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# CHINESE CONSTITUTIONALISM IN THE “NEW ERA”: THE CONSTITUTION IN EMERGING IDEA AND PRACTICE

*Larry Catá Backer\*\**

## *Abstract*

*The 19th Congress of the Chinese Communist Party concluded at the end of October 2017. It set the fundamental policy positions of China’s leadership for the next five years with particular emphasis on its approaches to constitutionalism, law, and the political theory of the state. These internal political changes will have substantial effects on China’s external relations and on the ways in which Western liberal democracies engage with China. In that context among the most important questions for law revolve around the extent and character of the evolution of CPC thinking, and the CPC Basic Line, with respect to Socialist Rule of Law and Socialist Constitutionalism now bound up in the adoption of “Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era.” The question is central to a consideration of the Work Report delivered by Xi Jinping reflected in the resulting final Resolution of the 19th Congress to amend the Constitution of the Chinese Communist Party and thereafter in 2018 to amend the State Constitution to reflect the advances in political principle and the CPC political framework embedded in the CPC Constitution. A key element of that question involves constitutional trajectory: to what extent did this report reflect an official downshifting of the importance of the state constitution and constitutionalism within the construction of Chinese notions of Constitutionalism, and if so, what variation on constitutionalism is likely to emerge? If so, what are the effects of any such downshift on the relation between the state and the political constitutions of China. To that end, it is worth considering whether principles of constitutionalism for the “New Era” may be extracted from Xi Jinping’s Report to the 19th Congress.*

---

\* W. Richard and Mary Eshelman Faculty Scholar & Professor of Law & International Affairs, Pennsylvania State University. Special thanks to Miaoqiang Dai (Penn State School of International Affairs M.I.A. expected 2019) and Shan Gao (Penn State Law SJD 2017) for their excellent research assistance (including invaluable translations from the original Chinese) and to the participants in the Roundtable for lively discussion and debate on these issues.

\* My utmost thanks to Stephan Wilske of Gleiss Lutz in Stuttgart, Christian Koller of the University of Vienna, and Jarred Klorfein of Paul Weiss in Washington D.C. for their helpful comments.

*And if they can, to try to extract a sense of the likely characteristics of emerging structures of Chinese constitutionalism. What follows, then is a preliminary report and assessment of Constitutionalism with Chinese Characteristics in the New Era from Out of the 19th CPC Report. After this short introduction to the issues and context of Chinese constitutionalism before the 19th Congress, Section II provides a contextual framework for situating the constitutional work of the 19th CPC Congress within contemporary Chinese currents of constitutional theory. Section III then explores the references to notions of constitution in earlier CPC Congress Reports. Section IV then turns to the consideration of the constitution project for China in the “New Era.” It first considers in more detail the understanding of constitution and its role in politics and governance within the 19th CPC Congress Report itself. It then explores the role of constitutionalism within the structures of the 19th CPC Congress Report through a close reading of the specific references to constitutions in the Report (state, political and mixed). Lastly, it provides a concise consideration of the connection between constitutionalism and the emerging characteristics of Chinese consultative democracy.*

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## INTRODUCTION

The Communist Party of China (CPC)<sup>1</sup> Congress is “a twice-per-decade event to set the party’s national policy goals and elect its top leadership.”<sup>2</sup> The first Congress was held in 1921, on the suggestion of European members of the Comintern,<sup>3</sup> who had urged that the various communist organizations then recently established in China should send representatives to a general Congress.<sup>4</sup> Since then, periodic CPC Congresses have provided a critical space through which the CPC can articulate, develop, and operationalize its objectives as a vanguard party. It provides a formal arena where the vanguard can come together to express the results of a

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<sup>1</sup> The Communist Party of China (CPC) is a Marxist-Leninist vanguard party whose leadership role in the operation of state, society, politics, economics and culture forms the essential and central element of the political and constitutional system of the Chinese state. It has a long and complex history, with origins in the transposition of Russo-European notions of Marxism and Leninism into China, which was then naturalized within a rich political culture of post-Imperial anti-colonialist nationalism, contentious relations with the counterpart Chinese Nationalist Party (Zhongguo Guomindang (GMD)), Soviet and European state Marxist Leninism, and ultimately developed with Chinese characteristics increasingly after 1949. See *Brief History of the Communist Party of China*, CHINA DAILY, [http://cpcchina.chinadaily.com.cn/2010-09/07/content\\_13901594\\_2.htm](http://cpcchina.chinadaily.com.cn/2010-09/07/content_13901594_2.htm).

<sup>2</sup> *China’s 19<sup>th</sup> Party Congress*, BROOKINGS INST. (2017), <https://www.brookings.edu/product/chinas-19th-party-congress/>.

<sup>3</sup> “In March 1919 leading members of the Communist Party in Russia founded the Communist International (later known as Comintern). The aim of the organization was to fight “by all available means, including armed force, for the overthrow of the international bourgeoisie and for the creation of an international Soviet republic as a transition stage to the complete abolition of the State.” John Simkin, *Comintern*, SPARTACUS EDUC. (Aug., 2014), <http://spartacus-educational.com/RUScomintern.htm>; see VLADIMIR I. LENIN, *The Third, Communist International* (1919), reprinted in LENIN’S COLLECTED WORKS, 29, 240-241 (George Hanna trans., Progress Publishers 4<sup>th</sup> ed. 1972) (“In March of this year of 1919, an international congress of Communists was held in Moscow. This congress founded the Third Communist International, an association of the workers of the whole world who are striving to establish Soviet power in all countries. The First International, founded by Marx, existed from 1864 to 1872...[t]he Second International existed from 1889 to 1914, up to the war.”). <http://spartacus-educational.com/RUScomintern.htm>.

<sup>4</sup> The First National Congress of the CPC (中国共产党第一次全国代表大会) was held in Shanghai from 23 July to 2 August 1921 in the course of which the CPC itself was established. See *Brief Introduction to the First National Congress of the Communist Party of China* 中国共产党第一次全国代表大会简介, CHINESE COMMUNIST PARTY NEWS, <http://cpc.people.com.cn/GB/64162/64168/64553/4427940.html> (“共产国际代表建议及早召开党的代表大会, 宣告中国共产党的正式成立。” [“The Comintern’s representative suggested convening the congress of the party as soon as possible and declaring the formal establishment of the Chinese Communist Party.”]; see also HANS J. VAN DE VEN, *FROM FRIEND TO COMRADE: THE FOUNDING OF THE CHINESE COMMUNIST PARTY, 1920-1927* (Univ. of Cal. Press, 1991) (arguing that the CPC emerged from the consolidation and transformation of a group of study societies, that acquired definitive contemporary form only after 1927 as a mass Marxist-Leninist party); see also TONY SAICH, *THE CHINESE COMMUNIST PARTY DURING THE ERA OF THE COMINTERN (1919-1943)*, (Int’l Inst. of Soc. History, Amsterdam), <https://sites.hks.harvard.edu/fs/asaich/chinese-communist-party-during-comintern.pdf>.

reflexive period of internal dialogue ideally founded on its own process principles.<sup>5</sup> The Congress serves as the meeting at which the leadership is elected and confirmed. It is also the key formal event in which such work can be elaborated and disseminated to the nation at large. “But the practice of quinquennial gatherings dates to Deng Xiaoping’s attempts in the 1980s to introduce a sense of order and predictability after the chaos of the Cultural Revolution.”<sup>6</sup>

With the 19<sup>th</sup> CPC Congress, held during the last week of October 2017, the CPC has announced that state, party and people have entered into a new historical stage, a “New Era.”<sup>7</sup> “With decades of hard work, socialism with Chinese characteristics has crossed the threshold into a new era. This is a new historic juncture in China’s development.”<sup>8</sup> That New Era itself pointed to a further development of Marxism Leninism in the Chinese context, the “Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era” which was itself at the center of the 19<sup>th</sup> CPC Report.<sup>9</sup> “That New Era has a number of important consequences for politics, for law and for the construction of a responsive constitutional state. The first is that the New Era again shifts the fundamental contradiction of society. “As socialism with Chinese characteristics has entered a new era, the principal contradiction facing Chinese society has evolved. What we now face is the contradiction between unbalanced and inadequate development and the people’s ever-growing needs for a better life.”<sup>10</sup> The second is that, like the American approach to politics and law that came before it, “New Era” offers an important alternative to legitimate construction of states and their politics: “It means that the path, the theory, the system, and the culture of socialism with Chinese characteristics have kept developing, blazing a new trail for other developing countries to achieve modernization.”<sup>11</sup> But it also conflates national and international

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<sup>5</sup> See, e.g., Cheng Li, *Preparing For the 18th Party Congress: Procedures and Mechanisms*, 36 CHINA LEADERSHIP MONITOR (2012), <http://media.hoover.org/sites/default/files/documents/CLM36CL.pdf>.

<sup>6</sup> J.P., *What is China’s 19th Communist Party congress and why does it matter?*, THE ECONOMIST (Oct. 17, 2017), <https://www.economist.com/blogs/economist-explains/2017/10/economist-explains-11>. For English language CPC sources on the 19<sup>th</sup> CPC Congress, see 19TH CPC NATIONAL CONGRESS, <http://www.xinhuanet.com/english/special/19cpcnc/index.htm>.

<sup>7</sup> Xi Jinping, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era: Delivered at the 19th National Congress of the Communist Party of China* (Oct. 18, 2017), [http://www.xinhuanet.com/english/download/Xi\\_Jinping's\\_report\\_at\\_19th\\_CPC\\_National\\_Congress.pdf](http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf).

<sup>8</sup> *Id.* at 10.

<sup>9</sup> *Id.* at 15-23; see Michael A. Peters, *The Chinese Dream: Xi Jinping thought on Socialism with Chinese characteristics for a new era*, 49(14) EDUC. PHIL. & THEORY, 1299-1304 (2017). “The Thought is the biggest highlight of the 19th National Congress of the Communist Party of China (CPC) and a historic contribution to the Party’s development,” said Zhang Dejiang when joining a panel discussion at the congress opened Wednesday. ‘This important thought represents the latest achievement in adapting Marxism to the Chinese context, and is an important component of the system of theories of socialism with Chinese characteristics,’ Yu Zhengsheng said while joining another panel discussion.” Hou Qiang ed., *CPC creates Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era*, XINHUA (Oct. 19, 2017), [http://news.xinhuanet.com/english/2017-10/19/c\\_136689808.htm](http://news.xinhuanet.com/english/2017-10/19/c_136689808.htm).

<sup>10</sup> Jinping, *supra* note 7, at 9-10. (“We must recognize that the evolution of the principal contradiction facing Chinese society represents a historic shift that affects the whole landscape and that creates many new demands for the work of the Party and the country.”).

<sup>11</sup> *Id.* at 9.

structural and normative development. On the one hand, it conflates the “China Dream of national rejuvenation”<sup>12</sup> with its transnational implications that it explained will see “China moving closer to center stage and making greater contributions to mankind.”<sup>13</sup> Thus, the thrust of the changes announced in the 19<sup>th</sup> CPC Congress through the articulation of the “New Era” principles “are not merely political, but enhance the “all-around” (comprehensive) approach to Chinese development which sees an intimate connection between law, politics, culture, internal and external relations.”<sup>14</sup>

The emerging principal contradiction of the “New Era,” however, does not diminish the role of the vanguard party is its leadership obligations or in its role as the center of political authority in China. “The basic dimension of the Chinese context—that our country is still and will long remain in the primary stage of socialism—has not changed. . . . We must remain fully committed to the Party’s basic line as the source that keeps the Party and the country going and that brings happiness to the people.”<sup>15</sup> To that end the leadership of the CPC—expressed through its Party and state constitutions—is essential.<sup>16</sup> “We must keep on strengthening the Party’s ability to lead politically, to guide through theory, to organize the people, and to inspire society, thus ensuring that the Party’s great vitality and strong ability are forever maintained.”<sup>17</sup> It is to that end that the governance reforms implicit in the “New Era” thinking, “The Thought on Socialism with Chinese Characteristics for a New Era and the Basic Policy”, are elaborated.<sup>18</sup>

The 19th Congress of the Chinese Communist Party announced a program of potentially significant development of its constitutional model. The changes required adjustment of the two great instruments of Chinese political legitimacy--first, the

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<sup>12</sup> *Id.* National Rejuvenation was elaborated. *Id.* at 11-14. Rejuvenation “is designed to hark back to and move on a century of hardship and humiliation, utilising the master narrative of Chinese nationalism to harness Chinese identity and nation-building.” Peters, *supra* note 9, at 1302, 1303.

<sup>13</sup> Jinping, *supra* note 7, at 10.

<sup>14</sup> Larry Catá Backer, *Constitutional Reform Comes to the Chinese State Constitution and Changes to China’s Global Trade Relationships*, L. AT THE END OF THE DAY (Jan. 15, 2018), <http://lcbackerblog.blogspot.com/2018/01/constitutional-reform-comes-to-chinese.html>.

<sup>15</sup> *Id.* at 10-11.

<sup>16</sup> This idea found expression in the RESOLUTION OF THE 19TH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA ON THE REVISED CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Oct. 24, 2017) (hereinafter “Resolution”), [http://news.xinhuanet.com/english/2017-10/24/c\\_136702726.htm](http://news.xinhuanet.com/english/2017-10/24/c_136702726.htm). The Resolution provided, in part that “The Congress holds that the leadership of the Communist Party of China is the most essential attribute of socialism with Chinese characteristics, and the greatest strength of this system; the Party exercises overall leadership over all areas of endeavor in every part of the country.” *Id.* The Resolution provided, in part that “The Congress holds that the leadership of the Communist Party of China is the most essential attribute of socialism with Chinese characteristics, and the greatest strength of this system; the Party exercises overall leadership over all areas of endeavor in every part of the country.” *Id.*

<sup>17</sup> Jinping, *supra* note 7, at 14.

<sup>18</sup> *Id.* at 15-23. For an interesting analysis, see Son Daekwon, *Xi Jinping Thought Vs. Deng Xiaoping Theory: Xi’s “new era” will see some of Deng’s famous maxims altered, if not discarded altogether*, THE DIPLOMAT (Oct. 25, 2017), <https://thediplomat.com/2017/10/xi-jinping-thought-vs-deng-xiaoping-theory/>.

constitution of the vanguard Party, the holder of political leadership, and second, from that the modification of the constitution of the administrative state to conform its organization and operation, to ensure that the principles through which it is operated, conforms to that of the political constitution of the vanguard party.<sup>19</sup>

The CPC moved quickly to implement the recommendations of the 19<sup>th</sup> CPC Congress Report. At the close of the 19<sup>th</sup> CPC Congress it adopted a Resolution,<sup>20</sup> to amend the Constitution of the CPC<sup>21</sup> to incorporate the thrust of the ideological changes and principles elaborated in the 19<sup>th</sup> CPC Congress Report. In January 2018, the CPC also announced that the central element of its 2<sup>nd</sup> Plenum<sup>22</sup> was to consider and adopt corresponding amendments to the 1982 State Constitution.<sup>23</sup> That transposition of the work of the CPC into the CPC and State Constitutions evidence the thrust of the Chinese legal-political system, one grounded on the CPC as polity, the CPC Constitution as the expression of binding ideology of that polity, and the state constitution as its expression.<sup>24</sup> The CPC Constitution organizes the government of politics; the State Constitution organizes the government of state, and both under the leadership of the CPC in its vanguard role.

The relationships among these actors and what they might suggest about the evolving theories of Chinese constitutionalism were an object of consideration during the course of a Round Table<sup>25</sup> held shortly after the conclusion of the 19<sup>th</sup> Congress.<sup>26</sup> In the course of the proceedings, the speakers collectively wondered<sup>27</sup>

<sup>19</sup> Backer, *supra* note 14.

<sup>20</sup> RESOLUTION, *supra* note 16.

<sup>21</sup> CONSTITUTION OF THE COMMUNIST PARTY OF CHINA REVISED AND ADOPTED AT THE 18TH CPC NATIONAL CONGRESS REVISED AND ADOPTED AT THE 19<sup>TH</sup> NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA (Oct. 24, 2017) (“CPC Constitution”), available at <http://www.china.org.cn/20171105-001.pdf>.

<sup>22</sup> 中共中央政治局召开会议 讨论拟提请十九届二中全会审议的文件 中共中央总书记习近平主持会议, [http://www.xinhuanet.com/politics/leaders/2018-01/12/c\\_1122250299.htm](http://www.xinhuanet.com/politics/leaders/2018-01/12/c_1122250299.htm); see also *Explainer: China to Amend the Constitution for the Fifth Time*, NCP OBSERVER (Jan. 25, 2017), <https://npcobserver.com/2017/12/27/explainer-china-to-amend-the-constitution-for-the-fifth-time/>.

<sup>23</sup> XIANFA (1982) (revised through Mar. 14, 2004), available at [http://english.gov.cn/archive/laws\\_regulations/2014/08/23/content\\_281474982987458.htm](http://english.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987458.htm).

<sup>24</sup> Discussed in Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT’L L.J. 331 (2012). This builds and elaborates the classical Leninist notion of the relationship between state, Party and constitution: “the state constitution is by and large a codification of the crucial elements of the communist party program.” Chris Osakwe, *The Common Law of Constitutions of the Communist-Party States*, 3 REV. SOCIALIST L. 155, 161 (1977).

<sup>25</sup> *Roundtable on the Implications of the 19<sup>th</sup> Congress of the Chinese Communist Party*, PA. STATE UNIV. SCH. OF INT’L AFFAIRS, (Nov. 3, 2017), [http://www.thecepe.org/?page\\_id=575](http://www.thecepe.org/?page_id=575).

<sup>26</sup> The Communist Party Congress is “a twice-per-decade event to set the party’s national policy goals and elect its top leadership.” BROOKINGS INSTITUTE, *supra* note 2. “China’s Communist Party has held congresses since its foundation. The first was in 1921. But the practice of quinquennial gatherings dates to Deng Xiaoping’s attempts in the 1980s to introduce a sense of order and predictability after the chaos of the Cultural Revolution.” J.P., *supra* note 6. For English language CPC sources on the 19<sup>th</sup> CPC Congress, see 19th CPC Congress, <http://www.xinhuanet.com/english/special/19cpcnc/index.htm>.

<sup>27</sup> See *Roundtable*, *supra* note 25.

about the extent and character of the evolution of CPC thinking, and the CPC Basic Line, with respect to Socialist Rule of Law and Socialist Constitutionalism. The question arose in the context of a discussion around the question of the extent to which – the 19<sup>th</sup> CPC Report delivered by Xi Jinping<sup>28</sup> and the resulting final Resolution of the 19<sup>th</sup> Congress<sup>29</sup> reflected a downshifting of the importance of the state constitution and constitutionalism in general from the Basic Line of the CPC itself. A related question arose around the effects of any such downshift on the relation between the state and the political constitutions of China. To that end, it is worth considering whether principles of constitutionalism for the “New Era” may be extracted from the sum of Xi Jinping’s Report to the 19<sup>th</sup> Congress. What follows, then is a preliminary report and assessment of Constitutionalism with Chinese Characteristics in the New Era from Out of the 19<sup>th</sup> CPC Report. What follows is a preliminary report and assessment of Constitutionalism with Chinese Characteristics in the New Era from Out of the 19<sup>th</sup> CPC Report.

After this short introduction to the issues and context of Chinese constitutionalism before the 19<sup>th</sup> Congress, Section II provides a contextual framework for situating the constitutional work of the 19<sup>th</sup> CPC Congress within contemporary Chinese currents of constitutional theory. Section III then explores the references to notions of constitution in earlier CPC Congress Reports. Section IV then turns to the consideration of the constitution project for China in the “New Era.” It first considers in more detail the understanding of constitution and its role in politics and governance within the 19<sup>th</sup> CPC Congress Report itself. It then explores the role of constitutionalism within the structures of the 19<sup>th</sup> CPC Congress Report through a close reading of the specific references to constitutions in the Report (state, political and mixed). Lastly it provides a concise consideration of the connection between constitutionalism and the emerging characteristics of Chinese consultative democracy.

That analysis is grounded in the principle that Chinese constitutionalism cannot be understood as limited to or flowing from the state constitution—an almost entirely Western misreading of the path of constitutionalism in China. Recent scholarship has increasingly suggested the centrality of the CPC to the study of constitutionalism in China, my own work included.<sup>30</sup>

To explain contemporary China, one cannot avoid the CCP, the most important political actor in the country ever since the People’s Republic of China was established in 1949. The CCP,

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<sup>28</sup> Jinping, *supra* note 7.

<sup>29</sup> RESOLUTION, *supra* note 16.

<sup>30</sup> See, e.g., RICHARD MACGREGOR, THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS (Harper Perennial 2010); ZHENG, YONGNIAN, THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION, AND TRANSFORMATION (Routledge, 2010); DAVID L. SHAMBAUGH, CHINA’S COMMUNIST PARTY: ATROPHY AND ADAPTATION 103-161 (Woodrow Wilson Press 2008); KJELD ERIK BRØDSGAARD, ZHENG YONGNIAN, EDs., THE CHINESE COMMUNIST PARTY IN REFORM (Routledge 2006); Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The “Three Represents”), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 29 (2006-2007).

however, has been marginalized in our scholarly research both within and outside China in recent decades when the focus of research on China has shifted to non-party actors such as the state and society.<sup>31</sup>

The CPC continues to play a central role in the development of constitutional norms and their connection with constitution making with Chinese characteristics. This essay provides a small window on the dynamic evolution of Chinese constitutionalism, the central importance of Chinese (rather than Western) political normative context for that development, and the specific shape of emerging constitutional doctrine in what the CPC itself has declared to be a “New Era.” What now clearly emerges is not radical change but rather an important shift in the explicit recognition of the constitutional role of the vanguard party as the center of legitimate political expression, and of the state constitution as the means through which that expression is manifested in the operation of the state. Though it has important roots in traditional socialist constitutionalism,<sup>32</sup> the refinements and developments of Marxist and Leninist theory represents a substantial advance requiring careful study in its own right.

#### I. CONSTITUTIONS AND CONSTITUTIONALISM IN CHINA: A BRIEF BACKGROUND

The debates around constitution and constitutionalism in China revolve around two constitutions instruments, the State Constitution and the CPC Constitution. When the People’s Republic of China was founded in October 1949, there was not a formal constitution of the state.<sup>33</sup> The Common Program of Chinese People’s Political Consultative Conference served as the de facto constitution of the state during the early years of the new country.<sup>34</sup> Five years later, the first constitution of the People’s Republic of China came into existence in the first National People’s Congress in September 1954. This constitution has four chapters with the first one being the general program and the other three chapters each elaborating the institution of the state, the basic rights and obligations of the citizens, and the flag, emblem and the capital of the state.<sup>35</sup> This structure was fixed till today even though the constitution of the state has already been revised and enriched. As mentioned in

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<sup>31</sup> ZHENG, YONGNIAN, *THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION, AND TRANSFORMATION* xiv (Routledge, 2010).

<sup>32</sup> See Osakwe, *supra* note 24, at 162.

<sup>33</sup> This is not to suggest the absence of a constitutional tradition before 1949. It was clear both that the CPC had been adept at self-organization and producing its general program, including the organization and discipline of its cadres from well before the start of the Japanese War. At the same time, as the CPC gained territory during the 1930s and early 1940s, those districts were also organized along the lines of Soviet style republics, including the development of law and judicial organs. See, e.g., Shao Chuan Leng, *Pre-1949 Development of the Communist Chinese System of Justice*, 30 *CHINA Q.* 93-114 (1967).

<sup>34</sup> Common Program of Chinese People’s Political Consultative Conference. Sept. 1949. Beijing, available at <http://www.cppcc.gov.cn/2011/09/06/ART11315304517625199.shtml> (only Chinese Version Officially Posted).

<sup>35</sup> XIANFA (1954), available at [http://www.npc.gov.cn/wxzl/wxzl/2000-12/26/content\\_4264.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/26/content_4264.htm) (only Chinese Version Officially Posted).

its prologue, the constitution of the state was based on the Common Program of Chinese People's Political Consultative Conference in 1949 with some development.<sup>36</sup>

This Constitution of the State was replaced by new one in the Fourth National People's Congress in January 1975. A product of the ideologies of the Cultural Revolution, it reflected a focus on class struggles and continued revolution (继续革命).<sup>37</sup> Three years later, it was again replaced.<sup>38</sup> The constitution of the state enacted in 1978 was a transitional constitution which sought to move away from what were now viewed as the normative defects in the state constitution then in effect. It is important to remember that the 1978 Constitution might be understood as a reboot bringing the organs of State and Party back to a common constitutional default position. To that end, it reproduced significant portions (and the approaches) of the 1954 Constitution. But by 1978, conditions had changed in China and the facts of that development and the lessons learned from the period 1954-1978 suggested that China had moved substantially beyond the conditions of 1954 and it was expected that a more permanent constitution was needed to express the developments of Marxism and Leninism with Chinese characteristics in this "new era", an era that would bear the stamp of Dong Xiaoping.

The current Constitution of the People's Republic of China was enacted in the Fifth Conference of the Fifth National People's Congress 1982. It adequately elaborated the fundamental institutions of the state, affirmed the protection of the citizen's basic rights. Unlike the previous constitutions, the 1982 Constitution gave greater prominence to the chapter of the citizen's basic rights and obligations over the chapter of the institution of the state. This is the first time in the history of the constitution of the state and marked the advance of the protection of the citizen's basic rights, including rights to property. The relatively ample and precise articles in the third chapter, the chapter of the institution of the states showed a well-rounded institutional structure of the state. Moreover, the constitution of the state (1982) added the national anthem into the last chapter.<sup>39</sup> The constitution of the state in 1982 was a production of all lessons Chinese people have learned during more than three decades of exploration in making a constitution of the state. It turned out to be a good constitution of the state and served its role till today even though it experienced four amendments in 1988, 1993, 1999, and 2004 in accordance with the needs of the development of the time.

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<sup>36</sup> *Id.* (“这个宪法以 1949 年的中国人民政治协商会议共同纲领为基础，又是共同纲领的发展。”) (“zhè ge xiàn fǎ yǐ nián de zhōng guó rén mín zhèng zhì xié shāng huì yì gòng tóng gāng lǐ ng wéi jī chǔ yòu shì gòng tóng gāng lǐng de fā zhǎn.”)

<sup>37</sup> XIANFA, PREFACE (1975), available at [http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content\\_4362.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4362.htm) (only Chinese Version Officially Posted).

<sup>38</sup> XIANFA (1978), available at [http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content\\_4365.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4365.htm) (only Chinese Version Officially Posted).

<sup>39</sup> XIANFA (1982), available at <http://www.people.com.cn/GB/shehui/1060/2391834.html> (only Chinese Version Officially Posted).

The CPC Constitution has had a longer and perhaps more complex history. When the Communist Party of China was established in 1921, it passed the Programme of the Communist Party of China (中国共产党纲领) on its first national congress.<sup>40</sup> The Programme included basic guiding principles of the party's goal, operation, and organization. It served as the constitution of the party for one year until the second national congress of the party passed the Constitution of the Communist Party of China in July 1922.<sup>41</sup> The first five chapters of the party's constitution each addressed the issues of members, organization, meetings, discipline, and funding, the sixth and last chapter provided two supplementary provisions including the right to amend the party's constitution and the date it comes into effect.<sup>42</sup> This structure of the party's constitution lasted for around five years even though some minor amendments were made in the third<sup>43</sup> and fourth national congresses.<sup>44</sup>

An overhaul of the party's constitution officially referred to as the third amendment to the constitution of the party, took place during the 5<sup>th</sup> CPC Congress in June 1927<sup>45</sup>. The contents of the party's constitution doubled by being expanded from 6 chapters to 12 chapters. Besides three chapters of members, discipline and funding which remained basically the same, the part of the organization was expanded to 7 chapters consisting of one chapter of the articles of Party building (党的建设) and others elaborating specific regulations of each level of the organization and the supervision committee. The new chapter of the supervision committee set up the supervision organs within the party for the first time. Moreover, a new chapter of Party Groups (党团, a group of party members in the organization other than the party which aims at intensifying the party's influence to non-party masses) was also created in this amendment. The last chapter of supplementary provisions was also replaced by a chapter elaborating the party's relationship with the Communist Youth League. Even though some changes were made to the party's constitution in the 6<sup>th</sup>

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<sup>40</sup> THE PROGRAMME OF THE COMMUNIST PARTY OF CHINA (July 23, 1921, Jiaying, Zhejiang), available at <http://cpc.people.com.cn/GB/64162/64168/64553/4427945.html> (only Chinese Version Officially Posted).

<sup>41</sup> CONSTITUTION OF THE COMMUNIST PARTY OF CHINA, (July 16, 1922), available at <http://cpc.people.com.cn/GB/64162/64168/64554/4428163.html> (only Chinese Version Officially Posted).

<sup>42</sup> CONSTITUTION OF THE COMMUNIST PARTY OF CHINA art. 28 and 29 (July 16, 1922), available at <http://cpc.people.com.cn/GB/64162/64168/64554/4428163.html> (only Chinese Version Officially Posted).

<sup>43</sup> THE FIRST AMENDMENT TO THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (July 1923, Guangzhou), available at <http://cpc.people.com.cn/GB/64162/64168/64555/4428213.html> (only Chinese Version Officially Posted).

<sup>44</sup> THE SECOND AMENDMENT TO THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Feb. 1925, Shanghai), available at <http://cpc.people.com.cn/GB/64162/64168/64556/4428256.html> (only Chinese Version Officially Posted).

<sup>45</sup> THE THIRD AMENDMENT TO THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (June 1, 1927, Wuhan), available at <http://cpc.people.com.cn/GB/64162/64168/64557/4428293.html> (only Chinese Version Officially Posted).

CPC Congress,<sup>46</sup> the structure of the CPC Constitution remained substantially unchanged until 1945.

In June 1945, for the first time the general program was included in the constitution of the party above all the other chapters in the 7<sup>th</sup> national congress of the Communist Party of China. Since then, the general program as the statement of political ideologies and principles has been the most important part of the constitution of the party. Apart from the general program, the structure of the constitution of the party was relatively stable, consisting of four main parts: the members, organization which consists of several chapters with one describing the general organization and others elaborating specific regulations of each levels of organization and the supervision organs, the party groups (“党组”, formerly referred to as “党团”) in other organizations, discipline, and funding.<sup>47</sup> The 8<sup>th</sup> national congress of the Communist Party of China basically followed the structure set by the 7<sup>th</sup> national congress but omitted the chapter of funding which added the chapter of the party's relationship with the Communist Youth League.<sup>48</sup>

During the cultural revolution period, the constitution of the party witnessed significant shrinkage in the 9<sup>th</sup> national congress in 1969<sup>49</sup> and the 10<sup>th</sup> national congress in 1973.<sup>50</sup> The shrinkage was marked by the simplification of structure or to put it in another way, the drop of a number of chapters. The 9<sup>th</sup> and 10<sup>th</sup> national congress passed the constitution of the party with only 6 chapters. The chapters of supervision organs, discipline, funding, and relationship with the Communist Youth League were omitted, leaving the general program, chapters of members and organizations. The articles of the principle of intra-party democracy and collective leadership were deleted and the articles of intra-party supervision committee were also missing. The party's constitution during in this time departed from the guidelines set by the party's constitution in the 8<sup>th</sup> national congress and mistakenly focused on class struggle (阶级斗争) and demonstrated cult of personality. The 11<sup>th</sup>

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<sup>46</sup> THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (June 1928, Moscow), available at <http://cpc.people.com.cn/GB/64162/64168/64558/4428362.html> (only Chinese Version Officially Posted). What's worth noticing is that the 6<sup>th</sup> national congress of Communist Party was held in Moscow in 1928 and significantly emphasized the leadership of the Communist International.

<sup>47</sup> THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (June 1945, Yanan), available at <http://cpc.people.com.cn/GB/64162/64168/64559/4442095.html> (only Chinese Version Officially Posted).

<sup>48</sup> THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Sept. 1956, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64560/65452/6412169.html> (only Chinese Version Officially Posted).

<sup>49</sup> THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Apr. 1969, Beijing) available at <http://cpc.people.com.cn/GB/64162/64168/64561/4429444.html> (only Chinese Version Officially Posted).

<sup>50</sup> THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Aug. 1973, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64562/65450/4429427.html> (Only Chinese Version Officially Posted).

national congress in 1977<sup>51</sup> made some revisions to the constitution of the party such as including democratic centralism (民主集中制) and partially recovered the intra-party supervision organs.<sup>52</sup> But it continued to recognize the wrong theories of Cultural Revolution and the political lines set by the party's constitution passed in the 9<sup>th</sup> and 10<sup>th</sup> national congress. The mistakes of a cultural revolution were not thoroughly corrected until the Third Plenary Session of the 11th Central Committee of the Chinese Communist Party in 1978.

In 1982, the constitution of the party expanded back to 10 chapters in the 12<sup>th</sup> national congress of the Communist Party of China and set a stable structure of the constitution.<sup>53</sup> The general program was still the first and most important part of the constitution of the party, it elaborated the general guiding principles and political ideologies of the party and stated the general tasks and the focus of the party's work at the current stage. Some critical domestic issues such as national unification and the party's stance in international affairs were also addressed in the general program. Since the 12<sup>th</sup> CPC Congress, the basic layout of the general program of the party's constitution has been fixed and each national congress after the 12<sup>th</sup> has revised but not otherwise changed the framework. These changes are significant—incorporating the evolution of Marxist Leninist principles in the Chinese context and providing the constraining basis for political choices in the form of the Basic Line of the CPC. Other chapters each addressed different aspects of members, organizations (consists of four chapters each elaborates the party's system of organization, the party's central, local and grass-roots organizations), cadres, discipline and discipline inspection organs, party groups in other organizations, and the relationship with the Communist Youth League. Since the 16<sup>th</sup> CPC Congress,<sup>54</sup> the CPC Constitution added a new chapter especially for the emblem and the flag of the party. This structure of the party's constitution has been strictly followed by each national Congress since 1982 even though some revisions and enrichments may be made in every Congress.<sup>55</sup>

There is a rich literature on Chinese constitutionalism that has grown around these instruments, but especially the State constitution.<sup>56</sup> There are a number of

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<sup>51</sup> THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Aug. 1977, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64563/4441865.html> (only Chinese Version Officially Posted).

<sup>52</sup> The Constitution of the Communist Party of China art. 8 & 13 (Aug. 1977, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64563/4441865.html> (only Chinese Version Officially Posted).

<sup>53</sup> THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Sept. 1982, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64565/65448/6415129.html> (only Chinese Version Officially Posted).

<sup>54</sup> THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (Nov. 2002, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64569/65444/4429114.html> (only Chinese Version Officially Posted).

<sup>55</sup> The latest Constitution of the Communist Party of China was amended on October 24, 2017 in the 19<sup>th</sup> National Congress of the Communist Party of China, full text available at [http://www.xinhuanet.com/politics/19cpcnc/2017-10/28/c\\_1121870794.htm](http://www.xinhuanet.com/politics/19cpcnc/2017-10/28/c_1121870794.htm) (Only Chinese Version Officially Posted).

<sup>56</sup> Constitutionalism has been an important element of Chinese debate since the founding of the PRC. See, e.g., Changchang Wu, *Debates on constitutionalism and the legacies of the cultural revolution*, 227 CHINA Q. 674–96 (2016). The strong pre-1949 antecedents of Chinese constitutionalism ought not to be ignored. Glenn Tiffert notes:

schools that have evolved around the issue of constitutionalism within Marxist Leninist states (in general) and Marxism Leninism with Chinese characteristics (in particular) especially in the period from the time of the leadership of Jiang Zemin,<sup>57</sup> which also sparked Western attention during the early period of Xi Jinping's leadership.<sup>58</sup> Dismissing as entirely unhelpful the wealth of Western engagements with Chinese Marxist Leninist constitutionalism—precisely because at their base this literature starts from the presumption of illegitimacy and the premise that constitutionalism and Marxism Leninism is an oxymoron (and thus tell us more about the state of Western self-conceptions than of the object studied)—most commentators on the rich and quite dynamic evolution of constitutionalism in China break down into *roughly* three groups.<sup>59</sup> For ease of reference these may be identified as a political constitutionalism, a legalist constitutionalism, and an evolutionary constitutionalism (others sometimes tend to use the more contextually political descriptors—left, right and center constitutionalism).

*Political constitutionalism* refers *roughly* to a very broad spectrum of schools that center politics within normative (sometimes binding but not necessarily legal) parameters. These range from variations of the classical European Marxist approach that eschews any role for rules and norms and equates constitutionalism with the

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The tendency in both China and abroad to treat contemporary Chinese law as discursively, even genetically, distinct from its Imperial, Republican or Maoist antecedents is therefore arresting. That many present reformers and observers of Chinese law are better versed in Jellinek, Vyshinsky, and Posner than in Shen Jiaben, Yang Zhaolong, and Zhang Youyu begs discomfiture, as does the paradox of their reluctance to take China's legal heritage seriously while simultaneously grappling with its normative and institutional legacies.

Glenn D. Tiffert, *Epistrophy: Chinese Constitutionalism and the 1950s*, eSCHOLARSHIP.ORG (University of California Digital Library) (Sept. 29, 2009), <https://escholarship.org/uc/item/0rm248nk>. On my view of constitutionalism, see Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PA. ST. L. REV. 671 (2009).

<sup>57</sup> See, e.g., "In 2003, an official document issued by the general office of the central agency of CPC brought about a debate on constitutional government." Zhiwei Tong, "Two Issues on Constitutional Government in China" p. 1 discussed in Larry Catá Backer, *Considering Zhiwei Tong's Essay, "Two Issues on Constitutional Government in China"*, L. AT THE END OF THE DAY (Apr. 7, 2014), <http://lcbackerblog.blogspot.com/2014/04/considering-zhiwei-tongs-essay-two.html#more>.

