, and maybe even threatens aspects of, a future model of constitutionalism and judicial independence that is contingent on Marxist legal theory or socialist jurisprudence. China's first Trade Policy Review Report reads, "China has reviewed legislation and revised and issued a considerable number of new laws in connection with its Membership of the WTO," which are legal reforms primarily focusing on new regulations and rules for changing economic needs and international commitments.<sup>47</sup> In the interim, as a result of inherently vague WTO rules, China can commit "some" resources for "some" legal reforms, by enacting "some" new legal propositions or laws, and meet its baseline Protocol on Accession requirements.

One-party CCP rule and prioritized economic growth results in legal reforms focused on compliance, though minimally, with the WTO rules and standards, which are reforms focused on improving China's socialist market economic legal system, implementing the WTO rules, and enacting laws that, generally, tally with the WTO

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44. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *supra* note 11, pt. I, art. 13.

45. *Id.*

46. M. Ulric Killion, *Quest for Legal Safeguards for Foreign Exporters Under China's Anti-Dumping Regime*, 29 N.C. J. INT'L L. & COM. REG. 417, 425 (2004).

47. *Trade Policy Review Report*, *supra* note 9, at 29.

rules.<sup>48</sup> Problematic are ongoing legal reforms that primarily focus on preparing the nation for participation in the new global market or liberal market economy by “continuing to revise laws that are not in conformity with China’s obligations under the WTO rules; revising laws that are not conducive to enhancing the competitive power of Chinese enterprises in the international market; and improving laws offering protection to domestic enterprises and ensuring industrial safety.”<sup>49</sup> Conversely, to protect both economic liberty and non-economic liberty interests from the arbitrary exercise of government power, modern states of legality pursue a more liberal international economic order based on a market system, sound money, and the rule of law.<sup>50</sup>

### C. Evolution of Positive Law in Antiquity

Notwithstanding the influence of the WTO rules, traditional culture and society also continue to influence modern legal reforms. In the native Chinese language and appropriate legal lexicon, the concept of constitutionalism from the late-Qing dynasty literally means “building up the constitution.”<sup>51</sup> For modern China, and its native language, culture, ideology, thought system, and appropriate lexicons, a Western conceptualization and lexicon of constitutionalism will not share the same value-laden meanings or influence.

The value-laden liberal ideals of constitutionalism, democracy, and liberty espoused by Enlightenment thinkers such as John Locke and Jean-Jacque Rousseau, “that government was held in trust instead of by ordained right and that the monarch was a mere agent

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48. See Jerome Alan Cohen, *Tiananmen and the Rule of Law*, in *THE BROKEN MIRROR: CHINA AFTER TIANANMEN* 323, 323–28 (George Hicks ed., 1990); see also CHI FULIN, *CHINA: THE NEW STAGE OF REFORM* (2004); Song Linfei, *China's Accession to the WTO and the Building of a Socialist Market Economic Legal System*, in *CHINA: ACCESSION TO THE WTO AND ECONOMIC REFORM* 331–64 (Wang Mengkui ed., 2002); Jiang Wei, *China's WTO Achievements Recognized*, *CHINA DAILY*, Dec. 15, 2005, [http://english.peopledaily.com.cn/200512/15/eng20051215\\_228220.html](http://english.peopledaily.com.cn/200512/15/eng20051215_228220.html).

49. Wang Baoshu, *supra* note 7, at 338.

50. See Alexander, *supra* note 37.

51. R. Randle Edwards et al., *Symposium on China and Constitutionalism: Introduction*, 9 *J. CHINESE L.* 1, 2 (1995) (noting that Constitutionalism has also been defined as the ideology of the constitution); Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 *ASIAN-PAC. L. & POL'Y J.* 255, 261–62 n.13 (2003) (citing Mo Jihong, *Jianli Xianfa Quanwei, Baozhang Gongmin Quanli* [Establishing the Authority of the Constitution to Protect Citizens' Rights], *BEIJING RIBAO* [BEIJING DAILY], Dec. 2, 2002, at 14).

of society with 'no will, no power but that of law,'<sup>52</sup> are conceptions that seem alien to the traditional Chinese social structure of hierarchical relationships and patriarchal values, as well as its vestiture of authority not in the people, but rather in the state.<sup>53</sup> In terms of the culture relative or problems in value pluralism, the Confucian value system prioritized society first by placing in the primary, in the continuum of values, a greater concern in benefiting the state and the kingdom, loyalty to the sovereign, and devotion to country.<sup>54</sup> The traditional Confucian ethic or virtue manifesting filial piety influences a resulting Confucian model for an ideal governing polity, because the virtue of filial piety informs the virtue of loyalty to the monarch. Thus, the concept of the state as an enlarged family results in the monarch-subject relationship becoming a social extension of the Confucian father-son relationship.<sup>55</sup>

This does not mean that China in antiquity did not have legal systems or institutions, because there was a legal system with a built-in mechanism for organic change.<sup>56</sup> A development and evolution of law occurs when man-made laws replace old customs and rites or natural law (or natural moral law), because a need for new institutions necessitates replacing the authority of the Son of Heaven with the authority of the ruler of the state.<sup>57</sup> Law as a system or institution would appear and evolve as a built-in mechanism for organic change, while no longer being solely confined to enforcing prescriptions of traditional culture or natural moral law or to lending itself to enforcing the standards of man-made laws or the state.<sup>58</sup>

A positive law evolved but left in its evolutionary track a clash between traditional culture and positive law, which served as a

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52. Lawrence R. Sullivan, *Intellectual and Political Controversies over Authority in China: 1898–1922*, in CONFUCIAN CULTURES OF AUTHORITY 171, 184 (Peter D. Hershock & Roger T. Ames eds., 2006).

53. See M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH U. GLOBAL STUD. L. REV. 43 (2005).

54. See Feng Lan, *The Female Individual and the Empire: A Historicist Approach to Mulan and Kingston's Woman Warrior*, 55 COMP. LITERATURE 229 (2003).

55. *Id.*

56. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1654 (1994) (noting that a system of law should have a built-in mechanism for organic change to be uniquely Western, at least in the twelfth century).

57. See, e.g., J.J.L. DUYVENDAK, *THE BOOK OF LORD SHANG* 47–48 (1928).

58. Berman, *supra* note 56, at 1652–55.

political expedient for imperialism and centralizing government.<sup>59</sup> The evolution in antiquity, by development and growth, is traditional Confucianism and its infusion of law with morals, and legalism as a harbor for positive law, vying for dominance.<sup>60</sup> While what earlier evolved in antiquity constituted new legal institutions, especially the written laws, the new legal institutions problematically focused on safeguarding the powers of government rather than individual rights and privileges, because the observance of written laws was imperative and the sought after deterrent effect necessitates laws that were severe. However, the severity of positive law in antiquity does not deny the potential of law in antiquity as a legal system or institution or philosophical form. Such law could constitute an organic system that could experience a further historical growth and evolutionary development.

An earlier development and evolution of positive law also did not displace the influence of traditional culture, a process commenced by the communists in the 1920s, because the historical development of law directly links to traditional Confucian morality.<sup>61</sup> This historical development of law is divisible into three periods. First, in antiquity or the pre-Han period, law and morality were separable concepts that served different purposes and philosophical traditions.<sup>62</sup> During this period, Confucian morality, which the earlier sages developed into norms, was a separate philosophical precept and represented the rules of conduct governing relationships between men.<sup>63</sup> Second, during the Han Dynasty (206 B.C.–A.D. 220), there was a further development of law in the spirit of morality, because during the Confucianization of law or legalization of Confucianism, traditional Confucian morals mold an early legal system, which then acquires an ethical context.<sup>64</sup> Third, after the Chinese Revolution (1911), during the reign of the Republic of China (1911–1949), law is westernized, but morality remained

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59. DUYVENDAK, *supra* note 57, at 47–48.

60. David A. Funk, *Traditional Chinese Jurisprudence: Justifying Li and Fa*, 17 S.U. L. REV. 1, 44–45 (1990).

61. See Chung-ying Cheng, *Commentary on Herbert H.P. Ma's "Law and Morality: Some Reflections on the Chinese Experience Past and Present,"* 21 PHIL. E. & W. 461 (1971).

