Towards a Cosmopolitan Constitutionalism:
On universalism and particularism in Chinese constitutionalism

Professor Haig Patapan.
Griffith Business School and Director, Centre for Governance and Public Policy.
Glyn Davis Building (N72)
Griffith University.
170 Kessels Road. Nathan Qld. 4111
h.patapan@griffith.edu.au

The article investigates whether there is a convergent or divergent trajectory in modern constitutionalism by focusing on the case of China. In the first part theoretical it examines the arguments favouring cosmopolitanism and contrasts it with those that endorse autochthony or exceptionalism as an essential aspect of sound constitutionalism. Having explored this theoretical dimension, it focuses on three aspects, constitutions, judiciary and international law to examine constitutional changes in China to see if there is evidence of these divergent or convergent trajectories in constitutionalism.
I. Introduction

The modern state lies at the intersection of powerful international and domestic forces. It is being challenged by globalisation (economic, social and technological), the rise of international institutions and international law, and the increasingly powerful moral claim of the equal dignity of all human beings. At the same time, however, there is the suspicion that these international forces are fragmentary rather than cohesive, that the virtues of the unique and the individual must be asserted against such global impulses, and that domestic regimes hold the greatest hope for democratic accountability, legitimacy and justice. For some these tensions are the birth pangs for global constitutionalism in the form of world government or the increasing importance of an international constitutionalism and an international society.¹ For others these movements manifest a modern form of colonialism that must be resisted by the reassertion of the traditional, the communal and the historically unique that can only flourish in the protection afforded by the state.²

These debates in many cases tend to begin by assuming the merits of the normative claim – of universalism or particularity – to build a case for reform. In this article I want to approach the question of changing constitutionalism by asking an antecedent or threshold question that seeks to examine the nature of the changes taking place. If indeed we now have


196 states with their own constitutions that in important aspects appropriate or incorporate common features, are they in some fundamental sense converging so that we are in the process of developing an ur-constitution, and therefore a cosmopolitan constitutionalism in each state? Or is it indeed to the contrary that centrifugal tendencies characterise international constitutionalism, pointing towards greater diversity and variety in the evolution of constitutionalism? Note that this question is to be distinguished from the claim that there is a tendency towards a global constitutionalism founded upon some idea of a world government. It is also different from the claim that there is evolving an international constitutionalism made possible by institutions such as the United Nations, the European Union or the World Trade Organisation. The question I will examine assumes that each state will have its own constitution but asks the extent to which these are tending towards a uniformity or diversity.

This is clearly an important question for students of constitutional law, international relations and comparative politics who seek to understand the nature of the modern state. But it is an even more important question from a jurisprudential and political philosophical perspective because it confronts the problem of whether such a convergence and homogenisation is good for nations and states. Does it portend the increasingly happy influence of progressive political institutions and practices or on the contrary does it effectively stifle the unique history, culture and institutions that subsist in each nation?

In this article I begin to explore how we can discern divergence or convergence of constitutionalism, the means or paths these changes will take, and their implications for domestic politics in each country. I do so by initially detailing the theoretical basis of such an examination. Here I distinguish between two versions of the cosmopolitan argument, the strong or ‘global’ claim that foresees a trajectory towards a common or world government, with an implicit commitment to achieving such a goal, and a less definitive version that seeks to explore the changes in constitutionalism without anticipating a political transformation towards such a universalism. I then outline some of the specific areas we need to examine in order to see if there is indeed convergence or divergence in constitutionalism. These include the founding constitutional settlement and subsequent changes to it, the role of judicial review and oversight in the interpretation and evolution of constitutionalism and finally the increasing importance of international law and international institutions in shaping national constitutions. Having examined the theoretical aspects of cosmopolitan constitutionalism as

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3 There are 193 member states of the United Nations. Taiwan, the Vatican and Kosovo, that are not members, would bring the total to 196 countries.
well as focusing on significant features that may reveal the nature of changes in constitutional trajectory, I then pursue these insights by turning to Asia and more specifically Chinese constitutionalism. The increasing importance of Asia as a region that is undergoing significant change and exerting increasing influence both in the region and more generally justifies its selection for our examination of evolving constitutionalism. Of course ‘Asia’ is only an approximate or general designation for an extraordinarily diverse range of nations in the region and therefore a comprehensive attempt at answering our question of convergence or divergence of constitutionalism would need to undertake an extensive comparative research into countries in the region. Nevertheless in the first instance I will focus my attention on China and its constitutionalism. I do so because of the increasing political and legal importance of China in the region and because the major far-reaching changes it has recently undergone makes it a useful case for understanding the nature of transformation in modern constitutionalism. The examination of China’s constitution, judiciary and international law reveals in each case tensions and ambiguities between an impulse towards cosmopolitan change and resistance to it. Transformation of the constitution to incorporate new rights provisions is countered by the dominant authority of the CCP. The increasing influence of rule of law, legal education and lawyers confronts the absence of judicial review and separation of powers. Finally, the increasing acceptance of international law and institutions is selective, focusing on economic, financial and commercial aspects. Thus the Chinese case, with its constitutionalism buffeted by powerful currents pushing towards an international consensus, while important domestic forces are strongly resistant to such homogeneity, shows in the conflicting trajectory the limitations of cosmopolitan constitutionalism.