<sup>58</sup> See, e.g., Joseph Fewsmith, *Debating Constitutional Government*, 42 CHINA LEADERSHIP MONITOR 1, 1, (2013); Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the "Urgency" of Political Reform*, 11 U. OF PA. ASIAN L. REV. 337 (2016), <http://scholarship.law.upenn.edu/alr/vol11/iss3/1>; Rogier Creemers, *China's Constitutionalism Debate: Content, Context, and Implications*, 74 CHINA J. 91-109 (2015).

<sup>59</sup> The taxonomy of schools of Chinese constitutionalism, like Chinese constitutionalism itself, remains highly contested. See, e.g., WEN-CHEN CHANG AND DAVID S. LAW, *CONSTITUTIONAL DISSONANCE IN CHINA* (2017) Wash. U. in St. Louis Legal Studies Research Paper No. 17-03-03, University of Hong Kong Faculty of Law Research Paper No. 2017/008 (24 Sept. 2017) (three camps on whether or to what extent China has embraced constitutionalism, an explicitly skeptical camp, a making progress camp, and a varieties-of-constitutionalism camp).

political program of the vanguard party,<sup>60</sup> to variations on approaches that center politics within constitutions, especially a dual constitutionalism with a political constitution centered on the normative constraints on vanguard party leadership and an administrative constitution through which policy is implemented.<sup>61</sup> At one extreme it preserves old approaches that embrace a perspective suspicious of Western notions of constitutionalism and of any constitutional project as a device for the preservation of class exploitation.<sup>62</sup> At the other end it suggests a development of Marxist Leninism that sees in constitutions an important device for the expression of collective leadership.<sup>63</sup>

*Legalist constitutionalism* refers *roughly* to a very broad spectrum of schools that seeks to de-center the political element in favor of a legal framework for ordering politics and the state. These approaches can vary from those that would posit state constitutional supremacy governs all political organs, even if the political organs themselves are responsible for the state constitution's provisions, to variations on notions of the autonomy of the state constitution to which all other institution creating governance systems are bound.<sup>64</sup> Legalist constitutionalism tends to draw attention to the State Constitution as the centering element of the institutionalization of power, even as in some variations, it concedes the authority of the CPC as the

<sup>60</sup> See, e.g., Zheng Zhixue (郑志学), Renqing Xianzheng de Benzhi (清宪政的本质) [Recognizing the Essential Nature of Constitutionalism], Dangjian (党建) [Party Constructs] (May 29, 2013), <http://theory.people.com.cn/n/2013/0529/c83855-21652535.html>.

<sup>61</sup> On my view of Chinese constitutionalism, see, e.g., Larry Catá Backer, *Towards a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism*, 40(2) MOD. CHINA 168 (2014); Larry Catá Backer, *Jiang Shigong 强世功 on "Written and Unwritten Constitutions" and Their Relevance to Chinese Constitutionalism*, 40 MOD. CHINA 119 (2014); Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30(1) B.U. INT'L L.J. 331 (2012).

<sup>62</sup> See, e.g., Yang Xiaoqing (杨晓青), Xianzheng Yu Renmin Minzhu Zhidu Zhi Bijiao Yanjiu (宪政与人民民主度之比较研究) [Comparative Research on Constitutionalism and People's Democratic System], Hongqi Wengao (红旗文稿) [RED FLAG MANUSCRIPTS] (May 22, 2013), [http://www.qstheory.cn/hqwg/2013/201310/201305/t20130521\\_232618](http://www.qstheory.cn/hqwg/2013/201310/201305/t20130521_232618); Wang Tingyou (汪亭友), Dui Xianzheng Wenti de Yixie Kanfa (对宪政问题的一些看法) [A Few Thoughts on the Problem of Constitutionalism], Hongqi Wenzhai (红旗文摘) [RED FLAG MANUSCRIPTS] (June 12, 2013), [http://news.xinhuanet.com/politics/2013-06/09/c\\_124840106.htm](http://news.xinhuanet.com/politics/2013-06/09/c_124840106.htm).

<sup>63</sup> See, e.g., Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 MOD. CHINA 12 (2010); Larry Catá Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30(1) B.U. INT'L L.J. 331 (2012); Andrew Peng, *Sinicized Marxist Constitutionalism: Its Emergence, Contents, and Implications*, 2(1) GLOBAL DISCOURSE 83 (2011).

<sup>64</sup> Baogang He, *Socialist Constitutionalism in Contemporary China*, in CONSTITUTIONALISM BEYOND LIBERALISM (Michael Dowdle and Michael A. Wilkinson, eds., Cambridge U. Press, 2017); Hua Bingxiao (华炳啸), Lun Fanxianzheng de Wuchi yu Qienuo: Huiying Fanxianzheng Guandian Xilie Zhi Er (论反宪政的无耻与怯懦: 回应反宪政观点系列之二) [On the Shamelessness and Gutlessness of the Anti-Constitutionalist Faction: Responding to the Anti-Constitutionalist Views, Part Two in a Series], Hua Bingxiao De Boke (华炳啸的博客) [Hua Bingxiao Blog] (July 8, 2013), <http://huabingxiao.blog.caixin.com/archives/58851>.

primary source of political legitimacy.<sup>65</sup> Another variation sees in instruments like the State Constitution an expression of delegation of authority from the political collective to the institutional apparatus of the state,<sup>66</sup> sometimes with a focus on judicial authority.<sup>67</sup>

*Evolutionary constitutionalism* refers roughly to a spectrum of approaches that inevitably centers people over vanguard and governmental constitutionalism over Party.<sup>68</sup> These schools tend to see Chinese constitutionalism as a process that will or should move toward structures in which the role of the vanguard party is diminished and a direct relationship between the masses and the organs of government are solidified, sometimes through law and sometimes through institutionalized politics.<sup>69</sup> Just as elements of political constitutionalism draw on old models of Soviet Marxist Leninism, variants of evolutionary constitutionalism draw on notions of Western liberal constitutionalism which sees as the inevitable end of the process of political life in China a move toward a form of Western style democratic republicanism.<sup>70</sup>

Beyond the fairly obvious differences among these vibrant schools of constitutionalism one might point to some points of commonality. All of these schools start from or argue against a set of central documents—constitutions—even as each of them approach those documents differently, as law, politics or transitional devices. Each of them focus on the relationship among constitutional documents, law and politics. Among the most interesting developments of Chinese constitutionalism have been the mutability of these terms within a constellation of regulatory techniques that are themselves fluid. What had been a central element of constitutionalism, however, was a fidelity—within this fluid universe of meaning and uncertainty of normative orthodoxy—the idea of law and rule of law as a mechanics (process and protection against arbitrary activity and personal or institutional abuse), the binding element of law and the cage of regulation to bind officials, and of rule systems to constrain the institutional operationalization of politics. There was a measure of quite conscious ambiguity respecting the supremacy of law—within its jurisdiction. But the scope of that jurisdiction remained unclear with respect to the vanguard party.

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<sup>65</sup> Tong Zhiwei, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, 53(3) SUFFOLK L. REV. 669 (2010); Zhiwei Tong (童之伟) Series: Reform of the Political System Should Start with the Party Constitution rather than the Constitution, in *Law at the End of the Day* (April 14, 2012), <http://lbackerblog.blogspot.com/2012/04/part-xxviiizhiwei-tong-series-reform-of.html>.

<sup>66</sup> Albert H.Y. Chen, *Toward A Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, in *RULE OF L.: PERSP. FROM THE PAC. RIM* 13, 13–51 (2000).

<sup>67</sup> See, e.g., Hualing Fu, *Access to Justice and Constitutionalism in China*, in *BUILDING CONSTITUTIONALISM IN CHINA* 163 (Stéphanie Balme & Michael W. Dowdle eds., 2009)

<sup>68</sup> See, e.g., Killion, M. Ulric, *China and Neo-Liberal Constitutionalism*. 3 *GLOBAL JURIST FRONTIERS* (2003), <https://ssrn.com/abstract=512983>; see also, He Li, *Debating China's Economic Reform: Liberals vs. New Leftists*, 15(1) *J. OF CHINESE POL. SCI.* 1–23 (2010).

<sup>69</sup> See, e.g., Samson Yuen, *Debating Constitutionalism in China: Dreaming of a Liberal Turn*, 2013/4 *CHINA PERSPECTIVES* 67 (2013), <http://journals.openedition.org/chin perspectives/6325>.

<sup>70</sup> For an interesting analysis in the Asian context, see Albert H.Y. Chen, *Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations*, 8(4) *I-CONN* 849 (2010).

And in any case, it was also clear that two regulatory systems might coexist—an administrative system lodged in state institutions and the overarching institutional rule system of the vanguard party. But was the political constitution of the CPC itself law? And what was the relationship between the political constitution of the CPC and the state constitution? These were the issues that tended to separate the various schools of constitutionalism in China. But what united them was recognition that constitutions were central to the administration of the state and the CPC apparatus, and both appeared to be at the center of both the CPC Basic Line<sup>71</sup> and the heart of the administrative constitutional order. However one approaches the issue of the validity of this emerging system for purposes of constitutional legitimacy, what becomes clear is that Chinese constitutionalism cannot be approached as a variant of a Western project grounded in the fundamental premise that the constitution of a state represents the culmination of a process of managing all of the *political* authority of sovereign power through a government to which such authority is delegated (however it might be divided within this apparatus). Political and administrative power is fused in the West and exercised through government in accordance with the constitution through which it is constituted. In China that is impossible given the Leninist logic of its own fundamental organization. Political authority and administrative obligation are two related but separate spheres of authority. Both might require the cage of regulation to ensure against arbitrary usurpation by individuals but when exercised collectively the political authority vested in the leading party is constrained by its own constitution even as that of the government is articulated through a state constitution that expresses the political values and objectives of the political constitution.

## II. THE NOTION OF STATE, PARTY, AND CONSTITUTION AS IDEA AND PRACTICE BEFORE THE “NEW ERA”

Well before the engagement with constitutions in the 19<sup>th</sup> CPC Congress, the CPC has had a long history of consideration of the concept and role of constitutions in the development of the productive forces of politics and the institutions of state in China. It is useful, then, to consider the way that the CPC’s focus on constitutions has developed along with its expression in the construction of Chinese constitutionalism. For that purpose, and to develop a rough baseline, it was useful to consider the extent to which the CPC Congress reports before that of the 19<sup>th</sup> CPC Congress mentioned the word constitution either with reference to the State

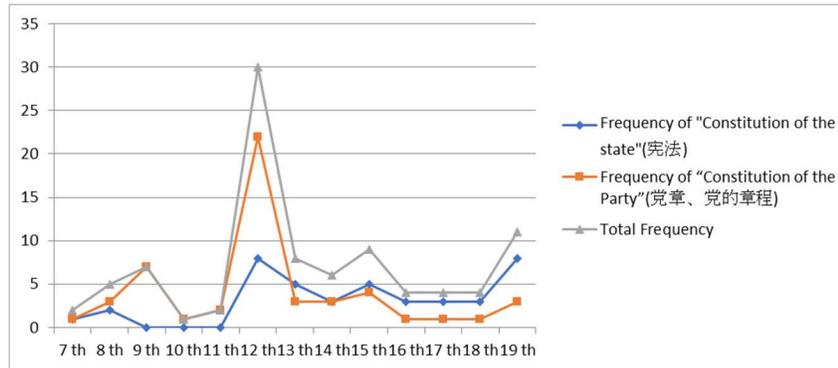
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<sup>71</sup> The CPC Basic Line is drawn from the General Program of the Constitution of the Chinese Communist Party (amended through 2012), available at <http://china.usc.edu/constitution-communist-party-china#GEN>:

The basic line of the Communist Party of China in the primary stage of socialism is to lead the people of all ethnic groups in a concerted, self-reliant and pioneering effort to turn China into a prosperous, strong, democratic, culturally advanced and harmonious modern socialist country by making economic development the central task while upholding the Four Cardinal Principles and the reform and opening up policy.

CPC Const. Gen. Program.

Constitution or to the CPC Constitution (appearing in the Chinese original as 宪法 or 章程 and its variation 党章).



**Figure 1** Frequencies of the term "constitution of the state" and "constitution of the party" in reports to each national congress of CPC<sup>72</sup>

#### A. *Before 1949*

During the period in which the CPC functioned as a revolutionary vanguard (rather than as a ruling party) before the establishment of the People's Republic of China in 1949, the CPC did not focus on constitution as document or idea in the formulation of its basic line—its core principles and guiding norms. That was true both for the notion of constitution as a means of constituting the CPC itself, or at some future point, the administrative apparatus of the state. During this stage, the roles of the CPC as a revolutionary and vanguard force, and the constitution of a state apparatus, were seen as a site through which the transformation of the nation could be effectuated and in which the leading elements of the nation could be incorporated in the process of establishing socialism in China.<sup>73</sup> Initially, the focus was on the creation of temporary hybrids—a republic “under the joint dictatorship of several revolutionary classes.”<sup>74</sup> The notion was to distinguish between the problem of the state and the problem of the normative foundation toward which the nation was to be guided under the leadership of the leading Leninist party.<sup>75</sup>

<sup>72</sup> As mentioned above, only reports to congresses since the 7<sup>th</sup> are included because the first appearance of the term constitution (either of the state or the party) was in the report to the 7<sup>th</sup> congress and in fact the report to the 7<sup>th</sup> congress was the first political report of its kind in the history of CPC.

<sup>73</sup> MAO ZEDONG, ON NEW DEMOCRACY (Jan. 1940), available at <http://www.commonprogram.science/documents/on%20new%20democracy.pdf>.

<sup>74</sup> *Id.* (“The question under discussion here is that of the ‘state system’”).

<sup>75</sup> *Id.* (“A cultural revolution is the ideological reflection of the political and economic revolution and is in their service. . . So far as the orientation of our national culture is concerned, communist ideology plays the guiding role, and we should work hard both to disseminate socialism and communism

During this period of state and party building, the notion of a constitution as a cage within which either project could be structured and operated was seldom used. The party seldom, almost never, mentioned the word constitution (both the constitutions of the state and the party) as the focus of the party was still fighting imperialism, feudalism and bureaucrat capitalism in the new democratic revolution (新民主主义革命) before the establishment of the People's Republic of China in 1949.<sup>76</sup> For the constitution of the CPC itself, armed struggle was the major approach of the period of the new democratic revolution and with it a centering on the military discipline and orders of the army which largely served the role of a functional constitution of the party in that era.

The first appearance of the constitution (either the constitutions of the state or of the party) in CPC National Congresses Reports is in Mao Zedong's report to the 7<sup>th</sup> Congress in 1945. The 7<sup>th</sup> CPC Report provided the model used thereafter for reporting to the CPC Congress the form of which survives through the 19<sup>th</sup> CPC Congress Report. The 7<sup>th</sup> CPC Report referenced a state constitution once, but in a disparaging way. Mao used the idea of constitution as a device through which anti-revolutionary parties sought to protect their interests against the revolutionary classes—and on that basis, was suspect. Specifically the reference was embedded in a criticism of Kuomintang government dictatorship through constitution.<sup>77</sup> The report also mentioned the “constitution of the party” once to indicate that the party is open to cooperate, or “unite” as mentioned in the original text, with any comrade as long as he or she complies with the programme of the party and the constitution of the party.<sup>78</sup>

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throughout the working class and to educate the peasantry and other sections of the people in socialism properly and step by step. However, our national culture as a whole is not yet socialist.”)

<sup>76</sup> The New Democratic Revolution is commonly understood to embrace the period of revolutionary struggle by the CPC that is commonly thought to have started in 1919 (with is now called May 4<sup>th</sup> Movement) led to the establishment of the People's Republic in 1949. See New-Democratic Revolution (1919-1949), available at <http://www.china.org.cn/english/features/38072.htm>.

<sup>77</sup> Mao Zedong (Mao Tse-tung) on coalition government. The political report to the 7<sup>th</sup> NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA (Apr. 24, 1945, Yenan), available at <http://cpc.people.com.cn/GB/64162/64168/64559/4526988.html> (only Chinese version officially posted). (“不顾广大人民和一切民主党派的要求，一意孤行地召开一个由国民党反人民集团一手包办的所谓“国民大会”，在这个会上通过一个实际上维持独裁反对民主的所谓“宪法”，使那个仅仅由几十个国民党人私自委任的、完全没有民意基础的、强安在人民头上的、不合法的所谓国民政府，披上合法的外衣，装模作样地“还政于民”，实际上，依然是“还政”于国民党内的反人民集团。”) [“The dishonest way is to) disregard the demands of the masses and of all the democratic parties and to insist on convening a so-called national assembly stage-managed by the anti-popular clique in the Kuomintang and have it adopt a “constitution” which in practice will be anti-democratic and will buttress the dictatorship of this clique, for the purpose of providing a cloak of legality for an illegal “National Government”—a government formed privately through the appointment of a few dozen Kuomintang members, imposed on the people and utterly devoid of any foundation in the popular will—thus making a pretense of “handing state power back to the people” while actually “handing it back” to the selfsame reactionary clique within the Kuomintang.”]

<sup>78</sup> *Id.*

B. *From 1949 to the Start of the Cultural Revolution (1966)*

The 8<sup>th</sup> CPC Congress was held more than a decade later in 1956. It referenced the “constitution of the state” twice and the “constitution of the party” three times. The first appearance of the “constitution of the state” was to indicate that the roadmap of socialist transformation of agriculture, handicraft industry, capitalist industry and commerce and gradually achieving the socialist industrialization was enshrined to the “constitution of the state” as the general task of the whole country in the transition period from 1949 to 1956.<sup>79</sup> The second appearance of the “constitution of the state” was to point out that the national bourgeoisie are also supporters of the “constitution of the state,” and are political and economic allies of the proletariat; the party will “both unite and struggle with” them.<sup>80</sup> This echoes the Maoist framework developed earlier in *On New Democracy*.<sup>81</sup> But it should be read in the context of the notion that the Chinese State constitution did not follow the Western model. Mao Zedong made that clear in his explanation of the necessity for a state constitution in 1954: “This Draft Constitution of ours is chiefly a summing-up of our experience in revolution and construction, but at the same time it is a synthesis of domestic and international experience. Our constitution is of a socialist type. It is based mainly on our own experience but has drawn upon what is good in the constitutions of the Soviet Union and the People's Democracies.”<sup>82</sup>

The three appearances of the “constitution of the party” were in the same paragraph and were written to clarify the CPC’s principle of collective leadership and expansion of intra-Party democracy. More specifically, the “constitution of the

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<sup>79</sup> Liu Shaoqi, The Political Report of the Central Committee of the Communist Party of China to the 8<sup>th</sup> National Congress of the Communist Party of China (Sept. 15, 1956, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64560/65452/4526551.html> (only Chinese version officially posted) (“(党在过渡时期的总路线，这就是：在一个相当长的时间内，逐步实现社会主义的工业化，逐步完成对农业、手工业和资本主义工商业的社会主义改造。党的这个总路线是在一九五二年国民经济恢复阶段终结的时候提出的，在一九五四年已经为全国人民代表大会所接受，作为国家在过渡时期的总任务，记载在中华人民共和国宪法里面。)”). [“The main line during the transition period is: for a long period of time, we gradually realize socialist industrialization, gradually complete the socialist transformation of agriculture, handicraft and commerce sector. This main line was proposed during the economic stabilization period at 1952, which was accepted by the National People’s Congress in 1954. This main task has been recorded by the Constitution.”]

<sup>80</sup> *Id.*

<sup>81</sup> ZEDONG, *supra* note 73.

<sup>82</sup> Mao Zedong, On the Draft Constitution of the People’s Republic of China, Speech at the 30th Session of the Central People’s Government Council, (June 14, 1954), available at [https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5\\_37.htm](https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_37.htm). (“Speaking of constitutions, the bourgeoisie was the forerunner. The bourgeoisie, whether in Britain, France or the United States, was revolutionary for a period, and it was during this period that the bourgeoisie began making constitutions. We should not write off bourgeois democracy with one stroke of the pen and deny bourgeois constitutions a place in history. All the same, present-day bourgeois constitutions are no good at all, they are bad, particularly the constitutions of the imperialist countries, which are designed to deceive and oppress the majority of the people. Our constitution is of a new, socialist type, different from any of the bourgeois type. It is far more progressive than the constitutions of the bourgeoisie even in its revolutionary period. We are superior to the bourgeoisie.”).

party” was mentioned here to reiterate the rights of party members and branches of the party and the rules of the party's congress at the county level and above enshrined in the draft of the constitution of the party.<sup>83</sup> Thus early on there is at least the appearance of the idea that the CPC is itself constrained in its organizational operation by or through its own administrative document. Note, though, that the reference is not meant to imply that the CPC was constituted by or through its constitution, but rather that the CPC Constitution memorialized that constitution—and its principles.

### C. *The decade of Cultural Revolution (1966 to late 1976)*

It should come as little surprise that one might not see the term “constitution of the state” ever mentioned in reports of the 9<sup>th</sup>, 10<sup>th</sup>, and the 11<sup>th</sup> CPC Congress between 1969 to 1977. The period marked the culmination of an ideological journey with roots in the old Marxist notions that the state apparatus was a means of solidifying capitalist power and thus inimical to the revolutionary project increasingly at the center of CPC governance. That then required a shift away from the necessary evil of “State Capitalism”<sup>84</sup> required at the founding the PRC, to the capture of the state apparatus by and through the CPC itself.

On the other hand, the term “constitution of the party” was mentioned in the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> CPC Congress ten (10) times in total (7 times in the 9<sup>th</sup> Congress, once in the 10<sup>th</sup> Congress and twice in the 11<sup>th</sup> congress). The 7 appearances of the term “constitution of the party” in the 9<sup>th</sup> CPC Congress Report was in the same paragraph describing the amendment of the constitution of the party.<sup>85</sup> At the same time the

<sup>83</sup> SHAOQI, *supra* note 79.

<sup>84</sup> See, e.g., MAO ZEDONG, ON STATE CAPITALISM [Written comment on a document of the National Conference on Financial and Economic Work held in the summer of 1953] in *Selected Works of Mao Tse-tung* Marxists.org (2004), available at [https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5\\_30.htm](https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_30.htm) (“It exists not chiefly to make profits for the capitalists but to meet the needs of the people and the state. . . . Therefore, this state-capitalist economy of a new type takes on a socialist character to a very great extent and benefits the workers and the state.”).

<sup>85</sup> Lin Biao, Report to the 9<sup>th</sup> National Congress of the Communist Party of China (Apr. 1, 1969, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64561/4429445.html> (only Chinese version officially posted) (“党的第九次全国代表大会的一项重要议程，是修改党的章程。中央已将党章草案提请大会讨论。这个草案是全党和全国革命群众共同参加起草的。从一九六七年十一月，毛主席提出由基层党组织参加修改党章以来，中央收到了几千份草案。党的八届扩大的十二中全会在这个基础上，制定了党章草案以后，全党、全军、全国广大革命群众又一次进行了热烈的认真的讨论。可以说，新党章草案是伟大领袖毛主席的英明领导和广大群众相结合的产物，反映了全党、全军、全国广大革命群众的意志，是党一贯坚持的民主集中制和群众路线的生动表现。特别重要的是，党章草案重新明确规定了党的指导思想的理论基础是马克思主义、列宁主义、毛泽东思想。这是无产阶级文化大革命粉碎刘少奇修正主义建党路线的伟大胜利，是马克思主义、列宁主义、毛泽东思想的伟大胜利。中央相信，经过代表大会讨论和通过以后，我们的党一定能够按照新党章的规定，建设得更加伟大、更加光荣、更加正确。”). [“One of the major proposal is to modify the Party Constitution. The Central Committee had already submitted the draft to this meeting for discussion. The draft was jointly produced by the whole party and revolutionary

revision of the CPC Constitution marked an important milestone in the principle that Marxism Leninism can have important and binding Chinese characteristics. “What is particularly important is that the draft party constitution clearly redefined the theoretical basis of the party's guiding ideology as Marxism, Leninism and Mao Zedong Thought. This is a great victory for the proletarian cultural revolution to shatter Liu Shaoqi's revisionist line for the founding of the party and a great victory for Marxism, Leninism and Mao Zedong Thought.”<sup>86</sup>

The only appearance of the term “constitution of the party” in the report to the 10<sup>th</sup> CPC Congress was in connection with a criticism of Lin Biao and reiterated the selection criteria of the successor of Chairman Mao. The criteria are “seek the benefit of most people in China and the world” and enshrined in the party's constitution as mentioned in the report.<sup>87</sup> The term “constitution of the party” was mentioned twice in the report to the 11<sup>th</sup> CPC Congress Report. The first one was in the section of the Report describing the punishment of the Gang of Four (四人帮)<sup>88</sup> according to the constitution of the party”, as mentioned in the original text. The second appearance of the term “constitution of the party” was to reiterate that the acceptance of new members ought to conform to the regulations of the constitution of the party.<sup>89</sup>

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members of the mass. Since November of 1967, the Central Party had received thousands of comments after Chairman Mao asked to have base level party organ join the constitution modification project. Based on the extended 12<sup>th</sup> Plenary Session of the 8<sup>th</sup> Party Congress, the whole party, whole military and revolutionary members of whole nation jointed vivid discussion after the publication of the draft. Thus, the new party constitution draft is the products of great leadership of Chairman Mao and the Mass, which reflects the joint will of the party, military and revolutionary member of the whole nation, and Mass line and Democratic Centralism. It is important to note that the draft clearly stated that the guiding principle is based on Marxism, Leninism and Mao Zedong Thought. This is a great victory after the end of the Liu Shaoqi's revisionary mistake, a great victory of the Marxism, Leninism, and Mao Zedong Thought. Central Committee believes that the new draft would bring more glory and rightness to the Party after it passed with the discussion and implemented. “[

<sup>86</sup> *Id.*

<sup>87</sup> Zhou Enlai. Report to the 10<sup>th</sup> National Congress of the Communist Party of China (Aug. 24, 1973, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64562/65450/4429430.html> (only Chinese version officially posted) (“无产阶级的运动是绝大多数的、为绝大多数人谋利益的独立的运动。”毛主席把“为中国和世界的大多数人谋利益”作为无产阶级革命事业接班人的主要条件之一，并且写进了我们的党章”。[“The proletarian movement is an independent movement for the welfare of the majority. Thus Chairman Mao set ‘for the interests of China and majority’ as one of the conditions for serving the proletarian revolution project. This condition is recorded by Party Constitution.”]

<sup>88</sup> “The Gang of Four (GoF) was the name given to a leftist political group composed of four Chinese Communist Party (CCP) members. They wielded significant power during China's Cultural Revolution (1966-76) and were subsequently charged of various crimes. Their trial in late 1980 represented a significant change in China's history since the founding of P.R.C. in 1949.” Haiping Zheng, *The Gang of Four Trial* (2010), <http://law2.umkc.edu/faculty/projects/fTrials/gangoffour/Gangof4.html>.

<sup>89</sup> Hua Guofeng, Report to the 11<sup>th</sup> National Congress of the Communist Party of China, (Aug. 12, 1977, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64563/65449/4526439.html> (only Chinese version officially posted) (“党的十届三中全会根据全党全军全国各族人民的要求，根据党章规定，一致通过决议：永远开除王洪文、张春桥、江青、姚文元的党籍，撤销他们党内外一切职务，彻底清算他们反共反人民反革命的罪行。”)。[“Upon the demand of all people of the nation and in pursuant to the party constitution, the 3<sup>rd</sup> plenary session of the 10<sup>th</sup> Party Congress unanimous

D. *The decade of the 1980s (political reform to 1989 Tian'anmen Incident)*

The decade after the Cultural Revolution was marked by political reform that serve as the ideological foundation of the modern state and CPC. This was the era of initial institution building, both in the context of the ideological structures of the CPC and in the reconstruction of the institutions of State and CPC. It is not surprising, then, that it is during this period that the references to constitution in the CPC Congress Reports begin to take on their contemporary forms. The frequency of the term constitution (both the constitutions of the state and the party) rocketed to thirty (30), eight (8) of which reference “the constitution of the state” and twenty-two (22) of which reference the “constitution of the party.” The first appearance of the term “constitution of the state” appears in a part of the 11<sup>th</sup> CPC Congress Report touching on the building of a socialist spiritual civilization (社会主义精神文明建设) and the term “constitution of the state” was included in the argument that education about the concept of a constitution, civil rights, civil obligations and the moral of citizens should be enhanced.<sup>90</sup>

The 2<sup>nd</sup> through 7<sup>th</sup> reference to state constitutions in the 11<sup>th</sup> CPC Congress Report all appeared in the same paragraph. But this was no ordinary paragraph—it tied the project of socialist law building with the project of constituting the state apparatus through the enactment of a “higher law” of a constitution (higher in the sense of its superiority to ordinary law but not with respect to its relation to the political framework within which the CPC operated in accordance with its own constitution). It marked a new stage of China’s rule of law. What’s worth notice is that this paragraph mentioned that in the new constitution of the party, the principle that “[t]he party must operate within the limits of the constitution of the state and the law.”<sup>91</sup> But that formulation could be read either as a declaration that the CPC was

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decides to permanently remove Wang hongwen, Zhangchunjiao, Jiang qing, and Yao wenyuan from all party and non-party position, and revoked their party membership. Completely cleaning their crimes to the party and people.”]

<sup>90</sup> *Id.* (“建设社会主义精神文明，是全党的任务……加强党的纲领、党的历史和党的革命传统的教育，加强宪法和公民权利、公民义务、公民道德的教育，在各行各业加强职业责任、职业道德、职业纪律的教育。”) [“Socialist Culture is the task of the Party... strengthen party’s principle, party’s history and tradition education, constitutional rights and duty education, ethic education in all field.”]

<sup>91</sup> Hu Yaobang, Report to the 12<sup>th</sup> National Congress of the Communist Party of China, 胡耀邦在中国共产党第十二次全国代表大会上的报告 [hú yào bāng zài zhōng guó gòng chǎn dǎng dì shí èr cì quán guó dài biǎo dà huì shàng de bào gào] (Sept. 1, 1982, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64565/65448/4526430.html> (only Chinese version officially posted) (“社会主义民主的建设必须同社会主义法制的建设紧密地结合起来…… 特别是不久即将提交全国人民代表大会通过的新宪法草案，根据党的十一届三中全会以来我国民主建设所取得的成就和已经确定的方针，作出了许多具有重大意义的新规定。这部宪法的通过，将使我国社会主义民主的发展和法制建设进入一个新的阶段……特别要教育和监督广大党员带头遵守宪法和法律。新党章关于“党必须在宪法和法律的范围内活动”的规定，是一项极其重要的原则。从中央到

to operate “under” the state constitution (as some later argued within and outside China),<sup>92</sup> or it might suggest only that the CPC was bound by the state constitution as an expression and operationalization of the CPC Basic Line which was itself required to conform to the General Program of the CPC Constitution.<sup>93</sup> The last appearance of the constitution of the state in this report was to emphasize that the party’s leadership of the armed forces of China was to be implemented by the Central Military committee in accordance with the e draft of the new constitution of the state.<sup>94</sup>

Almost all (at least 20 times out of 22 in total) of the mentions of the term “constitution of the party” in the report are directly or indirectly used in the discussion of the amendment of the party’s constitution and the new constitution of the party.<sup>95</sup> These references set the stage for ordering the relations between the Party,

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基层，一切党组织和党员的活动都不能同国家的宪法和法律相抵触。党是人民的一部分。党领导人民制定宪法和法律，一经国家权力机关通过，全党必须严格遵守。”。[“Socialist democratic construction must be integrated with the socialist legal system construction...the new constitution proposal includes many major changes based on the principles and reforms of the democratic development since the 3<sup>rd</sup> plenary session of the 11<sup>th</sup> Party Congress. The promulgation of this Constitution would take us into a new stage of democratic and legal system development...it is especially important to educate and supervise party cadres to obey the Constitution and law. The new party constitution principle requires “party must operate within the scope of constitution and law” is a crucial rule. All party organization and member’s activity, from top to bottom, shall not conflict with the Constitution and law. Party is part of people, party led people making Constitution and law, after the passage, all party shall strictly follow it.”]

<sup>92</sup> See *infra*, pp. 188-89 and notes.

<sup>93</sup> See, e.g., Ding Xiaodong, *Law According to the Chinese Communist Party: Constitutionalism and Socialist Rule of Law*, 43(3) *Modern China* (2017); Larry Catá Backer, *Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong’s Constitutionalism*, 40 *MOD. CHINA* 168 (2014).

<sup>94</sup> Yaobang, *supra* note 91.

<sup>95</sup> *Id.* (“在社会主义现代化建设的宏伟事业中，历史把重大的责任交给了我们党。为了加强新时期党的建设，我们对十一大党章作了许多有根本意义的修改。修改党章的总的原则是，适应新的历史时期的特点和需要，对党员提出更严格的要求，提高党组织的战斗力和战斗力，坚持和改善党的领导。我们一定要按照新党章的要求，努力把党建设成为领导社会主义现代化事业的坚强核心。现在提交大会审议的党章修改草案，清除了十一大党章中“左”的错误，继承和发展了党的七大和八大党章的优点。新党章在总纲中，对党的性质和党的指导思想，对现阶段我国社会的主要矛盾和党的总任务，对党在国家生活中如何正确地发挥领导作用，都作了马克思主义的规定。新党章对党员和党的干部在思想上、政治上和组织上的要求，比过去历次党章的规定都更加严格。它对党员的义务，写了绝对不得假公济私、损公利私，坚决反对派性，勇于支持好人好事，反对坏人坏事等内容；对各级领导干部的基本条件，写了要正确执行党的路线、方针和政策，反对党内外错误倾向，有胜任领导工作的专业知识和组织能力，坚持党的原则，同任何滥用职权、谋求私利的行为作斗争等内容，这大都是过去的党章所没有的。根据历史的经验和教训，新党章强调从中央到基层的各级组织都必须严格遵守民主集中制和集体领导的原则，明确规定“禁止任何形式的个人崇拜”。新党章对改善党的中央和地方组织的体制，对加强党的纪律和纪律检查机关，对加强基层组织的建设，都作了许多新的规定。新党章规定，党中央不设

the CPC Constitution, the state and its constitutional ordering—all within the context of the important ideological principle of socialist modernization. “In the grand cause of socialist modernization, history has handed major responsibilities to our party. . . . The general principle of revising the party constitution is to adapt itself to the characteristics and needs of the new historical period, to impose even more stringent requirements on party members, enhance the combat effectiveness of the party organizations, and uphold and improve the party's leadership.”<sup>96</sup> The references in other paragraphs are also used to show the changes the new constitution of the party had made and the advantages of those changes.<sup>97</sup> It is worth noting here that this joining of constitutionalism and socialist modernization, even at this early stage, suggests the all-around character of reform as a political project. Chinese constitutionalism, or an expression of its political ideology, is difficult to extract

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主席只设总书记，总书记负责召集中央政治局……应当说，现在的党章修改草案，比我们党过去的党章更加充实和完善。它是党的历史经验和集体智慧的宝贵结晶，是在新的历史时期把我们党的建设得更加坚强的重要保证。” [“Under great project of socialist modernization, party take the historical responsibility. To improve the party building, we made many meaningful changes to the party constitution. One of the main principle of modifying constitution is to meet the new historical development and condition, to ask party member for more, to improve the power of the party, and to improve the party leadership. We must follow the new party constitution to build a party as the solid core of socialist modernization leadership. The current party constitution cleaned the left-wing mistake and developed the many good practice from the 7<sup>th</sup> and 8<sup>th</sup> Party Congress. The preamble of the party constitution defined the party's essence, guiding principle, the main conflict and party's main task based on Marxism. The new party constitution makes stricter rules to regulate party cadre and member's mind, and political behavior. It specified that one cannot violate conflict of interest or form private faction; encourage good deed and against unethical or immoral acts. In addition, it requires all party cadres should follow the party's line and principle, against any wrong tendency in and out the party. It also requests party member follow the party principle, fight against abuse of power with competent governing knowledge and skills. The new party constitution based on historical experience and mistakes, require all levels party organs must strictly follow democratic centralism and collective leadership. It further prohibits personal cult. The new party constitution made many new changes concerning the organization and supervision system. Under the new party constitution, central committee do not establish chairman. The party secretary responsible for calling politburo meeting. . . Thus, the current party constitution is more complete. It is the products of collective wisdom and important assurance of the party building.”] (“新党章经过这次代表大会通过之后，必须在全党进行普遍教育，严格执行。每一个党员是否真正符合党章所规定的条件，能否充分履行党员的义务，将成为他是不是一个合格的党员的根本标准。在这次党章修改之前，我们党曾经制定了《关于党内政治生活的若干准则》，在党的实际生活中起了很好的作用。这个准则今后作为党章的重要补充，将继续保持它的全部效力。根据党的现状和新党章的精神，当前我们在党的建设上必须着重解决好以下几个问题。”) [“After the passage the amendment, new party constitution should be widely educated among all party members for strict implementation. The party constitution's requirement on duty and qualification is the benchmark for the qualification of a party member. Prior to this amendment, the party made *certain rules and principles concerning internal party-political life*. This publication plays an important and useful role and serves as a compliment to the party constitution. Party building task need to focus on the following areas in the future.”]

<sup>96</sup> *Id.* (“According to historical experience and lessons, the new party constitution emphasizes that all levels of organizations from the central government to the grass-roots units must strictly abide by the principles of democratic centralism and collective leadership and clearly stipulate that “no form of personal worship should be banned.””).

<sup>97</sup> *Id.*

from its context in the critical elements of economic objectives and international relations.