62. *Id.*

63. See FUNG YU-LAN, *SELECTED PHILOSOPHICAL WRITINGS OF FUNG YU-LAN* (1998).

64. See Chung-ying Cheng, *supra* note 61.

traditional. This meant that Confucian morality still influenced society by ordering society and producing good government and by addressing the education, cultivation, and fulfillment of an individual instead of an exclusivity for government and social control.<sup>65</sup>

In terms of government and social control, Han Fei Zi (a school of legalists or realists) further developed this view of government by Confucian morality, but with a different goal in mind.<sup>66</sup> Han Fei Zi, and other legalists before the third century B.C., denied the influence of traditional Confucian morality.<sup>67</sup> Rather, they used law exclusively for the Machiavellian purpose of political and social rectification, which means rectifying laws clearly and establishing severe penalties.<sup>68</sup>

The first two periods represent the classic struggle for dominance between traditional Confucianism and legalism, or the struggle between rule by man and rule by law.<sup>69</sup> In antiquity, there was a legal system with a built-in mechanism for organic change, which, like Western culture and its philosophical forms, experiences a historical growth and evolutionary development.<sup>70</sup> Modern Chinese communists find it problematic that traditional Confucian morality continues to exert its influence.<sup>71</sup>

As for modern China's state of legality, the citizenry are still awaiting the 1978 promise of legal reforms and democracy. In 1946, Mao Zedong offered democracy as the means to stop the historic cycle of dynastic change.<sup>72</sup> Between 1940 and 1949, the CCP demanded democracy because a grassroots democracy helped the communists struggle through military campaigns and to politically pursue legitimacy. Thus, the Communists extolled democracy; "the fuller and the quicker the democracy, the better it was for them."<sup>73</sup>

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65. *Id.*

66. Funk, *supra* note 60, at 44–45.

67. *Id.*

68. NICCOLO MACHIAVELLI, *THE PRINCE* (Luigi Ricci trans., New Am. Library 1952) (1515).

69. Funk, *supra* note 60, at 44–45.

70. Berman, *supra* note 56, at 1652–55.

71. George Xuezhong Guo, *The Guanxi* (Interpersonal Relations) of Chinese Communist Elite: Theory and Practice (1999) (unpublished Ph.D. dissertation, Univ. of Va.) (on file with author).

72. Li YongYan, *supra* note 5; see also Edward Cody, *China's Premier Calls Democracy a Distant Goal*, WASH. POST, Feb. 27, 2007, at A13; *Premier Says Promoting Fairness and Social Justice Is a Major Task*, PEOPLE'S DAILY, Feb. 27, 2007.

73. Li YongYan, *supra* note 5.

However, modern China remains steadfast to the misnomer of socialist democracy: neither Mao, nor Deng Xiaoping, or subsequent leaders have tried real democracy such as a democratically elected legislature or National People's Congress ("NPC").<sup>74</sup> From Mao to Hu Jintao, the concept of democracy remains subject to the influence of Marxism because it is a proletarian democracy that is "guaranteed by the people's democratic dictatorship" rather than Western-style democracy.<sup>75</sup> Chinese constitutionalism is still developing, but the influence of Marxism impedes its growth toward a more Western model of constitutionalism, as opposed to a variant thereof, such as an economic-specific, culture-specific,<sup>76</sup> or even Marxist model.

#### *D. Modern China's State of Legality*

In 1997, the CCP, through its NPC, announced that China would elect rule of law in governing its society.<sup>77</sup> In 1999, the NPC added, by amendment, the concept of rule of law to the 1982 Constitution.<sup>78</sup> As of 2007, the 1982 Constitution has undergone four constitutional amendments—on April 12, 1988, March 29, 1993, March 15, 1999, and March 14, 2004.<sup>79</sup> The third constitutional amendment declares China will practice rule of law, and an amendment to Article 5, reads, "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law."<sup>80</sup> However, the 1982 Constitution prescribes a legislative hierarchy that challenges constitutionalism and rule of law.

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74. ANDREW JAMES NATHAN, CHINESE DEMOCRACY 101 (1985).

75. KARL MARX & FRIEDRICH ENGELS, CRITIQUE OF THE GOTHA PROGRAMME (Foreign Language Press 1972) (1890); STATE COUNCIL INFO. OFFICE, BUILDING OF POLITICAL DEMOCRACY IN CHINA (2005), available at <http://www.china.org.cn/english/2005/Oct/145718.htm>.

76. Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of the World Constitutionalism,"* 2000 WIS. L. REV. 597, 604–13; Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development,* 23 GA. J. INT'L & COMP. L. 155, 158 (1993); see also Richard A. Rosen, *Constitutional Process, Constitutionalism, and the Eritrean Experience,* 24 N.C. J. INT'L L. & COM. REG. 263, 273 (1999).

77. Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform,* 4 ASIAN-PAC. L. & POL'Y J. 255, 261 (2003).

78. Hal Blanchard, *Constitutional Revisionism in the PRC: "Seeking Truth From Facts,"* 17 FLA. J. INT'L L. 365, 375 (2005).

79. Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges,* 6 CHINESE J. INT'L L. 445, 445 (2007).

80. XIAN FA (1982); XIAN FA XIU ZHENG art. 13 (1999).



Notwithstanding the de facto power of the CCP, pursuant to the 1982 Constitution, the NPC is the national legislature and highest or supreme organ of state power. Its standing body is the Standing Committee of the National People's Congress ("NPCSC").<sup>81</sup> The NPC exercises typical legislative functions, such as enacting and amending basic laws, electing Procurator-General, planning for national economy and social development, declaring war, and amending the constitution.<sup>82</sup> However, the powers of the NPC are distinguishable in two respects: (1) the NPC has the power to enforce the constitution; and (2) through the NPCSC it has the power of judicial review.<sup>83</sup> The NPC meets once a year, which results in its State Councilors and Ministers, who are in charge of ministries or commissions such as China's Ministry of Commerce ("MOFCOM"), having more powers than expressly delegated in the 1982 Constitution.<sup>84</sup> The annual session of the NPC is brief and addresses numerous items of business, including examination of the government's work and budgetary review.<sup>85</sup> As for the NPCSC, it meets bi-monthly and primarily focuses on law making issues.<sup>86</sup> Neither the NPC nor NPCSC has substantive time to conduct constitutional overviews and investigations of constitutional violations.<sup>87</sup>

As for judicial review powers, Amended Article 5 of the 1982 Constitution reads, "the People's Republic of China governs the country according to law and makes it a socialist country ruled by law,"<sup>88</sup> and Article 127 provides that the Supreme People's Court is the highest judicial organ.<sup>89</sup> However, constitutionalism in action and text reduced a potential for a rule of law rubric to a non-rule of law rubric, reduced a potential for legal accountability to political accountability. This left China's judicial system without a positive

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81. XIAN FA ch. III, § 1 (1982).

82. *Id.*

83. *Id.*

84. People's Republic of China Ministry of Commerce, MOFCOM, <http://english.mofcom.gov.cn/> (last visited Nov. 17, 2007).

85. *China Set Up New Agency to See to Constitution Application*, XINHUA [CHINA VIEW], June 21, 2004.

86. *Id.*

87. *Id.*

88. XIAN FA XIU ZHENG AN art. 13 (1999).

89. XIAN FA art. 127, § 7 (1982).

discursive machinery for judicial review: neither constitutional review or constitutional court, nor decentralized (or diffused) or centralized (or concentrated) constitutional review. The NPCSC has legislative interpretation power, or the sole power to interpret the constitution, laws of China, and China's legislative procedure law. The 2000 Legislation Law of the People's Republic of China confirms this power by defining the roles of lawmakers and procedures and by establishing a legal hierarchy between the constitution, laws, administrative regulations and orders, at both national and local levels.<sup>90</sup>

In terms of the trade regime, the Legislation Law also stipulates that individuals, enterprises, or organizations may submit written suggestions to the NPCSC, if they deem regulations or rules as contradicting the 1982 constitution or laws.<sup>91</sup> The NPCSC conducts studies of these suggestions.<sup>92</sup> While the Supreme People's Court has judicial interpretation power, it is only the power to interpret laws and regulations of China arising from actual cases. This is not the same power constitutionally vested with the NPCSC to interpret the 1982 constitution and laws of China.<sup>93</sup> The NPCSC responds to this critique of lack of a positive discursive machinery for judicial review by creating a new agency that offers more promises than deeds.