**Modern Constitutionalism**

In asking whether constitutions are tending towards a common formulation or on the contrary fragmenting, as well as the ancillary questions of how they are doing so and the larger implications of such changes for both international and domestic politics, it is first necessary to distinguish a series of theoretical questions concerning constitutions and their evolution. The first is to acknowledge the modern nature of constitutionalism. Of course throughout history all political organisations, whether monarchies, empires, or even small communities have always had a core or constitutive notion of a political and legal settlement that defines, informs and shapes all aspects of each arrangement. In most of these ordering norms have evolved over time-immemorial and therefore did not have a sole or constitutive enactment.
Perhaps the best example we can give of this is the British constitution, which was fundamentally shaped by major historical enactments such as the Magna Carta, the Bill of Rights and the Act of Settlement, yet is also defined by evolving and unwritten conventions.\(^4\) In contrast modern constitutionalism, tracing its theoretical origins to the well-known early modern works of social contract theorists such as Hobbes and Locke, contemplated founding moments and therefore constitutive enactments that brought into being the political entity, comprehensively – and legally – defining the role of the sovereign governments and the rights and entitlements of the citizen subjects. As ‘social contracts’, these foundational enactments were founded on the natural rights of individuals and therefore demarcated the relationship between the new sovereign state and rights bearing subjects who authorised or consented to limited government. It was this conception of the modern state, along with Montesquieu’s innovation of separation of powers that formed the theoretical background for the founders of the United States of America.\(^5\) As one of the seminal works advocating the American constitutional founding, *The Federalist Papers* (by Alexander Hamilton, James Madison and John Jay) shows how the founders understood the innovative nature of their enterprise to establish a modern republican nation on the premise of individual rights and freedoms.\(^6\) This founding has had far-reaching implications for modern constitutionalism, having been used as a model around the world.\(^7\) Of course a number of other models for constitutional innovation would vie with the American, including the European or Napoleonic as well as the Westminster.\(^8\) There were in addition later traditions, including Marxist and socialist models based on radical critiques of such liberal constitutionalism. Yet all of these, either implicitly or definitively endorsed and underlined the idea of constitutionalism, of a constitution as a foundational and therefore politically and legally constitutive enactment that brought into being, defined and limited the modern state.

The second important theoretical point concerns the intended practical effect of such constitutionalism. When we turn to the origins of modern constitutionalism we see a divergence of opinion regarding the nature and implementation of such constitutionalism. For the early social contract theorists, especially Hobbes and Locke but also subsequent critics of the liberal state, such as Rousseau and Kant, there is a fundamental divergence in the state, commonwealth or republic they advocate. Nevertheless all appear to agree on the modular aspect of such constitutional solutions capable of implementation in all times and places. Subsequent critics of the social contract approach, drawing upon the ideas of Hegel and Marx, still held on to the universal applicability of its legal and political solutions. In striking contrast to this approach to modern constitutionalism is Montesquieu. The influential French philosopher does envisage an ideal arrangement for promoting and protecting liberty, but he is also willing to defer to what he calls the spirit of the laws, that is, the moers of each country developed over time to accommodate the unique circumstances of each nation. That is why he advocates gradual changes and in some cases is willing to appear the conservative, not changing the laws in case the innovations prove to the inconsistent with the moers of the nation. Therefore deep within modern constitutionalism there is a debate on the extent to which constitutions are indifferent to time or place, or whether local and immediate circumstances mandate an alteration or variation of the abstract conceptions of modern social contract theories.\(^9\)

The third and challenging aspect of modern constitutionalism is the question of how constitutionalism, of whatever variant, would be taken up or adopted. Here too there appeared to be a divergence in views. For some, there was no inherent necessity for innovations in constitutionalism to be adopted, though there was the suggestion that the patent advantages of such institutional reform, encouraged, perhaps by the force of doux commerce, would make these nations so powerful and attractive that others would over time, seeking to emulate their peace and prosperity, adopt such constitutional innovation. For others, however, there was a force, impulse or directive that compelled states to move towards unified constitutionalism. Kant’s indifferent or even cruel nature that uses our natural inclinations against us, to force us to accept republican forms of government and ultimately a federation of such republics, is one example. For Hegel it is a world Spirit that dialectically resolves all historical contradictions to posit a universal state. Marx’s dialectical materialism sees such a force in

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economic circumstances, resolved in the classless communist state. These perspectives not
only posited powerful means beyond individual discretion and judgment, but more
significantly showed a path towards a universal or powerful unitary world government, either
as a federalism or unitary sovereignty.  