In the 13<sup>th</sup> CPC Congress Report, there were eight (8) references to the term constitution (both of the state and the party) with five (5) of them the term “constitution of the state” and three of them the “constitution of the party.” This is the first time the frequency of the “constitution of the state” supersedes that of the CPC Constitution. And, indeed, starting with the 13<sup>th</sup> CPC Congress Report, the frequency of term “constitution of the party” has never surpassed the frequency of the “constitution of the state.” Such a change could be regarded as a confirmation of the higher status of the constitution of the state over the constitution of the party at least at the nominal level and a re-confirmation of the principle that the party must operate within the limits of the constitution of the state and the law.<sup>98</sup>

The first appearance of the term “constitution of the state” in the 13<sup>th</sup> CPC Congress Report touched on the move toward the formation of the Chinese socialist legal system based on the state constitution.<sup>99</sup> The second and the third appearances of the term “constitution of the state” in the report was in the paragraph discussing of functional separation between the party and the state. Here, the report reiterated that the constitution of the state and the law are made by the people under the leadership of the party and the party shall operate within the limits of the constitution of the state and the law.<sup>100</sup> The fourth appearance of the term “constitution of the state” was in the paragraph of the reform of the cadre and personnel system. It argued that political civil servants (政务类公务员), relative to professional civil servants (业务类公务员) must be managed in accordance with the constitution of the state and the organization law.<sup>101</sup> The fifth appearance was in the paragraph of the institutionalization of democratic life at the grass-roots level. The sentence mentioned the need to protect constitutional civil rights and freedom by making law on news, publications, establishing associations, assemblies, demonstrations and to establish a people’s appeal system.<sup>102</sup> On the other hand, the first appearance of the

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<sup>98</sup> Zhao Ziyang, Report to the 13<sup>th</sup> National Congress of the Communist Party of China (Oct. 25, 1987, Beijing), available at 赵紫阳在中国共产党第十三次全国代表大会上的报告 <http://cpc.people.com.cn/GB/64162/64168/64566/65447/4526368.html> (only Chinese version officially posted) (“党必须宪法和法律范围内活动。”) [“Party must operate within the scope of the Constitution and Law.”]

<sup>99</sup> *Id.* (“以宪法为基础的社会主义法律体系初步形成。”) [“A constitution based socialist legal system has been formed.”]

<sup>100</sup> *Id.* (“党领导人民制定宪法和法律，并在宪法和法律范围内活动。”) [“The mass formulating Constitution and law under party leadership, which operated within the scope of the constitution and law.”]

<sup>101</sup> *Id.* (“政务类公务员，必须严格依照宪法和组织法进行管理，实行任期制，并接受社会的公开监督。”) [“Public servant in political position must strictly follow the constitution and organization law under term limits and public supervision.”]

<sup>102</sup> *Id.* (“因此，必须抓紧制定新闻出版、结社、集会、游行等法律，建立人民申诉制度，使宪法规定的公民权利和自由得到保障，同时依法制止滥用权利和自由的行为。”) [“It is imperative

term “constitution of the party” also stressed the democratic rights of the party members.<sup>103</sup> The second and third appearance of the party’s constitution emphasized the obligations of the party member.<sup>104</sup>

The CPC Congress Reports of this period also appear to set another contemporary practice—the growing importance of the CPC Congress Report itself for the elaboration of the fundamental development of the ideological project of Chinese Marxist Leninism and its application to the construction of the two key constituting documents of the state and of the CPC. Around that central ordering is built the description of the specific modalities of implementation in the form of objectives and specific policies to be applied by both the state and CPC governments. In other words, the CPC Congress Reports begin to serve as an important performance of CPC leadership. This template, developed by Seng Xiaoping, was carried over by his successors, Jiang Zemin and Hu Jintao.

#### E. *The 1990s to 2017*

The frequency of references to the term constitution (both of the state and of the party) in reports from the 14<sup>th</sup> CPC Congress through the 17<sup>th</sup> CPC Congress, delivered by Jiang Zemin and Hu Jintao, demonstrated a relatively stable pattern even though it witnessed a slight rise in the 15<sup>th</sup> national congress in 1997. This pattern continued the building of notions of socialist rule of law embedded within the state constitution, while at the same time stressing the leadership role of the CPC and its leading role in setting the political principles through which the State Constitution could be interpreted.

In the 14<sup>th</sup> CPC Congress Report,<sup>105</sup> the three references to the “constitution of the state” all appeared in the section of the Report considering the political structure

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to installing laws governing news publication, civil society, marching, establishing grievance filing system to ensure the constitutional rights and freedom of the people and to prevent abuse power and rights.”]

<sup>103</sup> *Id.* (“要切实保障党章规定的党员民主权利，制定保障党员权利的具体条例。”) [“Fully protect democratic rights of the party member by making specific rules.”]

<sup>104</sup> Ziyang, *supra* note 98.

<sup>105</sup> Jiang Zemin, Report to the 14<sup>th</sup> National Congress of the Communist Party of China 江泽民在中国共产党第十四次全国代表大会上的报告 (Oct. 12, 1992, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64567/65446/4526308.html> (only Chinese version officially posted).

of reform,<sup>106</sup> legal system construction,<sup>107</sup> and the protection of people's rights.<sup>108</sup> The term "constitution of the party" also appeared three times with the first one indicating the protection of party members' right to voice their opinions<sup>109</sup> and the other two related to the amendment of the constitution of the party, including enshrining "building socialism with Chinese characteristics and basic party line" into the constitution of the party.<sup>110</sup>

The 15<sup>th</sup> CPC Congress Report<sup>111</sup> mentioned the "constitution of the state" five times and the "constitution of the party" four times. The first three references to the "constitution of the state" were in the paragraph discussing governance in accordance with the law (依法治国) and reiterated that the constitution of the state and the law are made by the people under the leadership of the party and the party should operate within the limits of the constitution and the law.<sup>112</sup> The fourth appearance of the term "constitution of the state" was in the paragraph discussing the construction of the legal system, claiming "uphold the integrity of the constitution of the state and

<sup>106</sup> *Id.*, (".....积极推进政治体制改革。我们的政治体制改革，目标是建设有中国特色的社会主义民主政治，绝不是搞西方的多党制和议会制。我国宪法规定，中华人民共和国国家机构实行民主集中制的原则。") ["...It is imperative to push forward reform of the political structure, bearing in mind that promotion of democracy must be closely combined with improvement of the legal system. The goal of this reform is to build a socialist democracy suited to Chinese conditions and in no respect a Western, multiparty, parliamentary system. The Constitution of our country provides that the state organs of the People's Republic of China shall apply the principle of democratic centralism."]

<sup>107</sup> *Id.* ("高度重视法制建设.....要严格执行宪法和法律，加强执法监督") ["All due attention should be given to the legal system... It is essential to enforce the Constitution and other laws strictly, to supervise their enforcement"].

<sup>108</sup> *Id.* ("我国的宪法从根本方面保障了人民的各种权利。") ["The Constitution of our republic has given basic protection to all the people's rights."]

<sup>109</sup> *Id.* ("在党内生活中发扬讲真话不讲假话、言行一致的优良作风，支持和保护党员依据党章规定的权利发表意见。") ["In inner-Party activities we should carry on the fine tradition of speaking the truth and matching our deeds to our words. We should also encourage Party members to express their views, and we should protect their right to do so, as set forth in the Party Constitution."]

<sup>110</sup> *Id.* (".....十三届中央委员会提出了《中国共产党章程(修正案)》，请代表大会审议。修正案把建设有中国特色社会主义的理论和党的基本路线的内容写进党章.....") ["...the 13th Central Committee presents for the examination and deliberation of this National Congress the draft of a revised Constitution of the Communist Party of China. This draft includes in the Constitution the theory of building socialism with Chinese characteristics and the Party's basic line."]

<sup>111</sup> 江泽民在中国共产党第十五次全国代表大会上的报告 Jiang Zemin, Report to the 15<sup>th</sup> National Congress of the Communist Party of China (Sept. 12, 1997), <http://cpc.people.com.cn/GB/64162/64168/64568/65445/4526285.html> (only Chinese version officially posted).

<sup>112</sup> *Id.* ("依法治国，就是广大人民群众在党的领导下，依照宪法和法律规定，通过各种途径和形式管理国家事务.....党领导人民制定宪法和法律，并在宪法和法律范围内活动。") ["Ruling the country by law means that the broad masses of the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, ... The Party has led the people in drawing up the Constitution and other laws, to which it confines its activities."]

the law”.<sup>113</sup> The fifth appearance of the term “constitution of the state” was in the paragraph discussing the democratic supervision system, arguing to “enhance the supervision of the implementation of the constitution of the state and the law”.<sup>114</sup> For the term “constitution of the party”, its first appearance was to suggest enshrining Deng Xiaoping Thought into the constitution of the party as the guiding thoughts of the party.<sup>115</sup> The second appearance was in the paragraph discussing organizational construction, urging that the branches of the party at the grass-roots level should carefully perform their duties required by the constitution of the party.<sup>116</sup> The third and the fourth appearance of the term constitution of the party were in the same paragraph discussing the governance of the party, reiterating the importance of the party’s constitution and the criteria of acceptance of new members to the party.<sup>117</sup>

The 16<sup>th</sup> CPC Congress Report<sup>118</sup> mentioned the term “constitution of the state” for 3 times and the term “constitution of the party” only once. The first two

<sup>113</sup> *Id.* (“加强法制建设……维护宪法和法律的尊严，坚持法律面前人人平等，任何人、任何组织都没有超越法律的特权。”) [“Improve the legal system... To safeguard the dignity of the Constitution and other laws, we must see to it that all people are equal before the law and no individuals or organizations shall have the privilege to overstep it.”]

<sup>114</sup> *Id.* (“完善民主监督制度……加强对宪法和法律实施的监督，维护国家法制统一。”) [“Improve the system of democratic supervision... We shall strengthen the supervision over the enforcement of the Constitution and other laws to safeguard the uniformity of the legal system of the state as well as the supervision over the implementation of general and specific policies of the Party and the state to see to it that they are truly carried out.”]

<sup>115</sup> *Id.* (“中央建议十五大在党章中把邓小平理论确立为党的指导思想”) [“[T]he Party Central Committee has proposed that the 15th Party Congress establish Deng Xiaoping Theory as its guiding ideology by stipulating in its Constitution that the Chinese Communist Party takes Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory as its guides for action.”]

<sup>116</sup> *Id.* (“党的基层组织都要从各自的特点出发，认真履行党章规定的职责，努力成为贯彻党的路线方针政策、团结和带领群众完成本单位任务的坚强战斗堡垒。”) [“Grassroot level party organization, In light of their own characteristics, they should earnestly perform their duties prescribed by the Constitution of the Party and strive to become a staunch, powerful force that can carry out the Party’s line, principles and policies and that can unite with the masses and lead them in fulfilling the tasks of their own units.”]

<sup>117</sup> *Id.* (“从严治党，是保持党的先进性和纯洁性，增强党的凝聚力和战斗力的保证……要把从严治党的方针贯彻到党的建设的各项工作中去，坚决改变党内存在的纪律松弛和软弱涣散的现象。这就要严格按党章办事，按党的制度和规定办事；就要对党员特别是领导干部严格要求，严格管理，严格监督；就要在党内生活中讲党性，讲原则，开展积极的思想斗争，弘扬正气，反对歪风；就要严格按照党章规定的标准发展党员，严肃处置不合格党员……”) [“Tightening Party discipline is the guarantee for maintaining the Party’s advanced nature and purity and enhancing its cohesiveness and fighting capacity... We should, therefore, act in strict accordance with the Constitution of the Party and in line with the Party’s rules and regulations. We should be strict with Party members, leading cadres in particular, and strictly manage and supervise them. In inner-Party life we should stress Party spirit and principles, conduct active ideological struggle, encourage healthy trends and oppose unhealthy practices. We should recruit new Party members strictly in accordance with the standards provided for by the Constitution of the Party and see to it that unqualified Party members are duly dealt with. We should strictly enforce Party discipline to ensure that all members are equal before discipline.”]

<sup>118</sup> Jiang Zemin, Report to the 16<sup>th</sup> National Congress of the Communist Party of China (Nov. 8, 2002, Beijing), available at <http://cpc.people.com.cn/GB/64162/64168/64569/65444/4429125.html> (only

appearances of the term “constitution of the state” were in the paragraph discussing the development of the development of the people’s democracy. By those two terms, the report reiterated that the constitution of the state and the law is the demonstration of the unity of the party’s opinion and the will of the people, and no organization or individual is not allowed to enjoy the privilege that is above the constitution of the state and the law.<sup>119</sup> The third appearance of the term “constitution of the state” was in the paragraph discussing the construction of the socialist legal system and emphasized that the party members, especially cadres, should be models to abide by the constitution of the state and the law.<sup>120</sup> On the other hand, the only appearance of the term “constitution of the party” was again in the discussion of acceptance of new members to the party.<sup>121</sup>

Both the 17<sup>th</sup> CPC Congress Report<sup>122</sup> and the 18<sup>th</sup> CPC Congress Report<sup>123</sup> references the term “constitution of the state” three times and the term “constitution of the party” only once. The appearance of those terms in the two reports also demonstrated very similar patterns. All three times the appearance of the term “constitution of the state” in both reports was in the paragraph on governance in accordance with the law (依法治国) and both stressed the party and the members of the party should operate within the limits of the constitution of the state and the law. The report to the 18<sup>th</sup> national congress obviously put more emphasis on concept that the party as a whole shall operate within the limits of the constitution of the state and the law compared to the report to the 17<sup>th</sup>, which presented a micro-level statement that “the party’s organizations at each level and all members of the party shall consciously operate within the limit of the constitution of the state and the law.” The report to the 18<sup>th</sup> national congress also reiterated that “no organization or

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Chinese version officially posted). (江泽民在中国共产党第十六次全国代表大会上的报告) (jiāng zé mǐn zài zhōng guó gòng chǎn dǎng dì shí liù cì quán guó dài biǎo dà huì shàng de bào gào).

<sup>119</sup> *Id.* (“宪法和法律是党的主张和人民意志相统一的体现。必须严格依法办事，任何组织和个人都不允许有超越宪法和法律的特权。”) [“The Constitution and other laws embody the unity of the Party’s views and the people’s will. All organizations and individuals must act in strict accordance with the law, and none of them are allowed to have the privilege to overstep the Constitution and other laws.”]

<sup>120</sup> *Id.* (“党员和干部特别是领导干部要成为遵守宪法和法律的模范。”) [“Party members and cadres, especially leading cadres, should play an exemplary role in abiding by the Constitution and other laws.”]

<sup>121</sup> *Id.* (“要把承认党的纲领和章程、自觉为党的路线和纲领而奋斗、经过长期考验、符合党员条件的其他社会阶层的先进分子吸收到党内来。”) [“We should admit into the Party advanced elements of other social strata who accept the Party’s program and Constitution, work for the realization of the Party’s line and program consciously and meet the qualifications of Party membership following a long period of test, in order to increase the influence and rallying force of the Party in society at large.”]

<sup>122</sup> Hu Jintao, Report to the 17<sup>th</sup> National Congress of the Communist Party of China (Oct. 15, 2007), available at <http://cpc.people.com.cn/GB/64162/64168/106155/106156/6430009.html> (only Chinese version officially posted).

<sup>123</sup> Hu Jintao, Report to the 18<sup>th</sup> National Congress of the Communist Party of China (Nov. 8, 2012), available at <http://cpc.people.com.cn/n/2012/1118/c64094-19612151.html> (only Chinese version officially posted).

individual is not allowed to enjoy privilege that is above the constitution of the state and the law.”<sup>124</sup> In the report to the 18<sup>th</sup> national congress: “[t]he party leads the people in formulating the constitution and laws, and the party must act within the framework of the Constitution and laws. No organization or individual may enjoy the privilege of surpassing the constitution and the law and must never allow the law of words and the law of the people to exercise the power of pressing the law and the law of selfish occupation.”<sup>125</sup>

But this must be read within the overall context of the Report, especially respecting references to the CPC Constitution. Both of the appearances of the term “constitution of the party” in those two reports speak to the members of the party to abide by the constitution with the report the 18<sup>th</sup> national congress emphasized on “cadres, especially major leading cadres.” In the report to the 17<sup>th</sup> national congress: “[c]onsolidate and develop the achievements of advanced education in an all-around way ... seriously study and abide by the party constitution and enhance the awareness of party members .....”<sup>126</sup> In the report to the 18<sup>th</sup> national congress: “[p]arty organizations at all levels and Party members, cadres, especially leading cadres must conscientiously abide by the Party Constitution, and consciously act in accordance with organizational principles and guidelines for party political life of the party, no one is above the organization.”<sup>127</sup>

Flora Sapio, in her analysis of constitutional references in pre 19<sup>th</sup> CPC Congress Reports<sup>128</sup> has noted:

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<sup>124</sup> Jintao, *supra* note 122. (“ (In the report to the 17th national congress: 加强宪法和法律实施, 坚持公民在法律面前一律平等.....各级党组织和全体党员要自觉在宪法和法律范围内活动, 带头维护宪法和法律的权威。”) [“We will strengthen the enforcement of the Constitution and laws, ensure that all citizens are equal before the law ... Party organizations at all levels and all Party members must act under the Constitution and laws on their own initiative and take the lead in upholding the authority of the Constitution and laws.”]

<sup>125</sup> Jintao, *supra* note 123. (only Chinese version officially posted) (“党领导人民制定宪法和法律, 党必须在宪法和法律范围内活动。任何组织或者个人都不得有超越宪法和法律的特权, 绝不允许以言代法、以权压法、徇私枉法。”) [“No organization or individual has the privilege of overstepping the Constitution and laws, and no one in a position of power is allowed in any way to take one's own words as the law, place one's own authority above the law or abuse the law.”]

<sup>126</sup> Jintao, *supra* note 122. (only Chinese version officially posted) (“全面巩固和发展先进性教育活动成果.....认真学习 and 遵守党章, 增强党员意识.....”) [“Consolidate and develop all the achievements of the campaign to educate Party members to preserve their vanguard nature, and focus on strengthening primary Party organizations... We will earnestly study and abide by the Party Constitution, raise our awareness...”]

<sup>127</sup> Jintao, *supra* note 123. (only Chinese version officially posted) (“各级党组织和广大党员、干部特别是主要领导干部一定要自觉遵守**党章**, 自觉按照党的组织原则和党内政治生活准则办事, 任何人都不能凌驾于组织之上。”) [“Party organizations at all levels and all Party members and officials, especially principal leading officials, must willingly abide by the Party Constitution as well as its organizational principles and guiding principles for its political activities; and no one is allowed to place oneself above the Party organization.”]

<sup>128</sup> Flora Sapio, *Chinese Constitutionalism in Work Reports to the CCP Congress 1949 - 2012, Law at the End of the Day* (Nov. 23, 2017), <http://lcbackerblog.blogspot.com/2017/11/chinese-constitutionalism-after-19th.html>.

Statements about the Party Constitution and the State Constitution contained in earlier Work Reports to the CCP Congress allow to trace the developmental trajectory leading to the current equilibrium between the political constitution of the CCP, and the administrative constitution of the State. This trajectory can be roughly divided in an earlier period (1949 - 1987), when governance was conceived as based exclusively political documents and oral directives, and in a later period, when the Party acknowledged the importance of law-based forms of governance subordinate to a broad orchestration from the Party, and yet distinct from earlier methods of governance. The latter period began between 1987 and 1992, and it is still on-going.<sup>129</sup>

Sapio explains that by the end of the Hu Jintao leadership period, “the principle whereby the Party defines and leads all those political processes which are then concretely realized by organs of the State.”<sup>130</sup> If the emphasis on these processes was not directly and explicitly made in his 2007 Work Report, in 2012 Hu Jintao unequivocally stated how the Party leads the People in enacting the Constitution and the law.<sup>131</sup> And yet those certainties within the historical trajectory of the CPC Congress Reports were not entirely free from the ambiguities built into the language in those reports used to develop the structures of socialist rule of law as part of the socialist modernization of the state, and as an example of the construction of ideological and governance structures that could provide an international alternative to the Western model.

### III. THE ALL-AROUND CONSTITUTION IN THE “NEW ERA”

How were these ambiguities and idea navigated and developed in the Report to the 19<sup>th</sup> Party Congress? Drawing on the official bilingual publication of the 19<sup>th</sup> CPC Congress Report,<sup>132</sup> the word *constitution* appears in the *English version* of the 19<sup>th</sup> CPC Congress Report **13 times in 9 different sections** (appearing in the Chinese original as 宪法 or its variation 章程 and 党章). At the same time, translation issues produced some anomaly. The English word *constitution* in the official translation

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Xi Jinping, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era at the 19th National Congress of the Communist Party of China* (Oct. 18, 2017) [决胜全面建成小康社会 夺取新时代中国特色社会主义伟大胜利——在中国共产党第十九次全国代表大会上的报告—2017年10月18日, 习近平] (jué shèng quán miàn jiàn chéng xiǎo kāng shè huì duó qǔ xīn shí dài zhōng guó ó tè sè shè huì zhǔ yì wěi dà shèng lì zài zhōng guó gòng chǎn dǎng dì shí jiǔ cì quán guó dài biǎo dà huì shǎng de bào gào nián yuè rì xí jìn píng).

appeared in spots that did not correspond to the use of the same term in the original Chinese with precise correspondence. Indeed, it has been assumed that though the terms 宪法 or its variation 章程 and 党章 point to similar constituting forms, they are understood to reference what can be sometimes quite distinct institutional forms. As a consequence, the English term “constitution” may flatten out the meaning of the terms in the original Chinese. Moreover, those differences might be usefully explored in the construction of state and Party constitutions as autonomous instruments of basic rules and with respect to their relationship, especially in the context of the constitutionalism of the “New Era.”

### A. *A First Cut*

At least as a first cut at meaning, it is plausible to assume that the English translation and its use of the English word “constitution” were faithful to the general meaning of the 19<sup>th</sup> Congress Report even where a mechanical translation might have suggested otherwise. In any case, the English references to the constitution in the 19<sup>th</sup> CPC Congress Report consisted of the following:

Pg 7 BL (We have made fresh progress in work related to Hong Kong, Macao, and Taiwan.)  
We have fully and faithfully implemented the principle of “one country, two systems,” and ensured that the central government exercises its overall jurisdiction over Hong Kong and Macao as mandated by China’s Constitution and the basic laws of the two special administrative regions.<sup>133</sup>

Pg 8 BL (We have achieved remarkable outcomes in ensuring full and strict governance over the Party.)  
We encourage all Party members to hold the Party Constitution in great esteem.<sup>134</sup>

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<sup>133</sup>Xi Jinping, Report to the 19<sup>th</sup> National Congress of the Communist Party of China (Oct. 18, 2017, Beijing), available at [http://www.xinhuanet.com/english/special/2017-11/03/c\\_136725942.htm](http://www.xinhuanet.com/english/special/2017-11/03/c_136725942.htm) (only Chinese version officially posted). (“港澳台工作取得新进展。全面准确贯彻“一国两制”方针，牢牢掌握宪法和基本法赋予的中央对香港、澳门全面管治权，深化内地和港澳地区交流合作，保持香港、澳门繁荣稳定。”) [“We have made fresh progress in work related to Hong Kong, Macao, and Taiwan. We have fully and faithfully implemented the principle of “one country, two systems,” and ensured that the central government exercises its overall jurisdiction over Hong Kong and Macao as mandated by China’s Constitution and the basic laws of the two special administrative regions. We have thus boosted exchanges and cooperation between the mainland and the two regions and maintained prosperity and stability in Hong Kong and Macao.”]

<sup>134</sup>*Id.* (“推动全党尊崇党章，增强政治意识、大局意识、核心意识、看齐意识，坚决维护党中央权威和集中统一领导，严明党的政治纪律和政治规矩，层层落实管党治党政治责任。”) [“We have achieved remarkable outcomes in ensuring full and strict governance over the Party. We have made sweeping efforts to strengthen Party leadership and Party building, and taken strong action to transform lax and weak governance over the Party. We encourage all Party members to hold the Party Constitution

We have regularized and institutionalized the requirement for all Party members to have a solid understanding of the Party Constitution, Party regulations, and related major policy addresses and to meet Party standards.

Pg 22 BL (Ensuring every dimension of governance is law-based)

We must improve the Chinese socialist system of laws, at the heart of which is the Constitution; establish a Chinese system of socialist rule of law; build a socialist country based on the rule of law; and develop Chinese socialist rule of law theory.<sup>135</sup>

Pg 25 BL (Exercising full and rigorous governance over the Party)

We must uphold the Party Constitution as our fundamental rules, give top priority to the political work of the Party, combine efforts on ideological work and institution building, and strengthen Party competence in all respects.<sup>136</sup>

Pg 37 BL (Strengthening institutional guarantees to ensure the people run the country)

We should give better play to the role of deputies to people's congresses, and enable people's congresses at all levels and their standing committees to fully perform their functions as stipulated

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in great esteem. We urge them to strengthen their consciousness of the need to maintain political integrity, think in big-picture terms, follow the leadership core, and keep in alignment, and to uphold the authority of the Central Committee and its centralized, unified leadership. We have tightened political discipline and rules to ensure that political responsibility for governance over the Party is fulfilled at each level of the Party organization.”]

<sup>135</sup>*Id.* (“必须把党的领导贯彻落实到依法治国全过程和各方面，坚定不移走中国特色社会主义法治道路，完善以宪法为核心的中国特色社会主义法律体系，建设中国特色社会主义法治体系，建设社会主义法治国家，发展中国特色社会主义法治理论，坚持依法治国、依法执政。”) [“We must exercise Party leadership at every point in the process and over every dimension of law-based governance, and be fully committed to promoting socialist rule of law with Chinese characteristics. We must improve the Chinese socialist system of laws, at the heart of which is the Constitution; establish a Chinese system of socialist rule of law; build a socialist country based on the rule of law; and develop Chinese socialist rule of law theory.”]

<sup>136</sup>*Id.* (“必须以党章为根本遵循，把党的政治建设摆在首位，思想建党和制度治党同向发力。”) [“We must uphold the Party Constitution as our fundamental rules, give top priority to the political work of the Party, combine efforts on ideological work and institution building, and strengthen Party competence in all respects.”]

in the Constitution and the law, and to truly represent the people and maintain close ties with them.<sup>137</sup>

Pg 39 BL (Advancing Law based governance)

A central leading group for advancing law-based governance in all areas will be set up to exercise unified leadership over the initiative to build rule of law in China. We will strengthen oversight to ensure compliance with the Constitution, advance constitutionality review, and safeguard the authority of the Constitution.

We will redouble efforts to raise public awareness of the law, develop a socialist culture of rule of law, and increase public awareness of the principle underlying rule of law that the Constitution and the law are above everything else and that everyone is equal before the law.

No organization or individual has the power to overstep the Constitution or the law; and no one is allowed in any way to override the law with his or her own orders, place his or her authority above the law, violate the law for personal gain, or abuse the law.<sup>138</sup>

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<sup>137</sup> *Id.* (“更好发挥人大代表作用，使各级人大及其常委会成为全面担负起宪法法律赋予的各项职责的工作机关，成为同人民群众保持密切联系的代表机关。完善人大专门委员会设置，优化人大常委会和专门委员会组成人员结构。”) [“We should give better play to the role of deputies to people's congresses, and enable people's congresses at all levels and their standing committees to fully perform their functions as stipulated in the Constitution and the law, and to truly represent the people and maintain close ties with them.”]

<sup>138</sup> *Id.* (“(四) 深化依法治国实践。全面依法治国是国家治理的一场深刻革命，必须坚持厉行法治，推进科学立法、严格执法、公正司法、全民守法。成立中央全面依法治国领导小组，加强对法治中国建设的统一领导。加强宪法实施和监督，推进合宪性审查工作，维护宪法权威。推进科学立法、民主立法、依法立法，以良法促进发展、保障善治。建设法治政府，推进依法行政，严格规范公正文明执法。深化司法体制综合配套改革，全面落实司法责任制，努力让人民群众在每一个司法案件中感受到公平正义。加大全民普法力度，建设社会主义法治文化，树立宪法法律至上、法律面前人人平等的法治理念。各级党组织和全体党员要带头尊法学法守法用法，任何组织和个人都不得有超越宪法法律的特权，绝不允许以言代法、以权压法、逐利违法、徇私枉法。”) [“Advancing law-based governance in all fields is a profound revolution in China's governance. We must promote the rule of law and work to ensure sound lawmaking, strict law enforcement, impartial administration of justice, and the observance of law by everyone. A central leading group for advancing law-based governance in all areas will be set up to exercise unified leadership over the initiative to build rule of law in China. We will strengthen oversight to ensure compliance with the Constitution, advance constitutionality review, and safeguard the authority of the Constitution. We will carry out lawmaking in a well-conceived and democratic way and in accordance with law, so that good laws are made to promote development and ensure good governance. We will build a rule of law government, promote law-based government administration, and see that law is enforced in a strict,

Pg. 55 BL (Upholding “One Country, Two Systems” and Moving Toward National Reunification)

It is imperative too, to act in strict compliance with China’s Constitution and the basic laws of the two special administrative regions, and to improve the systems and mechanisms for enforcing the basic laws.

We will continue to support the governments and chief executives of both regions in pursuing the following endeavors: exercising law-based governance, . . . and fulfilling the constitutional responsibility of safeguarding China’s sovereignty, security, and development interests.<sup>139</sup>

Pg. 63 BL (Putting the Party’s political building first)

Every member of the Party must hold the Party Constitution in great reverence, act in strict accordance with the code of conduct for intraparty political life under new circumstances, and make intraparty activities more politically oriented, up-to-date, principled, and effective.<sup>140</sup>

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procedure-based, impartial, and non-abusive way. We will carry out comprehensive and integrated reform of the judicial system and enforce judicial accountability in all respects, so that the people can see in every judicial case that justice is served.”]

<sup>139</sup>*Id.* (“保持香港、澳门长期繁荣稳定，必须全面准确贯彻“一国两制”、“港人治港”、“澳人治澳”、高度自治的方针，严格依照宪法和基本法办事，完善与基本法实施相关的制度和机制。要支持特别行政区政府和行政长官依法施政、积极作为，团结带领香港、澳门各界人士齐心协力谋发展、促和谐，保障和改善民生，有序推进民主，维护社会稳定，履行维护国家主权、安全、发展利益的宪制责任。”) [“To maintain long-term prosperity and stability in Hong Kong and Macao, it is imperative to fully and faithfully implement the policies of “one country, two systems,” “the people of Hong Kong governing Hong Kong,” “the people of Macao governing Macao,” and a high degree of autonomy for both regions. It is imperative too, to act in strict compliance with China’s Constitution and the basic laws of the two special administrative regions, and to improve the systems and mechanisms for enforcing the basic laws. We will continue to support the governments and chief executives of both regions in pursuing the following endeavors: exercising law-based governance, uniting and leading the people of all sectors in an active and concerted effort to promote development and harmony, ensuring and improving people’s wellbeing, taking well-ordered steps to advance democracy, maintaining law and order, and fulfilling the constitutional responsibility of safeguarding China’s sovereignty, security, and development interests.”]

<sup>140</sup>*Id.* (“要尊崇党章，严格执行新形势下党内政治生活若干准则，增强党内政治生活的政治性、时代性、原则性、战斗性，自觉抵制商品交换原则对党内生活的侵蚀。”) [“Every member of the Party must hold the Party Constitution in great reverence, act in strict accordance with the code of conduct for intraparty political life under new circumstances, and make intraparty activities more politically oriented, up-to-date, principled, and effective. We must guard against the rules of business dealings eroding intraparty conduct, and foster a healthy political atmosphere of integrity within the Party.”]

Pg. 64 BL (Arming the whole Party with the Thought on Socialism with Chinese Characteristics for a New Era)

We will foster a Marxist style of learning, and make it regular practice and an institutionalized requirement for all Party members to gain a good command of the Party Constitution, Party regulations, and related major policy addresses and to meet Party standards.<sup>141</sup>

This bare listing does not tell one much, but it does reveal a few potentially useful concepts. It is clear that the 19<sup>th</sup> CPC Congress did not shy away from the use of the term constitution (in English or as 宪法, 章程 and 党章). It is clear that issues of law and of constitution remain an important element of CPC policy, or, in any case, it is not clear that the CPC appears to be abandoning either the concept or the use of the constitution as a vehicle. The references to the constitution appear to be used in three distinct ways. First the constitution, strictly applied, is used as a tool to legitimate and guide policy with respect to external relations and the construction of the institutionalization of one nation two systems. Second, the notion of constitution is used to articulate the guiding ideology and frame the institutional systems of the party in power, assuming the role of paramount normative order maker. Third, the term constitution is used to refer to the supreme rules that frame the system of government instituted in China, one that reflects the application of the paramount normative order and that is guided and managed by the party in power and its United Front. These multiple uses of the term may provide a hint of the character of the emerging constitutionalism of China in the New Era.

Yet, these insights produce a further set of questions. First, if the term remains an important element of CPC leadership, what is the nature of its contribution to the political and legal order of state and Party? Second, Is Socialist constitutionalism moving away from assigning a fixed meaning to the term “constitution”—for example is there a difference between the uses of the constitution and constitutional concepts different when used to manage outward relations than inward relations; is there a difference between constitutionalism as applied for the benefit of the masses and as the system for guiding the discretionary decision making of the party in power and its United Front? More importantly, perhaps, to what extent does the 19<sup>th</sup> CPC Congress Report begin to reveal its changing character and place within the constellation of Chinese constitutionalism, broadly understood in the Chinese context in the New Era”?

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<sup>141</sup>*Id.* (“弘扬马克思主义学风，推进“两学一做”学习教育常态化制度化，以县处级以上领导干部为重点，在全党开展“不忘初心、牢记使命”主题教育，用党的创新理论武装头脑。”) [“We will foster a Marxist style of learning, and make it regular practice and an institutionalized requirement for all Party members to gain a good command of the Party Constitution, Party regulations, and related major policy addresses and to meet Party standards. We will launch a campaign on the theme of “staying true to our founding mission” to enable all Party members, especially officials at and above the county and director level, to arm themselves with the Party’s new theories and become more purposeful in working tirelessly to accomplish the Party’s historic mission in the new era.”]

### B. Reading Constitution in Context

What appears from a closer and more nuanced reading of these texts is the emergence of a more complex and malleable constitutionalism. It is a constitutionalism that comes closer to recognizing the dual aspects of Chinese constitutionalism, its division into a paramount political constitution and an operational administrative constitution. At the same time, it suggests as well the ordering of the hierarchy of those constitutions, the allocation of power with respect to their interpretation and application, and lastly with respect to the premises for their interpretation and use in the maintenance of the Chinese constitutional order. Briefly put—the 19<sup>th</sup> CPC Congress Report refined its focus on the CPC constitution as the paramount source of the CPC's legitimacy and constraining force. It emphasized the distinction between the political constitution of the CPC, which is to be broadly and flexibly construed to meet the needs of the new historical era, and the state constitution, whose terms are to be strictly applied. And it strongly implied that the leadership role of the ruling party includes leadership respecting the role and application of the state constitution, which is its greatest creation tool for the fulfillment of its obligations to the people.

To that end, it might be useful to divide these references into three distinct types. For convenience, I will call the first type references to the CPC Constitution. I will call the second type references to the state constitution. And I will call the third CPC leadership references (mixed or hybrid references). To put the following considerations in sharper focus, of the 13 references to constitution in the English version of the 19<sup>th</sup> CPC Congress Report, (a) *four (4) make reference to the CPC Constitution* in four (4) different sections, (b) *only two (2) make reference to the state constitution*, in different sections, and (c) *the majority of the references, six (6) references in four (4) sections speak to mixed references, of state constitution under CPC leadership*.

*References to the CPC Constitution.* It might come as no surprise that the greatest number of references to constitutions are to the constitution of the Chinese Communist Party. But it is the character of those references that open a clear window into the emerging understanding of the construction of Chinese constitutionalism in the “New Era.” CPC cadres are “encouraged to hold the CPC Constitution in great esteem.”<sup>142</sup> They are required to cultivate a “solid understanding of the CPC Constitution.”<sup>143</sup> These encouragements and responsibilities are developed in connection with efforts to ensure full and strict compliance over the CPC itself. The CPC Constitution appears to assume an even greater role in the context of exercising full and rigorous governance over the CPC, the paramount political force in the state. In that context, the 19<sup>th</sup> CPC Congress Report speaks to the requirement to uphold the CPC Constitution “as our fundamental rules.”<sup>144</sup> This requirement is not exercised in isolation, but rather as an element of centering the political work of the

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<sup>142</sup> Jinping, *supra* note 7, at 8.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 25.

CPC in the context of ideological an institution building.<sup>145</sup> To that end, there is an emphasis on treating the CPC constitution (but not the state constitution) “in great reverence.”<sup>146</sup> That reverence must be translated into strict compliance with its rules (presumably including the premises and ideological lines of its General Program). And it translates into a Marxist style of learning necessary to master the CPC’s political constitution, its regulations and Basic Line.<sup>147</sup> Taken together, the references suggest both the constitutional character of the CPC Constitution, and their role in organizing and constraining the discretion of the CPC in its own political work. The language is not one that appears to advance the notion that the CPC is a purely political body without constraint. But rather the CPC itself produces the document through which it constitutes and administers its *kompetenz-kompetenz* (its power to determine the scope of its own power).<sup>148</sup> It is not so much about the devolution of power as its manifestation through rules that itself better permits the expression of collective and process based rather than personal and discretionary decision making.