The NPCSC establishes this new agency as a division under the Legal Affairs Commission of the NPCSC for the purpose of reviewing whether legislation or government decisions tally with the 1982 Constitution.<sup>94</sup> Though earlier announced in 2004 that the staff would roughly number fifty, as of 2006, this new agency was

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90. XIAN FA arts. 67(1), 67(4), ch.3 § 1 (1982); Zhonghua Renmin Gonghe Guo Lifa Fa [Legislation Law of the P.R.C.], (3d Sess. Ninth Nat'l People's Cong., Mar. 15, 2000, promulgated by Order No. 31, President of the People's Republic of China (Mar. 15, 2000).

91. Legislation Law of the P.R.C., art. 90.

92. *Id.*

93. *Id.* arts. 67(1), 67(4), ch.3 § 1 (1982); Letter of Reply from Supreme People's Court of P.R.C. Concerning the Inappropriateness of Citing Constitution as a Basis for Convictions and Sentencing in Criminal Judgments (1955); Reply from Supreme People's Court of P.R.C. Concerning How People's Courts Are to Cite Legally Normative Documents When Producing Legal Documents (1986).

94. See *China Set Up New Agency to See to Constitution Application*, *supra* note 85; Meng Yan, *New Agency to See to Constitution Application*, CHINA DAILY, June 21, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-06/21content\\_340970.htm](http://www.chinadaily.com.cn/english/doc/2004-06/21content_340970.htm).

comprised of a small staff of about ten to fifteen people.<sup>95</sup> It presents a blueprint for a constitutional crisis rather than promoting the growth and development of a state of legality.

The process for amending the 1982 Constitution is also problematic because, while constitutions sometimes need revision and amendment, the 1982 Constitution granted the NPC the authority to amend the Constitution by a flexible, rather than rigid, process.<sup>96</sup> Donald P. Kommers writes, “[A] viable constitution—that is, one that guarantees and respects the ideal of constitutionalism—will make sure that it does not promise more than it can deliver; that it confines itself mainly to the protection of negative liberties; and that it organizes the branches of government in a way that limits state power without interfering with the effective exercise of popular government.”<sup>97</sup> In terms of the practice of constitutionalizing party ideologies, Anne F. Thurston demonstrates the gist of this problem by a simple, yet poignant question: “Are the names of your leaders mentioned in your constitution?”<sup>98</sup> On March 14, 2004, the NPC amended the 1982 Constitution by incorporating Jiang Zemin’s theory of the “Three Represents” into the preamble as one of the guiding principles of the nation, together with the heritage and further development of Marxism, Leninism, Mao Zedong Thought, and Deng Xiaoping Theory.<sup>99</sup> There is a dangerous precedent of constitutionalizing party ideologies by a flexible as opposed to rigid amendment process.

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95. See *China Set Up New Agency to See to Constitution Application*, *supra* note 85; *China’s Population Hits 1.3 Billion*, WASH. TIMES, Jan. 3, 2005.

96. See generally XIAN FA arts. 62(1), 67(1)–(2), ch. 3, § 1 (1982); XIAN FA XIU ZHENG AN arts. 1–2 (1988); XIAN FA XIU ZHENG AN arts. 3–11 (1993); XIAN FA XIU ZHENG AN arts. 12–17 (1999); Dag Anckar & Lauri Karvonen, *Constitutional Amendment Methods in the Democracies of the World* (Aug. 15–17, 2002) (paper presented at the 13th Nordic Political Science Congress, Aalborg, Denmark).

97. Donald P. Kommers, *Limiting Government: An Introduction to Constitutionalism*, 9 E. EUR. CONST. REV. 92, 94 (2000) (reviewing ANDRAS SAJO, *LIMITED GOVERNMENT* (1999)); see also Hua Hua, *Balance Between Consistency, Adaptability*, CHINA DAILY, Oct. 30, 2003, available at [http://www.chinadaily.com.cn/en/doc/2003-10/30/content\\_276802.htm](http://www.chinadaily.com.cn/en/doc/2003-10/30/content_276802.htm); Human Rights, *Private Property Fixed as Pillars*, CHINA DAILY, Dec. 23, 2003, available at [http://www.chinadaily.com.cn/en/doc/2003-12/23/content\\_292557.htm](http://www.chinadaily.com.cn/en/doc/2003-12/23/content_292557.htm).

98. Anne F. Thurston, *Memory and Mourning: China Ten Years after Tiananmen*, SAIS REV., Summer–Fall 1999, at 61, 61–62 (1999).

99. *Full Text of Resolution on Amendment to CPC Constitution*, CHINA DAILY, Nov. 15, 2002; *Human Rights, Private Property Fixed as Pillars*, CHINA DAILY, Dec. 23, 2003; *Jiang Faces Reform Attacks From Within*, CNN.COM, Aug. 28, 2002, <http://edition.cnn.com/2002/world/asiapcf/east/08/28/china.zhao/index.html>.

As a measure of constitutionalism, the rule of law became a tool of government, actual rule by law, or a policy-driven model because of its usage in crackdowns against those labeled as political dissidents. Such dissidents include the prosecutions and persecutions post-Tiananmen Square (1989), the crackdowns against the Falungong, the crackdowns against other pro-democracy, cyber-democracy, and teledemocracy forces, as well as to other injustices.<sup>100</sup> Modern China's state of legality should evolve to a system that holds government accountable for its actions as well as incorporates respect for international human rights. This presents issues of how to promote a more Western constitutional design in China, and whether China will eventually embrace a more Western model of constitutionalism. This also presents issues of whether China's polity will pursue Western or Marxist models of modernization.

Walter W. Rostow's classical modernization theory and its reliance on evolutionary theory and functionalist theory emphasizes social engineering, such as poorer societies emulating models of developed countries.<sup>101</sup> China, as a developing non-market economy, is at the first of five stages of Rostow's stages theory of economic growth: a generally traditional society, limited output, limited access to science and technology, and decentralized political power.<sup>102</sup> Some may contend China is at the second stage, which is generally characterized by new ideas favoring economic growth, higher levels of education, increased levels of entrepreneurship, more institutions capable of mobilizing capital, increases in investment, and a duality because of the persistence of traditional society.<sup>103</sup> Only during the fifth stage is there mass consumption, with economic sectors specializing in durable consumer goods and services, and economic

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100. See generally J.A.G. ROBERTS, *A CONCISE HISTORY OF CHINA* 293-99 (1999); M. Ulric Killion, *China Internet Tax: Issues of Particularism, Liberalization, and Integration*, 11 MICH. ST. U.-DETROIT C.L. J. INT'L L. 369 (2002); Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43 (2001).

101. See generally AUGUSTE COMTE, *POSITIVE PHILOSOPHY OF AUGUSTE COMTE, PART I* (Harriet Martineau trans., Kessinger pub. 2003) (1985) (for classical functionalist theory); CHARLES DARWIN, *THE ORIGIN OF SPECIES, BY MEANS OF NATURAL SELECTION* (Gramercy 1995) (1859) (for classical evolutionary theory); TALCOTT PARSONS, *STRUCTURE AND PROCESS IN MODERN SOCIETIES* (Free Press 1963) (1960); WALTER W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (1960).

102. See generally ROSTOW, *supra* note 101.

103. *Id.*

growth in the pursuit of profit maximization rather than central planning, which would influence social and government policy.<sup>104</sup> Rostow's theory suggests that modernization necessitates casting China as starting from a traditional stage and needing to transition to a modern stage, or transcendence of the traditional system by the modern one, which will evolve into a more Western constitutional design. However, the influence of Marxism confines the historical growth and evolutionary development of legal institutions, which presents issues of how Marxism ultimately influences constitutionalism or "building up the constitution."

### III. MARXISM AND "BUILDING UP THE CONSTITUTION"

In post-WTO China, the laws, regulations, and cases serve as a measure of both modern legal reforms and "building up the constitution."<sup>105</sup> A problem is that they also present plausible different perspectives regarding the success or failure of ongoing legal reforms. In a post-WTO China, individual civil litigants pursuing legal rights in a court of law demonstrate a degree of success, reflecting the enactments of new legal propositions or laws by the NPC<sup>106</sup> and administrative bodies.<sup>107</sup> Mei Ying Gechlik's 2005 study of Shanghai's legal reforms demonstrates these improvements and suggests that Shanghai could possibly serve as the archetypal path to legal reforms.<sup>108</sup>

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104. *Id.*

105. Inclusion of Human Rights in Constitution Marks a Milestone, Beijing, March 14, 2004 (Xinhuanet); [http://news.xinhuanet.com/english/2004-03/14/content\\_1365532.htm](http://news.xinhuanet.com/english/2004-03/14/content_1365532.htm). "Ever since the end of the Qing Dynasty a century ago, the Chinese people have been struggling to build up a truly democratic constitutional government."