We need not take a position on any of these larger philosophical debates. We will not
advocate the merits of either a universal classless state or a modern liberal democratic
consensus. Indeed, as noted above, it would seem that these questions are best approached
from the other direction, phenomenologically rather than metaphysically. What this means is
that we must first establish the changes taking place before we can discern in them any larger
movements that we can attribute to comparative advantage or to greater ideational or material
causes. But how should these changes be evaluated? Which specific aspects of modern
constitutionalism warrant closer attention because they reveal more about the changes taking
place? Which measures are sufficiently common that they can be used for comparative
investigation?

Evaluating Changes in Constitutionalism

To see changes in constitutionalism and evaluate the extent to which they are converging or
resisting such convergence by developing a unique or *sui generis* constitutionalism requires a
nuanced and comprehensive understanding of each state’s constitutionalism in the light of the
character of international changes. To some extent both of these impulses will become
evident when we explore the challenges faced by each state in meeting demands that it alter
or preserve its constitutionalism. This in turn requires a sound appreciation of all aspects of
the state’s constitutionalism, from its political, historical and cultural genesis, to its legal
architecture, to the way it confronts and engages international changes. Though such a
comprehensive account is warranted for a definitive understanding of changes taking place in
any one state, in this article I propose three broad yet sufficiently discrete areas for evaluating
changes in constitutionalism. These areas – constitutions, judiciary and international law – I
contend provide a sufficiently detailed and therefore revealing insight into the extent and

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character of changes in constitutionalism. Let me outline in turn what I mean by each and why I think they are important.

The obvious starting point in understanding changing constitutionalism is the constitution itself, starting with the written constitution, with its specific provisions, amendment procedures and general scope. But this formal enactment needs to be placed within the larger political, historical and jurisprudential setting in order to see the character of its inception, what it sought to achieve, what it sought to replace or repudiate, and importantly, its overall legitimacy. Moreover, the specific contextual aspects that determined the nature of the constitution must be viewed within the larger international forces that have shaped modern constitutionalism. These will include the influence of colonialism, the first and second world wars, the foundation of the United Nations, the cold-war ideological contest in the context of post-colonial ambitions, the fall of the Berlin Wall and dissolution of the Soviet Union, and more recently, the Arab Spring and the rise of Asia. These larger political movements will often provide the reason for constitutional innovation, its character and its scope, as determined by the unique circumstances of each country. Consider, for example, the influence of Westminster and American constitutionalism, the post-colonial constitutionalism of African and Asian states, and the evolving nature of European Union. These observations are not intended to deny the importance of particular individuals in determining the nature of constitutions, either in initiating movements for innovation or adopting or adapting models from other jurisdictions. Nor should we forget that constitutions may have little practical force, and in some cases are nothing more than ‘paper’ provisions. ¹¹ Nevertheless a nuanced understanding of the origins and character of the constitution in a state will provide an important means for understanding whether and how it has acceded to international influences and the extent to which it has resisted them by turning to, or insisting upon autochthonous influences.

Understanding a constitution provides an essential starting point for evaluating how it has changed and what such changes reveal about cosmopolitan constitutionalism. Yet sometimes changes are not immediately obvious because they do not manifest themselves in formal amendments of a constitution or alterations of its terms. To the extent that judges are the interpreters of constitutions (and their determinations are in most instances decisive to giving full meaning to the terms of the constitution) then judicial decisions or judgments

¹¹ Which raises an important question as to why they are introduced and what they are intended to achieve: see, for example, Zachary Elkins, Tom Ginsburg, James Melton, *The Endurance of National Constitutions*, (Cambridge: Cambridge University Press, 2009).
provide important insights into the character of cosmopolitan constitutionalism. There is certainly wide variation in the institutional role of the judiciary, ranging from full judicial review to a much more deferential role to the political arms of government. This fact itself reveals an important aspect of constitutionalism, especially the extent to which it has adopted the comprehensive notion of separation of powers and the rule of law. Yet the adoption of full judicial review and the judicial recourse to principles and ideas from other jurisdictions also provides a powerful means for constitutions to move towards common principles and ideals. In this sense it is possible to argue that there is an evolving cosmopolitan common law being developed by constitutional courts or courts of ultimate jurisdiction, through the dissemination, adoption or adaptation of core principles and ideas and jurisprudential response to them in addressing and resolving common and contemporary questions. Such dissemination and adoption can be seen in a number of different areas, ranging from the threshold approaches to judicial interpretation,\(^\text{12}\) to the meaning of indigenous and native title,\(^\text{13}\) to the interpretation of human rights provisions.\(^\text{14}\)