Where do these references appear? Not surprisingly, these references are set out in those portions of the 19<sup>th</sup> CPC Congress Report that focus on the institutionalization of the CPC itself. The first with reference to the past.<sup>149</sup> The second with reference to CPC internal governance—its cage of regulation.<sup>150</sup> The third reference is contained in a section focusing on the centrality of CPC political building and the constraints under which that goal is undertaken.<sup>151</sup> The last reference focuses on the discipline of ideology and its dissemination within the CPC itself.<sup>152</sup> Taking this as a whole, these references to the constitution as the organizing instrument of the CPC and its guide to action suggests a further development of a move toward the constitutionalization of the CPC itself. Its character as the body corporate vested with the authority to lead the state and manage its affairs echoes Western notions not of liberal democratic governmental organs but rather the board of directors of a large complex enterprise. And it suggests a remarkable convergence, not between Chinese and Western liberal democratic theory, but between Marxism

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 63.

<sup>147</sup> *Id.* at 64.

<sup>148</sup> See Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, 2014 PEPP. L. REV. 17 (2014), <http://digitalcommons.pepperdine.edu/plr/vol2014/iss1/2>.

<sup>149</sup> *Press briefing: party building, self governance*, [http://www.china.org.cn/china/2017-10/20/content\\_41765343.htm](http://www.china.org.cn/china/2017-10/20/content_41765343.htm); Jinping, *supra* note 7, at 8 (“We have achieved remarkable outcomes in ensuring full and strict governance over the Party”).

<sup>150</sup> Jinping, *supra* note 7, at 25 (“Exercising full and rigorous governance over the Party”).

<sup>151</sup> *Id.* at 63 (“Putting the Party’s political building first”).

<sup>152</sup> *Id.* at 64 (“Arming the whole Party with the Thought on Socialism with Chinese Characteristics for a New Era”).

and Western liberal enterprise constitutionalism.<sup>153</sup> This is an area ripe for further study and may represent the most dynamic element of constitutional evolution in the West and China for this century.

*References to the State Constitution.* Only two (2) of the references to constitutions are solely centered on the state constitution in its own right. Standing alone, this would certainly add weight to the intuition that the 19<sup>th</sup> CPC Congress Report points to a substantial downshifting of conventional constitutionalism. That intuition seems confirmed in this respect. Yet that downshifting of the state constitution does not necessarily mean a drifting away from constitutionalism. Rather it may appear to suggest a re centering, from administrative to political constitution, and an affirmation of the hierarchy of authority that places the state constitution below and crafted to serve the political constitution of the state. Those hints are underlined by the form of reference to the state constitution standing alone. The first reference suggests the value of the state constitution as a tool—the manifestation of a rule that must be strictly applied. That is certainly useful in the context in which it is made—referencing the rules institutionalizing the one country—two system policy.<sup>154</sup> So does the second reference. Again, deployed in the context of the adherence to the one country—two systems policy, the reference is again to acting in “strict compliance with China’s constitution.”<sup>155</sup> So, where has state constitutionalism gone? It appears that the 19<sup>th</sup> CPC Congress Report underscores the dependent nature rather than the autonomous position of the state constitution within the Chinese constitutional universe. That is, the 19<sup>th</sup> Congress Report makes clear that the state constitution cannot be understood or applied except in the context of the leadership of the CPC and under its direction. As such the state constitution loses its autonomy and derives its power not from itself but from its exercise in accordance with leadership obligations of the CPC.

Where do these references appear? The traditional references to the state constitution as an autonomous instrument legitimating and constraining power appear in two places in the 19<sup>th</sup> CPC Congress Report. But both focus on the same issue—the outward projection of constitutional premises to define the limits and character of the state system. The first reference was embedded in reports on progress in the integration of China’s autonomous regions, and specially Hong Kong, Macao and Taiwan.<sup>156</sup> The second reference was embedded in the objectives of managing

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<sup>153</sup> E.g., Larry Catá Backer, *Transnational Corporate Constitutionalism: The U.N. Global Compact, the OECD Guidelines for Multinational Enterprises and the Emergence of a Constitutional Order for Economic Enterprises*, LAW AT THE END OF THE DAY (Sept. 21, 2009), <http://lcbackerblog.blogspot.com/2009/09/transnational-corporate.html>; GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012); Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems* (March 1, 2010), Penn State Legal Studies Research 10-2010, available at <https://ssrn.com/abstract=1568934>; Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751 (2011).

<sup>154</sup> Jinping, *supra* note 7, at 7.

<sup>155</sup> *Id.* at 55.

<sup>156</sup> *Id.* at 7 (“We have made fresh progress in work related to Hong Kong, Macao, and Taiwan”).

the one country—two systems policy.<sup>157</sup> In both cases, the references are made in passing in the sense that the constitution was brought to bear as a legitimating force rather than as the central element of the discussion. In both cases, the constitution serves its role as a cage of regulation, but one that serves China's interests in the ordering of its peripheral affairs—the management of its territories. To that extent, the law—and the fundamental legitimating force of the constitution—provide the basis for action, and its justification in ways that appeal both internally and to China's foreign audience.

*References to CPC leadership (mixed or hybrid references).* Chinese constitutionalism for the New Era most clearly emerges from large number of references to the state constitution that are here described as mixed or hybrid. They are given this description precisely because, while they continue to uphold the now conventional Chinese principles of rule of law and the primacy of the state constitution in ordering the apparatus of government, they make those principles contingent on their exercise through the leadership of the CPC. The description is tentative though the effects are apparent from the text of the 19<sup>th</sup> CPC Congress Report. Here there is a curious mix. The normative thrust of the statements point to conventional constitutional theory—the primacy of a state constitution, the principle of equality before the law, the principle of the supremacy of the law and of the illegitimacy of abusive discretion and cults of personality. At the same time, it deviates from conventional constitutional approaches because it shifts the responsibility for those constitutional principles to a very specific political institution that itself is subject to its own paramount constitutive instrument.

Thus, the obligation to improve the Chinese Socialist system of laws, “at the heart of which is the Constitution” falls on the CPC (and exercised through its own rules and governance institutions). (BL., p. 22). Indeed, the constitution lies at the heart of a socialist rule of law system, whose principles derive from the political constitution of the nation. More importantly, the state constitution appears to be active only under the leadership of the CPC. Thus the 19<sup>th</sup> CPC Congress Report declares that “we [the CPC] must improve the Chinese socialist system of rules, at the heart of which is the Constitution”,<sup>158</sup> it further declares that “we [the CPC] should give better play to the people's congresses, and enable [them] to fully perform their functions as stipulated in the Constitution and the law.”<sup>159</sup> More importantly, it is the political organs of the state, the CPC, to which falls the responsibility “over the initiative to build rule of law in China.”<sup>160</sup> In that context, the 19<sup>th</sup> CPC Congress Report explains that “we [the CPC] will strengthen oversight to ensure compliance with the Constitution, advance constitutionality review, and safeguard the authority of the Constitution.”<sup>161</sup> Where has constitutionalism migrated—the answer is plain, in and through the organs of the CPC and constituted within the principles and objectives of the political constitution whose articulation is manifested in the state constitution. It follows that it is to the CPC that the responsibility falls to “develop a

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<sup>157</sup>*Id.* at 55 (“Upholding “One Country, Two Systems” and Moving Toward National Reunification”).

<sup>158</sup> *Id.* at 22.

<sup>159</sup> *Id.* at 37.

<sup>160</sup> *Id.* at 39.

<sup>161</sup> *Id.*

socialist culture of rule of law, and increase public awareness of the principle underlying rule of law that the Constitution and the law are above everything else and everyone else.”<sup>162</sup> That responsibility follows and clarifies the hierarchy of constituting power. The Constitution can be above all precisely because it was so created by those with the authority to make that so, consistent with its own binding fundamental rules. It is in this light that the CPC mandatory requirement (reflected as well in the state constitution) that no one and no individual “has the power to overstep the Constitution or the law”<sup>163</sup> can be enforced precisely because such principle serves to underscore the leadership authority of the CPC and its political constitution. To that end, it is to the CPC that the state must look “to continue to support the governments and chief executives” of Hong Kong and Macao<sup>164</sup> as a necessary aspect of “fulfilling the constitutional responsibility of safeguarding China’s sovereignty, security and development interest.”<sup>165</sup>

Where do these references to what has been characterized here as “mixed references” appear? That is indeed the most curious part of the 19<sup>th</sup> CPC Congress Report. These references are all embedded in the core sections that focus on the project of the construction of socialist rule of law and socialist democracy. One would have expected that these would be the sections in which the state constitution’s autonomy would be reflected as well as its supremacy—to the extent that one gauges constitutionalism in Western terms. Yet these expressions of fidelity to the state constitution are embedded in curious form. They appear not complete in themselves but instead as a passive principle whose activation and management are dependent on the exercise of positive authority by the CPC itself constrained by its own fundamental rules. The first reference was made in the context of the CPC’s duty to ensure the implement of rule of law governance.<sup>166</sup> The statement that the Constitution is at the heart of the Chinese socialist system of laws is modified by the obligation of the CPC to improve that system. The second reference is embedded in a discussion about popular government.<sup>167</sup> But here the reference is technical—with a focus on the operation of the NCP system and of the obligation of the CPC to ensure that state officials are able to perform their duties. The third set of three references is found in the section of the Report describing the objectives of developing the constitutional system itself.<sup>168</sup> This is in a sense the heart of the state constitutionalism section of the Report—with its affirmation both of the role of the state constitution and its scope. But at the same time, it reaffirms that state constitutional supremacy is itself dependent on two factors—the exercise of CPC leadership in the implementation of the key elements of state constitutionalism and the power of the political constitution to frame that leadership. The last reference is

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 55.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 22 (“Ensuring every dimension of governance is law-based”).

<sup>167</sup> *Id.* at 37 (“Strengthening institutional guarantees to ensure the people run the country”).

<sup>168</sup> *Id.* at 39 (“Advancing Law based governance”).

tied to the exercise of legitimate authority in Hong Kong, Macao and Taiwan.<sup>169</sup> The most interesting aspect of that reference is the way in which the relationship between the CPC and the regional administrative leaders is framed. The CPC serves to support these officials in fulfilling their constitutional responsibilities, with the implication that this support has constitutional teeth exercised through the state constitution itself and overseen by the CCP.<sup>170</sup>

C. *Extracting Meaning from Context: The Constitution in Emerging Ideal and Practice*

So, what is the state of Chinese constitutionalism in the wake of the 19<sup>th</sup> CPC Congress? It is clear that the issue of socialist rule of law, and socialist democracy remain substantial priorities for the CPC itself and a core policy of governance. It is also clear that the State Constitution remains a central instrument of governance. This is particularly the case with respect to the most sensitive items identified as central to the amendment of the State Constitution in the wake of changes to the political principles for governance now written into the CPC Constitution.<sup>171</sup>

But it also is becoming clearer that the fundamental constituting document of the *political order* is not the state constitution but the political constitution of the CPC. The State Constitution assumes more the character of a derivative and implementation document—the cage of regulations whose character and interpretation is in every aspect bounded by the higher principles of the CPC Constitution in general and its General Program in particular. The 19<sup>th</sup> CPC Congress did not make this declaration explicit, but it made that conclusion inevitable in its discussion of constitutionalism and its practice. The state constitution manifests the exercise of political will in operationalizing first principles. But those first principles—those that bind the organization charged with the leadership role in exercising political authority—are constituted elsewhere, in the political constitution of the nation. And thus, it follows that the primary responsibility for the protection of the constitution and constitutional order falls to the CPC on behalf of the people. Constitutionalism for the New Era thus appears not to represent a break with the past as much as a self-conscious effort to evolve beyond it. There appears to be little need to nod in the direction of Western constitutional sensibilities. For example, neither the word judge nor judiciary appear in the 19<sup>th</sup> CPC Congress Report.<sup>172</sup>

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<sup>169</sup> *Id.* at 55 (“Upholding “One Country, Two Systems” and Moving Toward National Reunification”).

<sup>170</sup> See, e.g., Xinhua, *China Adopts Interpretation to Basic Law of Hong Kong SAR*, CHINADAILY, (Nov. 7, 2016, 9:34 AM), [http://www.chinadaily.com.cn/china/2016-11/07/content\\_27293017.htm](http://www.chinadaily.com.cn/china/2016-11/07/content_27293017.htm).

<sup>171</sup> See RESOLUTION, *supra* note 16.

<sup>172</sup> In the West, constitutionalism is usually conflated with the issue of judicial review and the tripartite structures of government (functional separation of powers into judicial, executive and legislative functions). There is a rich literature, contentious only at its fringes. See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673 (2004); Mark Tushnet, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands South Africa*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* at 164 (Peter Cane & Mark Tushnet eds., 2003). For a discussion of the role of the constitutional relevance of the

And yet the issue of the judicial role within the state constitution has been an important element of reform in conformity with but not as the driving structural element in the construction and operation of the state constitution.<sup>173</sup>

That shift is most noticeable in the concentration on the building of socialist consultative democracy—a self-consciously political institution,<sup>174</sup> rather than on the construction of legalized institutions through constitutional meta-rules. So, what is Chinese constitutionalism in the New Era? Perhaps the best answer is provided in the 19<sup>th</sup> CPC Congress Report itself—an “institutionalized development of consultative democracy”<sup>175</sup> That alone will provide the CPC one of its greatest operational challenges for the New Era. To that end, the idea of a constitution becomes a more nuanced and multi-purpose instrument. The 19<sup>th</sup> CPC Congress Report uses the term in a number of ways, or better put, it identifies multiple functions and identities of constitution that together make up Chinese Constitutionalism. One form of constitution serves as the fundamental rules of the constitution of the political order. This form of constitution represents the embodiment of the highest forms of constitutional principles and the organization of political power in China. It demands great esteem, solid understanding, and great reverence. It demands the fostering of a Marxist style of learning and obligation and gives institutional expression to ideological work and institution building. It is the core of socialist democracy.

Another form of constitution serves as the heart of the socialist system of laws and the foundation of socialist rule of law theory; but not as the foundation of socialist democracy. It provides the structures for the institution of government, but not its ideology. It serves as the guide for people to better perform their societal roles in government and in society. It serves as the institutional expression of the ideological principle of equality and the subordination of discretion to rule. It serves as the public expression of the core Leninist notion of collectivity and the centering of societal interests over those of individuals. And it provides the rules respecting the operation of the government within a complex institutional structure of two systems in one nation. Over and within both, the CPC itself represents the

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judiciary in China, see, Larry Catá Backer, *Between the Judge and the Law—Judicial Independence and Authority with Chinese Characteristics*, 33(1) CONN. J. OF INT'L L. 1 (2017);

<sup>173</sup> See, e.g., *China issues white paper on judicial reform of Chinese courts*, CHINADAILY (Feb. 2, 2017, 2:29 PM), [http://www.chinadaily.com.cn/china/2017-02/27/content\\_28361584.htm](http://www.chinadaily.com.cn/china/2017-02/27/content_28361584.htm) (“The improvement of the judicial management system and the standardization of the exercise of judicial powers will help the judicial system play a more effective role in administering the country and managing governmental affairs by operation of law, and promote the modernization of governance system and capability in our country.”). And indeed, judicial reform and the supervision of the judicial system itself may well be subsumed to some extent under current initiatives for improving governmental operation through the use of big data management and social credit. See *Supreme People’s Court & 43 other central institutions commit to punishing judgment debtors*, SUPREME PEOPLE’S COURT MONITOR (April 27, 2016) <https://supremepeoplescourtmonitor.com/2016/04/27/supreme-peoples-court-43-other-central-institutions-commit-to-punishing-judgment-debtors/> (“The 4th Five Year Court Reform Plan calls for “establishing a legal system for credit supervision, deterrence and punishment of those not fulfilling judgments against them.” The document analyzed in this blog post fulfills that performance target and is an important building block in the construction of China’s social credit system.”)

<sup>174</sup> Jinping, *supra* note 7, at 38.

<sup>175</sup> *Id.*

autonomous political force. It both constitutes and is constituted by its institutionalized system of rules. It is bound by the State Constitution but also ensures that it is obeyed, and must exercise an authority to interpret and modify the state constitution in accordance with its paramount political duty, a duty informed by its own higher law of the political constitution of the CPC itself.

Much of this emerging discourse, of course, must be read within the context of the growing prominence of democratic structures not fashioned in the Western manner but now perhaps best denominated as *socialist consultative democracy*.<sup>176</sup> But here there emerges another curiosity—the disconnect between the content of the state constitution and the construction of core principles of socialist consultative democracy. That connection appears to be strongest not within the principles of the state constitution (the expectation within Western liberal constitutionalism) but instead around the principles that constitute the political constitution of the state and the objectives (and basis for legitimacy) of the CPC as its leading force. And thus, the relationship, made clearer in the 19<sup>th</sup> CPC Report, between the overarching political principles that serve as the normative core of legitimacy and the application of those principles through the administrative apparatus of the State Constitution.<sup>177</sup> This relationship poses challenges that themselves can sometimes be quite distinct from those common in the West and Western constitutional states.<sup>178</sup>

Indeed, one of the most interesting aspects of the invocation of constitution is the 19<sup>th</sup> CPC Congress Report is the potential relationship between constitution and its normative principles and the conceptualization of socialist democracy as something contextually appropriate to the Chinese political order. This socialist consultative democracy is not built around popular elections and the rise of political parties, but around engagement in governance exercised through the organs that bring together the CPC and the United Front parties. It is in those institutions that socialist democracy will be developed—an exercise in endogenous democracy in contradistinction to the West’s emphasis on exog-

enous democratic exercise.<sup>179</sup> It is in this context that democracy is to practiced and the meaning of the socialist democratic path is revealed:

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<sup>176</sup> Jinping, *supra* note 7, at 4. Consider the notion of consultative democracy as deeply embedded within principles articulated especially over the course of the last decade or so. See HU ANGANG, *CHINA’S COLLECTIVE PRESIDENCY* (Springer 2014).

<sup>177</sup> “In that sense, the Chinese Constitution is regarded as a ‘general summary of the present policy’ of the Party.” ZOU KEYUAN, *The Party and the Law*, in *THE CHINESE COMMUNIST PARTY IN REFORM* 77, 81 (Kjeld Erik Brodegaard & Zhang Tongnian, eds. 2006).

<sup>178</sup> See, e.g., Larry Catá Backer, *Between the Judge and the Law—Judicial Independence and Authority with Chinese Characteristics*, 33(1) *CONN. J. OF INT’L L.* 1 (2017).

<sup>179</sup> Endogenous democracy in the sense used here touches on the modalities of the expression of representative government rather than to the process of democratization within non-democratic states. I have suggested to the ideology of democracy (and its forms) in the West might blind Western scholars to the possibility of variation of democratic expression and practice beyond the fundamental exercise of democracy through voting by citizens eligible to exercise that franchise. I posited that the essence of democratic governance—the effective exercise of authority of popular representatives in a quasi-fiduciary capacity need not necessarily always be based on the practice of voting for representatives to state organs, but rather can also be exercised by officials bound to exercise their discretionary authority within government. This distinction between the exercise of democratic representation within government and the exercise of democratic representation exogenously (to government) through the practice of voting for representatives marks a fundamental ideological difference in meaning that separates emerging Marxist

We must keep to the path of socialist political advancement with Chinese characteristics; uphold and improve the system of people's congresses, the system of Party-led multiparty cooperation and political consultation, the system of regional ethnic autonomy, and the system of community-level self-governance; and consolidate and develop the broadest possible patriotic united front. We should develop socialist consultative democracy, improve our democratic institutions, diversify our forms of democracy, and establish more democratic channels.<sup>180</sup>

What is then centered is socialist consultative democracy built around the Chinese People's Political Consultative Conference.<sup>181</sup> The 19<sup>th</sup> CPC Congress Report stresses: "Consultative democracy is an important way of effecting Party leadership and a model and strength unique to China's socialist democracy. . . . The CPPCC, as a distinctively Chinese political institution, is a major channel for socialist consultative democracy, and its committees are specialist consultative bodies."<sup>182</sup> The nexus between state, CPC and United Front through the CPPCC, then, serves as the connective tissue between CPC and State constitutions, and between the political authority of the CPC and its exercise through the rule system it itself has mandated as its own political line. It expresses in contemporary form the ideals of the *New Democracy* thinking embraced by the CPC before the founding of the PRC.<sup>183</sup> CPC leadership is normative and self-reflexive (within the constraints of the Mass Line);<sup>184</sup> this is a primary duty of the vanguard reflected in the leadership paragraphs of the General Program of the CPC Constitution.<sup>185</sup> The operation of the state, the place where norms are operationalized through the state apparatus, however, is a broader consultative space now emphasized by the 19<sup>th</sup> CPC Congress focus on

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Leninist theory from Western democratic theory. See Larry Catá Backer, *Crafting a Theory of Socialist Democracy For China in the 21st Century*, 16 ASIAN PACIFIC L. & POL'Y J. 1 (2014). For the conventional debate see, e.g., Charles Boix and Susan C. Stokes, *Endogenous Democratization*, 55 WORLD POLITICS 517-49 (2003).

<sup>180</sup> Jinping, *supra* note 7, at 22.

<sup>181</sup> *Id.* at 38.

<sup>182</sup> *Id.*

<sup>183</sup> ZEDONG, *supra* note 73.

<sup>184</sup> The revised General Program of the CPC Constitution provides in that respect: ("The Party follows the Mass Line in its work, doing everything for the masses, relying on the masses in every task, carrying out the principle 'from the masses, to the masses,' and translating its correct views into action by the masses of their own accord.") <https://china-social-credit.com/2017/10/general-program-constitution-communist-party-china-2017-revisions/>. See generally Flora Sapio, *General Program and the Constitution of the Communist Party of China, Table of Amendments 2017*, COALITION FOR PEACE & ETHICS BACKGROUND PAPER (2017) <http://www.thecepe.org/wp-content/uploads/2017/10/cpc-constitution-table-amendments-2017.pdf>.

<sup>185</sup> CPC Constitution, General Program Oct. 24, 2017 ("In order to lead the people . . . the [CPC] must adhere to its basic line, the Party must rule the Party, and the Party must be comprehensively and strictly rules, strengthen its government capability, advanced nature and purity, and comprehensively carry forward the great new undertaking to build itself in the spirit of reform and innovation"). *Id.*

consultative democracy under the leadership of the CPC as the basis of the project of developing socialist democracy.<sup>186</sup>

In China's political life, our Party exercises leadership. Strengthening the centralized, unified leadership of the Party on the one hand and, on the other, supporting the people's congresses, governments, committees of the Chinese People's Political Consultative Conference (CPPCC), courts, and procuratorates in performing their functions and playing their roles in accordance with the law and their charters, form a unified pair.<sup>187</sup>

The direction of change to both the political principles through which the state is organized and governed (and the discretion of the CPC itself is constrained) and its implementation through the administrative rule system of the State Constitution are already becoming visible. In its resolution on the revisions to the CPC Constitution,<sup>188</sup> the 19<sup>th</sup> CPC Congress began the process of distilling the evolutionary (e.g., “New Era”) elements of the fundamental political norms that guide and constrain the vanguard political organs of the nation (until again changed in accordance with the rules of the CPC itself).<sup>189</sup> As most commentators noted, the Resolution provided for the formal addition of Xi Jinping New Era Thought as a core element of the guiding principles in the CPC Constitution.<sup>190</sup> It extends the scope of the political authority of the CPC to include the culture of socialism with Chinese characteristics.<sup>191</sup> It embeds the political notion of national rejuvenations and the Chinese Dream as objectives-based principles that guide both the CPC and its state apparatus.<sup>192</sup> More importantly, it suggests the pyramidal structure of constitutional authority in the incorporation of the doctrine of the new fundamental contradiction facing Chinese society, a product of the development of Marxist Leninist Theory that now guides the exercise of political authority by the CPC, the exercise of which shapes the contours of the provisions of the State Constitution and its objectives.<sup>193</sup>

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<sup>186</sup> CPC Constitution, General Program Oct. 24 2017 (the CPC “advances the extensive, multi-level, and institutionalized development of consultative democracy”). *Id.*

<sup>187</sup> Jinping, *supra* note 7, at 71.

<sup>188</sup> See RESOLUTION, *supra* note 16.

<sup>189</sup> Sapio, *supra* note 183. Cf. Osakwe, *supra* note 24, at 162.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (“The Congress approves the incorporation of the culture of socialism with Chinese characteristics into the Party Constitution, along with the path of socialism with Chinese characteristics, the theoretical system of socialism with Chinese characteristics, and the system of socialism with Chinese characteristics.”).

<sup>192</sup> *Id.*; see HU ANGANG, CHINA IN 2020: A NEW TYPE OF SUPERPOWER 213 (Brookings Institution Press 2011); Larry Catá Backer and Keren Wang, “What is China's Dream?” *Hu Angang Imagines China in 2020 as the First Internationally Embedded Superpower* (Consortium for Peace & Ethics, Working Paper No. 2013-2, 2013) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2223279](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223279).

<sup>193</sup> Resolution, *supra* note 116.

The Congress holds that a major political conclusion is drawn in the political report to the 19th Party Congress that the principal contradiction facing Chinese society has evolved and is now that between the people's ever-growing needs for a better

The CPC Constitution guides the CPC toward the objectives to “to improve and develop the system of socialism with Chinese characteristics, to modernize China's system and capacity for governance, and to pursue reform in a more systematic, holistic, and coordinated way.”<sup>194</sup> The CPC Constitution incorporates the goal of governmental reform as an obligation of the CPC in the organization of the state and state power,<sup>195</sup> and the assertion of its soft power globally.<sup>196</sup> It is to the CPC rather than to the state that the military is to look to leadership.<sup>197</sup> And it is to the CPC Constitution, rather than to the State Constitution, that the CPC orders its own self-discipline and imposes obligations respecting the assertion of political authority. “The Party must constantly strengthen its ability to purify, improve, reform, and excel itself.”<sup>198</sup> To that end a comprehensive approach to discipline and inspection is required—one which is political in origin but with implications for the operation of the state and the use of state authority to enhance political discipline of the political community represented by the CPC itself. That is a critical concept of the overarching principle of CPC political authority: “[t]he Congress holds that the leadership of the Communist Party of China is the most essential attribute of socialism with Chinese characteristics, and the greatest strength of this system; the Party exercises overall leadership over all areas of endeavor in every part of the country.”<sup>199</sup> The State Constitution will be amended to reflect these normative political choices embedded into the political constitution of the vanguard Party.<sup>200</sup> It

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life and unbalanced and inadequate development; it reflects the realities of the development of Chinese society, and serves as an important basis on which we formulate major policies and long-term strategies for the Party and the country. The Party Constitution is revised accordingly to provide important guidance for us to better understand the new historic juncture in China's development and its particular features in the current stage and to further advance the cause of the Party and the country.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (“We shall give play to the decisive role of market forces in resource allocation and ensure the government plays its role better; advance supply-side structural reform; establish a system of socialist rule of law with Chinese characteristics; advance extensive, multilevel, and institutionalized development of consultative democracy.”).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (“The inclusion of these statements will help ensure the Party's absolute leadership over the people's armed forces, modernize national defense and the military, promote ethnic unity, and develop an open economy of higher standards.”).

<sup>198</sup> *Id.* (“Party must firmly exercise self-supervision and practice strict self-governance in every respect; strengthen the Party's long-term governance capacity and its advanced nature and purity; and take enhancing its political building as the overarching principle and make comprehensive efforts to ensure that the Party's political work is stressed, ideology is strengthened, organizations are consolidated, conduct is improved, discipline is maintained, institutional development is always emphasized, and the fight against corruption keeps going.”).

<sup>199</sup> *Id.*

<sup>200</sup> Mo Jihong, Executive Vice President of the Constitutional Law Society of the Chinese Law Society noted: “If a major change does not have a constitutional basis, the continuity and authority of the constitution will be hurt. But the constitution is not rigid and constant, it needs to adapt to the evolving reality. The reform of the supervision system advances orderly under the leadership of the party, we cannot say it is not in conformity with the objective of the constitution because the constitution itself as the fundamental law of the state must meet the policy requirement of the party. It could seem as rigid to assert

will serve as the basis for the expression of social consultative democracy in which the United Front Parties, representing the full range of the institutional organization of political power can function within a government. That government will practice endogenous democracy through the mechanism of the mass line, under the guidance of the vanguard party (whose ideological norms guides all decisions).

And it is in that process of translation from the exercise of political discretion bounded by the CPC Basic Line to its implementation in concrete form through the State Constitution that lies the complex and rich interplay of the CPC, state and individuals, especially those intellectuals who seek to ensure conformity of political and state constitution with the principles of the Basic Line.<sup>201</sup> These will likely include the transposition of the political principle of discipline of state and CPC officials.<sup>202</sup> In a sense the extent of this transposition from CPC to State Constitution guided by the 19<sup>th</sup> CPC Congress documents is already taking place. Chinese authorities are setting the stage through public commentaries published on the State

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that a supervision organ cannot be set if the constitution is not revised.” 莫纪宏等：宪法、行政法、刑事诉讼法三角度解读监察法草案 [Mo Jihong, Interview of Southern Weekly: Three aspects of the interpretation of the draft law: the constitution, the administrative law, the criminal complaint law], Source website of Chinese Academy of Social Science, Institute of Law, available at <http://www.iolaw.org.cn/showNews.aspx?id=61936>.

<sup>201</sup> See, e.g., 提高宪法贯彻实施水平 回应人民对美好生活向往 [Han Dayuan, *Improve the Implementation of the Constitution* (Dec. 7, 2017)], [http://www.qstheory.cn/politics/2017-12/07/c\\_1122074914.htm](http://www.qstheory.cn/politics/2017-12/07/c_1122074914.htm).

<sup>202</sup> See, e.g., 刘松山：制定监察法，不宜先修改宪法 [Liu Songshan: The Development of Supervision Law, Should Not Amend the Constitution], <http://www.aisixiang.com/data/107157-2.html> (“The Supervision Law is a reform legislation which means there are much uncertainties about it. We should focus on the lawmaking process of the supervision law instead of revising the constitution. We shall give play to the adaptability, inclusiveness, explanatory ability and expansibility of the constitution and fit the National Supervision Committee into the People’s Congress System which is included in the constitution now. There are spaces for explanation and inclusiveness in Article 2, Article 3, and Article 62 of the Constitution.”); Zhiwei Tong: On “The State Supervision Law Legislation Need Further Improvement” 国家监察立法预案仍须着力完善 English Translation and Original Chinese Version, Law at the End of the Day (Nov. 14, 2017), <http://lcbackerblog.blogspot.com/2017/11/zhiwei-tong-on-state-supervision-law.html>; 秦前红：国家监察体制改革宪法设计中的若干问题思考 [Qin Qianhong, *Some Thoughts on the Constitutional Design of National Supervision System Reform*, (Jan. 3, 2018, available at <http://www.aisixiang.com/data/107631.html>).

Constitution<sup>203</sup> and in the Communiqué of the 2<sup>nd</sup> Plenum of the 19<sup>th</sup> CPC Congress.<sup>204</sup>

#### CONCLUSION

For those who looked for an expansion of the authority and autonomy of the state constitution within Chinese constitutionalism, the 19<sup>th</sup> CPC Congress Report confirms a downshifting from that objective. But that downshifting does not produce a diminution of constitutionalism. The opposite appears to be true. It is just that constituent power continues to be driven by and institutionalized within the political constitution of the CPC rather than the administrative constitution of the state. Within that complex, the greatest challenge for the New Era will lie in the further development of the relationship between the CPC and its Basic Line. These, at any rate, are what may be suggested by the references to the constitution in the 19<sup>th</sup> CPC Congress Report. The conclusions are tentative. They are meant to suggest possible trajectories. The next five years may better reveal the contours of the development of Chinese constitutionalism. If this 19<sup>th</sup> CPC Congress Report is any guide, then that development points to greater deviation rather than closer convergence with Western constitutional traditions. Yet at the same time, it appears to suggest a convergence between the democratic ideals and practices of global enterprises in the West—complex overlapping systems lead by a collective (as a board of directors) and subject to a charter that vests substantial discretion that is bounded only by clear but broad constraints that all members of the vanguard (and especially the leading collective) are bound to comply (Leninist fiduciary duty or fidelity to the Basic Line

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<sup>203</sup> My thanks to Flora Sapio for this insight. Five official commentaries may be found at 人民日报评论员：宪法修改必须依法按程序进行——五论学习贯彻党的十九届二中全会精神 [*People's Daily Commentator: Constitutional Amendments Must Be Processed According to Law - On the Spirit of Studying and Implementing the Second Plenary Session of the 19th Central Committee*] (Jan. 24, 2018), [http://www.xinhuanet.com/2018-01/24/c\\_1122310285.htm](http://www.xinhuanet.com/2018-01/24/c_1122310285.htm). (“守程序是法治之始。党的十九届二中全会强调，作为事关全局的重大政治活动和重大立法活动，修改宪法必须在党中央集中统一领导下严格依法按程序进行。这既是对宪法和立法规律的尊重、对以往立法经验的汲取，也是为了让党和人民的意志更好体现在宪法之中。”) [“The procedure is the beginning of the rule of law. The Second Plenary Session of the 19th Central Committee of the CPC stressed: As a major political activity and a major legislative activity related to the overall situation, the revision of the Constitution must be conducted strictly in accordance with the law under the centralized and unified leadership of the Party Central Committee. This not only respects the constitution and the law of the legislature, but also draws lessons from past legislative experiences as well as makes the will of the party and the people better reflected in the constitution.”]

<sup>204</sup> See 中国共产党第十九届中央委员会第二次全体会议公报，（2018年1月19日中国共产党第十九届中央委员会第二次全体会议通过）[COMMUNIQUE OF THE SECOND PLENARY SESSION OF THE 19TH CENTRAL COMMITTEE OF THE COMMUNIST PARTY OF CHINA, (Adopted by the Second Plenary Session of the 19th Central Committee of the Communist Party of China on January 19, 2018)] available [http://www.xinhuanet.com/politics/2018-01/19/c\\_1122286278.htm](http://www.xinhuanet.com/politics/2018-01/19/c_1122286278.htm).

mandates)<sup>205</sup> It is to the divergences between Chinese and Western public law theories and the growing convergence between Chinese and Western private law constitutionalism that one should turn one's attention.

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<sup>205</sup> CHANG AND LAW, *supra* note 59, at 18 (“Whichever of these views one finds most persuasive, it should be obvious that China offers an interesting and important test case for competing definitions of core concepts.”).





## UNIDENTIFIED LEGAL OBJECT: CONCEPTUALISING THE EUROPEAN UNION IN INTERNATIONAL LAW

*Jed Odermatt*

*Abstract*

*What is the European Union? This seemingly simple question gives rise to a multitude of different answers from EU lawyers, international lawyers, political scientists, and the media. The debate is as old as European integration, and a satisfying answer still alludes us. Does the legal characterization of the EU and EU law matter from a legal standpoint? This article argues that such characterizations do matter. It first discusses four main ways in which the EU is perceived in the EU law and international law literature: (i) the EU as a 'new legal order'; (ii) the EU as a 'self-contained regime' in international law; (iii) the EU as a 'Regional Economic Integration Organization' (REIO); and (iv) the EU as a 'Classic intergovernmental organization' (Classic IO). Using examples from recent legal practice, this article shows how such characterizations are the 'starting points' in debates which can shape legal outcomes. It is difficult to overcome such divergent views, however, since they represent much deeper disagreements and power relations. Developing a theory of EU legal character gives rise to new challenges.*

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## I. INTRODUCTION: WHAT IS THE EUROPEAN UNION?

What is the European Union? This seemingly simple question gives rise to a multitude of different answers from EU lawyers, international lawyers, political scientists, and the media. In 1961 McMahon wrote that “although the [European] Communities were brought into being in the form of an international treaty, one should not allow the circumstances of their birth to obscure their real nature...”<sup>1</sup> What the ‘real nature’ of the EU is, however, remains a mystery. As is often the case with these questions, the answer still depends on whom you ask.<sup>2</sup> In a recent article on the topic of ‘European Exceptionalism’, it was noted that “[t]he debate over whether the EU is a state, federation, international organization or flying saucer is as old as European integration itself.”<sup>3</sup> The answer to the question ‘what kind of legal entity is the EU?’ still eludes us.<sup>4</sup>

Do such arguments and debates matter from a legal standpoint? One might argue that these are purely academic questions. To the European Commission lawyer working on food safety standards, or the Legal Associate in London working on competition law, the question of what kind of legal entity the EU is is not really significant. This article makes the case that legal categories do matter. In many cases, such characterizations are the ‘starting points’ in legal debates, which then shape legal outcomes. As the EU seeks to play a greater role in the international legal order, and as one of its Member States seeks to extricate itself from the EU legal order, the Union, its Member States, and third states will be faced with legal questions that touch upon the EU’s legal nature. Developing a single theory of EU legal character will assist in providing legal certainty as new questions and problems arise.

The article sets out four main ways in which EU has been conceptualized in the international law and EU law literature. The article is structured according to these four models: (i) the EU as a ‘new legal order’; (ii) the EU as a ‘self-contained regime’ in international law; (iii) the EU as a ‘Regional Economic Integration Organization’ (REIO); and (iv) the EU as a ‘Classic intergovernmental organization’ (Classic IO). These four models appear in the table below.

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<sup>1</sup> J. F. McMahon, *The Court of the European Communities: Judicial Interpretation and International Organisation*, 37 BRIT. Y.B. INT’L L. 320, 329 (1961).

<sup>2</sup> Martti Koskenniemi (Chairman of the Study Group on Fragmentation of International Law), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) and U.N. Doc. A/CN.4/L.702, ¶ 483 (July 18, 2006) (“This is the background to the concern about fragmentation of international law: the rise of specialized rules and rule-systems that have no clear relationship to each other. Answers to legal questions become dependent on whom you ask, what rule-system is your focus on.”).