106. *See, e.g.*, 2005 Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005); *China to Enact First Anti-Sexual Harassment Law*, CHINA DAILY, Mar. 4, 2005, available at [http://www.chinadaily.com.cn/english/doc/2005-03/04/content\\_421875.htm](http://www.chinadaily.com.cn/english/doc/2005-03/04/content_421875.htm); *China Outlaws Sexual Harassment*, XINHUA [CHINA VIEW], Aug. 29, 2005, available at [http://english.peopledaily.com/en/200508/29/eng20050829\\_204985.html](http://english.peopledaily.com/en/200508/29/eng20050829_204985.html).

107. Zhonghua Renmin Gongheguo fanqingxiao tiaoli [Anti-Dumping Regulation of the People's Republic of China] (promulgated by the State Council, Nov. 26, 2001, effective Jan. 1 2001) (P.R.C.), available at <http://bizchina.chinadaily.com.cn/guide/inw/law36.htm>; Zhonghua Renmin Gongheguo zuigao renmin fayuan gonggao (Zui Gao Renmin Fayuan Guanyu Chengli Fanqingxiao Xingzheng Anjian Yingyong Falv Ruogan Wenti De Guiding) [Provisions of the Supreme People's Court on Several Issues Concerning the Application of Anti-Dumping Administrative Cases] (Supreme People's Ct., Nov. 2, 2002).

108. Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97 (2005).

There is another perspective, however, demonstrating a degree of failure in legal reforms because modern legal reforms follow a pattern similar to economic reforms, which involves policy experimentation rationalized by CCP policy.<sup>109</sup> Policy experimentation also appears to be influencing the issue of legal institutional convergence versus divergence. China's legal experimentation and willingness to commit "some" resources for "some" legal reforms, such as "some" new legal propositions or laws, like its economic experimentation, inevitably produces non-capitalist institutional innovations that are supposedly, optimally suited to China's particular economic circumstances (i.e., the localization of Marxism to the realities of traditional culture and society).<sup>110</sup>

There are other flaws with modern China's state of legality, such as the problems attributable to issues of the constitution in action and constitution in text, and extra-constitutionalism in practice.<sup>111</sup> The problems are substantive and many, ranging from the historical incorporation of party ideologies to the CCP's views on constitutional theory and practice, such as China electing to follow democratic centralism and socialist democracy rather than Montesquieu's separation of the powers of government principle.<sup>112</sup> Western experts and authority rightly search for a constitutional state or state of legality, resembling models of Western states of legality.

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109. Wing Thye Woo, *A United Front for the Common Objective to Understand China's Economic Growth: A Case of Nonantagonistic Contradiction, Wu vs. Woo*, ISSUES & STUDIES June 2003, at 1, 16 (noting that specifically, China's future growth performance depends on whether past successes were: "(1) the result of China's economic experimentation that produced non-capitalist institutional innovations that were optimally suited to the country's particular economic circumstances, or (2) the result of China's institutional convergence and integration with the advanced WTO economies like France, Japan, and the United States").

110. *Trade Policy Review Report*, *supra* note 9, at 29 (Since the mid-1980s, the NPC has delegated responsibility for issuing regulations to the State Council, which has resulted in "interim provisions" that also carry the force of law; these interim provisions are replaced by laws after they are tested and when the authorities deem them appropriate. Policies are also occasionally implemented on a "trial" basis.).

111. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, VOL. 1 (First Harvard Univ. Press 1993) (1991) (discussing extra-constitutionalism). See generally Stephen D. Krasner, *Approaches to the State, Alternative Conceptions and Historical Dynamics*, 16 *COMP. POL.* 223 (1984) (examining—via a review of recent literature—how state authority, through institutional structures, changes in response to alterations in domestic and international environments).

112. CHARLES DE SECONDAT, *BARON DE MONTESQUIEU, THE SPIRIT OF LAWS* (1748), *reprinted in* GREAT BOOKS OF THE WESTERN WORLD (Robert Maynard Hutchins ed., 1952).

The flaws in Chinese constitutionalism, including rule of law, are primarily problems of constitutional practices, which presents issues of a constitution in text/constitution in action dichotomy. Illustrating this dichotomy, the U.S. Country Reports on China routinely find, “[T]he Constitution and laws provide for fundamental human rights; however, these protections are often ignored in practice.”<sup>113</sup> The constitution in action demonstrates a problem of constitutional stipulations and prescriptions for equality, or the constitution in text, and their respective applications or enforceability under the rule of law, in a court of law.

The resulting disparity between the constitution in text and constitution in action also, arguably, produced a persistent state of extra-constitutionalism in practice, which presents a real problem, especially concerning the plight of Chinese citizens. In China, many now contend that there is an increasing phenomenon of challenges to government power.<sup>114</sup> Cases and issues supposedly challenging government power include: investigations by People’s Congresses;<sup>115</sup> hearings into prices; administrative examination and approval; expulsion of discipline-violating college students; judicialization of constitutional law; detention and sending back home of indigent migrants; pre-marriage physical check-ups; impeachment of judges; discrimination against hepatitis B patients; emergency measures in the face of SARS and bird flu; land acquisition; urban demolition and resettlement; illegally prolonged detention; labor security; judgments on the Liu Yong case and the BMW case; and combating corruption and building a clean government.<sup>116</sup> However, a successful challenge to government power is rare, as seen in the famous *Seeds case*, and in subsequent treatment by party officials of Judge Li Huijuan.<sup>117</sup>

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113. S. REP. NO. 107-32, at 738 (2001), available at <http://www.foreignaffairs.house.gov/archives/107/71555d.pdf>; see also S. REP. NO. 108-30, at 845 (2003), available at <http://www.foreignaffairs.house.gov/archives/107/78290c.pdf> (discussing specific examples of such violations).

114. Shen Kui, *Normative Basis for the Changes of China’s Public Law*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Winter 2004, at 28–29.

115. See XIAN FA arts. 57–58, 61–62, 62(2), 67(1), 67(4), ch. 1 (1982) (containing the constitutional provisions regarding the National People’s Congress).

116. Shen Kui, *supra* note 114.

117. Jim Yardley, *A Judge Tests China’s Courts, Making History*, N.Y. TIMES, Nov. 28, 2005. In the “Seeds Case,” Judge Li Huijuan addressed a conflict between a national law on seeds and a provincial regulation (local law) on seeds issued by the Henan People’s Congress;

A persistent state of extra-constitutionalism in practice also produces distinctive juridical practices, such as a distinctive procedural structure for review of cases. As earlier mentioned, while Anglo-American rule of law, German *Rechtsstaat* and French *État de droit* are distinctive, they still converge around a commonality of the Enlightenment and its subsequent interpretations, especially the high ideal of a liberal democracy. This commonality also results in a convergence of juridical practices, including procedural structures for review of cases,<sup>118</sup> which reflects a convergence of the constitution in action and the constitution in text of these representative country-samplings of Western jurisprudence. There is also the convergence of common law and civil law systems toward the idea of precedents and *stare decisis*, as recent studies demonstrate that judicial decisions play an important role in both civil law and common law systems.<sup>119</sup> While earlier Western models of procedural structures for review diverge because of distinctive histories and procedural structures, they, despite their differences, eventually converge to a three-tier pyramid structure.<sup>120</sup>

China's law case review model or procedural structure for review starkly contrasts Western models because it is a pole-shaped two-tier structure rather than pyramid-shaped three-tier structure.<sup>121</sup> The establishment of a two-tier structure is arguably attributable to the 1949 founding of modern China, the political economy of the 1950s, official CCP ideology and policy about the role of law and legal issues in modern culture and society. Although, before 1949, there was a three-tier structure in place that included a one-tier

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following her ruling, the Luoyang Middle Court's discipline committee contacted her because Henan Province officials complained that the ruling contained a political error.

118. Fu Yulin, *supra* note 24, at 39, 43–44.

119. See, e.g., Dana T. Blackmore, *Eradicating the Long Standing Existence of a No-Precedent Rule in International Trade Law—Looking Toward Stare Decisis in WTO Dispute Settlement*, 29 N.C. J. INT'L L. & COM. REG., 487, 498 (2004) (“A forty-six year study revealed that, of the 4,000 German Federal Constitutional Court cases, it departed from precedent in fewer than twelve cases.”); Thomas Lundmark, *Interpreting Precedents: A Comparative Study*, 46 AM. J. COMP. L. 211, 215 (1998) (book review); Mei-Fei Kuo & Kai Wang, *When Is an Innovation in Order?: Justice Bader Ruth Ginsberg and Stare Decisis*, 20 U. HAW. L. REV. 835, 872 n.310 (1998).