The other important aspect that warrants close attention concerns international law and those related international institutions that, through accession or adoption, are influential in transforming the nature of domestic public law and therefore influence its constitutional character.\(^\text{15}\) One of the most obvious here is the United Nations itself, founded with its original 51 members in 1945 and presently with a membership of 193 (when South Sudan was declared a state in 2011). Important international covenants and treaties include the *Universal Declaration of Human Rights* (UDHR) adopted by the UN General Assembly in 1948, and subsequent treaties, especially the *International Covenant on Civil and Political Rights* (ICCPR) adopted by the UN General Assembly in 1966 and the *International Covenant on Economic, Social and Cultural Rights* (ICESC) adopted by UN General Assembly in 1966 and the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) adopted by the UN General Assembly in 1979. Other important international bodies include the World Trade Organisation (WTO) founded in 1995 to replace

\(^{12}\) For example, concepts such as ‘originalism’, the ‘living tree’, and ‘proportionality’.


the 1948 General Agreement on Tariffs and Trade (GATT), the International Criminal Court (ICC) created by the Rome Statute in 2001 and regional organisations including the European Union (EU), the European Charter of Human Rights (ECHR) and the American Charter of Human Rights (ACHR). The extent to which these international law provisions add or supplement similar or comparable domestic provisions is a matter of contestation. But what cannot be denied is the extent to which they provide a powerful force towards a constitutional consensus in those countries that have signed or ratified them.

Changes in Chinese Constitutionalism

We now turn from the theoretical and procedural questions we have canvassed above to the examination of specific constitutions to see the extent to which they evince aspects of cosmopolitanism. Before discussing the choice of the specific case selected in this article, we should note that for comparative purposes there is significant merit in looking at various constitutions within a regional context, whether, for example, it is Africa, Asia or the Americas. Though composed of countries with wide diversity of political, social and cultural histories, at the very least the geographic proximity of countries in regions allow for commonalities that facilitate comparative research. It is in the light of these considerations that we will focus on Asia and more specifically, People’s Republic of China (PRC) or China. The political and economic changes taking place in Asia, and their consequent international implications, are now a commonplace. It is in this context that China looms as a state that has, through its increasing wealth and power, become a major influence in the region and by implication, the world. China thus provides a revealing case study for our examination of cosmopolitanism. The direction that Chinese constitutionalism is taking is an important question in itself, but due to its regional and international influence Chinese


18 See, for example: Randall Peerenboom, China Modernizes: Threat to the West or Model for the Rest, (Oxford: Oxford University Press, 2007).
decisions on constitutionalism will obviously have wider implications. Consistent with our discussion above, we will explore the changing nature of Chinese constitutionalism by examining three important features – constitutions, judiciary and international law – to see the extent to which we can discern changes in its constitutionalism, towards an international consensus or in resistance to such attempts.

**Constitution**

China has thousands of years of legal tradition, informed by Confucians, Taoists, Maoists and Legalists who debated the importance of individual discretion and the rule of law. Yet *Xianfa*, the Chinese word for constitution, assumed the modern meaning of constitutionalism as fundamental law superior to all others only at the end of the 19th century, influenced by the Japanese Meiji Constitution (1866-1912), which in turn had drawn upon the German Constitution of 1871. Indeed from the 1830s Opium Wars China had looked to constitutional reform and international recognition as a state to emulate and counter the achievements of industrialised nations. This meant an openness to international ideas for constitutional reform. We can see this in the dying days of the Qing dynasty of the Manchus (1644-1911), in the republican period that looked to western theorists and the French Third Republic, Sun Yat-sen’s Nationalist *fatong* or juridical state shaped by Chinese thought, Western parliamentary democracy and Soviet revolutionary party state that informed the *Guomindang* (KMT) or Chinese Nationalist Party culminating in the 1947 *Constitution of the Republic of China* that proved to be a failed compromise between the KMT and Mao’s Chinese Communist Party (CCP). Taking Stalin’s advice, the CCP sought to secure its legitimacy as well as the legitimacy of its laws by enacting a Constitution in 1954. Drawing on Soviet and Eastern European jurisprudence the 1954 Constitution entrenched the CCP and secured socialist concepts of democracy, rights, and accountability and remained in force until 1975. But for much of this time it proved to be ineffective. The Hundred Flowers Campaign of 1956-7 to secure socialist legality by encouraging citizen engagement and critique was soon followed by the CPP rejection of legality in the form of 1957 ‘anti-rightist movement’, the