<sup>3</sup> Turkuler Isiksel, *European Exceptionalism and the EU’s Accession to the ECHR*, 27 EUR. J. INT’L L. 565, 571 (2016).

<sup>4</sup> See generally C. Binder & J.A. Hofbauer, *The Perception of the EU Legal Order in International Law: An In-and Outside View*, 8 EUR. J. OF INT’L L. 139 (2017).

**Fig. 1 Four Models of the European Union in International Law**

	Internal sphere	External sphere
Unique legal entity; high degree of autonomy	<p><b>'New Legal Order'</b></p> <p>EU has developed into a 'new' type of legal/political entity of a constitutional nature</p>	<p><b>'Regional Economic Integration Organization' (REIO)</b></p> <p>EU is a 'special type' of international organization Specialized rules are required to take into account its nature and autonomy</p>
Fits within existing categories; low degree of autonomy	<p><b>'Self-contained Regime'</b></p> <p>EU is a part of international legal order, but has developed specialised internal rules</p>	<p><b>'Classic' International Organization</b></p> <p>EU is not qualitatively different from other international organizations Existing rules can be applied to the EU</p>

The first view reflects the EU's own self-perception, that of the EU as a 'new legal order' or even a 'sui generis' entity. The second model is that of a 'self-contained regime' in international law, a legal system that remains a part of the international legal order but has for the most part developed specialized internal rules. The third model views the EU international organization, albeit one with special unique features, commonly described as a regional economic integration organization ('REIO'). The fourth model views the EU as a traditional intergovernmental organization, or 'classical' IO, that is not qualitatively different from other IOs. Each of these models is explained, analysed and debated in more detail in the following section.

The four models differ with respect to a number of assumptions about the EU and its relationship with international law. The four models are placed on two axes. The first relates to the extent to which the EU is viewed as a 'unique' entity in international law. Debates about what kind of entity the EU is often revolve around

this question of uniqueness. The ‘New Legal Order’ model and the ‘REIO’ model both assume that there is something special about the EU, which sets it apart from other legal entities. The ‘Self-contained regime’ model and ‘Classic IO’ model both see the EU as something that fits within existing international law categories; they either deny that the EU is unique at all, or reject that any legal consequences should flow from its unique features. The second axis relates to the ‘sphere’ that is concerned, either from the perspective of the internal legal order of the EU, or from the perspective of the EU’s place within the wider international legal order. The ‘New legal order’ and ‘self-contained regime’ models are mostly concerned with the relationship between the EU and the Member States and are less concerned about the EU’s relationship with other entities (internal sphere). The ‘REIO’ and ‘Classic IO’ model focus on the EU’s relationship with the wider world of international law (external sphere).

It should be stressed that these four models are not mutually exclusive. In practice, one’s conception of the EU may combine elements of these models or lie in between categories. Nor does the table seek to answer the vexed question of what type of legal entity the EU is. Rather, the four models highlight the different conceptions of the EU that we find in the legal literature, case law, and international legal practice. The four models are ideal types; few would subscribe fully to any of these models. While the CJEU and many EU lawyers gravitate towards the ‘new legal order’ model, their views are much more nuanced in reality. Likewise, even international lawyers who subscribe to the ‘Classic IO’ model would accept that the EU possesses certain characteristics that set apart from other IOs.

The reason for highlighting these four models is to illustrate the various conceptual ‘starting points’ that lawyers take when addressing legal questions dealing with the EU’s place in international law. The article demonstrates how the legal outcome in different scenarios have been shaped by the assumptions associated with each of these models. In order to illustrate this, I rely on a number of examples from recent legal practice where the legal character of the EU played a role in determining the legal outcome. The examples discussed in the following sections include, among others, *Opinion 2/13* regarding the EU’s accession to the European Convention on Human Rights; the *Miller* litigation on the invocation of Article 50 TEU; the EU’s practice before the International Law Commission, in particular during work on the responsibility of international organizations; and the EU’s participation in international organizations and international dispute settlement mechanisms. In each of these instances, the legal outcome was shaped, at least in part, by these ‘starting points’ and the deeper conceptual understandings about the nature of the EU and EU law.

The different models in this article emerged from a review of international law and EU law literature. Although debates about the nature of the EU exist in international relations literature, this article restricts itself to the legal scholarship. IR scholars seem to have less problem with the multiple-nature of the EU, and can study it as a type of international organization, proto-state or federation.<sup>5</sup> Legal scholarship, on the other hand, appears to have more difficulty with such characterisations, since legal characteristics often lead to legal consequences.

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<sup>5</sup> For an overview of this discussion, see William Phelan, *What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime*, 14 INT’L STUD. REV. 367 (2012).

A. *Divergent Approaches*

The United States of America, Botswana, Russia and Palau differ in terms of culture, language, military power, economic development, and legal systems, but we agree that they have at least one thing in common: they are all recognized as States in international law. However, there is no such consensus when it comes to the legal character of the European Union, however. How can it be that the EU (and its previous incarnations) has existed for over sixty years, but there is still no consensus among lawyers about how such a strange legal entity is to be identified?

One reason for the divergent views is academic specialisation. The topic is approached from different angles and academic fields. Public international lawyers, while not necessarily ignoring the European Union, often fail to engage in serious discussion about the EU's place within the international legal order. The EU and EU law is therefore often viewed as a separate, specialised field of study, and international lawyers are often reluctant to enter this terrain. Another reason is complexity. The EU, viewed by some as a complicated byzantine structure, is considered too complex and too specialised to be discussed seriously without in-depth knowledge of the EU and its institutions. This can also be explained in part by the 'managerial approach' to international law, which renders international law scholarship increasingly compartmentalised. Koskenniemi describes this approach:

What is significant about projects such as trade, human rights, or indeed "Europe", is precisely the set of values or purposes that we link with them. To be doing "trade law" or "human rights law", or "environmental law" or "European law" – as the representatives of those projects repeatedly tell us – is not just to operate some technical rules but to participate in a culture, to share preferences and inclinations shared with colleagues and institutions who identify themselves with that "box."<sup>6</sup>

The study of the EU has for a long time been its own field of specialization, its own special box, one which many international lawyers are reluctant to open. The literature on the EU's place in the international legal order is then highly influenced by the intellectual community with which an author identifies. Simma and Pulkowski observe how "[o]ften, a scholar's approach seems to depend on whether her intellectual home is the sphere of public international law or that of a specialized subsystem."<sup>7</sup> A particular analysis may be shaped depending on whether one identifies as an EU or public international law expert:

Public international lawyers generally presume the application of public international law and the character of the EU as an

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<sup>6</sup> Martti Koskenniemi, *International Law: Constitutionalism, Managerialism and the Ethos of Legal Education*, 1 EUR. J. LEGAL STUD. 8, 10-11 (2007).

<sup>7</sup> Bruno Simma & Dirk Pulkowski, *Leges Speciales and Self-Contained Regimes, Responsibility in the Context of the European Union Legal Order*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 139, 148 (James Crawford, Alain Pellet, Simon Olleson eds., Oxford Univ. Press 2010).

international organisation (i.e. focusing on its formal sources), while EU lawyers tend to adopt the perspective of the EU as an autonomous legal order or even a self-contained regime, stressing its sui generis nature, allowing the substantive perspective to prevail in the evaluation.<sup>8</sup>

The EU lawyer may see herself as part of a wider community that seeks to uphold and promote the European project, and therefore more willing to accept that the Union is somehow special or unique. In a similar way, many who view themselves as part of the community of international law cling to the notion of international law as a universally applicable system of rules. The idea that the EU is a ‘new legal order’ implicitly challenges this idea of universality and adds to anxiety over the fragmentation of international law.<sup>9</sup>

From the EU law side, there is also a similar lack of engagement with the EU’s role in the international legal order. Much of the literature examining the EU’s place in international law falls into the category of ‘EU external relations law’.<sup>10</sup> Such literature engages with legal issues arising from the EU’s participation in the international legal order, focusing on internal questions regarding issues like the EU’s competence to conclude international agreements or to be represented in international institutions. Literature in this field remains inward-looking, debating legal issues facing the Member States and the institutions, but lacks self-reflection on the EU’s place within the wider international legal order.

The effect of such academic specialisation and compartmentalization is that EU lawyers and international lawyers talk past one another. EU lawyers, for their part, tend to have a relatively well-developed and consistent idea of what the EU is. This ‘self-perception’ is discussed in more detail in Part II.A below. International law scholarship, on the other hand, has far more difficulty conceptualising the EU. Part of this lies with the state-centric approach that still pervades international law. Schütze explains how international law’s assumptions that it is built on the sovereign state obscure the way it approaches ‘compound subjects’ such as the EU:

Classic international law is built on the idea of the sovereign state. This State-centered structure of international law creates normative difficulties for non-State actors. The European Union is a union of States, and as such still encounters normative hurdles when acting on the international scene. These normative hurdles have become fewer, but there remain situations in which the Union

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<sup>8</sup> Katja Ziegler, *International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation*, in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 268, 270 (Alexander Orakhelashvili ed., Edward Elgar 2011).

<sup>9</sup> See Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties* 15 LEIDEN J. INT’L L. 553 (2002) (“[o]ne phenomenon that does contribute to fragmentation is the way the Union as an international actor is present in a number of different roles on the international scene.”).

<sup>10</sup> “The existing EU literature is mostly devoted to the study of the EU’s internal legal framework. As a result, analysis of the EU’s place in the international legal arena tends more often than not to be limited to the rules governing the EU’s external relations.” Anthony Valcke, *Review: The European Union and the International Legal Order: Discord or Harmony?* 14 EUR. J. INT’L L. 1051 (2003) (book review).

cannot externally act due to the partial blindness of international law towards compound subjects.<sup>11</sup>

The study of the EU from an international law perspective suffers from a broader challenge within international law scholarship, that is, the inability to fully understand entities that do not neatly fit with existing categories such as 'state' or 'international organization'. The last three models discussed in the following section demonstrate how international lawyers disagree on a number of key points. Does the EU remain a creature of international law at all, or has it developed into something else? Which rules of public international law are to be applied to this kind of entity, and to what extent (if at all) should they be modified or adapted to take into account the EU's special status? Is the EU truly an autonomous actor on the international plane, separate from its Member States, as it often claims? Or does the EU simply represent the collective will of its members, each of which remain fully sovereign subjects of international law. Whereas the EU lawyer has a relatively robust understanding of how to conceive the EU legal order, international law scholarship diverges on these and many other points.

#### B. *Divergent views of Kadi*

This divergence was most clearly on display in the academic response to the line of *Kadi* judgments from the CJEU.<sup>12</sup> In this famous line of case law, the CJEU found that it was capable of exercising judicial review regarding EU measures that intended to implement UN sanctions. They are widely viewed as setting the EU's relationship with the wider international legal order. Not only did the judgments spark intense scholarly debates among EU law experts, there was also an intense response and debate in international law scholarship, especially from many scholars outside Europe. This article does not intend to re-litigate these arguments. Rather, it illustrates how the diverging reactions to the case law can be explained partly by the legal audience.<sup>13</sup> To many international lawyers, it was not so much the outcome in *Kadi* that raised issues, but the rather blunt way in which the Court dealt with international law.<sup>14</sup> While many praised the outcome of the judgment for its protection of human rights norms, it also led to a great deal of critical responses, mostly from those looking at the legal dispute from an international law perspective.<sup>15</sup> The judgment tended to downplay the important and special character

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<sup>11</sup> ROBERT SCHÜTZE, *EUROPEAN CONSTITUTIONAL LAW* 217 (Cambridge Univ. Press 2012).

<sup>12</sup> Joined Cases C-402/05 P & C-415/05 P, *Kadi & Int'l Found. v. Council & Comm'n*, 2008 EU:C:2008:461.

<sup>13</sup> An edited volume on the *Kadi* 'trial' includes separate sections on the 'public international law perspective' and 'constitutional perspective'. MATEJ AVBELJ ET AL., *KADI ON TRIAL: A MULTIFACED ANALYSIS OF THE KADI TRIAL* (Routledge 2014).

<sup>14</sup> *Supra* note 12, at ¶ 316. (For example, the Court refers to the Charter of the United Nations as merely an 'international agreement': "...the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.")

<sup>15</sup> Grainne de Búrca, *The European Court of Justice and the International Legal Order After Kadi II*, 51 HARV. INT'L L.J. 1 (2010); see Peter Margulies, *Aftermath of an Unwise Decision: The U.N.*

of the UN system for peace and security, and to over emphasise the separateness of the EU from that the wider legal order. The following criticism summarises the view of many from the international law perspective:

This decision [*Kadi* ECJ] overlooked the fact that the relevant human right to a fair trial is not absolute (unlike the prohibition on torture) and therefore could be derogated from in certain circumstances. This is essentially what the UN Security Council had done due to the threat posed by terrorism. Of serious concern is that the ECJ did not recognise that it was *the court of a regional organisation* and that, under the UN Charter, all EU Member States (who are also UN Members) were legally bound by Chapter VII resolutions of the Security Council. The Court therefore, and presumably knowingly, set up an important confrontation with the United Nations.<sup>16</sup>

Given the complex and controversial issues that were dealt with in these cases it is understandable that this scholarship is also marked by such divergent views. But this divergence does not stem only from disagreements about the interpretation of the UN Charter or the status of certain human rights norms; it also stems from a more fundamental disagreement about the EU's very legal character. In the quote above, the author stresses that the CJEU is a "court of a regional organisation". The legal analysis that follows is shaped by this perception. The EU lawyer begins her analysis from a different starting point and set of assumptions, that is, the EU as autonomous legal order. According to this perspective, the legal dispute is somewhat straightforward: the CJEU was called upon to decide whether the legal instrument before it – an EU regulation – was compatible with EU law.<sup>17</sup> The CJEU decided that since this regulation, an instrument of secondary law, breached fundamental rights in the EU legal order, the regulation was invalid. The fact that this regulation happened to implement a UN Security Council resolution could not alter the fact that the regulation violated fundamental rights, which form part of the "very foundations of the Community legal order".<sup>18</sup> The international lawyer, on the other hand, has a different starting point: the assumption that the EU is an intergovernmental organization founded on treaties.<sup>19</sup> The analysis that follows is similarly

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*Terrorist Sanctions Regime After Kadi II* 6 AMSTERDAM L.F. 2, 51 (2014) (arguing that the Court failed in *Kadi II* to display the appropriate level of deference to Sanctions Committee decisions).

<sup>16</sup> ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 198 (Cambridge Univ. Press 2d ed. 2010). (emphasis added).

<sup>17</sup> P.J. Cardwell, D. French & N.D. White, *Decisions of International Courts and Tribunals*, 58 INT'L & COMP. L.Q. 1, 229 (2009). "... the reason that the *Kadi* judgment should not be characterised as radical is because it reflects the long-standing view of the Court that the EU legal system is an autonomous legal framework independent of, and not reliant upon, public international law."

<sup>18</sup> *Supra* note 12, at ¶ 304.

<sup>19</sup> Pellet points out that "les Communautés comme, d'ailleurs l'Union européenne, ont été créées par des traités; ce sont ces traités qui fondent leur personnalité juridique; et un traité est un instrument juridique international. Dès lors, les Communautés et l'Union sont, avant toute chose et peut-être exclusivement, des personnes du droit international." Alain Pellet, *Les Fondements Juridiques*

straightforward: the EU Member States have an obligation to implement UN Security Council Resolutions and Article 103 of the UN Charter gives clear precedence to these obligations in case of conflict. The fact that the EU Member States happened to implement their obligations through an international organization does not alter the fact that they remain bound by their obligations under the UN Charter. In each case, the different starting points and assumptions lead to the use of different legal tools, which then leads to different legal results.

Of course, the examples discussed above are overly simplified characterisations of much more complex and nuanced positions. Yet they serve to identify how the assessment depends upon one's starting point, and which legal narrative about the EU is accepted. There is nothing novel in pointing out that the legal assessment of lawyers depends on their points of reference<sup>20</sup> or foundational assumptions.<sup>21</sup> Yet such disagreement and divergence cannot be explained simply by academic specializations and backgrounds. In the following section I argue that four main views of the EU have emerged about the legal identity of the EU. I then demonstrate how these different views also have legal effects in practice.

## II. CONCEPTUALIZING THE EU IN INTERNATIONAL LAW: FOUR MODELS

### A. *The Union's Self-Perception: A 'New Legal Order' of International Law*

It is now well-established that the CJEU conceives the Union as a 'new legal order', holding in *van Gend en Loos* that the EEC Treaty was "more than an agreement which merely creates mutual obligations between the contracting states".<sup>22</sup> The Court continues to apply the logic of the 'new legal order' in its legal reasoning. In *Opinion 2/13*, before finding that an agreement designed to allow for the EU's accession to the European Convention on Human Rights was incompatible with the EU Treaties, the CJEU recalled its mantra: "the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not

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*Internationaux du Droit Communautaire*, in 5 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 193, 201 (1997).

<sup>20</sup> Cardwell, French & White, *supra* note 17, at 240 (pointing out how *Kadi* "highlights a growing sense of divergence in opinion between EU and public international lawyers, especially in terms of our respective normative 'points of reference'—in the case of EU lawyers, the EU treaties, in the case of international lawyers, the UN Charter.").

<sup>21</sup> Christian Tomuschat, *The Kadi Case: What Relationship is There Between the Universal Legal Order Under the Auspices of the United Nations and the EU Legal Order?*, 28 Y.B. EUR. L. 654, 655 (2009).

<sup>22</sup> Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 EU:C:1963:1, 12 (Feb. 5, 1963).

only those States but also their nationals.”<sup>23</sup> The Court continues to invoke this “shibboleth”<sup>24</sup> in its judgments in various and sometimes surprising ways.<sup>25</sup>

This model of the EU as a ‘new legal order’ is closely linked with the EU’s own self-perception and identity. It is one of the foundational myths used to construct the elements of the EU legal order.<sup>26</sup> Like national myths, it does not matter whether the ‘new legal order’ is technically or historically correct – rather, the account provides a useful symbolic narrative of the polity’s construction and self-identity. The Court continued to put in place some of the cornerstones of EU law, including the notions of direct effect and primacy, in part, by building upon the new legal order narrative, which tends to set EU law apart from ‘ordinary’ international law.<sup>27</sup> The Court could have conceivably derived EU law principles such as direct effect and primacy by referring to existing public international law principles, such as customary rules of treaty interpretation.<sup>28</sup> Concepts such as supremacy and primacy pre-date the Union and its Court, and have been described as an “appropriate synonym of *pacta sunt servanda*”<sup>29</sup>, a fundamental principle of the law of treaties.<sup>30</sup> As Denza points out:

Contrary to what is sometimes suggested, the ECJ did not invent the doctrine of direct effect, which can be traced back to rulings of the Permanent Court of International Justice and to cases in European jurisdictions, but it did lay down criteria to be uniformly applied throughout the European Community. It is this uniformity

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<sup>23</sup> Opinion 2/13, Opinion pursuant to Article 218(11) TFEU – Draft international agreement, 2014 EU:C:2014:2454 (Dec. 18, 2014).

<sup>24</sup> Isiksel, *supra* note 3, at 571.

<sup>25</sup> Tomuschat, *supra* note 21, at ¶ 39.

<sup>26</sup> “[I]l n’est nul besoin de se raccrocher au mythe de la rupture totale du droit communautaire par rapport au droit international général pour rendre compte de sa spécificité, qui est réelle et profonde. En réalité, l’ordre juridique communautaire, ancré dans le droit international, y trouve l’essentiel de sa force et de ses caractéristiques.” Pellet, *supra* note 19, at 268.; “[O]ne of the greatest received truisms, or myths, of the European Union legal order is its alleged rupture with, or mutation from, public international law and its transformation into a constitutional legal order.” J.H. Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT’L L.J. 411, 420 (1996); see Antonin Cohen & Antoine Vauchez, *The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited*, 7 ANN. REV. OF L. & SOC. SCI. 417, 426 (2011).

<sup>27</sup> As Lowe points out, the CJEU “imagined into existence an entire new, legal order, hammering into place the other great beams of that legal order, such as the supremacy of Community law...” Vaughan Lowe, *The Law of Treaties; or Should this Book Exist?*, in RESEARCH HANDBOOK ON THE LAW OF TREATIES 3, 6 (Christian J. Tams, et al., eds., Edward Elgar 2014).

<sup>28</sup> Eileen Denza, *The Relationship Between International Law and National Law in INTERNATIONAL LAW*, 411, 415 (Malcolm Evans ed., Oxford Univ. Press, 4th ed., 2014). “This formulation of the supremacy of Community law – not self-evident on the face of the European Community Treaties – is among the features distinguishing European Community law from international law.”; see Bruno de Witte, *Retour à “Costa” La Primauté du Droit Communautaire à la Lumière du Droit International*, in NOI SI MURA 257 (Werner Malhofer ed., 1984).

<sup>29</sup> Ole Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10 EUR. J. INT’L L. 766, 785 (1999). Spiermann argues that “compared to other parts of the international law of cooperation, there is nothing new about direct effect and nothing innovative about precedence.” *Id.* at 787.

<sup>30</sup> De Baere and Roes argue that they are founded on the duty of loyalty. Geert De Baere & Timothy Roes, *EU Loyalty as Good Faith*, 64 INT’L & COMP. L.Q. 829, 840 (2015).

which is one of the most striking features distinguishing European Community from public international law.<sup>31</sup>

In this sense it is not the unique features of the Union that set it apart from other polities, but the degree to which the Union possesses and exercises these features.<sup>32</sup> As de Witte argues:

the effort to sharply separate the EU from the field of international law might be misguided for two complementary reasons: because it overestimates the novelty of EU law, and because it underestimates the capacity of international law to develop innovative features in other contexts than that of European integration.<sup>33</sup>

The Court did not use public international law as a building block of the EU legal order, but built these new concepts in contradistinction to international law. In order to do this it had to caricature international law as relatively weak and unenforceable.<sup>34</sup> EU law, on the other hand, could be superior to national law and capable of direct effect, since the Member States had created a 'new legal order'.

EU lawyers now largely accept the 'new legal order' narrative developed by the Court. Those who deal with EU law in day-to-day practice do not imagine themselves working with a 'creature of international law'<sup>35</sup> but in what resembles in most respects a national legal order. The EU may have international law origins and its constitution is formally an international legal instrument,<sup>36</sup> but this is largely irrelevant to the lawyers in Brussels and London working on state aid and competition law. This does not mean that questions of legal character do not have legal significance. More complex questions arise when this new legal order narrative

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<sup>31</sup> Eileen Denza, *The Relationship Between International Law and National Law*, in INTERNATIONAL LAW, 411, 428 (Malcolm Evans ed., Oxford Univ. Press, 3rd ed. 2010).

<sup>32</sup> "Some people say that the EU is unique – that it resembles no other entity and, in its concept and design, owes nothing to anything found anywhere else. That is not true. Although the breadth and depth of its powers put the EU in a special position, this is merely a matter of degree. The EU is simply the foremost among a whole pack of international bodies that have the power to control what countries do." TREVOR C. HARTLEY, *EUROPEAN UNION LAW IN A GLOBAL CONTEXT: TEXT, CASES AND MATERIALS* xv (Cambridge Univ. Press 2004).

<sup>33</sup> Bruno de Witte, *The European Union as an International Legal Experiment*, in THE WORLDS OF EUROPEAN CONSTITUTIONALISM 19, 20-21 (Gráinne de Búrca & J.H.H. Weiler eds., Cambridge Univ. Press 2011).

<sup>34</sup> "Par ses faiblesses intrinsèques, le droit international public diffère profondément du droit communautaire. Plusieurs traits du droit international sont ainsi devenus, par contraste, d'utiles repères pour apprécier la spécificité du droit communautaire et, par là même, pour mesurer l'écart qui s'est creusé entre les deux ordres juridiques." OLIVIER JACOT-GUILLARMOU, *DROIT COMMUNAUTAIRE ET DROIT INTERNATIONAL PUBLIC* 258 (Librairie de l'université Georg 1979).

<sup>35</sup> Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 HARV. INT'L L.J. 389, 403 (1996). "At least at its inception, the European Community was clearly a creature of international law. As there are no indications that a revolution in its legal sense has subsequently occurred ... the European Treaties are still creatures of international law."

<sup>36</sup> Barents argues, for instance, that "[a]lthough the EC is based on a document which bears the name 'treaty', this has but a formal meaning. In a material sense the EC Treaty has the character of an autonomous constitution and, as a result, it constitutes the exclusive source of Community law." RENÉ BARENTS, *THE AUTONOMY OF COMMUNITY LAW* 112 (Kluwer Law Int'l 2004).

is applied, not just to the relationship between the EU and its Member States, but to understand the EU's relations with third parties.

### 1. The EU as *sui generis*

Closely tied to the 'new legal order' narrative is the description of the EU as a *sui generis* entity.<sup>37</sup> Stating the EU is *sui generis* tells us that it is a unique creature, but nothing whatsoever about the legal consequences that flow from this. Like 'new legal order' it is also a malleable concept, which can be used in different situations to mean different things. The idea is that the EU is so special, so different from other forms of political and legal organization that it simply does not fit in any existing category of international or constitutional law.<sup>38</sup> Since the EU is not a state, and does not neatly fit easily among classical international organizations, there is a tendency to attach the label *sui generis* as some kind of mid-way category.

For most international lawyers, however, the idea that the EU fits into its own legal category is inaccurate at worst or unhelpful at best.<sup>39</sup> It is not a helpful conceptual model, but an "unsatisfying shrug".<sup>40</sup> Schütze is highly critical of the *sui generis* 'theory'.<sup>41</sup> The first line of argument is that the term is conceptually useless – it cannot be used to analyse or measure the Union and its evolution. Moreover, the *sui generis* theory is an entirely negative one; the label only tells us what the EU is not, but does nothing to describe what type of polity the EU is, or how international law should apply to it.<sup>42</sup> The second argument is that the *sui generis* label is inaccurate: "the *sui generis* 'theory' is historically unfounded. All previously existing Unions of States lay between international and national law."<sup>43</sup> As discussed

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<sup>37</sup> *EU Law and International Law, in EU EXTERNAL RELATIONS LAW: TEXT, CASES AND MATERIALS 208* (B. Van Vooren & R.A. Wessel eds. Cambridge Univ. Press 2014).

<sup>38</sup> de Witte, *supra* note 33, at 20. De Witte summarizes the view of many EU lawyers: "the dominant strand in the EU law literature takes the view that the European Union, whilst not a federal state, is also no longer and international organizations, but rather an ill-defined *sui generis* legal construct."; De Baere similarly describes the EU is a *sui generis* legal concept, and that "cannot be fitted easily within either constitutional or international law..." GEERT DE BAERE, *CONSTITUTIONAL PRINCIPLES OF EU EXTERNAL RELATIONS 1* (Oxford Univ. Press 2008). 32, at 20, De Witte summarizes the view of many EU lawyers: "the dominant strand in the EU law literature takes the view that the European Union, whilst not a federal state, is also no longer and international organizations, but rather an ill-defined *sui generis* legal construct."; De Baere similarly describes the EU is a *sui generis* legal concept, and that "cannot be fitted easily within either constitutional or international law..." GEERT DE BAERE, *CONSTITUTIONAL PRINCIPLES OF EU EXTERNAL RELATIONS 1* (Oxford Univ. Press 2008).

<sup>39</sup> Denza points out that "European lawyers are given to saying that the European Union is *sui generis*—which is true but not helpful." EILEEN DENZA, *THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION 1* (Oxford Univ. Press 2002).

<sup>40</sup> Hay argues that the notion of *sui generis* "not only fails to analyze but in fact asserts that no analysis is possible or worthwhile, it is fact PETER HAY, *FEDERALISM AND SUPRANATIONAL ORGANIZATIONS: PATTERNS FOR NEW LEGAL STRUCTURES 44* (Ill. Univ. Press 1966).

<sup>41</sup> SCHÜTZE, *supra* note 11, at 67.

<sup>42</sup> BARENTS, *supra* note 35, at 45–46. Barents argues that "[T]here exists only a consensus about what Community law does not represent (constitutional or international law). However, this conclusion offers no explanation about the nature of Community law. In particular, it does not provide answers to fundamental questions ..."

<sup>43</sup> SCHÜTZE, *supra* note 11, at 67.

above, many of the supposed unique features of the Union which are put forward in favour of the EU being *sui generis*, can be found in entities outside the context of the EU.

Terms like 'new legal order' and *sui generis* were adopted because international law and constitutional law were missing the vocabulary to describe an entity such as the EU. International lawyers tend to have an aversion to the *sui generis* concept, in part because it could imply that general international law should not, or cannot, apply to it. The international landscape consists of not just States but a highly heterogeneous array of complex legal structures and diverse entities. Could the WTO, with its unparalleled role in world trade and unique dispute settlement system be described as *sui generis*? Could the UN Security Council – which has no counterpart in the realm of international peace and security – also be described as *sui generis*? A completely negative definition such as *sui generis* tells us nothing about how international law should approach the subject.<sup>44</sup>

Some point out the distinctive features of the EU legal order, pointing to issues such as direct effect and supremacy; the position of individuals; the exercise of governmental powers by EU institutions; the role of the Court of Justice in interpreting and applying EU law; the inability of Member States to enforce EU law through traditional countermeasures;<sup>45</sup> and so on. The reply to this will often be that these are all features that make the EU distinctive, but cannot alter the EU's character as an international organization.<sup>46</sup> The fact that the EU is a well-developed or complex legal order does not mean that its character as a legal order of international law is lost.<sup>47</sup> The common story is that the EU was originally conceived using international law instruments, but it has since transformed into something else which fits neither into the realms of international nor municipal law.<sup>48</sup> This 'something else' was described as *sui generis*.

International lawyers have often questioned the 'new legal order' and *sui generis* models. One reason for this is that such conceptions imply that the EU is not only a highly distinctive legal order, but also an *exceptional* one. Being unique can imply special treatment. This has given rise to discussion of so-called 'European exceptionalism',<sup>49</sup> a term has been given multiple meanings in the literature. Some refer to European exceptionalism as a form of double standards.<sup>50</sup> Isikiel, for instance, understands this exceptionalism as the Union seeking to release itself from international standards based on its "purported fidelity to principles of human rights,

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<sup>44</sup> Bruno de Witte, *The Emergence of a European System of Public International Law: the EU and its Member States as Strange Subjects*, in *THE EUROPEANISATION OF INTERNATIONAL LAW* 39-54. (J. Wouters, A. Nollkaemper and E. De Wet ed., 2008).

<sup>45</sup> See J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L. J.* 2403, 2422 (1991).

<sup>46</sup> See Timothy Moorhead, *European Union Law as International Law*, 5 *EUR. J. OF LEGAL STUD.* 126, (2012) (arguing that "the Union legal order is essentially one of international law.").

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

<sup>48</sup> Weiler and Haltern point out that "[t]here is no doubt that the European legal order started its life as an international organisation in the traditional sense, even if it had some unique features from its inception." Weiler & Haltern, *supra* note 26, 419.

<sup>49</sup> George Nolte & Helmut Aust, *European Exceptionalism?*, 2 *GLOBAL CONSTITUTIONALISM* 407, 416 (2013).

<sup>50</sup> Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 *AM. J. OF INT'L L.* 649, 690 (2011).

democracy, and the rule of law.”<sup>51</sup> Nolte and Aust<sup>52</sup> and Ličková<sup>53</sup> view exceptionalism more in the sense of the EU justifying certain legal exceptions for itself, both in its own case law, but also in its legal relationship with third States. Both understandings of exceptionalism flow from a common idea that the EU is not just distinctive, but special. One consequence of this is that other states and organizations “have to arrange themselves with particularities of the special status of the EU.”<sup>54</sup> Such claims of exceptionalism can be seen in the CJEU’s reasoning in *Opinion 2/13*. The following section discusses how the ‘new legal order’ narrative in this judgment was a starting point that shaped the ultimate legal outcome.

## 2. *Opinion 2/13* and the New Legal Order Narrative

In *Opinion 2/13* the Full Court of the CJEU decided that the Draft Accession Agreement, designed to allow the EU to join the ECHR, was inconsistent with EU law. The Court based its Opinion, in large part, on the idea of the EU as a ‘new legal order’:

“The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.”<sup>55</sup>

Here the Court is using this new legal order narrative and the concept of autonomy to approach the question of how and under which conditions the EU can participate in an international convention.

*Opinion 2/13* came as a surprise and was met with heavy criticism.<sup>56</sup> Not only academics, but also the EU institutions and EU Member States, were of the view that the Accession Agreement was compatible with the EU Treaties. One of the reasons for such a sharp divergence of views is the diverging view of the EU’s legal character. Academic discussion following *Opinion 2/13* has focused on the Court’s

<sup>51</sup> Isikel, *supra* note 3 at, 566, n.4.

<sup>52</sup> Nolte & Aust, *supra* note 49, at 418.

<sup>53</sup> Magdalena Ličková, *European Exceptionalism in International Law*, 19 EUR. J. OF LEGAL STUD. 463 (2008).

<sup>54</sup> “The argument is advanced that no other group of states has pooled sovereignty to the degree that EU member states have done. No other entity would have brought about such a distinct form of supranational governance which also acts alongside its member states on the international level. This would have particular consequences on the international level, for instance when other states have to arrange themselves with particularities of the special status of the EU.” Nolte & Aust, *supra* note 49, at 431.

<sup>55</sup> *Opinion 2/13*, *supra* note 23, ¶ 158.

<sup>56</sup> Some of this criticism includes: Isiksel, *supra* note 3; *Editorial Comments*, 52 COMMON MKT. L. REV. 1-16 (2015); B. de Witte, Š. Imamović, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court*, 40 EUR. L. REV. 5, 68 (2015); T. Locke, *The Future of the European Union’s Accession to the European Convention on Human Rights after Opinion 2/13: is it Still Possible and is it Still Desirable?*, 11 EUR. CONST. L. REV. 239, 243 (2015).

analysis of particular aspects of the Accession Agreement. While the Court expressed its disapproval of the draft agreement through a discussion of technical details, the more fundamental disagreement was about the very nature of the EU and its legal order. One passage of the Opinion is particularly illuminating in this regard:

The approach adopted in the [Accession Agreement] envisaged, which is *to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party*, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.<sup>57</sup>

The CJEU is not just critical of the Accession Agreement, but of the very ‘approach adopted’ by its drafters. These drafters approached the EU from the perspective of an international organization (see section II.CC below). According to this approach, the EU was to be treated in the same manner as other contracting parties, unless there was a clear reason to treat the EU differently. The Accession Agreement introduced certain innovations – the co-respondent mechanism and prior involvement procedure, for example – but these were exceptions designed to protect the autonomy of the EU legal order. For the most part, the EU was to be treated as another contracting party. Such an approach was an anathema to the Court. The starting point should not have been the EU’s equality, as the drafters believed, but its *exceptionalism*.

The EU’s self-conception as a ‘new legal order’ gives rise to problems when the EU seeks to apply that model to its relationship with other States and international organizations. Why should other members of the Council of Europe accept that the EU is to be afforded special treatment due to the CJEU’s understanding of the EU as an autonomous legal order? The CJEU did not demand certain tweaks or adjustments to the Accession Agreement, but called for its redesign, based on the EU’s autonomy and special characteristics. No such special treatment is afforded to any other contracting states to take into account, for example, their sovereignty or constitutional idiosyncrasies. Isiksel points out how “these questions throw into high relief why characterizing the EU as a *sui generis* entity is, in addition to being analytically unsatisfactory, politically and normatively problematic.”<sup>58</sup> The new legal order narrative makes sense only as long as it is applied in the internal sphere, to regulate the relations between the EU Member States and the institutions. Problems arise when the Court asserts its conception of autonomy – an ill-defined and malleable concept – must also apply to the EU’s participation in the international legal order.

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<sup>57</sup> Opinion 2/13, *supra* note 23, ¶ 193 (emphasis added).

<sup>58</sup> Isiksel, *supra* note 3, at 577.

### B. *The EU as a ‘Self-contained Regime’*

The second model is the conception of the EU as a ‘self-contained regime’. Like the new legal order narrative, this model accepts the autonomy of the EU, but unlike the new legal order narrative, it still accepts that the EU is very much a part of the wider international legal order. According to one definition, a system can be considered ‘self-contained’:

if it comprises not only rules that regulate a particular field or factual relations laying down the rights and duties of the actors within the regime (primary rules), but also a set of rules that provide for means and mechanisms to enforce compliance, to settle disputes, to modify or amend the undertakings, and to react to breaches, with the intention to replace and through this to exclude the application of general international law, at least to a certain extent.<sup>59</sup>

A self-contained regime is a ‘sub-system’ of international law; it not only regulates a certain sphere of activity, but also contains its own secondary rules, largely or completely replacing the application of general international law. Some examples of self-contained regimes that have been put forward include the legal system of the World Trade Organization, the regime of diplomatic law, and various systems in international human rights law. One of the characteristics of a self-contained regime is that, since they possess a complete system of rights and remedies, there is no ‘fall-back’ to general rules. This is based on the concept of *lex specialis* – states are free to establish a sub-system of legal rules that is more specialised and displaces the application of general rules. The ILC study on *Fragmentation of International Law* recognized that a system may develop into a self-contained regime over time:

The establishment of a special regime in the wider sense (S.S. Wimbledon, any interlinked sets of rules, both primary and secondary) would also normally take place by treaty or several treaties (e.g. the WTO “covered treaties”). However, it may also occur that a set of treaty provisions develops over time, without conscious decision by States parties, perhaps through the activity of an implementing organ, into a regime with its own rules of regime-administration, modification and termination.<sup>60</sup>

The ILC’s study lists ‘EU law’ as a candidate for a possible self-contained regime.<sup>61</sup> The EU has been described as “the most convincing example of a self-contained regime”<sup>62</sup> and there are a number of very strong arguments that the EU

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<sup>59</sup> Eckart Klein, *Self-Contained Regime*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, available at [opil.ouplaw.com/home/EPIL](http://opil.ouplaw.com/home/EPIL) (last visited Feb. 2, 2018).