120. Fu Yulin, *supra* note 24, at 41.

121. *Id.* at 39, 41, 43.



system for small unappealable cases; the 1954 Court Organization Law and Procedure Law created the present two-tier structure.<sup>122</sup>

During the 1950s, strategies and formulas for success varied and were experimental, ranging from a Soviet-style central planned economy, copying Stalinist industrialization, to even copying the judicial model and case law review model of the former Soviet Union and its People's Courts.<sup>123</sup> Despite modern legal reforms, the two-tier structure still operates in China and results in each court of first instance being able to act as a court of final instance, from the intermediate to higher courts. Such a system firmly embeds the juridical practice of extra-constitutionalism in practice through trial supervision procedures.<sup>124</sup>

From the perspective of the CCP, extra-constitutionalism in practice, such as trial supervision procedures, manifests a review structure that enhances and supports the policies, goals, and actions of the CCP. This is because the two-tier model intensifies extra-procedural control while also creating requisite scaled political effects of correcting errors.<sup>125</sup> The two-tier model is mostly a product of a political economy environment that demands the procedural structure conform to the policies, actions, and goals of the CCP rather than a procedural structure, such as an appeal, revision, and cassation model, which gradually creates judicial precedents on a case-by-case basis.

The state of extra-constitutionalism, in conjunction with recent laws, regulations, and cases, also presents issues in the context of the law in text-law in action dichotomy as well the rules on the paper-practical rules dichotomy—concepts or transplants from Western

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122. *Id.* at 48; Nanping Liu, "Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107, 108–12 (1991) (noting that from the Qin Dynasty (221–206 B.C.) to Republic of China (1911–1949), there was also a history of Western-style legal precedents).

123. XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA 4 (1997) ("[T]he Soviet law and legal system provided not only the platform for the architecture of the Chinese socialist system of law but also the professional training that enabled China to adapt the Soviet socialist model of law during the 1950s.").

124. Fu Yulin, *supra* note 24, at 43–49.

125. *Id.*; see Yardley, *supra* note 117. See also Philip P. Pan, *The Unquiet Death of a Chinese Peasant: Lenient Treatment for Driver in 'BMW Case' Ignites Media Frenzy, Wide Discussion of Wealth and Justice*, WASH. POST, Jan. 16, 2004, at A14 (discussing how the party's post-judgment intervention is to correct errors).

jurisprudence that now possess distinctive Chinese characteristics.<sup>126</sup> Admittedly, the transplanted economic laws are usually less controversial than constitutional, administrative, and other domestic laws because economic laws address issues of efficiency, stability, and predictability in the new global market or liberal market economy. The transplanted economic laws does not pose an immediate threat, whether true or not, to a non-Western culture and society.<sup>127</sup> The problem with the Chinese judiciary's ability to safeguard liberty, including the norms of economic equality prescribed by WTO standards, such as the non-discrimination norm of most-favored-nations<sup>128</sup> treatment requiring equal treatment in economic transactions, arises from the fact that liberty in terms of Western constitutionalism constitutes negative liberty rather than positive liberty. Consider for example the case of the pursuit of a behavior laid down by one-party CCP rule and a self-chosen rationale principle.

Independent judicial review addresses issues of substantive due process rather than procedural due process or "the opportunity to be heard . . . at a meaningful time and in a meaningful manner."<sup>129</sup> Substantive due process constitutes individual liberty and poses a threat to the CCP because it address both the government's power and the protection of fundamental rights, as opposed to the procedural due process safeguard of the right to be heard.<sup>130</sup> The influence of Marxism continues to drive extra-constitutionalism in

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126. See K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1911); KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962); ROSCOE POUND, *LAW AND MORALS* (1926); Paul D. Carrington & Erika King, *Law and the Wisconsin Idea*, 47 *J. LEGAL EDUC.* 297 (1997).

127. For examples of post-1979 transplantations by the legislature, see *Zhonghua Renmin Gongheguo Minfa Tongze* [General Principles of Civil Law of the People's Republic of China] (promulgated by Order No. 37, President of the People's Republic of China, Apr. 12, 1986, effective Jan. 1, 1987); *Zhonghua Renmin Gongheguo She Wai Jingji He Fong Fa* [Law of the People's Republic of China on Economic Contracts Involving Foreign Interest] (promulgated by Order No. 22, President of the People's Republic of China, Mar. 21, 1985). For examples of controversial post-1979 transplantations by the judiciary, see *Shengsi lianren de baoxian jiuge* (2003) (examining an insurance case involving a couple of dead lovers, the Intermediate People's Court of Suzhou resolved such issues by referring to the American Uniform Simultaneous Death Act). For more information about the rule of law, see HELEN YU & ALISON GUERNSEY, *WHAT IS THE RULE OF LAW?* (2006).

128. GATT, *supra* note 11, art. I.

129. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotation marks omitted) (citations omitted); *accord Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

130. See Killion, *supra* note 46, at 447–54.

practice, the distinctions between the constitution in text and constitution in action, law in text and law in action, and rules on paper and practical rules. Indeed, one party CCP rule is the greatest barrier to fully implementing a modern state of legality.

Marxism continues to influence ongoing legal reforms because, notwithstanding traditional culture and society and its prescriptive meanings or normative norms. Marxism influences the growth and development of China's socialist legal system, and even whether its socialist legal system can experience growth and development. The often-overlooked and primordial influence on modern legal reforms is Marxism, or the ongoing process of attempting to finalize its localization. The influence of Marxism, Leninism, Communism, Socialism, or even Mao's Socialism, on modern legal reforms and constitutionalism, ultimately, presents issues of reconstructing or localizing orthodox Marxist legal theory or a Marxist legal system. China presents itself to the international community as jointly pursuing a socialist-political polity and capitalist-economic policy, and herein lies an elemental problem of modern reforms.<sup>131</sup>

Many Western experts and authorities recognize a distinctive Marxist legal theory or socialist jurisprudence. Widely representative of this group are Janet Campbell, Franz Neuman, and even Carl Schmitt, who developed authoritarian, proto-fascist theories. For instance, Janet Campbell attempts to show how a socialist society could be a truly free society, or perhaps, implicitly, a Marxian utopia.<sup>132</sup> In an analysis of Marxist legal theory, Campbell draws from the historical development of legal theory grounded in Marxist political economy from an earlier development of law in the former Soviet Union and its people's courts.<sup>133</sup> For Campbell, although a system of regulation in socialism may not be on par with Western ideals of the rule of law, it still presents a viable alternative that does not ignore the regulatory needs of society, which is also compatible with the Marxist critique of the legal order.<sup>134</sup>

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131. See generally Killion, *supra* note 16 (discussing the role of Confucianism and capitalist-economic reforms in China's transition to judicial independence).

132. See JANET CAMPBELL, AN ANALYSIS OF LAW IN THE MARXIST TRADITION 77-102, 109-10, 118-20, 164-70, 207-23 (2003).

133. *Id.*

134. *Id.* at 309-21.

Then there is the legal scholarship of Franz Neumann.<sup>135</sup> Due to earlier cold war polarization in both ideology and international relations, his earlier contributions during the 1940s and 1950s to legal scholarship suffered a period of disfavor due to his defense of a socialist version of the rule of law or libertarian socialist account of the rule of law and individual rights.<sup>136</sup> His viewpoint situates between Marxism and liberal democracy, and between authoritarian state socialism (as led by Stalin's Soviet Union) and free-market capitalism (dominated by U.S. strategic interests and McCarthyite purges of un-American leftist).<sup>137</sup> Some contend that Neumann was ahead of his time because his views espoused a third option between unregulated capitalism and state socialism.<sup>138</sup>

There is also the authoritarian, proto-fascist theory developed by Carl Schmitt, a former Nazi jurist prosecuted during the 1947 Nuremberg International Military Tribunal.<sup>139</sup> Since 1985, and posthumously, there has been a growing interest in his scholarship.<sup>140</sup> For Schmitt, liberalism promotes political-cultural pluralism and open-ended discursive deliberation between competing perspectives on the goals of public policy rather than decisive and preemptory sovereign action that is unhindered by constitutional limitations, which is needed to enforce the absolute value that a sovereign power promotes as a substantive principle of homogeneity.<sup>141</sup> Schmitt deems liberals to overemphasize legality when they attempt to avoid

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135. See, e.g., MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH 1923–1950* (1973); FRANZ NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933–1944* (1972); Michael Salter, *Neo-Fascist Legal Theory on Trial: An Interpretation of Carl Schmitt's Defence at Nuremberg from the Perspective of Franz Neumann's Critical Theory of Law*, 5 RES PUBLICA 161 (1999); Keith Tribe, *Introduction to Neumann: Law and Socialist Political Theory*, 10 ECON. & SOC'Y 316 (1981).