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20 The Opium wars, also known as Anglo-Chinese wars, generally refer to two major wars, Number 1 (1839 to 1842) and Number 2 (1856-60). Subsequently almost any conflict between China and European powers was collected under the term.
Great Leap Forward (1958-61) political campaign that attacked critics and resulted in the great Chinese Famine of 1960s, and the Great Proletarian Cultural Revolution (1966-76). Before the end of the Cultural Revolution the CCP enacted a new constitution in 1975 that enhanced the role of the CCP and removed most human rights provisions and eliminated the requirement for open and independent trials. But Mao’s death in 1976 and the subsequent purge of the ‘Gang of Four’ led to the enactment of a new Constitution in 1978, deleting some of the socialist provisions, supplementing rights and introducing the ‘Four Modernisations’ in industry, agriculture, defence and science and technology.\textsuperscript{21} The shift from class struggles to economic construction was evident in the 1979 and 1980 revisions of the 1975 Constitution and its complete replacement by the current 1982 Constitution. The 1982 Constitution, drafted and enacted at the start of China’s opening and reform, confirmed the principle of constitutionalism and the primacy of the rule of law and elevated the fundamental rights and duties of citizens.\textsuperscript{22} It took up many aspects of the pre-Cultural Revolution principles, entrenching Dengist concepts such as the ‘Four Cardinal Principles’.\textsuperscript{23} It did not, however, adopt the concepts of federalism or separation of powers.\textsuperscript{24} Subsequent change in Chinese constitutionalism has been marked by criminal law and procedural reform, reform of economic institutions, including rules on business transactions and investments and more recently reforms to the rule of law, with special focus on the better administration and protection of individual rights.\textsuperscript{25} The 2004 amendments were perhaps the most extensive, providing for the first time constitutional recognition of ‘human’ rights and continued protection of the private economy, declaring that ‘lawful private property of citizens is


\textsuperscript{22} Its differences from the previous constitutions include its enactment by the People’s Congress (and not by the Standing Committee of the Party), its extensive assessment of constitutions around the world during its drafting, the placement of rights and duties in the second chapter, and importantly the ambiguity regarding the constitutional status of its preamble which makes the Constitution the highest law of the land, potentially superior to the CCP.

\textsuperscript{23} The ‘Four Cardinal Principles’ are the political leadership of CCP, the state foundation on the ‘people’s democratic dictatorship’, economic system of ‘socialist thought’ and the ideology of Marxism, Leninism, Mao Zedong Thought. The ‘three represents’ in the Jiang Zemin era, requires the CCP to represent the fundamental interests of the majority of the people (see: Qianfan Zhang, \textit{The Constitution of China: A Contextual Analysis} (Oxford and Portland, Oregon: Hart Publishing, 2012), p. 50.

\textsuperscript{24} Note, however, the role of autonomous regions of minority ethnic groups (such as Inner Mongolia and Xingjiang) that have more extensive political rights.

inviolable’, and the taking of such property requires compensation (Article 13). The present debates focus on the tension in Chinese constitutionalism between the socialist principles informing its preamble and many important provisions, and the recent adoption of concepts such as human rights and private property which some argue are liberal-democratic in nature.

This brief overview shows three important aspects of the changing nature of contemporary Chinese constitutionalism. The first is the continuing salience from the late imperial period and with increasing influence in recent history of the view that the legal and political regime should be altered by establishing a constitution as a supreme law or foundational constitutive enactment. This perspective is to be contrasted with the emphasis on the predominance of the CCP and its leadership, evident most strikingly in Mao’s disregard of constitutionalism during the Great Leap Forward and the Cultural Revolution. The second is that though constitutionalism had important elements of Chinese traditions, thought and ‘characteristics’, the predominating theoretical influence was international and in particular western. We can see this in the constitutional entrenchment of important modern elements including democratic governance, rule of law, human rights and political accountability. The third important aspect concerns the increasing dominance in recent history of liberal constitutionalism, seemingly at the expense of the socialism that was a mainstay of Chinese constitutionalism from the early revolutionary period.

Judicial Review
Constitutional courts and courts of final jurisdiction are influential interpreters of constitutions and therefore important for understanding the evolution of constitutionalism. In their adoption and application of precedents and principles of jurisprudence from other jurisdictions they become especially influential sources of cosmopolitan constitutionalism. When we seek to examine the nature of such judicial influence in China we confront a formidable threshold difficulty. Though the meaning and character of judicial independence is complex and evinces a wide variety of forms, the predominance of the Chinese Communist

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Party (CCP), the absence of a strong notion of judicial review and the lack of strict separation of powers mark China as an exception to international conceptions of judicial independence.\footnote{On contested notions of such independence see: Randall Peerenboom, Ed. Judicial Independence in China: Lessons for Global Rule of Law Promotion, (Cambridge: Cambridge University Press, 2010).}