<sup>60</sup> Koskenniemi, *supra* note 2, ¶ 157.

<sup>61</sup> *Id.* at ¶ 129.

<sup>62</sup> Klein, *supra* note 59; Simma & Pulkowski, *supra* note 7, 152.

should be considered as such. The main reason is that Union law provides an exhaustive system to deal with breaches of the EU Treaties.<sup>63</sup> It is now clear that EU Member States may not resort to traditional inter-state countermeasures against other Member States for breaches of EU law, excluding a key aspect of public international law from the powers of the Member States.<sup>64</sup> From a public international law perspective, the concept that general international law does not apply within scope of the EU Treaties, is a revolutionary development. As Weiler points out, this is one of the key features that sets the EU legal order from international law:

The Community legal order ... is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure. Without these features, so central to the classic international legal order, the Community truly becomes something new.<sup>65</sup>

While there appears to be no more room for inter-state countermeasures in the EU legal order, Simma and Pulkowski argue that these could still exist in certain narrow 'emergency' situations. These are (i) the continuous violation of EU law by a Member State and (ii) state to state reparation for breaches of EU law.<sup>66</sup> Even in these hypothetical scenarios, resort to public international law would only take place because the EU system would have effectively failed. The argument is that Member States have only given up their rights to institute inter-state countermeasures to the extent that the procedures under EU law remain effective. In these situations, there would be a 'fallback' to the general system of state responsibility. One could argue that since international law can continue to operate as such a 'fallback', this would imply that the EU is not fully self-contained system.<sup>67</sup>

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<sup>63</sup> Kuijper argues that upon establishing the European legal order, "[a]mong the Member States ... general international law is no longer applicable within the scope of 'the Treaties.'" Pieter Jan Kuijper, "It Shall Contribute to ... the Strict Observance and Development of International Law" *The Role of the Court of Justice in THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW* 589, 594 (A. Rosas, E. Levits, Y. Bot eds., 2013).

<sup>64</sup> See, e.g., Judgment in *Commission v. Luxembourg & Belgium*, Joined cases 90/63 and 91/63, EU:C:1964:80, 631, in which the Court found the principle of *exceptio non adimpleti contractus* (enforcement of an obligation may be withheld if the other party has itself failed to perform the same or related obligation) could not be applied in the EU legal order.

<sup>65</sup> Weiler, *supra* note 45, at 2422.

<sup>66</sup> Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. OF INT'L L. 483, 518 (2006).

<sup>67</sup> See Gerard Conway, *Breaches of EC Law and the International Responsibility of Member States*, 13 EUR. J. OF INT'L L. 3, 679, 695 (2002), concluding that "[d]espite the uniqueness and comprehensiveness of the system created by the European Communities, it remains the case that the term 'self-contained regime', strictly understood, cannot be applied to it." Ziegler, *supra* note 7, 285. "... in principle, secondary norms of international law (for example of the law of treaties or state responsibility) remain available as a subsidiary fall-back position, because the EU Treaties foresee no mechanism beyond the penalty payments in Art 260 TFEU (ex Art 228 EC), leaving scope, for example, for the suspension of the Treaty in regard to a Member State according to Art 60(2) lit. a) VCLT which is in material breach of an obligation. This implies that the EU is not a fully self-contained regime."

International law tends to treat claims of self-containment with caution. As Special Rapporteur Arangio-Ruiz pointed out, “[g]enerally, the specialists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties...”.<sup>68</sup> Indeed, whenever States create an international organization they decide to create new legal relationships between themselves and derogate (to a certain extent) from general international law.<sup>69</sup> Another reason that the self-contained regime label may be resisted is that it is viewed as contributing to the fragmentation of international law, caused by “the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice.”<sup>70</sup> The consensus on the topic seems to be that, while the EU is probably the closest thing to a ‘self-contained regime’, the application of public international law has not been completely excluded, and international law would apply in order to solve problems not addressed by the Treaties, or to fill gaps. This means that the EU “... is very close to a genuine self-contained regime, but even here the umbilical cord to general public international law has not yet been cut.”<sup>71</sup>

Like the new legal order and *sui generis* narratives, the ‘self-contained regime’ model has little explanative value, especially when understanding the EU’s relationship with other legal entities. Presenting the Union as a self-contained or closed system of law only describes how principles of public international law should apply within the EU legal order. The next section discusses how some of these tensions have appeared during the legal debates in the United Kingdom related to its withdrawal from the European Union.

### 1. The Brexit Debate

The question of whether EU law is a ‘self-contained regime’ is not only an academic exercise, but can have legal consequences for the EU and its Member States. The question of whether EU law provides a complete system of remedies and whether a fallback to principles of public international law are appropriate has already been discussed in the context of the UK’s withdrawal from the EU. Brexit will give rise to further questions about the EU’s legal character.

On 29 March 2017, British Prime Minister Theresa May officially gave notice under Article 50(2) of the Treaty on European Union (TEU) of the United Kingdoms’

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<sup>68</sup> Simma & Pulkowski, *supra* note 7, 148.

<sup>69</sup> “It was possible for the parties to the original EC Treaty to establish a system under which rules of general international law (at least those of the character *jus dispositivum*) would not apply; in fact, the point of establishing a new legal regime by means of a treaty is to derogate from the general law, so it could be expected that rules of general international law could play no more than a limited role within that regime.” Olufemi Elias, *General International Law in the European Court of Justice: From Hypothesis to Reality*, 31 NETH. Y.B. OF INT’L L. 3, 5 (2000).

<sup>70</sup> Koskenniemi, *supra* note 2, ¶ 8.

<sup>71</sup> Klein, *supra* note 59.

intention to leave the European Union.<sup>72</sup> This notice was given only after British Parliament passed the *European Union (Notification of Withdrawal) Act (2017)*<sup>73</sup> earlier in the month, giving the Prime Minister the power to give formal notice to the Council of the European Union. However, the UK Government without having involved British Parliament. This gave rise to litigation the High Court of England and Wales, and eventually the UK Supreme Court, on whether the British Parliament had to be consulted before Article 50 could be triggered.

*R (Miller) v Secretary of State for Exiting the European Union (Miller case)* ostensibly did not involve issues of public international law or even EU law; it involved a UK constitutional law question about the role of Parliament and the powers of the executive. Yet *Miller* did address these questions tangentially by focusing questions on the legal character of the Union. The EU's legal character is not only defined by the CJEU and EU institutions, it is also co-shaped through other judicial institutions at multiple levels. This includes the legal systems of the EU Member States, which are a key part of the EU legal order.<sup>74</sup>

The UK Government had argued that there was no constitutional requirement to involve Parliament in invoking Article 50 TEU because such a step – the withdrawal from a treaty – is customarily done via royal prerogative. As the Government argued before the High Court: “[s]uch a notification [under Article 50 TEU] would be an administrative act on the international law plane ...”<sup>75</sup> The argument was the EU Treaties are, after all, international *treaties*, at least from the viewpoint of UK law. When withdrawing from these instruments, it was argued, the UK should follow its standard constitutional practice. Yet such a view overlooks the fact that when the UK joined the EU, the EU legal order had already transformed into something else, the constitutional foundations of a system that has in time become closely entwined with British law, and confers rights upon individuals.

On 24 January 24, 2017 the Supreme Court upheld the decision of the Divisional Court on appeal by an 8-3 majority.<sup>76</sup> One of the key issues influencing its decision on the issue of Article 50 TEU notification was the EU's legal character and the nature of EU law. The High Court acknowledged that “in normal circumstances”<sup>77</sup> the withdrawal from a treaty on behalf of the UK would be a matter for the Crown. In the case of leaving the European Union, however, this would not

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<sup>72</sup> *Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council*, <http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf> (last visited Feb. 12, 2018) [hereinafter *Letter to the European Council*].

<sup>73</sup> *European Union (Notification of Withdrawal) Act 2017*, 2017, c. 9 (U.K.).

<sup>74</sup> “...the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties.” *Opinion I/09*, EU:C:2011:123, ¶ 85.

<sup>75</sup> *R (Miller) v. Secretary of State for Exiting the European Union, Detailed Grounds of Resistance on Behalf of the Secretary of State*, Sept. 2, 2016, ¶ 5.

<sup>76</sup> *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>77</sup> *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (Q.B.), [94] (Eng. & Wales), ¶ 30: “as a general rule applicable in normal circumstances, the conduct of international relations and the making and unmaking of treaties on behalf of the United Kingdom are regarded as matters for the Crown in the exercise of its prerogative powers.”

only produce legal effects on the international plane, but would also have the effect of modifying domestic law, including the rights enjoyed by residents in the UK.<sup>78</sup>

The Supreme Court also notes the *unique* nature of the EU Treaties and the way in which EU law is given effect in the UK legal order. EU law is a “dynamic, international source of law”:

The EU Treaties as implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts.<sup>79</sup>

The Supreme Court found that EU law is a “source of UK law.”<sup>80</sup> The European Communities Act 1972 (*ECA 1972*) is not the only Act that gives effect to international instruments; in a dualist system such as the UK legislation is required to give legal effect to international treaties. The *ECA 1972* goes much further, however, since it authorises a process by which “EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes.”<sup>81</sup> In this way the *ECA 1972* acts as a “conduit pipe”<sup>82</sup> between European and British legal systems. The Court acknowledges, therefore, that it is not just the *ECA 1972* that is unique, but also the EU legal order to which it is linked. Given the nature of EU law as an independent source of law, the British Government could not through an act of royal prerogative ‘switch off’ the effects of EU law by withdrawing from the EU Treaties.

*Miller* shows the divergent views about the nature of the EU and the EU legal order. The Court finds that the EU Treaties are not a form of ordinary international law. This contrasts with the approach of the British Government, whose starting point was that the EU Treaties remain instruments that produce effects on the *international plane* and are not a direct source of law in the UK. The dissenting judges in *Miller* also had a different conception of the EU and EU law. Lord Reed rejects the doctrine developed in *Van Gend en Loos*, stating that it “is incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty.”<sup>83</sup> To Lord Reed, EU law is not an independent source of law, but one that remains on the international plane, and is given effect via the *ECA 1972*.<sup>84</sup>

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<sup>78</sup> *Miller* (UKSC), *supra* note 75, ¶ 69: “Although article 50 operates on the plane of international law, it is common ground that, because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected.”

<sup>79</sup> *Id.* ¶ 9.

<sup>80</sup> *Id.* ¶ 60.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ¶ 65.

<sup>83</sup> *Miller* (UKSC), *supra* note 75, ¶ 182, Dissenting Opinion of Lord Reed.

<sup>84</sup> *Id.* ¶ 17. According to Lord Reed (dissenting), the *ECA 1972* “simply creates a scheme under which the effect given to EU law in domestic law reflects the UK’s international obligations under the Treaties, whatever they may be.”

This is another example of how the legal result in a case can turn on the starting point taken. In *Miller*, the legal identity of the EU played an important role.<sup>85</sup> In a commentary on the Article 50 process, Eeckhout and Frantziou point out:

Article 50 raises important constitutional concerns not only for the withdrawing state - an issue that thrives in the UK blogosphere - but also from the perspective of the EU and its identity as a new legal order that creates rights and duties and safeguards them through accountable institutions, rather than being merely an international treaty signed by states.<sup>86</sup>

The legal arguments in *Miller* were focused on issues of UK constitutional law. Yet behind this dispute lies divergent views on the EU's legal identity. The *ECA 1972* is a statute of constitutional significance. However, this is not only because UK law decided that this would be the case, but also because the EU has evolved into a dynamic and independent source of law.

## 2. Can Article 50 Notification Be Revoked?

Another legal question that has been debated since the Brexit referendum is whether notification under Article 50(2) TEU, once given, might be revoked. The question was not addressed directly in the *Miller* judgment, since it was agreed by both parties that Article 50 TEU notice "cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn."<sup>87</sup> This is an assessment of a number of legal commentators.<sup>88</sup> I disagree with this assessment. If the United Kingdom and the other 27 EU Member States all decided that the UK should not leave the European Union, it is difficult to envisage a scenario whereby Article 50 would force the UK to leave against its will. The question is whether notice can be revoked unilaterally.

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<sup>85</sup> As Elliott argues, the differing views in *Miller* illustrates "fundamentally different views about the constitutional status that EU law has (and will, until Brexit, continue to have) within the UK's legal system." Mark Elliot, *Analysis: The Supreme Court's Judgment in Miller*, PUBLIC LAW FOR EVERYONE (Jan. 25, 2017), <https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/>.

<sup>86</sup> See Piet Eeckhout & Eleni Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading* 41 (UCL Eur. Inst., Working Paper, 2016). (Emphasis added).

<sup>87</sup> *Miller*, *supra* note 76, ¶ 26.

<sup>88</sup> "Most commentators argue that [unilateral revocation] is impossible or at least doubtful, from a legal point of view. Indeed Article 50 TEU does not expressly provide for the revocation of a notice of withdrawal and establishes that, once opened, the withdrawal process ends either within two years or later, if this deadline is extended by agreement." Eva-Maria Poptcheva, EUR. PARL. DOC. (PE 577.971) 5 (2016). This analysis does not rule out the possibility of suspending withdrawal, with the agreement of the EU Member States and institutions. "The first point to note about Article 50 is that it is a once-and-for-all decision; there is no turning back once Article 50 has been invoked." Nick Barber, Tom Hickman & Jeff King, *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, U.K. CONST. L. ASS'N (June 27, 2016), <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role>.

Article 50 TEU itself does not give any answer. For some, the absence of any possibility to revoke in the Treaties does point to an answer – had the drafters intended it to be revocable, this argument assumes, they would have included such a possibility in the text. Such an argument was put forward in arguments before the High Court:

Article 50 is deliberately designed to avoid any such consequence. There is no mention of a power to withdraw. And the very possibility of a power to withdraw a notification would frustrate, again, Article 50(3), which sets out in the clearest possible terms, what the consequences are of giving the notification under Article 50(2).<sup>89</sup>

Yet one might make a similar argument that Article 50 TEU does not mention revocability since such a right exists under public international law. Article 65 of the Vienna Convention of the Law of Treaties (VCLT) provides a procedure with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty, and Article 68 sets out that “a notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.”<sup>90</sup> If one accepts this provision represents customary international law, then it is binding upon the Union and its Member States. The UK would therefore have the right to withdraw its notice at any point up until withdrawal takes effect.<sup>91</sup> The first argument sees Article 50 TEU as setting out the complete picture regarding the process of withdrawal. Since there is no explicit mention of revocability, it is not possible under the EU Treaties. The second argument, however, sees that Article 50 TEU is to be supplemented by public international law when the EU Treaties are vague or unclear.

The answer, again, depends on the legal character of the EU. If one views the EU as a ‘self-contained regime’ the EU Treaties are a complete system of rights and remedies and there should be no recourse to general international law when deciding upon a legal question within the sphere of EU constitutional law. Indeed, one could argue that by including a withdrawal procedure in the EU Treaties, the drafters intended to set out the entire procedure that should take place in case of a Member State choosing to leave, replacing the application of public international law. One could make the case that in the EU context, the rules of public international law are not appropriate, since the legal consequences of a Member State leaving are so extreme, not only for the Member State, but also for the remaining EU Member States.

Such an approach to Article 50 TEU would be to unnecessarily burden the United Kingdom and the other EU Member States. The drafters of Article 50 could not have possibly envisaged all the types of legal issues that might arise through a

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<sup>89</sup> R v. Secretary of State for Exiting the European Union [2016] UKSC 5 (CO) 16-17 (appeal taken from Eng.).

<sup>90</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

<sup>91</sup> See EUROPEAN UNION COMMITTEE, HOUSE OF LORDS, *The process of withdrawing from the European Union* Supplementary written evidence—Professor Derrick Wyatt QC (2016) PLE0001 (UK), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/written/32079.html>.

process of a Member State leaving. The 'self-contained regime' model should not be applied so as to remove any flexibility. Indeed, the CJEU has shown a certain openness to the application of international law where the EU Treaties are silent. In *Hungary v. Slovakia* the CJEU implied that public international law (the status of a Head of State) still applies in the relations between the EU Member States, and has not been completely supplanted by the EU legal order.<sup>92</sup> While EU law and the EU Treaties must be the starting point when analysing such issues, there is no reason to exclude the application of principles of the law of treaties (and other rules of customary international law) where appropriate.

The UK's withdrawal from the EU will continue to give rise to questions under UK national law, EU law and international law.<sup>93</sup> Resolving these legal issues will also involve questions related to the legal identity of the EU. As James Crawford noted, the UK's withdrawal from the EU will expose the 'hybrid character' of the EU:

There is considerable tension within the EU legal order between the underlying international law framework of treaties, and the internal law of the EU, which is not intentional law in any straightforward sense. But when negotiating within the EU for a situation outside it, the hybrid character of the EU is very much in issue.<sup>94</sup>

### C. *The EU as a Regional Economic Integration Organization (REIO)*

The third model is that of the EU as a 'Regional Economic Integration Organization' (REIO). The two models discussed above – the EU as a 'new legal order' and the EU as a 'self-contained regime' – relate to the nature of the EU's internal legal order. They tell us little about how the EU is to relate with other subjects of international law, or where it fits within this wider international legal order. The REIO model seeks to address that question. This model accepts that the EU is unique in many ways but reiterates that it still belongs to the world of international organizations. This is perhaps the most common view among international lawyers: the EU is an international organization, albeit one with certain distinct features.

This conception of the EU is reflected in a number of international treaties which allow for participation of the EU. Only a small number of treaties specifically mention the EU as a party;<sup>95</sup> most allow for participation of 'regional economic integration organizations' (REIO), or alternatively (recognizing the EU's

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<sup>92</sup> Case C-364/10, *Hungary v. Slovakia*, 2012 E.C.R. 49.

<sup>93</sup> See generally Jed Odermatt, *Brexit and International Law: Disentangling Legal Orders*, 31 EMORY INT'L L. REV. 1051 (2017).

<sup>94</sup> James Crawford, *The Current Political Discourse Concerning International Law*, 81 MOD. L. REV. 1, 16 (2018).

<sup>95</sup> For example, the EU was a founding member of the WTO. Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154 (1994).

competence beyond economic matters) ‘regional integration organizations’ (RIO).<sup>96</sup> The European External Action Service’s Treaties Office Database shows that the EU is a party to 91 international agreements containing an ERIO clause.<sup>97</sup> According to this model, the EU is first and foremost an international organization. While some may reject the description of the EU as an ‘international organization’, the EU has accepted the REIO label by joining international agreements and participating in international organizations via REIO clauses. On the one hand, the REIO model accepts that the EU is an international organization when it acts on the international plane. On the other hand, it also reflects the idea that such an organization is different from the classical form of intergovernmental organization, reflecting somewhat the EU’s self-conception of a unique type of legal entity.

### 1. REIOs Before the International Law Commission

Is a REIO a distinct type of international organization for the purposes of international law? The EU has argued at the International Law Commission (ILC) that specialized rules should be developed with respect to REIOs.

The ILC has on many occasions been faced with questions regarding which rules of international law apply to subjects other than States. An early example of this can be found in the ILC’s Waldock Report, referring to the EU in the context of succession of obligations of states. The question arose as to what type of entity the EU is according to international law. Waldock draws a sharp distinction between unions of States, which aim to create a new entity on the international plane (e.g. the UN or Council of Europe) and unions intended to create a new political entity on the plane of internal constitutional law (e.g. US, Switzerland or the former United Arab Republic). The European Union, however, does not easily fit within either of these categories:

“For the present purposes, it must suffice to say that, while EEC is not commonly viewed as a union of States, it is at the same time not generally regarded as being simply a regional international organisation. The direct effects in the national law of the member States of regulatory and judicial powers vested in Community organs gives EEC, it is said, a semblance of a quasi-federal association of States. Be that as it may, from the point of view of

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<sup>96</sup> Art. 44, Convention on the Rights of Persons with Disabilities, 2518 U.N.T.S. 283 (2008). “Regional integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.”

<sup>97</sup> Inventory of Agreements Containing the Regional and International Organization Clause, European Union External Action Treaties Office, available at <http://ec.europa.eu/world/agreements/ClauseTreatiesPDFGeneratorAction.do?clauseID=30> (last visited Apr. 19, 2018).

succession, EEC appears without any doubt to remain *on the plane of intergovernmental organisation*.”<sup>98</sup>

The ILC's Study on the Fragmentation of International Law points out “the European Community [...] is a subject of international law and for practical purposes may be treated towards the outside world as an intergovernmental organization, with whatever modification its specific nature brings to that characterization.”<sup>99</sup> The ILC has had to deal with the legal character of the EU in a number of codification projects. For example, when the ILC embarked on its project on the International Responsibility of International Organizations, it included the European Union in its work, implying that the EU is to be treated as an IO for the purposes of international law.<sup>100</sup> The evident problem with this approach is that it considers the EU alongside a host of different types of international organizations that share very few characteristics with the EU apart from the fact that they were established by an international treaty. The EU and some legal commentators questioned the usefulness of dealing with entities as diverse as the European Union, International Monetary Fund and World Meteorological Organization in one set of draft articles.<sup>101</sup> The European Commission, representing the Union, consistently argued that any draft articles must take into account the special nature of the EU legal order. Rather than frame this argument around the unique nature of the EU, however, the European Commission argued that the ILC should consider the EU as a REIO, for which a different set of rules had developed.<sup>102</sup>

The academic literature on the international responsibility of the EU<sup>103</sup> is marked with the same set of divergent views as discussed in the introduction. International lawyers tend to discuss international organizations generally, and include the discussion of the EU in that analysis. According to this view, secondary rules of responsibility should be capable of applying to *all* international organizations irrespective of their particular type, including the EU. The other view in the literature (often written by EU lawyers or those working in the EU institutions) focuses on the EU itself, and discusses the particular issues arising from the nature

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<sup>98</sup> *Succession of States*, U.N. Doc. A/CN.4/256, at 18 (1972), 2 Y.B. Int'l L. Comm'n 24, U.N. Doc A/CN.4/SER.A/1972/Add.1. (Emphasis added).

<sup>99</sup> Koskenniemi, *supra* note 2, ¶ 219.

<sup>100</sup> Draft Articles on the Responsibility of International Organizations with Commentaries; Rep. of the Int'l L. Commission, on its Sixty Third Session, U.N. Doc. A/66/10, at 52; GAOR, 66th Sess., Supp. No. 10 (2011).

<sup>101</sup> See Jan Klabbbers, *Self-control: International Organizations and the Quest for Accountability*, in (eds), *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: EUROPEAN AND INTERNATIONAL PERSPECTIVES* 76 (Malcolm Evans & Panos Koutrakos eds., Hart Publishing 2013) “surely, it will not do to have an identical regime for entities as disparate as the World Bank, the EU, and say, the European Forest Institute; hence to the extent that organisations welcome a general responsibility regime, they nonetheless feel that their situation is different.”

<sup>102</sup> See generally J. Odermatt, *The Development of Customary International Law by International Organizations*, 66 INT'L COMP. L. QUART. 491 (2017).

<sup>103</sup> See, e.g., A. DELGADO CASTELEIRO, *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION FROM COMPETENCE TO NORMATIVE CONTROL* (Cambridge Univ. Press 2016); *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: EUROPEAN AND INTERNATIONAL PERSPECTIVES* (Malcolm Evans & Panos Koutrakos eds., Hart Publishing 2013).

of the EU and the EU legal order.<sup>104</sup> Much of this second strand of literature is inward-looking, focusing on internal legal issues such as competences and mixity, rather than situating the EU among other international organizations. It is unsurprising that the latter strand of literature endorsed more EU-specific rules in the draft articles.

This cleavage in the academic literature could also be seen played out within the ILC. Of the many conceptual issues the ILC and the Special Rapporteur faced when developing the Draft Articles, one of the most perplexing was how to find a set of universally-applicable rules that could be applied to a highly diverse set of international bodies. The European Commission consistently argued that the draft articles had to take into account the unique nature of the Union, specifically its role as a REIO.<sup>105</sup> Indeed, the European Commission was sceptical about whether it would be possible or desirable to have rules applicable to all international organizations, given the high degree of diversity of international organizations that exist.<sup>106</sup> From the outset the European Commission highlighted the unique nature of the EU:

the EC is regulated by a legal order of its own, establishing a common market and organizing the legal relations between its members, their enterprises and individuals. Legislation enacted under the EC Treaty forms part of the national law of the Member States and thus is implemented by Member States' authorities and Courts. In that sense, the EC goes well beyond the normal parameters of classical international organizations as we know them. It is important that the ILC draft articles should fully reflect

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<sup>104</sup> Pieter Jan Kuijper & Esa Paasivirta, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION: EUROPEAN AND INTERNATIONAL PERSPECTIVES* 35 (Malcolm Evans & Panos Koutrakos eds., Hart Publishing, 2013); Esa Paasivirta and Pieter Jan Kuijper, *Does One Size Fit All? The European Community and the Responsibility of International Organizations*, 36 *NETHERLANDS Y.B. OF INT'L L.* 169 (2005); Martin Björklund, *Responsibility in the EC for Mixed Agreements – Should Non-Member Parties Care?*, 70 *NORDIC J. INT'L L.* 373 (2001); Christian Tomuschat, *The International Responsibility of the European Union*, in *THE EUROPEAN UNION AS AN ACTOR IN INTERNATIONAL RELATIONS* 177 (Enzo Cannizzaro ed., Kluwer 2002); Pieter Jan Kuijper & Esa Paasivirta, *Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations*, 1 *INT'L ORG. L. REV.* 111 (2004); Frank Hoffmeister, *Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?*, 21 *EUR. J. INT'L L.* 723 (2010).

<sup>105</sup> See *supra* note 99.

<sup>106</sup> “The European Commission expresses some concerns as to the feasibility of subsuming all international organizations under the terms of this one draft in the light of the highly diverse nature of international organizations, of which the European Community is itself an example.” *Comments and Observations Received from International Organizations*, [2008] 2 *Y.B. Int'l L. Comm'n* 32, U.N. Doc. A/CN.4/593.

the institutional and legal diversity of structures that the community of states has already established.<sup>107</sup>

These comments build upon the idea of the EU as “a rather specific international organization.”<sup>108</sup> The European Commission argued that, given this special nature, specialised rules were needed to take this into account in the draft articles. It was also argued that “concepts such as ‘regional economic integration organization’ have emerged in the drafting of multilateral treaties, which seem to reflect some of these special features.”<sup>109</sup> For example, the European Commission argued that special rule of attribution should be included “so that responsibility could be attributed to the organization, even if organs of member states were the prime actors of a breach of an obligation borne by the organization.”<sup>110</sup> Despite the arguments put forward by the European Commission, as well as much of the academic commentary, the ILC did not support the idea that any specialised rules of attribution had developed regarding the Union.<sup>111</sup> Rather than develop a set of rules applicable to REIOs only, the ILC chose instead to develop rules that applied equally to all international organizations, irrespective of their type or categorization. The ILC arguably did allow the diversity of international organizations to be taken into account through the inclusion of a *lex specialis* rule,<sup>112</sup> which sets out that general rules of responsibility may be supplemented by more specific ones. This provision could potentially allow for the development of specialised rules in the context of the European Union.<sup>113</sup>

The REIO/RIO model of the EU accepts the EU as an international organization but implies that the EU possesses certain unique features that should be taken into account. However, as illustrated from the ILC’s draft articles of

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<sup>107</sup> Giuseppe Nesi, *EU Presidency Statement – Report of the International Law Commission*, EUROPEAN UNION @ UNITED NATIONS (Oct. 27, 2003), [http://eu-un.europa.eu/articles/en/article\\_2940\\_en.htm](http://eu-un.europa.eu/articles/en/article_2940_en.htm).

<sup>108</sup> “The European Commission attaches great importance to the work of the International Law Commission, but necessarily looks at it from the perspective of a rather specific international organization.” *Comments and Observations received from International Organizations*, U.N. Doc. A/CN.4/568, at 127 (May 12, 2006).

<sup>109</sup> *Comments and Observations received from International Organizations*, U.N. Doc. A/CN.4/545, at 28 (June 25, 2004).

<sup>110</sup> *Observations of Mr. Kuijper* (Observer for the European Commission), Sixth Committee, Summary Record of its 21st Meeting, UN Doc. A/C.6/59/SR.21, at ¶18 (2014).

<sup>111</sup> Giorgio Gaja, Special Rapporteur, International Law Commission, *Second Report on Responsibility of International Organizations*, UN Doc. A/CN.4/541, at 5-8 (2004).

<sup>112</sup> Draft Articles on the Responsibility of International Organizations with Commentaries, in Rep. of the Int’l Law Commission, on its Sixty Third Session, U.N. Doc. A/66/10, at 100. “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.”

<sup>113</sup> *Id.* “By way of illustration, it may be useful to refer to one issue which has given rise in practice to a variety of opinions concerning the possible existence of a special rule: that of the attribution to the European Community (now European Union) of conduct of States members of the Community when they implement binding acts of the Community.”; *but see* Jean d’Aspremont, *A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union*, in *THE EU ACCESSION TO THE ECHR 75-76* (Vasiliki Kosta, Nikos Skoutaris & Vassilios Tzevelekos eds, Hart Publishing 2014).

responsibility of IOs, is far from agreed upon what, precisely, these unique features are, and the extent to which they should be relevant for the purposes of identifying rules of international law.

D. *The EU as a (Classic) International Organization*

The final model is that of a classic intergovernmental organization. This view downplays the unique characteristics of the EU and the constitutional character of the EU Treaties. It accepts that the EU has certain unique features, but rejects that this sets it apart as a qualitatively different entity other international organizations or groups of states. Viewing the EU as ‘just another’ international organization may be conceptually appealing to many international lawyers who see the compartmentalisation of international organizations into discrete categories as a threat to the universal application of international law. Orakhelashvili reminds us that the EU is an international organization:

It is true that there is a substantive difference between the European Union and other international organizations as the former possesses specific aims of European integration and extensive powers to bind Member States and their nationals to that end. However, there are no consistent criteria for constructing a workable juridical distinction between supranational organizations and international organizations, especially in relation to general international law. Being a supranational organization means also being an international organization.<sup>114</sup>

The Classic IO model also dismisses arguments in favour of EU exceptionalism. It goes against the EU’s self-perception as a ‘new legal order’. Some describe the EU as an ‘association of states’<sup>115</sup> which also tends to deny the characteristics of the EU as a distinct legal entity in its own right. In some instances, the EU is referred to as a ‘bloc’, which presents the EU as a group of like-minded countries, rather than an organization with its own personality and powers.

EU lawyers would reject such characterizations. As discussed above, even if the EU is technically founded on international law instruments, they would argue, treating the EU as an international organization is not helpful as an analytical tool. Yet they should be reminded that outside of the EU, the Union continues to be viewed in such a manner. We can see such a divergence of views in international forums where the EU Member States are in minority, such as at the United Nations

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<sup>114</sup> Alexander Orakhelashvili, *The Idea of European International Law*, 17 EUR. J. OF INT’L L. 315, 343 (2006).

<sup>115</sup> MALCOLM SHAW, *INTERNATIONAL LAW* 177 (Cambridge Univ. Press 7th ed. 2014). Stating that “[t]he European Union is an association, of twenty eight states”. The EU is presented in a section alongside the Commonwealth of Nations and the Commonwealth of Independent States (CIS). Likewise, Triggs discusses the EU alongside ASEAN, the Arctic Council and the CIS and tells us that the “most well-recognised association of states is the European Union.”; GILLIAN D TRIGGS, *INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES* 175 (LexisNexis, ed., Butterworths 2006).

General Assembly.<sup>116</sup> Here the EU is not viewed as a special or unique entity. It is viewed as an international organization or a political bloc. When the EU gained 'enhanced observer' status at the UN General Assembly in 2011, the UN Press Release described the Union as a 'bloc'.<sup>117</sup> Since the EU gained such observer status in the UN system, the Union has had difficulty asserting itself as an independent legal entity, separate from its Member States. This of course is explained more by political than legal reasons – States that are not members of the EU may be sceptical or hostile to the idea of European states gaining greater power within multilateral bodies through separate membership of the EU. But this shows how the EU's own self-perception, that of a unique type of supranational organization, is not accepted universally, not least in many of the multilateral bodies where the EU seeks to enhance its participation and visibility.

### III. THEORIZING THE EU'S INTERNATIONAL LEGAL CHARACTER

The previous section outlined four views of the European Union that exist in the international and EU law. Using examples from recent legal practice, it showed that these views are not confined to academic literature. It showed how legal outcomes are shaped, in part, by which model is taken as a starting point in a given circumstance. Moreover, the legal identity of the EU is shaped, not only by the CJEU and the EU institutions, but also the judicial systems of the EU Member States, and at other levels, such as the International Law Commission or UN General Assembly. What are we to make of these diverging views? Which of these models is correct?

It is tempting for legal scholars to seek a single 'answer' to this question. The EU is not a subatomic particle that exists in multiple states or whose character depends on the observer. It is a legal entity. It enters into international agreements and appears before courts. In order to resolve some of the most complex legal issues—the responsibility of the EU, the legal fallout from Brexit, the EU's participation in multilateral fora, and so on – there should be a consistent understanding about what type of legal entity the EU is.

There is a tendency to argue that everything is relative and that the answer to this question will always be a matter of perspective and the standpoint of the

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<sup>116</sup> On the diplomatic saga involving the EU's efforts to upgrade its status at the UNGA, see Evan Brewer, *The Participation of the European Union in the Work of the United Nations: Evolving to Reflect the New Realities of Regional Organizations*, 9 Int'l Org. L. Rev. 181 (2012); Geert De Baere & Esa Paasivirta, *Identity and Difference: The EU and the UN as Part of Each Other*, in *THE EUROPEAN UNION'S EMERGING INTERNATIONAL IDENTITY: VIEWS FROM THE GLOBAL ARENA* 42 (Henri de Weale & Jan-Jap Kuijpers eds. 2013); Jan Wouters, Jed Odermatt & Thomas Ramopoulos, *The Status of the European Union at the United Nations General Assembly*, in *THE EUROPEAN UNION IN THE WORLD. ESSAYS IN HONOUR OF MARC MARESCEAU* 212-13 (Inge Govaere, Erwan Lannon, Peter Van Elsuwege & Stanislas Adam eds., Leiden, Martinus Nijhoff Publishers 2014).

<sup>117</sup> Press Release, General Assembly, General Assembly, in Recorded Vote, Adopts Resolution Granting European Union Right of Reply, Ability to Present Oral Amendments, U.N. Press Release GA/11079/Rev. 1 (May 3, 2011) ("The European Union would be able to present oral proposals and amendments, which, however, would be put to a vote only at the request of a Member State. The bloc would have the ability to exercise the right of reply, restricted to one intervention per item.").

observer.<sup>118</sup> In its ‘Decision on Jurisdiction, Applicable Law and Liability’ in *Electrabel SA v. The Republic of Hungary*, the arbitration tribunal was called upon to decide whether EU law should be considered international law, for purposes of defining the applicable law. The Tribunal noted the ‘multiple nature’ of EU law, stating that “EU law is a sui generis legal order, presenting different facets depending on the perspective from where it is analysed. It can be analysed from the perspectives of the international community, individual Member States and EU institutions.”<sup>119</sup> The tribunal cites two academic articles to demonstrate that ‘many scholars’ accept that “EU law is international law because it is rooted in international treaties.”<sup>120</sup> This reasoning feeds into the idea that the nature of the EU and EU law depends on the legal domain in question – national courts, EU courts, or international tribunals. It stresses that EU law can exist in multiple states.

The description of the EU legal order as “un ordre juridique interne d’origine internationale”<sup>121</sup> used by Advocate General Maduro in *Kadi I* seeks to capture the duality of the EU legal order, one with international law origins and dimensions, but with municipal, even constitutional, characteristics. Crawford and Koskeniemi also seek to capture the ‘dual nature’ of the EU legal order as one that is both international and domestic in nature:

In certain cases, of which the European Union is the best example, a legal system originating in a treaty and dependent on standard international law techniques for its origin and development, may come to seem – may actually be – sufficiently distinct as to constitute a separate legal system, linked to the international legal system, participating in it, but with its own ‘reserved domain’ and its own rules of recognition. But even with the European Union this is only provisionally the case: the member states generally treat it as a kind of international organisation, and as only by delegation exercising state authority.<sup>122</sup>

This recognizes that the EU legal order has both an internal and external dimension. Which model we apply in a given case will depend on which dimension is being discussed. Gardiner captures this internal/external dichotomy in relation to the EU:

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<sup>118</sup> Lando Kirchmair, *The ‘Janus Face’ of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order’s Relationship with International and Member State Law*, 4 GOETTINGEN J. INT’L L. 677, 679 (2012) “Depending on its perspective – and not on a different standpoint of the observer – the ECJ applies a monistic doctrine relating to its Member States and a dualistic doctrine relating to international law, two completely diverging doctrines.”

<sup>119</sup> *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, The Tribunals Analysis, ¶ 4.117 (Nov. 30, 2012).

<sup>120</sup> *Id.* at ¶ 4.120.

<sup>121</sup> Case C-402/05, P Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-06351. The original language of the Opinion is in English, which uses the more awkward phrase: “municipal legal order of trans-national dimensions.”

<sup>122</sup> James Crawford & Martti Koskeniemi, *Introduction*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 12* (James Crawford & Martti Koskeniemi eds, Cambridge Univ. Press 2012).