136. Salter, *supra* note 135, at 161.

137. *Id.* at 167.

138. *Id.*

139. *Id.* at 161–62.

140. See, e.g., Christian J. Emden, *The Brilliant Fascist? Carl Schmitt and the Limits of Liberalism*, H-GERMAN (2005) (book review), <http://www.h-net.msu.edu/reviews/showrev.cgi?path=298891122323542> (reviewing four publications that attempt to elucidate Carl Schmitt's intellectual career).

141. See DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen AND HERMANN HELLER IN WEIMAR* (1997) (discussing competing Weimar era legal theories of Schmitt, Kelsen, and Heller); CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., MIT Press 1985) (discussing inconsistencies of liberal democracy).

political decisions in their quest for a precisely organized system of legal rules.<sup>142</sup>

A critical component of Schmitt's theory is that a sovereignty does not lie in a system of principles, but rather it lies in the power to make exceptions to customary legalities to address emergencies because a primary function of the sovereignty is to preserve order.<sup>143</sup> His inversions are authoritarian, especially when reducing principles of constitutionality to a secondary expression of sovereign power, which is independently constituted by non-rational brute force and an unaccountable decision.<sup>144</sup> The latter establishes the fundamental nature of the legal order of a liberal state, and therefore cannot be held accountable to the content of merely derivative constitutional norms.<sup>145</sup> Schmitt's decisionism reduces legal authority, which is relegated by rule of law, to an instrumental form of sovereign power.<sup>146</sup>

Schmitt's legal theory is both problematic and dangerous, because before and after the Nazi era, "anti-Semitism" was the core of his theory.<sup>147</sup> For instance, the post-1985 resurgent interests in his theories coincided with a re-emergence of "the radical right," as a distinctive political force. This resurgence, especially on the European continent, is finding outlets in nationalistic expressions of "ethnic cleaning" against groups standing outside racial, ethnic, and religious definitions of homogeneity;<sup>148</sup> i.e., anti-Semitism, anti-Black racism, and anti-immigration sentiment. A danger attaches to the re-interpretation of the very existence of these groups within national borders as a threat. As a courtesy of Schmitt's theory, proto-fascist theories still present an ever-present danger to modern society. So long as "civil libertarian appeals to preserve democratic values of accountability, transparency and openness to maximum participation in the exercise of public and private power fail to gain

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142. David Gordon, Book Review, 6 REV. AUSTRIAN ECON. 117 (1992) (reviewing PAUL EDWARD GOTTFRIED, CARL SCHMITT: POLITICS AND THEORY (1990)).

143. *Id.* at 118.

144. Salter, *supra* note 134, at 164.

145. *Id.*

146. *Id.*

147. RAPHAEL GROSS ET AL., CARL SCHMITT AND THE JEWS: THE "JEWISH QUESTION," THE HOLOCAUST, AND GERMAN LEGAL THEORY (2007) (discussing Schmitt's anti-Semitism before and after the Nazi era—as the core of his theory).

148. Salter, *supra* note 134, at 162.

and sustain majority support amongst those both exercising and subject to such power,"<sup>149</sup> fascistic reconstructions of governments and their institutions remain a possibility. A Nazi regime was able to rely upon support from both legal practitioners and academicians, including Schmitt, and from sources outside the legal profession.<sup>150</sup> The greatest danger of Schmitt's legal theory lies in the potential re-emergence of the same or different version of Fascism.

However, Karl Marx and Friedrich Engels, as economic determinists, deemed law to be superfluous in a socialist utopia and law.<sup>151</sup> They believed that law played a limited role in the transition from capitalism to communism because they perceived law in a capitalist society to be a tool of the elite bourgeoisie.<sup>152</sup> The driving forces of social, political, and economic life were the contradictions in material or economic life, because they arise from a conflict between the social forces of production and the relations of production—the class and property relations of society—within which these productive forces have developed.<sup>153</sup> Law suffers relegation to just another ideological form for which Marx foretold that once men become conscious of this conflict, they will fight it out because economic relations and changing economic circumstances primarily shape law. Thus, law is one of many areas of class struggles that must be fought out.<sup>154</sup> Law, like other social phenomena, is subject to Marx and Engel's dialectical materialist analysis, which examined the interaction between the economic base of society and the ideological superstructure.

Engels compared the French Civil Code (*Code civil des français*) and Roman law with English and Prussian law.<sup>155</sup> For Engels, because of the 1789 Revolution, if economic relations determine state and public law, then private law only sanctions existing economic relations between individuals.<sup>156</sup> Engels deems

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149. Emden, *supra* note 139.

150. *Id.*

151. PAUL PHILLIPS, MARX AND ENGELS ON LAW AND LAWS 186–223 (1980).

152. *Id.*

153. *Id.*

154. *Id.*

155. FRIEDRICH ENGELS, LUDWIG FEUERBACH AND THE END OF THE CLASSICAL GERMAN PHILOSOPHY (Univ. Press of the Pac. 2005) (1886).

156. *Id.*

this a possibility in various forms. He even saw such developments in England, which occurred in sync with its national development by mostly retaining vestiges of feudal laws and giving them a bourgeois content.<sup>157</sup>

At the close of the great revolution, it was possible for such a class law code of bourgeois society like the French *Code Civile* to be worked out on the basis of Roman law.<sup>158</sup> Engels writes, “If, therefore, bourgeois legal rules merely express the economic life conditions of society in legal form, then they do so well or ill according to circumstances.”<sup>159</sup> This materialist concept generally guides Marxists in evaluating the role that law plays in a Marxist or Communist society, as equally true in the preceding formation of social and economic life.<sup>160</sup>

Marx foretells of abolishing the old state apparatus and its replacement by a more egalitarian and democratic state. Marx suggested that this would occur when the working class took power and commenced building Socialism as the first stage of the transition from Socialism to Communism, thus producing the end of the nation-state and creating a worker’s paradise or utopia.<sup>161</sup> For Marx and Engels, the state would wither away when Communism was achieved.<sup>162</sup> This is the point in society when the productive forces of man had developed and had been rationally planned to a state, when scarcity and inequality were eliminated, including the struggle for individual existence.<sup>163</sup> In this utopia, there will no longer be private or conflicting ownership of the productive forces; the social inequality of capitalism will have been overcome; and the majority of working people will have become accustomed to administering their own affairs and those of society, without the need for legal and physical coercion.<sup>164</sup>

If China’s polity, the CCP, is attempting to finalize the localization of Marxism, then modern legal reforms and

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. See KARL MARX, COMMUNIST MANIFESTO (Henry Regnery Co. 1950) (1848).

162. See *id.* at 23–34.

163. See *id.*

164. See *id.* at 24–27.

constitutionalism remain wholly or partially contingent upon an institutional analysis of a Marxian framework or Marxist political economy. A primary concern of Marxist political economy is the subject of the relations of production because productive forces necessarily determine the relations of production.<sup>165</sup>

In modern China, a starting point and theory of analysis is Marxist political economy, which continues to serve as a theoretical tool and framework in the fundamental analysis of economic institutions as well as corresponding political and legal institutions.<sup>166</sup> It is institutional economics serving as a theoretical system in the analysis of social, political, and legal institutions, and many other philosophical forms.<sup>167</sup> In terms of Marxist institutional analysis, the most critical theory is the elemental institutional analysis derived from the premises that productive forces determine production relations, economic foundation decides superstructures (or society's institutions and ideas) and a core segment that covers the social division of labor.<sup>168</sup> The problems become increasingly obvious when one considers Marxist political economy as driving institutional research and institutional analysis and as serving as the primordial force providing an explanatory system for institutional phenomena.<sup>169</sup> The consequences are obvious, especially in terms of the 1978 promise of legal reforms and democracy.