The term judicial institutions (\textit{sifa jiguan}) is often broadly used in China to refer to courts, procuratorates and the public security force (police) as a whole, though it also has a narrower reference to courts and procuratorate system. The influence of the CCP is such that China is governed by both a party system and a bureaucracy. This means that though the National People’s Congress (NPC) is defined by the 1982 Constitution as the supreme power of the state, creating legal institutions and subordinating them to its authority, the CCP and the administrative (executive) authorities still exercise significant power over courts and procuratorates, especially in the development of policy and in the allocation of resources and the appointment of personnel.\footnote{For example see: Jianfu Chen, Chinese Law: Context and Transformation, (Leiden and Boston: Martinus Nijhoff, 2008), p. 149.} Though attempts had been made to establish a new legal system in the 1950s, drawing upon European models and the Soviet model of a procuratorate system, these were largely abolished during the Mao era. Therefore most of the current legal system can be traced to the enactment in 1979 of two organic laws establishing courts and procuratorates. The structure of these courts has the Supreme People’s Court (SPC) at its apex, followed by the High People’s Courts (at the provincial level), the Intermediate People’s Court (in cities and prefectures within provinces) and Basic People’s Courts (at country level). A similar hierarchy exists for the procuratorate system, which is charged with initiating public prosecutions on behalf of the state. The SPC, initially composed of 250 judges is the highest authority to review cases appealed from the lower courts.\footnote{A further 300 or so judges were seconded to the SPC in 2007 to review and approve death sentences.} Except for special cases, however, the SPC rarely decides actual cases, except in the approval of death sentences.\footnote{For example see: Susan Trevaskes: Death Penalty in China, (Palgrave Macmillan, 2012).} Its main function is to issue ‘judicial explanations’ of statutes or regulations and a variety of advisory opinions to the lower courts. Its bimonthly publication, the SPC Gazette, does contain exemplary cases decided mainly by lower courts, but because China follows European legal traditions, these do not constitute a common law concept of \textit{stare decisis}. The recent ‘case guidance system’ to improve uniformity and certainty of judicial decisions is an attempt in this direction but does not yet represent a comprehensive system of precedents. According to the SPC, lower courts are required to follow these cases but there is a continuing debate about whether or not the SPC can in fact compel them to do so. They are,
however, required to follow the judicial interpretations of the SPC which determines how provisions in primary legislation should to applied in specific cases.33

From this general overview we can see that the SPC does not exercise judicial review, understood as the judicial interpretation of the meaning of the Constitution and the overruling of legislation considered unconstitutional. There was an attempt towards such review in 2001, in the case of *Qi Yuling vs Chen Xiaoqi and Others* where the SPC held that the ‘basic right of education as provided in the Constitution’ was violated. This was the first case where the SPC explicitly cited a constitutional provision as legal ground for judicial decision or interpretation. The decision seemed to promise the start of the judicialisation of the constitution and *Qi Yuling* seemed to be China’s equivalent of *Marbury vs Madison*. Subsequent developments undermined this prospect, with the new SPC president deleting it from the case book in 2007 and the decision ultimately being voided in 2008.34 It is important to note that the President of the SPC is a middle ranked cadre of CCP and is under the leadership of the Central Politics and Law Commission, the Secretary of which is a member of the Politburo Standing Committee, the most powerful decision-making institution in China.

China’s resistance to adopting comprehensive judicial review should be seen in the larger context of significant reforms that suggest a fundamental albeit slow transformation in the conception of rule of law in Chinese constitutionalism. Since 1978 the NPC and its standing committee (NPCSC) have made 236 major laws, the State Council has issued over 690 administrative regulations and local authorities have made over 8600 local regulations.35 The increase in the number of courts has been equally rapid. By the end of 1986, there were 29 high courts, 337 intermediate courts and 2907 basic courts and 14,000 people’s tribunals as well as 132 specialised tribunals established in China. At the end of 2004 there were 3548 general and specialised courts (for example, maritime, railway and military courts) nationwide.36 The legal profession has been equally transformed. The short lived attempts to

establish a lawyer system in 1955 ended in 1957. It was revived when the Provisional Regulations on Lawyers was issued in 1980. In 1979-1980 there were fewer than 300 lawyers working in a dozen or so law firms. In contrast by the end of 2004 there were more than 118,000 practicing lawyers in more than 11,691 law firms. These developments were aided by the rebuilding of laws schools so that by the end of 2003 the six political-legal institutions under the jurisdiction of the Ministry of Justice had become several hundred law faculties and law schools in various Universities. These changes suggest an evolution in the conception of rule of law and therefore the potential for transformation in the role of the judiciary even though there is to date no support for separation of powers or a strong version of judicial review.

**International Law and Institutions**

International law and international institutions can have far-reaching influence on the character of constitutionalism. This influence is understood in terms of ‘socialisation’ of participating states, not only supporting transparency, capacity building and enhanced dispute settlement but through discussion to define mutual interests. Here socialisation is often interpreted as redefining interests in terms that correspond with treaty norms. Of course states taking part in international organisations and acceding to international laws do so primarily to advance their interests. We can see this, for example, in China’s involvement with the United Nations.

The modern conception of the state has been significantly influenced by international law. According to international law, the fundamental or primary legal subject of the