In its internal aspect, that is viewing relations between the member states themselves, the Community is an organism for collective exercise of sovereignty in matters over which competence is transferred to the Community by treaty. In its external aspect, the Community functions as an international organization, entering into treaties in matters within its competences.<sup>123</sup>

In its *internal dimension*, the EU can be thought of as a constitutional legal order, one that regulates the rights and responsibilities of the EU Member States in their mutual relations. From this perspective, it makes sense to treat the EU as new legal order or self-contained regime. At the *external level*, when the EU participates on the international scene and mediates with other subjects of international law, these descriptions lose their value, and the EU is best treated as an international organization.

Such an approach might be conceptually appealing. It allows the CJEU and EU lawyers to continue with the ‘new legal order’ narrative, since this only applies in the internal sphere, while at the same time mollifies fears of some international lawyers that the EU is seeking special treatment or undermining the universality of the international legal order. However, it is unlikely that such a strict dichotomy can always work well in practice. Take, for instance, the legal dilemma that arose in *Opinion 2/13*. One could argue that the new legal order narrative was justified because the legal issue concerned the EU’s internal legal order: whether a proposed accession agreement complies with EU law. However, this would ignore the fact that the case involved an external dimension too, since it dealt with the EU’s interaction with other legal subjects and participation in another legal order (the ECHR system). By requiring the EU to obtain a high level of special treatment from the other ECHR contracting parties, the CJEU made it difficult for the EU to accede in practice. By viewing the dispute as one that involves the purely internal dimension, the Court overlooked the wider context of the dispute.<sup>124</sup> As was discussed above, one of the reasons that *Opinion 2/13* remains controversial is that involved a clash of two very different views of the EU and EU law. As the EU seeks to participate in the international legal order – through trade agreements, dispute settlement mechanisms, or via participation in international organizations and processes – it is likely that such clashes will arise in the future.

The relativistic approach – that the legal character of the EU depends on the legal domain in question – is also problematic in that it reduces legal certainty. For international law to work effectively, it must be possible for it to be applied consistently across different situations and to different subjects of international law.<sup>125</sup> The legal characterisations of the EU in any circumstance will often reflect deeper power relations. Where the EU is in a stronger position, it will be able to

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<sup>123</sup> RICHARD GARDINER, *TREATY INTERPRETATION* 129 (2nd ed. Oxford Univ. Press 2015).

<sup>124</sup> Jed Odermatt, *The Principle of Autonomy: An Adolescent Disease of EU Law*, in *STRUCTURAL PRINCIPLES IN EU EXTERNAL RELATIONS LAW* (Marise Cremona ed., Bloomsbury Publishing 2018).

<sup>125</sup> Christina Eckes & Ramses Wessel, *The European Union from an International Perspective: Sovereignty, Statehood, and Special Treatment*, in 1 *THE OXFORD PRINCIPLES OF EUROPEAN UNION LAW – THE EUROPEAN UNION LEGAL ORDER* (Takis Tridimas & Robert Schütze eds., Oxford Univ. Press 2018). “International law, however, only works when it is applied across the board for certain categories of international actors. Its rationale is to offer clarity and set the conditions for a smooth cooperation between different subjects.”

assert its 'new legal order' narrative. However, where it sits beside 193 members of the UN, it is less likely to dictate to others that it is unique and requires special treatment. If one applies this relativistic approach, legal outcomes will be shaped, in part, by these power dynamics. It is difficult, therefore, to develop a consistent conceptual model since legal arguments about the legal nature of the EU are closely entwined with political debates about the EU's place in the international legal order.

Is this really a problem? One might argue that the international legal character of the EU has, and always will be, the subject of contestation and debate, but this has rarely given rise to serious problems in practice. Academics and lawyers will continue to debate the nature of the EU in lengthy articles and at academic conferences, but the real world will move on. This article has argued, however, that such theoretical disagreements can have practical consequences. One should remember that the 'new legal order' narrative, while now accepted for the most part within the EU, was also subject to decades of debate and contestation. The debate today is no longer whether the EU is an autonomous legal order but whether this autonomy can be applied at the international level to the EU's relationships with third states and international organizations. The EU's self-perception continues to be challenged when it steps out into the world. It is unlikely that the EU will be successful in convincing third states that the EU is qualitatively different and requires international law to take into account this status. As the EU seeks to increase its interaction at the international level, and as one Member State seeks to extricate itself from the EU legal order, we are likely to see the question of the EU's legal character come up again.





# OUTSIDE DIRECTORS LIABILITY: A COMPARATIVE ANALYSIS BETWEEN THE U.S. AND JAPAN

*Maria Lucia Passador \**

## *Abstract*

*Outside directors are pervasive and represent one of the core aspects of good governance under the U.S. corporate model. However, Japan has recently gone through extensive corporate governance reforms which include increased roles for outside directors. This has raised questions regarding how to regulate the liability for these directors. This paper will review the concept of outside directors in order to facilitate better understanding of regulatory reforms in Japan. This paper will then examine the topic in the U.S. context and compare the major features of the phenomenon in Japan and the U.S. Finally, this paper will conclude by evaluating the implications of this analysis.*

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## INTRODUCTION

The pervasive role of outside directors in the legal environment<sup>1</sup> can explain much of the contemporary landscape of corporations, including practices and patterns that gradually<sup>2</sup> developed<sup>3</sup> in a large number of countries,<sup>4</sup> thus representing the core of most prescriptions for good corporate governance.<sup>5</sup> The current *de lege ferenda* in the Korean legislation once more proves that the presence of independent and outside directors<sup>6</sup> plays a relevant role in the Asian context and leads to additional reflections related to that geographical area.

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<sup>1</sup> Among the first studies, focused on their duties and responsibilities, see AVERY S. COHEN & RONALD M. LOEB, DUTIES AND RESPONSIBILITIES OF OUTSIDE DIRECTORS (Practising Law Institute 1978).

<sup>2</sup> Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1057 (2006). The Authors underline how “[c]oncern over liability for outside directors has arisen periodically since the 1970s, typically in response to specific events that appear to expose outside directors to heightened risk. Outside director liability is again causing much concern, with the [...] trigger being the 2005 securities class action settlements involving WorldCom and Enron. In these settlements, outside directors agreed to make substantial payments out of their own pockets to settle securities class action lawsuits even though there was no evidence in either case that the outside directors knowingly participated in fraudulent activity”. The literature on the topic is incredibly vast: See also Joseph W. Bishop Jr., *Current Status of Corporate Directors’ Right to Indemnification*, 69 HARV. L. REV. 1057 (1956); Joseph W. Bishop, *Indemnification of Corporate Directors, Officers and Employees*, 20 BUS. LAW. 833 (1965); Joseph W. Bishop Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078 (1968); JOSEPH WARREN BISHOP & GEORGE THOMAS WASHINGTON, THE LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE (Boston: Warren, Gorham & Lamont 1981); Richard J. Farrell & Robert W. Murphy, *Comments on the Theme: “Why Should Anyone Want to be a Director?”*, 27 BUS. LAW. 7 (1972); William E. Graver, *Securities Regulation - Outside Director’s Liability for Misleading Corporate Statements. Recent Developments*, 59 CORNELL L. REV. 728 (1973); Larry Soderquist, *Toward a More Effective Corporate Board: Reexamining Roles of Outside Directors*, 52 N.Y.U. L. REV. 1341 (1977); Fran Hawthorne, *Mergers and Acquisitions: Outside Directors Feel the Heat*, 23 INST. INV. 58 (1989); Dan Bailey, *D&O Liability in the Post-Enron Era*, 2 INT’L J. DISCLOSURE & GOVERNANCE, no. 2, 159 (2005).

<sup>3</sup> For a comparative overview, mainly focused on liability aspects, see Bernard S. Black et al., *Shareholder Suits and Outside Director Liability: The Case of Korea*, 10 J. KOREAN L. 336 (2011); Markus Roth, *Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective*, 8 J. CORP. L. STUD. 337 (2008); Brian Cheffins & Bernard Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385 (2006).

<sup>4</sup> See RONALD J. GILSON & REINIER H. KRAAKMAN, REINVENTING THE OUTSIDE DIRECTOR: AN AGENDA FOR INSTITUTIONAL INVESTORS (Stan. L. Sch. 1990).

<sup>5</sup> *Tough at the Top*, 369 THE ECONOMIST, Oct. 23, 2003 at 4–S7.

<sup>6</sup> It is worth considering that:

[t]he Korean terminology corresponding to “independent director” would be *sawae-isa*. Its direct translation is “outside director”, but since Korean law requires certain criteria for a *sawae-isa* to secure his or her independence from management and major shareholders, ‘independent director’ would be another possible translation of *sawae-isa* (and there is no other established legal jargon in the Korean language corresponding to “independent director”). Throughout this paper, a *sawae-isa* in the Korean law and literature will be referred to as an “outside director” or an “independent director” without strict distinction.

Perhaps due to an increased globalization,<sup>7</sup> tighter market competition and stronger shareholder pressures,<sup>8</sup> the New York Stock Exchange Listed Company Manual, 303 A.01, and the Japanese Companies Act,<sup>9</sup> art. 327-2, recently confirmed such tendency<sup>10</sup> among listed companies.<sup>11</sup>

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Kyung-Hoon Chun, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles 2*, n.4 (2016), <http://www.ssm.com/abstract=2824303>. The Author adds that the concept of “outside director” was not completely new to the business community in Korea. By the time the law required them for listed corporations, “the business community had at least a minimum understanding of their role in corporate governance”. *Id.* at 11, n.23 (citing Kon Sik Kim, *Transplanting Audit Committees* 164 (1998), <http://www.imf.org/external/np/loi/050298.htm>). Right now, in Korea, a unique reality concerning independent directors is being faced:

Increasingly, companies fill their independent director quota with retired government officials, such as high-ranking prosecutors or tax officers. While professors and lawyers are increasingly being tapped to become independent directors, it is becoming progressively more difficult to find businessmen or career bankers serving as independent directors in large listed companies. Such a trend is even more pronounced in large business groups. This is strikingly different from other jurisdictions, where most of the independent or non-executive directors in large listed companies are CEOs, CFOs, or other high level executives of other large companies. This trend in Korea may suggest that many companies want their independent directors to play a ‘relational role’, especially in terms of providing a channel of communication with the government. This is certainly not a role that the legislature expected independent directors would play in Korea.

*Id.* at 26-27.

<sup>7</sup> Jiyeoun Song, *Japan's Labor Market Reform After the Collapse of the Bubble Economy: Political Determinants of Regulatory Changes*, 50 *ASIAN SURV.* 1011, 1014 (2010).

<sup>8</sup> More in general, in the US environment, the SOX and the NYSE Standards drastically changed the traditional role of the board of directors, although covering a broad range of corporate law, including auditing, internal controls and other corporate governance matters. With respect to the SOX and the NYSE Standards, Robert C. Clark classified the regulations into two categories: “conflicting-reducing standards” and “action-inducing standards”: the former means the standards to make sure the board members are independent from the executive officers, especially the CEO, including majority or independent directors, tightened definition of independence, mandatory establishment of the audit, nominating/corporate governance and compensation committees, and holding of regular executive sessions composed entirely of non-employee directors; while the latter induce some actions from the directors to perform their monitoring role. Both standards purport not only to prevent corporate frauds, theft, excessive executive pay or any corporate scandals, but also to enhance corporate economic performance. See Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 *GA. ST. U. L. REV.* 252, 278 (2005).

<sup>9</sup> Kaisha-hō [Companies Act], Law No. 86 of 2005, art. 327 (Japan).

<sup>10</sup> In addition, also the Institutional Shareholder Service, Inc. (ISS) stated that, generally, it recommends not voting in favour of the appointment of representative of directors, whose company does not have any outside director (or nominee) at an annual shareholder meeting in 2013. See Takayuki Ishii, *2013 nen ISS Giketuken Kōshi Zyogen Hōshin [ISS's Policy of Recommendation on Voting in 2013]*, 1993 *SHŌJI HŌMU* 41, 45 (2013). As to its effect, see Tajuya Wakiyama, Kazuhiro, Nakanishi, Hiroko Miwa, *Honnen 6 Gatu Sōukai ni okeru sygai-torisimariyaku no senninn wo meguru zitumu dōko [Practical Trend regarding Appointing Outside Director in June, 2013]*, 2006 *SHŌJI HŌMU* 62, 69 (2013).

<sup>11</sup> To be fair, it must be recognized that the California Public Employees' Retirement System (CalPERS) requested major Japanese securities firms to appoint outside directors as early as 1992 (see Toshio Sakamaki, *Shagai Torishimariyaku to Shagai Kansayaku no Kinou [Functions of Outside Directors and Outside Auditors]* 1050 *JURIST* 136, 141 (1994)). The reason why most corporations usually did not introduce outside directors lied on the fact that such governance role is played by outside auditors, according to the vast majority. Still, empirical findings prove that the number of outside auditors does not

The purpose of the paper is to explore the implication of regulating the risky role of outside directors and Boards' composition in light of Japan's extensive corporate governance reform in 2014.<sup>12</sup> The analysis covers companies both in Japan and in the United States, where the level of litigation surrounding outside directors is incredibly relevant<sup>13</sup> and the literature on the topic is extremely ample and intriguing<sup>14</sup>, focusing mainly on Delaware regulation. Its purpose is to examine the possible effects of the amendment to the Japanese Companies Act on the future of outside directors' liability, disregarding its impacts on unlisted companies and on inside directors, except for some necessary implications to illustrate points made concerning outside ones.

Part II will briefly review the concept of outside directors, which facilitates better understanding of regulatory reforms in Japan. Part III will examine the topic in the U.S. context. Part IV will compare the major features of the phenomenon in Japan and the U.S. Part V concludes by evaluating the implications of the analysis.

## I. OUTSIDE DIRECTORS IN THE LIGHT OF THE JAPANESE CORPORATE LAW REFORMS

### A. *Japanese Corporate Culture*

Japan's corporate governance is identified as a "stakeholder" model, with

bank finance and monitoring, the absence of hostile takeovers, moderate executive pay, management cultures based on consensus, emphasis on product quality and long-term strategy rather than financial returns, and so on. "Patient" owners and long-term management was thought to be supportive of long-term employment, since short-term returns are sacrificed to build stable relationships.<sup>15</sup>

In most countries at a worldwide level, as in the U.S., interests of capital and management oppose the interests of labor since shareholders are mostly finance-driven portfolio investors and management is rewarded depending upon stock

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affect the number of outside directors. Takuji Saito, *Determinants of Director Board and Auditor Board Composition Evidence from Japan*, 11 PUB. POL'Y REV., no. 3, 395 (2015).

<sup>12</sup> See Maria Lucia Passador, *Corporate Governance Models: the Japanese Experience in Context*, 15 DEPAUL BUS. & COMM. L.J. 25 (2016). Similarly, the issue was considered in the light of reforms to Korean corporate and securities law carried out in the wake of the 1997-1998 East Asian financial crisis in Choe Heungsik & Lee Bong-Soo, *Korean Bank Governance Reform After the Asian Financial Crisis*, 11 PACIFIC-BASIN FIN. J. 483 (2003); Jongmoo Jay Choi, Sae Woon Park & Sean Sehyun Yoo, *The Value of Outside Directors: Evidence from Corporate Governance Reform in Korea*, 42 J. FIN. & QUANTITATIVE ANALYSIS 941 (2007); Black et al., *supra* note 3; Michael Klauser, *Shareholder Suits and Outside Director Liability: The Case of Korea*, CORP. GOV. CAP. MKT. KOREA 259 (2009).

<sup>13</sup> Black et al., *supra* note 2, at 1141.

<sup>14</sup> See *infra* Part III and *supra* note 5.

<sup>15</sup> GREGORY JACKSON, TOWARD A COMPARATIVE PERSPECTIVE ON CORPORATE GOVERNANCE AND LABOUR MANAGEMENT 1, 17 (RIETI Discussion Paper Series 04-E-023, 2004).

options and external career mobility.<sup>16</sup> In Japan, Boards do not recruit managers among professionals, managerial performance does not reflect on share prices, which are monitored by the market, and inefficient managers are changed through hostile takeovers. Dispersed ownership, strong shareholder rights and high stock market capitalization represent the key aspects of Japanese corporations, but co-operative industrial relations and employment security are also maintained. Through cross-shareholding, managers build dense networks of stable shareholders. While traditionally hostile takeovers did not work, a “main bank” system performed the key monitoring role over client firms. Such freedom from capital market pressures constitutes an essential prerequisite of the employee-oriented Japanese firm.<sup>17</sup> The entire system, as will be underlined in the following paragraphs, stands out due to its lifetime employment, seniority wages, and corporate welfare benefits. The system tends to prefer hiring few employees mid-career, on-the-job training, generalists (rather than specialists), inside promotion, and internal transfers.<sup>18</sup> The management human resource market is small, so managers are inclined to be reluctant to include outside directors in employee-dominant Boards. Hence, it is not clear who actually monitors the management and it is quite difficult to expect rigorous monitoring by the company’s Board to oversee the President or Chairman at the top of the hierarchical organization.

The situation in Japan changed since the burst of the 1990s economic “bubble”; the influence of main banks in corporate finance declined and “sparked substantial unwinding of stable cross-shareholdings since the mid-1990s”,<sup>19</sup> cross-border mergers and acquisitions increased, as did the promotion of the role of outside directors and company auditors.<sup>20</sup>

## B. Japanese Corporate Law Reforms

Notwithstanding the fact that reform activities concerning the Board structure became active from early 1990s, the suggestion to introduce outside directors can be traced back to 1975.<sup>21</sup> Later, the Structural Impediments Initiative, that started in 1989 between the U.S. and the Japanese Government,<sup>22</sup> requested to introduce an audit committee formed by outside directors. This eventually led to the introduction of outside statutory auditors under the Special Exception Law in 1993,<sup>23</sup> thus

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<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> EeHwan Jung and Byung-you Cheon, *Economic Crisis and Changes in Employment Relations in Japan and Korea*, 46 *ASIAN SURV.* 457, 458-59 (2006).

<sup>19</sup> JACKSON, *supra* 15, at 5-18.

<sup>20</sup> ECONOMIC AND SOCIAL RESEARCH INSTITUTE, *M&A CONFERENCE REPORT 2008 (OVERVIEW)* 7 (Gov. Of Japan 2008).

<sup>21</sup> Katsuro Kanzaki, *Beikoku no Shagai Torishimari-yaku no Hoteki Sekinin [Legal Liabilities of Outside Directors in the United States]*, 816 *SHŌJI HŌMU* 36, 36 (1978).

<sup>22</sup> Sakamaki, *supra* note 11, at 136.

<sup>23</sup> Masahiro Maeda, *Shagai Torishimari-yaku Seido to Torishimari-yaku-kai no Kassika [Outside Directors and Vitalization of Board Activities]*, 372 *KANSAYAKU* 6, 15 (1996).

considering the American-style Board superior to the German one,<sup>24</sup> to improve efficient management and strategic business decisions that cannot be strictly separated from monitoring. In 1998, the Japanese Corporate Governance Forum, a private organization comprised of business leaders, lawyers and academics, established clear corporate governance objectives—suggesting that the Board should be independent and run by non-executive directors who have no direct interests in the company—in order to ensure the effectiveness of the monitoring of the management by the Board by introducing independent directors as advisors.<sup>25</sup> Until the 2001 Amendment to the Commercial Code there was no statutory or regulatory requirement or Japanese firms to appoint outsiders to the Board. Nor were companies given any legal incentives to appoint outside directors to insure the liabilities of the management in derivative suits. There was no concept of outside directors under the Commercial Code<sup>26</sup> until such definition was introduced, though only for the purpose of allowing such outside directors to limit their liabilities to a smaller extent than other directors by amending the Bylaws and allowing companies to contract with outside directors instead of hiring them directly. Among listing rules, there were no requirements about the independence of Board members<sup>27</sup> when they judge conflict of interest cases between a company and its directors. In the long run, independent, non-executive directors should comprise a majority of the Board, a majority of each committee established under it should be independent, and the audit committee should be comprised solely of independent directors.<sup>28</sup>

In 2003, amending the Special Exception Law<sup>29</sup> and introduced an alternative corporate governance system to the traditional two-tier governance system. The

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<sup>24</sup> On the one hand, “[t]he act of borrowing is usually simple, [...] build[ing] up a theory of borrowing, on the other hand, seems to be an extremely complex matter.” Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 335 (1996).

<sup>25</sup> Japan Corporate Governance Forum, KAPORETO GAVANANSU GENSOKY – ATARASHII NIHONGATA KIGYO TOUCHI WO KANGAERU – SAISHU HOKOKU [CORPORATE GOVERNANCE PRINCIPLES – CONSIDERING NEW JAPANESE STYLE COPROATE GOVERNANCE – FINAL REPORT] 19 (1998).

<sup>26</sup> SHOHO [商法] [Comm. C.] Act No. 48 of March 9, 1899 (Japan). A suggestion for a new definition is contained in Dai 19, note 6, of the Interim Outline.

<sup>27</sup> See Shigeru Morimoto, *Koporeto Gabanansu Kanren Rippou no Saikin no Doko (Ge)*, 99 TORISHIMARIYAKU NO HÖMU 18, 22 (2002) and Shigeru Morimoto, *Inkai to Secchi Kaisha Seido no Rinen to Kinou* [Principles and Functions of the Committee System Establishing Companies], 263 BESSATSU SHÖJI HÖMU 148, 157-158 (2003) [hereinafter Morimoto, *Inkai*]. Though the necessity for requirement of rigid independence was shared among scholars and members of the Legislative Counsel, such a requirement was dropped – in the hopes that the practice standard would voluntarily emerge from the efforts of adopting firms to meet the expectations of the market – to pass the bill at the Diet (Morimoto et al., *Heisei nen Shoho Kaisei to Kaiei Kikou Kaikaku* [The 2002 Commercial Code Amendment and Management Structure Reform], 263 BESSATSU SHÖJI HÖMU 105, 141 (2003).

<sup>28</sup> The latter was modified in 2001, when new Principles (see especially JAPAN CORPORATE GOVERNANCE FORUM, REVISED CORPORATE GOVERNANCE PRINCIPLES 6-3 (2001)) were established. According to them, the majority of members in an audit committee shall be outside directors, without giving any explanation.

<sup>29</sup> The amendment became effective from April 1, 2003, but it was drafted basing along the framework outlined in the *interim* outline draft published by the Ministry of Justice on April 18, 2001 (*Shoho-to no Ichibu wo Kaisei-suru Horitsu An Yoko Chukan Shian* [Interim Draft of the Outline for the Bill for the Amendment of Part of the Commercial Code, Etc.], THE LEGISLATIVE COUNSEL, THE CORPORATE LAW DIVISION (2001), <http://www.moj.go.jp/PUBLIC/index.html>). Then, on May 22, 2002, the Diet passed it without any modification to the draft originally submitted, but some of the suggestions contained in the Outline (thus, the ones supported by the Stock Exchange, the US and academics, as

traditional system, with the board of directors and the statutory auditors (*torishimariyaku-kai* and *kansayaku*), was extremely insider-dominated and lacked the objectivity to successfully monitor the management, the legality, appropriateness and suitability of business decisions and other corporate affairs by each director.<sup>30</sup> Unfortunately, under the two-tier system the Board does not always play its expected role,<sup>31</sup> mainly due to its large size,<sup>32</sup> its insider-dominated nature,<sup>33</sup> and the traditional use of employees as directors, which is considered as the very last step of the “lifetime employment”<sup>34</sup> system,<sup>35</sup> a quasi-compensation for their life-time loyalty to the corporation.<sup>36</sup>

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mentioned in Harada *et al.*, *Kaisha Hosei no Ohaba no Minaoshi ni Kansuru Kakukai Inken no Bunski (Ge)* [Analyses of Comments from Various Groups Concerning Reforms of Corporation Law], 1605 SHŌJI HŌMU 14, 14-15 (2001)) provoked objections and, *inter alia*, the requirement to appoint at least one outside director to its board, regardless the adoption of the committee system. See Yo Maeda, *Shoho-tou no Ichi-bu o Kaisei-suru Horitsu-an Yoko no Kaisetsu* [Commentary on the Outline of the Bill for Amendment of Part of the Commercial Code], 263 BESSATSU SHŌJI HŌMU 1 (2003); Shigeru Morimoto, *linkai to Secchi Kaisha Seido no Rinen to Kinou* [Principles and Functions of the Committee System Establishing Companies], 263 BESSATSU SHŌJI HŌMU 148 (2003). See Gen Goto, *The Outline for the Companies Act Reform in Japan and its Implications*, 35 ZJAPANR 14 (2013), <http://www.ssrn.com/abstract02348554>.

<sup>30</sup> MASAO YANAGA, RIGARUMAINDO KAISHA HO 159-60 (7th ed. 2003).

<sup>31</sup> Such system, even if sometimes referred to as a two-tier system, is featured by completely different functions in comparison with the supervisory board in the German two-tier system.

<sup>32</sup> Notwithstanding its gradual reduction, started in 2004 (The Japan Corporate Auditor Association, *Kabumushi Sokai Taio-tou ni Kansuru Anketo Shukei Kekka – fifth Intanetto Anketo* [Result of Survey Concerning Shareholders Meeting Strategy Etc. – Fifth Internet Survey] (2004), [www.kansa.or.jp/PDF/enquet5\\_040908.pdf](http://www.kansa.or.jp/PDF/enquet5_040908.pdf)), in fact, that is an undeniable feature of such a system, as stated in Watson, *supra* note 24.

<sup>33</sup> Morimoto, *supra* note 27. It is worth noticing that the board of statutory auditors and outside statutory auditors introduce for large scale companies tend not to change the inside nature of statutory auditors.

<sup>34</sup> Further definitions of the expression are mentioned in Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508, 509–10, n.3-4 (1999). The authors, comparing the Japanese and the U.S. context, also conclude that “Japanese firms’ promise of lifetime employment to their employees is conventionally seen as central to Japanese firms’ willingness to invest heavily in their employees’ skills. This presents an attractive picture for America in that an institution that employees would want at the same time contribute to productivity. But both theoretical analysis and raw political history tell us that the story is too good to be true,” *Id.* at 540.

<sup>35</sup> It has been said to induce employees to make more firm-specific investments (see Margaret M. Blair, *Firm-Specific Human Capital and Theories of the Firm* 162–86 (Geo. U. L. Ctr., Bus., Econ. and Reg. Pol’y, Working Paper No. 167848, 2003), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=167848](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=167848)). Such a mechanism does not completely disappear in case of adopting committees, since the top step of the promotional ladder for career employees shifts from the directorship to the status of executive officers in a firm adopting such system. See Yotaro Kobayashi, *Gabanansu to Shagai Torishimariyaku*, 242 BESSATSU SHŌJI HŌMU 153, 158.

<sup>36</sup> Masahiro Maeda, *Shagai Torishimari-yaku Seido to Torishimari-yaku-kai no Kasseika* [Outside Directors and Vitalization of Board Activities], 372 KANSAYAKU 6, 17 (1996).

The Committee System (*Inkai To Secchi Kaisha*)<sup>37</sup>—which a few companies courageously introduced even before it was mandatorily introduced by the law<sup>38</sup>—was proposed due to the fact that investors, including overseas institutional investors, often criticized the weakness of corporate governance of Japanese listed companies. Specifically, with regards to the fact that the number of outside directors is quite small compared to listed companies in other developed countries. Between September and November 2011, two serious corporate management scandals were brought to light in Japan. The *Daio Paper*<sup>39</sup> case and *Olympus*<sup>40</sup> case caused criticism about Japan's corporate governance system. Institutional investors and scholars contended that the regulators should revise the Companies Act and the rules of the Tokyo Stock Exchange to require companies to employ truly independent outside directors on the ground that Japan's corporate culture and corporate governance system caused these scandals.<sup>41</sup>

The amendment encouraged such corporations to appoint more outside directors and to improve audit and supervision of the management of the companies. This allowed Japanese corporations to be much closer to American ones,<sup>42</sup> pursuing more efficient monitoring with outside directors in the Board, shifting operational decision-making from the board to executive officers, and requiring the majority of the members of each committee to be outside directors. In other words, “the American style” would promote swift business decisions by allowing a shift of

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<sup>37</sup> Joint stock companies are required to establish three committees, namely an audit, a compensation and a nomination committee. Interestingly, as Gilson and Milhaupt reported in 2004, most of the firms adopting the Committee System do not belong to traditional *keiretsu* group and, thus, the (initial) data for the firms not providing meaningful information about whether they adopted the Committee System appointing more or less outside directors from *keiretsu* companies than firms with the auditor system. See Ronald J. Gilson & Curtis J. Milhaupt, *Choice as a Regulatory Reform: The Case of Japanese Corporate Governance 2* (Colum. L. and Econ. Working Paper No. 251, 2004), <http://ssrn.com/abstract=537843>.

<sup>38</sup> Morimoto, *Inkai*, *supra* note 27, at 149.

<sup>39</sup> The former president, a third generation member of the founding family, borrowed more than 10.6 billion yen from Dao Paper's seven subsidiaries through a total of 26 times during the period from May 2010 to September 2011. The former president instructed the managing directors of these subsidiaries to transfer the money into his account unilaterally and spent money just for entertainment expenses. This case suggests the following issues: audit firm did not work; outside directors are absent; monitoring subsidiary's management and the role of parent company's shareholders.

<sup>40</sup> Olympus is a camera and medical equipment company, whose past management introduced a speculative investment (*zaiteku*) in the context of an aggressive financial asset management, to recover the losses that, on the contrary, dramatically grew. Since the end of the 1990s, Olympus needed to apply fair market valuations to financial assets. To avoid the situation where the substantial amount of unrealized loss would come up to the surface, the manager in the financial department of the company invented a complicated plan, with the cooperation of outside specialists, which made the losses hidden in offshore investment funds. Inflated M&A transactions' price and commissions were circulated secretly to the offshore funds, and they were offset with the hidden losses. After those transactions, those bloated expenses were amortized, and accordingly, the books were balanced. This case suggests the following topics: the practice of appointing managers, independence and ability/specialty of outside directors, the function of audit firm and the role of capital market as a gate keeper.

<sup>41</sup> Nihon Keizai Shimbun, Inc., *Getting to the bottom of fraud at Olympus key*, NIKKEI WEEKLY (Mar. 5, 2012), available on LexisNexis.

<sup>42</sup> See Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. LAW 887 (2003). (“Japanese law, particularly the legal rules governing economic organization, is a prime example of the transplant phenomenon, both in its systemic and single-rule variations.”).

certain daily operational decision-making authorities from the Board to executive officers and enhance the monitoring function of the Board.<sup>43</sup> It is worth highlighting that most of considerations made were taken from the US model. First, replacing the CEO is one of the critical monitoring functions of the Board and, according to the research by Michael Weisbach,<sup>44</sup> Boards with at least 60% independent directors are more likely than other boards to fire a poorly performing CEO. Thus, independent directors behave differently than inside directors when they decide whether to replace the current CEO.<sup>45</sup> Under the auditor system,<sup>46</sup> the Boards can replace representative directors at any time by removing them and nominating other ones, though this is not that likely to happen in Japan.<sup>47</sup> Under the new committee system, it will be easier to find replacements for management. In takeover contexts, the independent Board does not function significantly differently the “majority-independent boards extract higher prices from bidders”, but “the economic significance of the lower takeover premia for bidders with majority-independent boards is small” and “there is little evidence that relatively independent boards behave in a significantly more (or less) shareholder friendlier fashion than other boards when they adopt and employ takeover defenses”.<sup>48</sup> According to skeptics, outside directors would impede swift business decisions on the board,<sup>49</sup> but if we consider that most such business decisions are part of the daily operation handled by the Representative Directors and that the Board can reduce its size to facilitate swift decisions under the auditor system, this contention does not provide a strong explanation for the changes in the Boards of firms with the committee system.

On the one hand, US corporations have to elect at least half of the Board according to these requirements; on the other hand, Japanese corporations had to elect at least one outside director or, alternatively, explain why it is not appropriate for the company to appoint such a figure in a general shareholders’ meeting.<sup>50</sup> US directors are frequently sued for their personal liability of breach of fiduciary duties,<sup>51</sup> Japan directors are increasingly sued for the damages incurred by the company, shareholders or third parties, but outside directors are not actively engaged in the management of corporations and have limited knowledge of the corporation’s affairs.

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<sup>43</sup> Maeda, *supra* note 29, at 33, 37, 40-42 (also discussing requirements of outside directors).

<sup>44</sup> Michael S. Weisbach, *Outside Directors and CEO Turnover*, 20 J. FIN. & ECON. 431 (1998).

<sup>45</sup> Bernard Black & Sanjai Bhagat, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 925-26 (1999).

<sup>46</sup> Saito, *supra* note 11. (Carrying out an in-depth study on the importance of boards of auditors)(Interestingly enough, among the findings, it is clear that outside directors are selected on the ground of the types of advice necessary).

<sup>47</sup> Kenjiro Egashira, *Jiminto No Shoho Kaisei Shian To Kosshi To Kansa Yaku/Kansa Yaku Kai [Outline of Proposals of Commercial Code Amendments, etc. of Liberal Democratic Party and Statutory Auditors and Board of Statutory Auditors]*, 1470 AHOJU HÖMU 17, 22 (1997).

<sup>48</sup> Black & Bhagat *supra* note 45, at 926-30.

<sup>49</sup> TOKYO BAR ASS’N, SIKKO YAKUIN SHAGAI TORISHIMARIYAKU NO JITTAI [REAL SITUATION OF EXECUTIVE OFFICERS AND OUTSIDE DIRECTORS] 117, 124 (2001).

<sup>50</sup> See Kaisha-ho, *supra* note 9, at art. 327-2; Yusuke Ishii & Kosuke Wakabayashi, *Corporate governance ni kansuru kiritsu no minaoshi [Amendment to rules regarding corporate governance]*, 2056 JUNKAN SHÖJI HÖMU 26, 27 (2015).

<sup>51</sup> See Black et al., *supra* note 3, at 338.

Being an outside director matters. Outside directors are not actively engaged in the management of the corporation and in its affairs; therefore, it may be held that such a different status would affect to their personal liability for the breach of fiduciary duty based on the cases in Japan and in the US, focusing on Delaware laws. Miwa and Ramsayer contend that the number and functions of the outside directors employed by Japanese firms are endogenous and should be firm-specifically optimal, considering industry and firm, referring to the trade-off for outsiders between expertise and independence,<sup>52</sup> absent the influence of extortionate litigation and Delaware court decisions in the US. If so, most companies adopting the new Committee System might not change their board composition as long as the business of each company remains unchanged.<sup>53</sup>

To conclude, it is essential to note that a reform bill of the Japanese Companies Act was finally approved in a Cabinet meeting on November 29<sup>th</sup>, 2013.

### C. *Directors' Liability for Breach of Fiduciary Duties in Japan*

Broadly speaking, in spite of different shades, corporate directors' duties are alike in most jurisdictions.<sup>54</sup> Thus, where a jurisdiction developed a "workable approach to some aspect of directors' duties, it is worthwhile to consider the adaptability of that approach in other jurisdictions."<sup>55</sup>

As to Japan, both inside and outside directors owe the same fiduciary duties<sup>56</sup> to the company,<sup>57</sup> and the relationships between each director and the company itself

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<sup>52</sup> Yoshiro Miwa & Mark J. Ramseyer, *Who Appoints Them, What Do They Do? Evidence on Outside Directors from Japan*, 14 J. ECON. & MGMT. STRATEGY 299, 332-33 (2005). The Board composition is endogenous among Japanese firms and firms with more outside directors do not visibly outperform those with fewer ones. Furthermore, the Authors observed (quite reasonably) there are more outside directors in the construction industry compared to other industries in 1985.

<sup>53</sup> *Id.* at 314-15.

<sup>54</sup> Melvin Aron Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945 (1990).

<sup>55</sup> Vicki L. Beyer, *Judicial Development of a Business Judgment Rule in Japan*, 5 BOND L. REV. 209 (1993).

<sup>56</sup> *Id.* at 209-11. As a side note, in order to confirm the relevance of such duties in the Japanese context, it may be recalled that recently asset management companies' clients have become more vigilant with respect to fiduciary duty, and elaborated some best practices on the topic: NOMURA RESEARCH INSTITUTE, FIDUCIARY BEST PRACTICES FOR JAPANESE ASSET MANAGEMENT COMPANIES (2016), <http://www.fis.nri.co.jp/~media/Files/publication/kinyu-itf/en/2016/lakyaravol250.pdf>. With respect to the appointment of independent outside directors, "Japanese AMCs [shall] appoint independent outside directors to their boards. [...] [T]he role played by outside directors may be relatively small in countries, like the US, with laws that severely penalize fiduciary breaches and require investment trusts to have independent boards of directors. In Japan's still-young asset management industry, however, few companies have sufficiently imbued themselves with a client-first culture. Japan has no laws against fiduciary breaches, nearly all Japanese investment trusts are of the contractual variety, and none has an independent board of directors. Amid such an environment, appointing independent outside directors that oversee management on behalf of clients, is one effective means of enforcing fiduciary duties." *Id.* at 26-29.

<sup>57</sup> See JAPAN FEDERATION OF BAR ASS'N, SHAGAI TORISHIMARIYAKU GUIDELINE [OUTSIDE DIRECTOR GUIDELINE] 11 (2015). Still, it is clear that directors in possess of a particular expertise should (such assumption is quite difficult to be proved by Courts, as stated in NIHON BENGOSID RENGOKAI SHLIIHŌSEIDO CHŌSAKAI SHAGAI TORISHIMARIYAKU GUIDELINE KENTŌTEAM, SHAGAI TORISHIMARIYAKU

shall be governed by agency relationship, according to Art. 330 of the Companies Act. Thus, even if a quite recent decision holds that such fiduciary duties include the duty to increase shareholders' common interest,<sup>58</sup> each director owes fiduciary duties only to the company, not to individual shareholders.<sup>59</sup> Interestingly, on the one hand, Japanese law does not distinguish these duties between the duty of care and the duty of loyalty. However, on the other hand, according to the Stock Corporation's Laws,<sup>60</sup> the fiduciary duty includes the duty to manage the company in a responsibly prudent way and the duty not to acquire a profit at the expense of the company in a conflict of interest situation.