In terms of the institutional analysis of a Marxist framework or Marxist political economy, critical components of Marxist analysis or economic determinism are the economic base of society and the superstructure, with the latter comprising the social, political, legal, and religious institutions, including other philosophical forms.<sup>170</sup>

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165. See 5 KARL MARX & FREDERICK ENGELS, *The German Ideology*, in KARL MARX & FREDERICK ENGELS COLLECTED WORKS 1845–1847, at 19 (Int'l Publishers 1976).

166. See Sun Hui, *Marx's Ontology and Its Significance in Our Times—A Survey of the Second Marxist Philosophical Form*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Spring 2003, at 29.

167. Zou Shipeng, *supra* note 8, at 17.

168. *Id.*

169. *Id.*; Jiang Shigong, *Towards a Jurisprudence of Legislators—A Reflective Look at Contemporary Jurisprudence Against the Backdrop of Law Transplantation*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Summer 2005, at 61.

170. NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (Martin Albrow ed., Elizabeth King & Martin Albrow trans., Routledge & Kegan Paul 1985); 5 MARX & ENGELS, *supra* note 164.



Marx, when setting forth a clear exposition of his materialistic conception of history, writes,

In the social production of their existence, men inevitably enter into definite relations which are independent of their will; namely relations of production appropriate to a stage in the development of their material given fares of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life.<sup>171</sup>

For Karl Marx, although the superstructure is an important factor, the economic base is the fundamental and exclusive causal influence because the economic base is the fundamental and exclusive causal influence in his materialistic conception of history.<sup>172</sup>

There are, admittedly, controversies regarding how to define the superstructure, and even how to measure its attendant influence on social, political, legal, religious, artistic, and other philosophical forms comprising the superstructure.<sup>173</sup> Orthodox Marxism maintains that the superstructure, such as the political, legal, religious, and other philosophical forms, has no causal influence.<sup>174</sup> This is because the economic base is an all-encompassing causal influence, constituting both the forces and relations of production.<sup>175</sup> Some sources will, simply, limit the role of the economic base to the relations of production.<sup>176</sup> Other sources, perhaps representing a minority viewpoint or even unorthodox Marxists, argue that the superstructure serves as a superficial cause rather than a fundamental cause in Marx's materialistic conception of history.<sup>177</sup> Some sources

171. KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 20–21 (Maurice Dobb ed., S.W. Ryzamskaya trans., Int'l Publishers 1970) (1859).

172. ALEX CALLINICOS, MAKING HISTORY: AGENCY, STRUCTURE AND CHANGE IN SOCIAL THEORY 173 (1988); GERALD ALLAN COHEN, KARL MARX'S THEORY OF HISTORY: A DEFENCE 216 (Princeton Univ. Press 1978) (2000); 5 MARX & ENGELS, *supra* note 165, at 53–54.

173. COHEN, *supra* note 171, at 216.

174. 5 MARX & ENGELS, *supra* note 165, at 53–54.

175. COHEN, *supra* note 171, at 217.

176. *Id.*

177. CALLINICOS, *supra* note 171, at 173–75.

even suggest that Marx recognized a historical superficial influence, if not causal influence, of the superstructure in early Western civilization, such as the influence of politics in ancient Greece and Rome, and even Catholicism during the Middle Ages.<sup>178</sup> However, antithetically, by virtue of Marx's materialistic conception of history, the superstructure of neither politics, nor religion, could ever rise to the same level or prominence in modern society.<sup>179</sup>

An elemental problem of Marxist analysis is that the economic base gives rise to the superstructure, thereby presenting the phenomenon of the base conditioning the superstructure, or social, political, legal, religious, artistic, and other philosophical forms once it comes into existence.<sup>180</sup> Even assuming a superficial influence of the superstructure, advocacy of a superficial role of the superstructure, in essence, challenges Marx's materialistic conception of history. In terms of Marx's materialistic conception of history, any role assigned to the superstructure, such as even a superficial influence, ultimately challenges the economic base as the fundamental and exclusive causal influence, thereby arguably rendering Marx's theory of history as a false doctrine. A persistent problem of Marxism is that the economic base conditions the superstructure by limiting its development.<sup>181</sup> This most importantly includes limiting the development of constitutionalism, rule of law, and independent judicial review.

Moreover, the economic determinism of the institutional analysis of a Marxist framework or Marxist political economy, and its basic tenet that the economic base of society is the fundamental and exclusive causal influence, must theoretically deny that a body of law or system of law contains a built-in mechanism for organic change.<sup>182</sup> A problem of a Marxist political economy is economic determinism, which heavily weighs against a body of law or rule of law being reflective of a living law, especially a legal system primarily focused on enacting new legal propositions or laws, though

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178. *Id.*

179. *Id.*

180. ALEX CALLINICOS, THE REVOLUTIONARY IDEAS OF KARL MARX 97 (Bookmarks 2004) (1983).

181. *Id.* at 95–96.

182. Berman, *supra* note 56, at 1654.

impossible to cover all legal relations, and not a natural evolution and development of law.<sup>183</sup> Eugen Ehrlich wrote,

To attempt to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool, and but little water can be put in the pond. . . .

It could not be otherwise.<sup>184</sup>

Despite classical legal positivism and its attendant command theory,<sup>185</sup> which is the only, though tenuous, means<sup>186</sup> of justifying a Marxist-inspired legal system that primarily focuses on enacting new legal propositions or laws, legal propositions that are void of prescriptive meanings and the norms of a culture and society do not present a complete picture of the state of the law. They tell us neither what the “law is,” nor what it “should be.”<sup>187</sup>

A problem is an earlier displacement of traditional culture, traditional government, traditional political theory, and traditional jurisprudence because these institutions and philosophical forms from antiquity actually demonstrate greater vestiges of democratic government than modern China’s one-party CCP rule.<sup>188</sup> For Joseph de Maistre and the divine origins of constitutions, the fundamental

183. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 487 (Walter L. Moll trans., Russell & Russell Inc. 1962) (1936).

184. *Id.* at 488.

185. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Prometheus Books 2000) (1832) (discussing that a proposition of law was true if it simply reported correctly the past commands of a political society and defining positive law as commands from the government or a command issued by a sovereign); see also HANS KELSEN, *PURE THEORY OF LAW* 67–68, 105–07, 138–39 (Max Knight trans., Univ. of Cal. Press 1967) (1934) (“The function of the science of law is not the evaluation of its subject but its value-free description.”).

186. RONALD DWORKIN, *LAW’S EMPIRE* 35 (1986) (“Many officials of Nazi Germany obeyed Hitler’s commands as law, but only out of fear. Does that mean they accepted a rule of recognition entitling him to make law? If so, then the difference between Hart’s theory and Austin’s becomes elusive, because there would then be no difference between a group of people accepting a rule of recognition and simply falling into a self-conscious pattern of obedience out of fear.”).

187. EHRLICH, *supra* note 182, at 488; H.L.A. HART, *THE CONCEPT OF LAW* (2nd ed. 1994) (1961) (discussing how Hart’s Rule of Recognition assigns a particular person or group the authority to make law because rules of law are true not, just in virtue of commands, but in virtue of social conventions representing the community’s acceptance of rules empowering the creation of valid law).

188. CH’IEN MU, *TRADITIONAL GOVERNMENT IN IMPERIAL CHINA: A CRITICAL ANALYSIS* 121, 142 (Chün-tu Hsüeh & George O. Totten trans., 1982).

principles of a political constitution and constitutional law “exist before all written law,” as the development of “an unwritten pre-existing right” that is “intrinsically constitutional, and truly fundamental,” but “never written, and could not be, without endangering the state”; and “the weakness and fragility of a constitution are actually in direct proportion to the multiplicity of written constitutional articles.”<sup>189</sup> The latter propositions serve as a reminder of the dangers of constitutionalizing party ideologies, and the dangers of a constitution that affirms or demands compliance to party ideology.<sup>190</sup> The greatest folly of both “old” Marxism (orthodox or classical Marxism) and “new” Marxism (modern, neo-classical or localized Marxism) is an earlier and continuing displacement of traditional culture and society (predominantly traditional Confucianism) as a prominent philosophical form, in antiquity and modernity.