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39 See, however, Article 135 of the Constitution which refers to ‘principle of separation of responsibilities’.
international community is the state. The fundamental rights of states, as defined by international law, include state sovereignty or independence, in particular the right to exercise jurisdiction over its territory and permanent population, and therefore the right to engage in self-defence. A corollary of such a right is the duty not to intervene in the internal affairs of other sovereign states. Legal equality of states – that is, equality of legal rights and duties – is the other fundamental international law principle. One of the foremost international institutions is the United Nations (UN), which established an international system founded upon the concept of state sovereignty and therefore legitimacy. UN membership represented international recognition and therefore prestige and authority because it was an important milestone in national independence and state sovereignty. The importance of UN membership can be seen in the People’s Republic of China’s (PRC) attempts since 1949 to represent China at the UN by displacing Taiwan. It achieved success in 1971, effectively expelling Taiwan from the UN, and thereby achieving reintegration into the international community. Yet China was slow to participate in many of the UN’s affiliated agencies, not joining the World Bank, International Monetary Fund (IMF) or the Conference on Disarmament (CD) until September 1976, after Mao’s death. Still, its involvement in international organisations has been growing significantly. Where in 1966 China was a member of only one intergovernmental organisation (IGO) and fifty-eight international nongovernmental organisations (INGO), by 2000 it had become a member of as many as fifty IGOs and 1275 INGOs. But the larger ambiguities in China’s international role remains, shaped by the tensions between its role as an incipient great power and a member of the P-5 (the group of permanent members in the Security Council with nuclear capability), and the fact that it is also a developing socialist state previously exploited by imperial powers and a
chief beneficiary of World Bank loans. It therefore has an ambivalent view of globalisation as opposed to modernisation, insisting on protecting its sovereignty by denying international organisations the same status as sovereign states. This is evident in its endorsement of ‘Five Principles of Peaceful Coexistence’ and the rights of national self-determination and independence. Practically this means a pragmatic focus on preserving the international environment conducive to its internal development while enhancing its international status.48

The extent to which international law and organisations may be said to have shaped Chinese constitutionalism can be judged by examining two specific areas: human rights and economic liberalisation. One of the important aspects of international statehood has been the principle of non-intervention because it effectively removes from international scrutiny contentious domestic issues of human rights and democratic governance. In his 1995 speech to the UN China’s state chairman Jiang Zemin declared ‘the sacred nature of state sovereignty is inviolable’. According to Jiang, ‘freedom’, ‘democracy’ and ‘human rights’ were often used as a pretext to encroach on the sovereignty of other states.49 China continues to insist on the inviolability of sovereignty, though its practical application of the principle is more complex.50 China has displayed flexibility in its adoption of human rights organisations. It became a member of the UN Human Rights Commission in 1981 and the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1984. It acceded to core human rights treaties in the 1980s and 1990s though it did not sign the International Covenant on Economic, Social and Cultural Rights (ICESCR) until 1997 and the International Covenant on Civil and Political Rights (ICCPR) until 1998.51 It ratified the ICESCR in 2001. Yet these international obligations have not readily translated to changes in constitutionalism.52 China participates in the UN HRC’s Universal Periodic Review (UPR) mechanism every four years and is praised for its record in poverty alleviation. But in 2007 it

advocated curtailing the ability of HRC to monitor human rights in individual countries. In the Security Council it generally prevents the consideration of human rights violations in places such as Zimbabwe and Darfur.\textsuperscript{53} And as we have seen above, there are limits on the constitutional enforcement of human rights.

When we turn our attention to economic liberalisation and its consequent transformation of the constitutional regime we become aware of the far-reaching implications of China’s 2001 accession to the World Trade Organisation (WTO). By successfully joining the WTO China has been willing to limit its sovereignty and independence in exchange for status, trading opportunities and to restructure its own economy. Significantly, it has used WTO to enforce changes that would otherwise not have been possible. Of course the direct implications of membership are economic and financial. But there are also other important consequences for Chinese constitutionalism. The WTO Agreement requires the enforcement of the WTO Understanding, which means that the national judicial system must act in compliance with international treaty obligations and norms, overriding Chinese domestic judicial decisions and practice. These changes will also mean increased legal transparency, greater political openness and accountability, transforming the Chinese administrative system. In 1989 the NPC enacted the Administrative Litigation Law (ALL), intended to ‘protect the rights and interests of citizens, legal persons and other organisations, and upholding and supervising the exercise of administrative power according to law’ (Article 1). The effect of ALL has been to provide judicial safeguards to rights and interests against the official abuse of power though non-personal and non-property rights such as political and religious rights seem to be excluded, as well as the Constitution itself, which is not to be applied by judges in deciding cases. Membership of the WTO has strengthened the importance of administrative law, with the NPCSC enacting the Administrative Licence Law in 2004 to curtail excessive and arbitrary administrative actions. It declares for the first time the general principles of protecting legitimate expectations and of establishing a limited government that respects market rules (Articles 12 and 13). In 2007 the State Council enacted the Regulation on the Disclosure of Government Information, making open government a fundamental principle.\textsuperscript{54} Yet these fundamental changes in the formal legal and institutional


structures confront formidable problems in implementation, suggesting the need for caution in assessing them.\textsuperscript{55}

As the discussion above shows, there is an increasing Chinese acceptance and commitment to international institutions, laws and norms. Yet as the cases of human rights and economic liberalisation show the influence of these international developments varies according to the specific area under consideration and this divergence can be accounted for by the demands of pragmatic reconciliation of such international demands with the primacy of national interest and state sovereignty.

\textbf{China and Cosmopolitan Constitutionalism}

In this article we have attempted to examine the question of cosmopolitan constitutionalism, that is, the extent to which state constitutions are moving towards or resisting a common constitutionalism. We have chosen China as a case study not only because of its increasing global and regional political importance but especially because it is in many respects a difficult or ambiguous case of evolving constitutionalism. In China we see extraordinary changes taking place within a very short time, turning away from the years dominated by Maoist political transformations to the adoption of international aspects of constitutional thought and practice. Yet such changes also seem to confront what is uniquely local, adopting innovations with reservations and limitations or in some cases repudiating them altogether. Thus in each of the three areas we examined in some detail – constitutions, judiciary and international law – we see profound tensions between these contending forces of constitutionalism.

As we have seen, constitutionalism is an enduring, and with the new emphasis on human rights, an increasingly powerful idea in China. Yet the countervailing role and influence of Chinese Communist Party, justified in large measure by its historical legitimacy and the ever-increasing modern demands for a powerful state that needs to address the challenges of stability, security, and prosperity means that the this tension is presently resolved in favour of the CCP. These tensions are also manifest in the role of the judiciary. There has been an extraordinary transformation in the rule of law in China, most noticeable in the increased number of tribunals and courts, the emphasis on legal education and the prominence of the legal profession. Resisting these trends has been China’s repudiation to

\textsuperscript{55} For developments in the telecommunications, banking and services sectors see: Andrew C. Mertha and K Zeng, “Political Institutions, Resistance and China’s Harmonization with International Law”, \textit{The China Quarterly}, Vol. 182. (2005), pp. 319-337.
date of substantive judicial review and separation of powers, relegating the judiciary to the arm of the executive. In terms of judicial independence, therefore, China would appear to be strongly resisting international constitutionalism. The situation is equally complex in the context of international law. The increasing willingness of China to take an active role in international institutions shows the powerful influence of international constitutionalism. Yet closer inspection shows the strategic use of these international initiatives, with economic measures, national interest and state sovereignty taking precedence over human rights.

From our examination of these significant aspects of Chinese constitutionalism we can draw three general inferences regarding the universal and particular trajectories in modern constitutionalism. The first is a confirmation of the power and influence of universalism or cosmopolitan constitutionalism in shaping and transforming each state’s unique constitutionalism, evident in all three areas we have examined. Second, as the case of China suggests, this influence seems to be more far-reaching and significant in international laws and institutions related to economic and financial matters, rather than human rights. Economic, financial and commercial aspects of international law would therefore appear to be especially powerful means for the introduction of cosmopolitan constitutionalism measures into a state. Yet this very fact also confirms our third observation, that acknowledges the undiminished authority of states in resisting constitutional change and dictating the change of pace and reform where fundamental state sovereignty is at stake. The historical authority and present power of the CCP in China means that it can successfully resist international demands for the recognition of human rights, substantial judicial review and separation of powers.

These insights into cosmopolitan constitutionalism help us understand the recent announcement by Party Central authorities preventing discussion of the ‘Seven Unmentionables’ (qi bu jiang) – universal values, freedom of the press, civil society, citizen’s rights, the party’s historical errors, the capitalist elite and judicial independence – apparently harking back to previous periods of the Anti-Rightist Movement, challenging the basis of the constitution.56 Xi Jinping’s view, now known as the ‘the theory of the two cannot negates’, is that the party should not differentiate post-1949 CCP history between pre-reform period of socialism with Chinese characteristics and post-reform period of open door so that one negates the other. Party history and therefore party primacy and rule appear to be at the core

of such an approach. Such an approach appeared consistent with the 2011 ‘Five No’s’ claim by Wu Bangguo, former Politburo Standing Committee member and chairman of the NPC. Wu’s ‘Five No’s’ were: ‘no to multiparty politics; no to diversification of [the party’s] guiding thought; no to the separation of powers; no to a federal model; and no to privatization’. The political imperatives of CCP control therefore appear as the signal major force resisting moves towards cosmopolitan constitutionalism. The CCP, and importantly Chinese nationalism, are therefore crucial for the future evolution and transformation of Chinese constitutionalism. Whether the present circumstances reveal a moderated transition favouring cosmopolitanism or a return to a pre-constitutional era seems a question equally poised and balanced, reflecting the complex and profound changes taking place in Chinese constitutionalism within the larger context of powerful international developments. China therefore reveals the powerful impulse towards, and the formidable limitations to cosmopolitan constitutionalism.

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57 Resisting ‘Westernization’ as ideological subversion from abroad and the defense of ‘socialist core values’ seemed to be the concern of Lieutenant General Qi Jianguo, the deputy chief of the PLA General Staff with the foreign affairs and intelligence portfolio, who saw five problems in Western penetration and subversion through ‘multiple channels, including military deployments, political transformation, economic control, and cultural penetration’. See: Willy Lam, “China’s Reform Summed Up: Politics, No; Economics, Yes (Sort of)”, Lam (2013), p.4.