When confronting a modern Confucian culture and society, a Marxist-inspired constitution or state of legality does not measure up to either natural law theory, and its primordial concern of what law “ought to be,” or modern legal positivism, and its retrospective concern with what law “ought to be.”<sup>191</sup> A Marxist-inspired constitution produces the contagion effects of amoral, apolitical, and atheoretical proclivities of classical legal positivism.<sup>192</sup> This is because such a constitution must, by virtue of an institutional analysis within a Marxist framework, deny the validity of prescriptive meanings or normative norms of a Confucian culture and society, as the Chinese communists have done so since the 1920s. As previously mentioned, positive law in antiquity presented a built-in mechanism for organic change. As such, like Western culture and its philosophical forms from Plato’s rejection of law as coercive power, to Romans and Roman jurists that associated the Law of Nations (*Jus Gentium*) with the Law of Nature, to the

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189. Joseph de Maistre, *Essay on the Generative Principle of Political Constitutions and of Other Human Institutions*, in THE WORKS OF JOSEPH DE MAISTRE, 147, 152 (Jack Lively ed., 1965) (1809).

190. Suna Kili, *Problems of the Application of Contemporary Constitutions*, in MODERN CONSTITUTION 117, 131–32 (Thomas Fleiner-Gerster ed., 1988).

191. See Berman, *supra* note 56, at 1653–55.

192. See generally Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law*, 13 EUR. J. INT’L L. 401, 426 (2002) (discussing Oppenheim’s view of positive as normative).

Enlightenment philosophies (Age of Reason, 1660–1798), positive law had the capacity and capability of experiencing a historical growth and evolutionary development.<sup>193</sup> Positive law in antiquity with growth and development, unlike Marxist-inspired legality, was more capable of reflecting genuine prescriptive meanings of a Confucian culture and society. Such meanings include norms reflective of Confucian morality or even requisite constitutional ethos for a Confucian culture and society, in both antiquity and modernity.<sup>194</sup> Positive law in antiquity, like modern legal positivism, also possessed greater capability of responding to the unique juridical needs. Such needs that included prescriptive meanings or normative norms, of a Confucian culture and society, in both antiquity and modernity, which is a retrospective concern with what law “ought to be.”<sup>195</sup>

A Marxist-inspired constitution only compares to an extreme form of classical legal positivism and not modern legal positivism. Modern China’s state of legality produced a body of rules laid down and enforced by the CCP and its agents of coercive power, from the NPC, to the Supreme People’s Court. Both coercive power and legitimacy are problematic because “[m]ost positivists do not deny that law ought to serve moral ends, the ends of justice, but argue that what law *is*, is a political instrument, a body of rules manifesting the policies of the legitimately constituted political authorities.”<sup>196</sup> For a Marxist-inspired constitution, in both action and text, and its attendant “people’s democratic dictatorship,” the problem will always be the lack of a body of rules laid down and enforced by a sovereign, a legitimately constituted political authority.<sup>197</sup> A Marxist-inspired constitution or state of legality dictates extremist positivism in the construct of a legal system. Such a constitution

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193. See EHRlich, *supra* note 182, at 487–88; POUND, *supra* note 125, at 1–15; Berman, *supra* note 56, at 1652–55; see also SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* (1930); Wan Junren, *Contrasting Confucian Virtue Ethics and MacIntyre’s Aristotelian Virtue Theory*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Summer 2003, at 37 (contrasting Confucian values with Western values).

194. Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 169 (1987) (describing the United States Constitution as a fundamental ethos).

195. Berman, *supra* note 56, at 1653.

196. *Id.* at 1653.

197. See ROUSSEAU, *supra* note 36, at 124 (discussing how each, by giving his vote gives his opinion on this question, and the counting of votes yields a declaration of the general will).

thus evades the discipline of modern legal positivism and is incapable, in terms of prescriptive meanings or normative norms, of adequately responding to the needs and particularities of a modern Confucian culture and society.

The continuing influence of Marxism, continuing displacement of traditional culture and society, and a policy of pursuing minimum compliance with the WTO rules and standards for sound legal systems, including judicial review, hinders Chinese constitutionalism or "building up the constitution." Western experts and authority, anticipate that non-Western and traditional legal systems, including Marxist-legal systems, will be surpassed by a more modern Western legal system as pursuant to the WTO rules and standards. China nonetheless commits "some" resources for "some" legal reforms, such as "some" new legal propositions or laws. China does so for purposes of meeting its baseline WTO Protocol on Accession requirements, and participating in the new global market or liberal market economy. This policy of pursuing minimum compliance with the WTO Protocol on Accession, the WTO rules and TPRM is a by-product of China's polity, the CCP, continuing to hail Marxism as its official ideology, and hailing Marxism and its Marxian analysis as the primordial force providing an explanatory system for institutional phenomena.<sup>198</sup>

Ultimately, notwithstanding an amendment of the WTO rules, successful legal reforms promoted by the WTO rules, or greater borrowing from Western constitutional models due to institutional admiration,<sup>199</sup> Marxism, as a theoretical construct, must deny the influence of prescriptive meanings or normative norms of a culture and society in the construct of a legal system containing a body of law or system of law with a built-in mechanism for organic change. Marxian analysis wholly, or in part, confines the development of the superstructure, and the philosophical forms of constitutionalism, rule of law and independent judicial review. The most obvious consequence of attempting to finalize the localization of Marxism to the realities of traditional culture and society is the denial of both prescriptive meanings or norms of culture and society, as well as the

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198. See Jiang Shigong, *supra* note 13, at 160–61; Zou Shipeng, *supra* note 8, at 12.

199. Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *IND. J. GLOBAL LEGAL STUD.* 383, 389 (2003).

WTO rules and standards for sound legal systems as causal influences on legal reforms and constitutionalism, or “building up the constitution.” The influence of Marxism on the growth and development of constitutionalism, rule of law, and independent judicial review is a confining one. This substantiates Fareed Zakaria’s thesis that, historically, rule of law and a liberal market economy precede liberal democracy and universal suffrage because rule of law can only be the result of an evolution of legal systems, and not the starting point.<sup>200</sup>

#### IV. CONCLUSION

A problem for those proponents advocating an increasing role of the superstructure as a causal influence is that such advocacy essentially renders Marx’s materialistic conception of history as a false doctrine and thus fails the promise of a future Marxist utopia. The inevitable consequence for China, the CCP, and its citizenry is that it renders the attempt to finalize the localization of Marxism to the realities of traditional culture and society as meaningless, or simply, it renders the final reduction of Marxism to a nugatory “ism.” This renders Marxist legal theory or socialist jurisprudence an incorrect path to modern reforms as well as an influence on modern legal reforms not deserving institutional admiration, especially as the primordial force providing an explanatory system for institutional phenomena.<sup>201</sup> This is instead of a path to modern legal reforms that promote a variant of the Western model of a state of legality or constitutional state, such as the Anglo-American rule of law, German *Rechtsstaat* and French *État de droit*.

As Eugen Ehrlich succinctly observed, “The various legal propositions as such, the legal institutions divorced from their presuppositions, have no information to convey.”<sup>202</sup> This is because if there is a unifying regularity in the phenomenon of legal life, it can only be found in the fact that legal life is conditioned upon the social and economic constitution and not the fundamental and exclusive

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200. See generally FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2003) (discussing the evolution of liberal democracy from Roman Emperor Constantine to the American colonies).

201. See Jiang Shigong, *supra* note 13, at 169; see also Zou Shipeng, *supra* note 8 (discussing the Chinese localization of Marxism and its effects on modern China).

202. ERHLICH, *supra* note 182, at 475–76.

causal influence of economic determinism. Borrowing from the words of Xu Zhangrun when he was translating a thesis of the late eminent scholar Liang Shuming (1893–1988):

[Liang Shuming] wished to find a way out of the holistic crisis for his homeland, to establish a home for the mind by creating a new life for the Chinese people and Chinese society where *Physis* [nature] could hopefully accommodate *Nomos* [law] compatibly and competently; where the transcendent source of meaning and humane feeling, founded upon a new basis, could be reintegrated and reflected into rules of law as a whole.<sup>203</sup>

For these reasons, ideal constitutionalism, rule of law, and independent judicial review can only be the result of an evolution of legal systems. They cannot be the starting point,<sup>204</sup> as the CCP has attempted to do by simply committing “some” resources for “some” legal reforms.

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203. Xu Zhangrun, *Western Law in China: Transplantation or Transformation—Four Cases and Liang Shuming's Responses*, ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA], Autumn 2004, at 134, 147.

204. See ZAKARIA, *supra* note 199.