Directors are liable for the damage incurred by the company as a result of their breach of fiduciary duties<sup>61</sup> or if the damage was intentional or due to gross negligence and occurred to creditors or third parties<sup>62</sup> in general.<sup>63</sup>

Shareholders may bring (*rectius*, are required to demand on the company to bring) derivative suits against directors to recover damages caused by directors' breach of fiduciary duties. In case the corporation does not bring a suit against them within 60 days from the day in which it was asked, shareholders can *directly* bring such derivative suits on behalf of the corporation.<sup>64</sup>

Despite the absence of a similar provision in Japanese statutes,<sup>65</sup> the business judgment law—a remarkable common law principle of corporate law that evolved in the last 185 years<sup>66</sup> and still faces key developments—also applies.<sup>67</sup> Under the so-

GUIDELINE NO KAISETSU [COMMENTARY TO OUTSIDE DIRECTOR GUIDELINE] 43-44) be held higher standard of care, since the standard of such a fiduciary duty could be determined based on their background and on the circumstances they are facing.

<sup>58</sup> See Tokyo Kōtō Saibansho [Tokyo High Ct.] April 17, 2013, Hei 23 (ne) no. 2230, 1392 HANREI TAIMUZU [HANTA] 226 (Japan).

<sup>59</sup> See Masao Yanaga, *Kaishahō hanrei sokuho MBO to torishimariyakutō no gimu* [Report of recent case of Companies Act director's duty in MBO], 1456 JURIST 2, 3 (2013).

<sup>60</sup> See KENJIRO EGASHIRA, KABUSHIKI KAISHAHO [LAWS OF STOCK CORPORATION] 430 (6th ed. 2014).

<sup>61</sup> Kaisha-hō, *supra* note 9, art. 423, ¶ 1.

<sup>62</sup> *Id.* at art. 429, ¶ 1.

<sup>63</sup> See Saikō Saibansho [Sup. Ct] Nov. 26, 1969, Sho 39 (o) no. 1175, 23 SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHU] 2150. See EGASHIRA, *supra* note 60, at 506. For instance, shareholders seeking the damage for stock price reduction caused by poor performance of the company, unless there is special reason, may not bring a suit against a director as third party (Tokyo Kōtō Saibansho [Tokyo High Ct.] Jan. 18, 2005, Rei 16 (ne) no. 3563, 1209 KIN'YŪ SHŌJI HANREI [KINHAN] 10), whereas they may bring it when the Board decided to disproportionately distribute dividends, shareholders may bring a suit against directors (SHINSAKU IWAHARA, KAISHAHŌ KOMMENTAR [COMMENTARY OF COMPANIES ACT] 385 (2014)).

<sup>64</sup> Kaisha-hō, *supra* note 9, art. 847, ¶ 3.

<sup>65</sup> See Tokyo Chihō Saibansho [Tokyo Dist. Ct.] April 25, 2002, Hei 11 (wa) no. 28165, 1098 HANREIN TAIMUZU [HANTA] 84; Tokyo Chihō Saibansho [Tokyo Dist. Ct.] March 3, 2005, Hei 15 (wa) no. 1807, 1256 HANREIN TAIMUZU [HANTA] 179.

<sup>66</sup> S. Samuel Arshat, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93 (1979); D. Gordon Smith, *The Modern Business Judgment Rule*, (BYU L., Research Paper Series No. 15-09, 2015).

<sup>67</sup> Jung-Gook Park, *A Study on Judicial Precedents in Japan Concerning Business Judgment Rule*, 14 J. HONGK L. REV. 539 (2013); HARALD BAUM & MORITZ BÄLZ, BUSINESS LAW IN JAPAN. CASES AND COMMENTS: INTELLECTUAL PROPERTY, CIVIL, COMMERCIAL AND INTERNATIONAL PRIVATE LAW: WRITINGS IN HONOUR OF HARALD BAUM (2012); in particular, see DAN W. PUCHNIAK & MASAFUMI NAKAHIGASHI, CASE NO. 21: CORPORATE LAW - BUSINESS JUDGMENT RULE - DERIVATIVE ACTION - SUPREME COURT, 15 JULY 2010 - "APAMANSHP" WITH COMMENT (2012); 近藤光男 & MITSUO KONDŌ,

called *keiei handan no gensoku*, even when a certain decision damages the company or third parties, directors are presumed not to breach their fiduciary duties as long as the directors correctly performed all the single steps, from information collection to investigation, including assessment, to a reasonable extent. Moreover, they are not considered liable when their reasoning and decision-making was not clearly unreasonable.

The rule does not apply when there is a conflict of interest between the director and the company relating to the violation of certain laws or regulations, but applies when directors opt for a specific decision. In other words, such rule does not apply when plaintiffs allege a director's failure to comply with their oversight duty, since no business judgment rule is involved in these cases, while it is applicable to the way in which internal control systems are structured.<sup>68</sup>

## II. DIRECTORS' FIDUCIARY DUTIES IN THE UNITED STATES

As anticipated, for our purposes, we shall note the mixed (federal and state) nature of the U.S. legislation. In other words, the legislative power is exercised both by the U.S. Congress, whose authority is listed in art. 1, section 8, of the Constitution, and by the State Legislative Assemblies, having residual competences under the Tenth Amendment. Thus, as to company law, internal relations are regulated by the State Government according to the *internal affairs doctrine*,<sup>69</sup> and external ones by

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HANREI HÖRI KEIEI HANDAN GENSOKU = BUSINESS JUDGMENT RULE (第1版, Dai 1- ed. 2012); Hyo-Shin Kim, *A Reconsideration over Business Judgement Rule and Duties of Care*, 13 CHUNGANG L. REV. 449-76 (2011); Vicki L. Beyer, *Judicial Development of a Business Judgment Rule in Japan*, 5 BOND L. REV. 209 (1993).

<sup>68</sup> See Masahiro Terada et al., *Fushōji ni kannyoshiteinai torishimariyaku – kansayaku no sekininn* [*Liabilities of directors and statutory auditors who were not involved in corporate scandal*], 1998 JUNKAN SHŌJI HŌMU 42, 43 (2013).

<sup>69</sup> See, e.g., MODEL BUSINESS CORPORATION ACT § 15.05 (2010); McDermott, Inc. v. Lewis, 531 A.2d 206 (Del. 1987), *construed* in Vice-Chancellor Berger, *Lewis v. McDermott, Inc.*, Nos. 7034 & 7044 (*Consolidated*), 12 DEL. J. CORP. L. 766 (1987); Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977), *reviewed* by Ely J. Malkin, *Santa Fe Industries v. Green Revisited: A Critique of Circuit Court Application of Rule 10b-5 to Breaches of Fiduciary Duty to Minority Shareholders*, 28 UCLA L. REV. 564 (1981); Cort v. Ash, 422 U.S. 66 (1975), *construed* by Bruce A. Boyer, Note, *Howard v. Pierce: Implied Causes of Action and the Ongoing Vitality of Cort v. Ash*, 80 NW. U.L. REV. 722 (1985-1986); MARCO VENTORUZZO, *COMPARATIVE CORPORATE LAW* 40 (2015); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1585-86 (2005) (the Authors define the symbiotic (rather than competitive) relationship between systems, as Delaware is happy to loosen the content of federal legislation and, thus, to reduce the probability that an ineffective regulation produces a populist reaction).

The rule is not, however, free from exceptions: any company having contacts (although incorporated elsewhere, in respect of the freedom of incorporation principle) with the State of California, but that, at the same time, is not listed on Nasdaq or in the United States, in fact, is bound, pursuant to Cal. Corp. Code § 2115(a), to conform to the rules of the State (in case law, the rule applies in *Wilson v. Louisiana-Pacific Resources, Inc.*, 138 Cal.App.3d 216 (1982), *construed* in Stephen R. Ginger, *Regulation of Quasi-Foreign Corporations in California: Reflections on Section 2115 after Wilson v. Louisiana-Pacific Resources, Inc.*, 14 SW. U.L. REV. 665 (1984)); also mentioned in; *but see*, Matt Stevens, *Internal Affairs Doctrine: California versus Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C.L. REV. 1047 (2007); *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal. App. 4th 434 (2003).

the Federal Government, thank to *interstate commerce clause*.<sup>70</sup> In spite of the mentioned bipartition,<sup>71</sup> well-known scholars emphasize that State autonomy is quite reduced since federal authorities—as happened with regard to the Sarbanes-Oxley Act—set wide spaces within which States can legislate.<sup>72</sup> In this respect, an attempt was made to gradually overcome the mentioned geographical and substantive hiatus, produced by the *Model Business Corporation Act*, that was published for the first time in 1950,<sup>73</sup> and subsequently amended in 1984.<sup>74,75</sup>

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As to the *freedom of incorporation principle*, see Lucian Arye Bebchuk & Alma Cohen, *Firms's Decisions Where to Incorporate*, 46 J.L. & ECON. 383 (2003).

<sup>70</sup> State law is perfectly impervious to federal legislation (“*Delaware carve-out*”), as described in Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212 (2005).

<sup>71</sup> A closer look, however, might help to detect the absence of such forms of public enforcement and of state bodies which might verify compliance with regulatory requirements or impose implementation through fines or orders, but they only register disputes among individuals. Kahan & Rock, *supra* note 69, at 1606.

<sup>72</sup> Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 592 (2003).

<sup>73</sup> Ray Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAW. vii (1950-1951); William P. Hackney, *The Financial Provisions of the Model Business Corporation Act*, 70 HARV. L. REV. 1357 (1957).

<sup>74</sup> The Committee on Corporate Laws, *Changes in the Model Business Corporate Act—Amendments Pertaining to Director's Conflicting Interest Transactions*, 43 BUS. LAW. 691 (1987); Douglas M. Branson, *Countertrends in Corporation Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 MINN. L. REV. 53 (1983).

<sup>75</sup> For an overview, in particular on the connection between the *Model Business Corporation Act* (MBCA), adopted in 1950 by the Commission on corporate law within the American Bar Association and (i) the national legislation, *inter alia*, see Richard A. Booth, *Capital Requirements in United States Corporation Law* (2006) (on file with the University of Maryland School of Law); (ii) Delaware, see R. Franklin Balotti & Megan W. Shaner, *Safe Harbor for Officer Reliance: Comparing the Approaches of the Model Business Corporation Act and Delaware's General Corporation Law*, 74 L. & CONTEMP. PROBS. 161 (2011); Jeffrey M. Gorris, Lawrence A. Hamermesh & Leo E. Strine, Jr., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 L. & CONTEMP. PROBS. 107 (2011); . Norman Veasey, *On Corporate Codification: A Historical Peek at the Model Business Corporation Act and the American Law Institute Principles through the Delaware Lens*, 74 L. & CONTEMP. PROBS. 95 (2011); Marco Venturuzzo, *The Role of Comparative Law in Shaping Corporate Statutory Reforms*, 52 DUQ. L. REV. 151 (2014); ARNO MAIER, DER GRUNDSATZ DER KAPITALERHALTUNG UND DIE DURCHGRIFFSHAFTUNG WEGEN UNTERKAPITALISIERUNG IM DEUTSCHEN UND AMERIKANISCHEN GESELLSCHAFTSRECHT: UNTER BESONDERER BERÜCKSICHTIGUNG DES RECHTS VON NEW YORK, KALIFORNIEN UND DELAWARE SOWIE DES MODEL BUSINESS CORPORATION ACT (WITH ENGLISH TABLE OF CONTENTS AND SUMMARY) (1986); (iii) Virginia, see George D. Gibson & George C. Freeman, Jr., *A Decade of the Model Business Corporation Act in Virginia*, 53 VA. L. REV. 1396 (1967); Daniel T. Murphy, *Redemption of Stock under the Model Business Corporations Act and the Virginia Stock Corporation Act*, 14 U. RICH. L. REV. 311 (1980).

Given the clear discrepancies among States,<sup>76</sup> the present piece will focus on Delaware law,<sup>77</sup> characterized by special flexibility and very reduced restrictions<sup>78</sup> that attract a constantly growing number of listed companies, and whose courts' decisions always wisely interpret the laws.<sup>79</sup> However, it seems appropriate to point out how Delaware may express its position, but just when it is given the floor. Hence, it is impossible to talk about a mere competition among States, a brilliant distinctive figure in the US corporate law,<sup>80</sup> given that the small size of the State under discussion does not coincide at all with its leading role and prime importance,<sup>81</sup> and given that it is also necessary to simultaneously consider the sharp and incisive function of the Federal Government.<sup>82</sup> After all, the Federal Government plays a

<sup>76</sup> LUCA ENRIQUES, *LE REGOLE DELLA FINANZA: DIRITTO SOCIETARIO E MERCATO IN ITALIA E IN EUROPA* 126 (2012).

<sup>77</sup> See also William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715 (1998); Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57 (2009). This role was previously held by New Jersey, as specified in Ventrone, *supra* note 75 at 156–57.

<sup>78</sup> Renee L. Crean, *Recent Development in New York Law*, 72 ST. JOHN'S L. REV. 695, n.1-2 (1998). The Delaware regulatory structure is compared with New York State one, which, according to the Author, however, failed to compete in today's market, since it is not convinced yet that a strict regulation offers better protection. As long as this boundary is not crossed, as long as the legislative failure is not remedied, "it will continue to fall *well behind* Delaware in the market for corporate charters" *Id.* at 719, corsivo aggiunto.

<sup>79</sup> Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 284 (1976); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987); Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years after Professor Cary's Polemic (Response to William L. Cary)*, *Yale Law Journal*, vol. 83, p. 663 (1974), 71 U. COLO. L. REV. 497, 499 (2000).

<sup>80</sup> ENRIQUES, *supra* note 76.

<sup>81</sup> Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 673 (2005) ("Our petite territory is not coincidental to the supple and balanced nature of our corporate law; rather, our size is a useful force in maintaining our corporation law's contractarian nature."). He firmly believes Delaware itself is interested to achieve legal excellence, in a virtuous and productive environment in which efficient company law is created.

<sup>82</sup> Roe, *supra* note 72, at 591 (To emphasize the role of the federal government, even before the competition in its ameliorative or pejorative sense (respectively, the *race to the top* or *race to the bottom*). Assuming an overall view, the Author believes that:

[i]f American corporate law is good in the end, its quality may well derive from this vertical organizational advantage as much as, or maybe more than, it derives from horizontal competition. But this theoretical angle on the quality of corporate law is only a possibility, not a necessity. [...] [W]hat we have just done is undermine the last century of corporate law thinking on the interstate race. There cannot be a pure race in a federal system where the federal player can take the issue away from the states. [...] Every corporate crisis – the stuff that tests the quality of corporate law – raises the threat or the reality that the issue will move from the states to Washington. The idea of a pure race, comforting as it might have been, is over. We have never had one in the United States. It's just not possible.

leading role, intending to facilitate a true unification that, up to now, not even the Congress was able to realize.<sup>83</sup> After all, the Delaware state legislature, while facing the various and multiple needs of the company, always proves to be particularly including and, for this reason, its (virtually uncontested and incontestable) domain of expertise was clear with regard to any other competitor.<sup>84</sup>

Under Delaware law,<sup>85</sup> Boards are responsible to manage a corporation<sup>86</sup> and control “vast aggregations of property that they do not own”,<sup>87</sup> thus owing fiduciary duties—of both care and loyalty—to the corporation and its shareholders.<sup>88</sup> It is presumed that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was not in the best interest of the company. Absent an abuse of discretion, that judgment will be respected by the courts.”<sup>89</sup>

The duty of care is the obligation of a director “to be adequately informed and diligent when making corporate decisions and overseeing the management of the corporation”,<sup>90</sup> and to proceed with a “critical eye” in assessing information and protecting corporations’ interests.<sup>91</sup> Directors are required to be informed of all the material information and to assess it with critical eye in order to protect the interest of the company and its shareholders.<sup>92</sup> The duty of loyalty—defined in “broad and unyielding terms” by courts<sup>93</sup>—is the obligation not to use the position of trust and confidence of a director to further private interests, but rather to put the interests of the corporation and its stockholders ahead of the director’s own personal interests.<sup>94</sup> The duty of loyalty requires directors to protect the interests of the corporation and to refrain from injuring it and demands that there shall not be any conflict between duty and self-interest. If a director is interested in the transaction or

*Id.* at 646.

<sup>83</sup> Strine, *supra* note 81, at 683-84. The author highlights that the United States obtained the benefits of a “virtually national” corporate law, in the most efficient way. Delaware’s teachings are likely to be more important than their own state ones, even for firms not chartered in Delaware. Delaware’s balanced approach towards legal issues regarding corporations is, thus, American corporate law.

<sup>84</sup> Although the position according to which there is no competition among States is considered acceptable, it is essential to mention how the largest majority of scholars *inter alia*, Fisch, *supra* note 77 at 1099-1100, given the fact that Delaware law meets the needs of corporate law world, consider it as an indisputable winner of the stars and stripes competition. For an exhaustive bibliography on the role of regulatory competition in the United States, see K. Kocaogly, *A Comparative Bibliography: Regulatory Competition on Corporate Law*, (Georgetown Law Working Paper, 2008), [ssrn.com/abstract=1103644](https://ssrn.com/abstract=1103644).

<sup>85</sup> DEL. CODE ANN. tit. 8, § 141(a) (West, 2014).

<sup>86</sup> See *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) (“A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.”).

<sup>87</sup> *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988).

<sup>88</sup> Fisch, *supra* note 77, at 1085.

<sup>89</sup> See *Aronson*, 473 A.2d at 812.

<sup>90</sup> BRUCE F. DRAVIS, *THE ROLE OF INDEPENDENT DIRECTORS IN CORPORATE GOVERNANCE* 58 (2nd ed. 2015).

<sup>91</sup> See also Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PA. ST. L. REV. 837, 842 (2012).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 844.

<sup>94</sup> *Guth v. Loft Inc.*, 5 A.2d 503, 510 (Del. 1939); see also *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

not independent from a person who has a self-interest in the transaction, then he could be held liable for breach of duty of loyalty.<sup>95</sup> Such interest in the transaction can be mentioned when he stands on both sides of the transaction itself, or gains personal benefit from it, as opposed to that of a corporation or of its shareholders as a whole.<sup>96</sup> Furthermore, when directors are so beholden to the interested party that their discretion would be sterilized they could be considered as not independent,<sup>97</sup> but that assessment about the disinterestedness and independence of each director shall be made examining all the relevant factors in combination.<sup>98</sup> Personal friendships, outside business relationships, or approval or acquiescence in challenged transactions could be sufficient to raise reasonable doubts about the independence of a director. Thus, being “interested” and “independent” implies that such evaluations must be conducted in the specific context of the transaction under analysis.<sup>99</sup>

Delaware courts have also affirmed that the duty of loyalty includes a duty to act in good faith, a duty that, to some extent aims at “suturing the gap between care and loyalty”.<sup>100</sup> Thus, a director violates “one of the most confused and entangled subjects in corporation law”,<sup>101</sup> the duty of good faith,<sup>102</sup> when acting intentionally with a purpose other than that of advancing the best interests of the corporation, when a director acts with the intent to violate applicable positive law, or when a director fails to act in the face of a known duty to do so, demonstrating a conscious disregard for his own duties.<sup>103</sup>

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<sup>95</sup> The lack of independence a director might have does not necessarily imply a breach in the duty of loyalty. In re Emerging Commc'ns, Inc. S'holders Litig., No. Civ. A. 16415, 2004 WL 1305745, at \*41 (Del. Ch. May 3, 2004), commented in David H. Cook, *The Emergence of Delaware's Good Faith Fiduciary Duty: In re Emerging Communications, Inc. Shareholders Litigation*, 43 DUQ. L. REV. 91 (2004), whose relevance is once more stated in Lauren Gojkovich, *Leveraging Litigation: How Shareholders Can Use Litigation Leverage to Double-Down on Their Investment in High-Stakes Securities Litigation*, 16 STAN. J. L. BUS. FIN. 100 (2010) (the Court denied four of the defendant directors' breach of fiduciary duty, while affirming that they were not independent.).

<sup>96</sup> *Aronson*, 473 A.2d at 812.

<sup>97</sup> *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004).

<sup>98</sup> WILLIAM E. KNEPPER, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* §2.06 (8th ed. 2015).

<sup>99</sup> Usha Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447, 465 (2008).

<sup>100</sup> Cook, *supra* note 95, at 111. The Author claims that, by doing so, “good faith might reasonably prevent the reopening of old corporate wounds”.

<sup>101</sup> Carl Samuel Bjerre, *Evaluating the New Director Exculpation Statutes*, 73 CORNELL L. REV. 786, 788 (1988), quoting *Geller v. Transamerica Corp.*, 53 F. Supp. 625, 629 (D. Del. 1943) and, in the same sense, underlining how care and loyalty are sometimes reviewed under the same standard William T. Allen, Jack B. Jacobs & Leo E. Strine, *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. L. 1287 (2001).

<sup>102</sup> For an overview of the contours of such duty, as well as to its evolution as an independent standard of director liability in Delaware corporation law, see *ex multis* Cook, *supra* note 95, at 91, a piece commenting a landmark case that might be considered as the reason why, perhaps, such duty clearly emerged in Delaware Law or at least through which “the Delaware Chancery Court gave full realization to the import of good faith as an independent standard of director liability.” *Id.* at 103.

<sup>103</sup> In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006). See also *In Re Walt Disney Co. Derivative Litigation*, 31 DEL. J. CORP. L. 349 (2006); Joseph K. Leahy, *A Decade After Disney: A Primer on Good and Bad Faith*, 83 CIN. L. REV. 859 (2015); Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. POL'Y REV. 1, 30-60 (2015); Carolyn Berger, *Good Faith After Disney: Justice Berger's Closing Discussion*, 55 N.Y. L. SCH. L. REV. 659 (2010); Renee M. Jones, *How Open-*

In order to establish a breach of the duty of good faith—once considered a free-standing duty under Delaware law, now deemed to be part of the duty of loyalty<sup>104</sup>—plaintiffs are required to show that directors knew that they were not discharging their own fiduciary obligations.<sup>105</sup>

Similarly, in Japan, outside directors generally are not held to a different standard for fiduciary duty than the standard applied to inside directors, but in the above-mentioned *In re Emerging Communications, Inc. Shareholders Litigation* case<sup>106</sup> the Court indicated that outside directors with special expertise may be held to higher standards of duty of care. In this case, a shareholder brought a class action alleging that directors breached their fiduciary duty in approving a “going private” acquisition of the company by its management. One of the outside directors, principle and general partners of an investment advising firm who had significant experience in the finance sector, was held liable for breach of fiduciary duty. The Court found he violated the duty of loyalty and/or good faith, since he was not independent from the management and given his specialized finance expertise, “he knew, or at the very least had strong reason to believe” that the price proposed was unfair.<sup>107</sup>

The Court held the outside director liable on the ground of the special expertise possessed and lack of independence shown. It is not clear if Delaware courts hold directors with a special expertise, in general, to a higher standard of fiduciary duty. It seems, however, that Courts will take directors’ particular skills and expertise into account in the examination of a breach of fiduciary duty.<sup>108</sup>

#### A. *Liability Issues*

When directors violate fiduciary duties, they can be personally liable for the damage incurred by the company or by its shareholders.<sup>109</sup> In addition to a direct suit seeking recovery for their own damage, shareholders can bring derivative suits

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*Ended Standards Help Delaware Preserve its Edge*, 55 N.Y. L. SCH. L. REV. 499 (2010); Peter C. Kostant, *Meaningful Good Faith: Managerial Motives and the Duty to Obey the Law*, 55 N.Y. L. SCH. L. REV. 421 (2010); Franklin A. Gevurtz, *Disney in a Comparative Light*, 55 AM. J. COMP. L. 453 (2007); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398 (2007); Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the “New” Good Faith*, 56 AM. U. L. REV. 211 (2006); *Corporate Law - Fiduciary Duties of Directors - Delaware Court of Chancery Finds Disney Directors not Liable for Approval of an Employment Agreement Providing \$140 Million in Termination Payments - In re Walt Disney Co. Derivative Litigation*, 119 HARV. L. REV. 923 (2006); Tara L. Dunn, *The Developing Theory of Good Faith in Director Conduct: Are Delaware Courts Ready to Force Corporate Directors to Go Out-of-Pocket after Disney IV?*, 83 DENV. U. L. REV. 531 (2005); Jaclyn J. Janssen, *In re Walt Disney Company Derivative Litigation: Why Stockholders Should not put too Much Faith in the Duty of Good Faith to Enhance Director Accountability*, WIS. L. REV. 1573 (2004).

<sup>104</sup> See *Cede & Co.*, 634 A.2d at 361; *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

<sup>105</sup> *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235, 240 (Del. 2009).

<sup>106</sup> See *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at \*41.

<sup>107</sup> See *id.* at 39-40.

<sup>108</sup> Alexandros N. Rokas, *Reliance on Experts from a Corporate Law Perspective*, 2 AM. U. BUS. REV. 323, 331 (2013).

<sup>109</sup> See Black et al., *supra* note 3 at 329-30.

against directors *on behalf of* the company.<sup>110</sup> Prior to instituting a derivative suit, shareholders must demand the company bring a suit against the director, unless shareholders can allege with particularity that such demand should be excused.<sup>111</sup> If shareholders can prove that the decision by the board is improper Courts will allow them to file a suit against directors on behalf of the company. A Court can find the decision of the board not to sue the director was based on the business judgment rule as long as the requirements of the rule are met.<sup>112</sup> Generally, in these cases courts did not allow shareholders to proceed with a derivative suit. Thus, many shareholders choose to bring a suit without making a demand and try to allege that a demand should be excused, a circumstance that happens when the board lacks the ability to consider the litigation demand properly. In order to establish demand excusal, shareholders are required to show both that a majority of the Board “has a material financial or familiar interest”, while a minority of the Board “is incapable of acting independently for some other reason such as domination or control,” directors are not disinterested and independent, or that “the underlying transaction is not the product of a valid exercise of such business judgment.”<sup>113</sup>

#### B. *Delaware’s Business Judgment Rule*

Under Delaware law, corporate directors are presumed to act in full accordance with their fiduciary duty, thus plaintiffs challenging the decisions of the board owe the initial burden of proof to rebut the presumption, also known as the “business judgment rule”.<sup>114</sup> When the plaintiff alleges that at least half of “approving directors” violated their fiduciary duty in reaching the challenged decision, the burden shifts to directors.<sup>115</sup> Then, directors have to establish that the decision was the product of an entire fairness evaluation, considering both fair dealing and fair price. For instance, plaintiff may rebut the business judgment standard by alleging that at least “half of the directors who approved the decision were not disinterested, were not independent, or did not act in good faith”,<sup>116</sup> and thus, breached the duty of loyalty. In case even just one of them is an “interested” director, when he controls the majority of the Board, directors are not considered independent and the entire board will not be granted the benefit of deference under the business judgment rule.<sup>117</sup> Once a plaintiff can rebut the presumption of the business judgment rule, if directors fail to show entire fairness in the decision courts will affirm the breach of

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<sup>110</sup> In case a corporation becomes insolvent (*inter alia*, N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007)), in fact, creditors may bring derivative suit against directors for breach of fiduciary duty.

<sup>111</sup> DEL. CT. CH. R. 23.1(a).

<sup>112</sup> See Zapata v. Maldonado, 430 A.2d 779, 784 n.10 (Del. 1981).

<sup>113</sup> Grimes v. Donald, 673 A.2d 1207, 1216 (Del. 1996). It is worth reminding how the fact that a majority of the Board was “economically beholden” through personal or other relationships to someone – generally, to the controlling person and, in the case at hand, to the Chairman and CEO – leads to a circumstance vitiating any and all claims of director independence (Cook, *supra* note 95 at 104-05.).

<sup>114</sup> Lafferty et al., *supra* note 91, at 841 n. 12-13.

<sup>115</sup> See Lee v. Pincus, C.A. No. 8458-CB, 2014 WL 6066108, at \*10 (Del. Ch. Nov. 14, 2014).

<sup>116</sup> See *id.*

<sup>117</sup> Telxon Corp. v. Meyerson, 802 A.2d 257, 264 (Del. 2002).

fiduciary duty. Consequently, whether the director breached his duty in reaching the challenged decision is determined by whether such decision is really and entirely fair.

In general, the business judgment rule does not apply to claims of director's breach of oversight duty, because no affirmative decision really occurs.<sup>118</sup> However, claims that directors adopted an improper and inappropriate information system would be subject to the business judgment rule since such claims challenge the board decision to adopt a specific control system.<sup>119</sup>

### C. Delaware's Exculpatory Provision

In 1986, the Delaware General Assembly enacted § 102(b)(7),<sup>120</sup> "[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director." This statute allows corporations to exculpate directors from monetary liability for breach of the duty of care and the overwhelming majority of Delaware corporations have adopted this exculpatory provision, without intending it to be the solution for all directors' problems and without depriving the plaintiff shareholders of an entire fairness review.<sup>121</sup> As a consequence, in a company whose article of incorporation includes an exculpatory provision, a complaint from a plaintiff that is exclusively attributable to the violation of duty of care is dismissed.<sup>122</sup> However, such provisions do not eliminate the breach of duty of loyalty or good faith by directors, and the associated liability. Consequently, in order to survive a motion to dismiss brought by defendant directors, plaintiff seeking monetary damages for the breach of fiduciary duties have to plead a non-exculpated claim against each director, which is claim to breach of duty of loyalty (and confidentiality)<sup>123</sup> or good faith.<sup>124</sup>

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<sup>118</sup> KNEPPER, *supra* note 98, at §2.05.

<sup>119</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

<sup>120</sup> DEL. CODE ANN. TIT. 8, § 102(b)(7) (2001).

<sup>121</sup> Joseph M. McLaughlin, *Disinterested Directors and 'Entire Fairness' Cases; Corporate Litigation*, N.Y. L. J. ONLINE, June 11, 2015, [www.newyorklawjournal.com/id=1202728945598/Disinterested-Directors-and-Entire-Fairness-Cases?slreturn=20170122070053](http://www.newyorklawjournal.com/id=1202728945598/Disinterested-Directors-and-Entire-Fairness-Cases?slreturn=20170122070053); see also Janaki Rege Catanzarite, *Emerald Partners v. Berlin: Is It Misunderstood?*, 28 DEL. J. CORP. L. 225, 230-32 (2003), that clarifies as its (limited) purpose - not applying to any breach of the duty of good faith involving intentional misconduct or a knowing violation of law or any transaction from which the director derived an improper personal benefit - was to allow the shareholders to choose whether or not to "incorporate a clause into the corporation's charter exculpating directors for any monetary liability stemming from a breach of the duty of care, ... mak[ing] clear, however, that shareholders cannot exculpate directors from a breach of their duty of loyalty to the corporation or its stockholders".

<sup>122</sup> See *Emerald Partners v. Berlin*, 787 A.2d 85, 94 (Del. 2001); Catanzarite, *supra* note 121; Richard B. Kapnick & Courtney A. Rosen, *The Exculpatory Clause Defense to Shareholder Derivative Claims*, 17 BUS. TORTS J., 1, 18-22 (Winter 2010).

<sup>123</sup> Lafferty et al., *supra* note 91, at 847.

<sup>124</sup> *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001).

### III. CASE LAW

This Section will consider, both in the US and in the Japanese context, the event in which plaintiffs sued outside director for failing to unintentionally monitor, supervise or oversee the business or affairs of the company; cases in which plaintiffs argued that outside directors shall be deemed liable for each and any loss arising from inappropriate monitoring inaction.

It will also address the cases in which plaintiffs who sued an outside director due to her personal liability by challenging specific board decision, alleging that she breached a fiduciary duty by deciding as to the companies' management in a way that generated a loss for the corporation or even for third parties.

#### A. *Delaware Cases on Monitoring and Supervision Liabilities*

Directors' oversight duty is a topic that Delaware courts faced more than once, reviewing it in the context of whether demand is excused in derivative suits.<sup>125</sup>

In *Graham v. Allis-Chalmers*,<sup>126</sup> the Court recognized that directors, within their duty of care, owe duty to exercise proper control over the corporate affairs in order to prevent corporate misconduct. Such directors are not entitled to "install and operate a corporate system of espionage to ferret out wrongdoing", but only to rely on the "honesty and integrity" of the employees. Thus, they shall be considered responsible for any failure to take actions against corporate misconduct only in case "something occurs to put them on suspicion that something is wrong."

Almost forty years after, the Court reconsidered the issue, declaring that, regardless of the notice of actual wrongdoing, directors owe the "duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes in adequate, exists".<sup>127</sup> In other words, directors are required to "provide to senior management and to the board itself timely, accurate information sufficient to allow [them], each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance."

More recently, the Court clarified the scope of the duty under analysis. To begin with, it is considered as a part of the duty of good faith ("a condition [...] of the fundamental duty of loyalty")<sup>128</sup> rather than of the duty of care. Thus, liability for breach of oversight duty is not justified under the exculpation provision. As a consequence, the Court held that directors owe oversight liability only if (i) they

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<sup>125</sup> Eric J. Pan, *A Board's Duty to Monitor*, 54 N.Y. L. SCH. L. REV. 717, 733 (2009).

<sup>126</sup> *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963).

<sup>127</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d at 970. The case has been widely discussed by scholars: Michael J. Borden, *Of Outside Monitors & Inside Monitors: The Role of Journalists in Caremark Litigation*, 15 U. PA. J. BUS. L. 921 (2013); Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719 (2007); JONATHAN R. MACEY, *THE ICONIC CASES IN CORPORATE LAW* (2008); Charles M. Elson & Christopher J. Gyves, *In re Caremark: Good Intentions, Unintended Consequences*, 39 WAKE FOREST L. REV. 691 (2004); Kirk S. Jordan, *In re Caremark Int'l, Inc., Derivative Litigation, Del. Chancery, C.A. 13670 (Chancellor Allen, Sept. 15, 1996)*, 15 PREVENTIVE L. REP. 46 (1996).

<sup>128</sup> *Stone ex rel. AmSouth Bancorporation*, 911 A.2d at 369-70.

utterly fail to implement any reporting or information or control system or (ii) the directors consciously fail to monitor<sup>129</sup> or oversee such operations, thus disabling themselves from being informed of risks or problems requiring their attention. Moreover, since the breach of oversight duty is a breach of good faith which requires directors' intention of wrongdoing, "imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations."<sup>130</sup> In order to establish a claim for a lack of oversight, the plaintiff has to prove directors' knowledge of the deficiencies of internal controls<sup>131</sup> and the existence of an (even vague) indication of the presence of a risk which might point to the directors' awareness of the deficiencies in the internal control system.<sup>132</sup>

Such a failure of oversight duty claim is considered by the same judges as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."<sup>133</sup> As a result, in fourteen out of 250 *post Caremark* cases brought to the Court, there was a motion to dismiss only in one case, *ATR-Kim Eng. Fin. Corp. v. Araneta*<sup>134</sup> did parties fully litigate oversight duty claims and the Court asserted an oversight duty.<sup>135</sup> In the *ATR-Kim* case, in the absence of a proper reporting system and regular board meetings, the Court affirmed the directors' liability for having "consciously abandoned any attempt to perform their duties independently and impartially, as they were required to do by law",<sup>136</sup> failing to carefully monitor the conduct of their colleague, who was also a majority shareholder and transferred key assets to a member of his own family.

The above-mentioned cases lead to the conclusion that "a plaintiff must plead the existence of facts suggesting that the board knew that internal controls were inadequate, that the inadequacies could leave room for illegal or materially harmful behavior, and that the board chose to do nothing about the control deficiencies that it knew existed."<sup>137</sup> A plaintiff is required to prove how the Board (of part of the Board, since any deficiency of control system should be *individually* assessed)<sup>138</sup>

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<sup>129</sup> Delaware courts defined a board's duty to monitor and several recent Delaware cases reveal that such approach to the duty under discussion does not require boards to play a role in the monitoring of corporate activities that may result in harm to a corporation's business. See Pan, *supra* note 125; Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine*, 38 FLA. ST. U. L. REV. 209 (2011).

<sup>130</sup> *Stone ex rel. AmSouth Bancorporation*, 911 A.2d at 369-70.

<sup>131</sup> Borden, *supra* note 127, at 934.

<sup>132</sup> Among indicators, there might be a report from the compliance program, the initiation of governmental investigation or a private lawsuit and warning from external auditors. See Borden, *supra* note 127, at 935; see also *McCall v. Scott*, 239 F.3d 808 (6th Cir. 2001), *commented in* Janet E. Kerr, *Developments in Corporate Governance: The Duty of Good Faith and its Impact on Director Conduct*, 13 GEO. MASON L. REV. 1037, 1042 (2006).

<sup>133</sup> *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d at 967.

<sup>134</sup> *ATR-Kim Eng Fin. Corp. v. Araneta*, No. 489-N, 2006 WL 3783520, at \*1, \*19 (Del. Ch. Dec. 21, 2006).

<sup>135</sup> Borden, *supra* note 127, at 929; Pan, *supra* note 125, at 735; Pan, *supra* note 129.

<sup>136</sup> *ATR-Kim Eng Fin. Corp.*, 2006 WL 3783520, at \*20.

<sup>137</sup> *Desimone v. Barrows*, 924 A.2d 908 (Del. Ch. 2007).

<sup>138</sup> See *In re Am. Intern. Grp., Inc.*, 965 A.2d 763, 774-79 (Del. Ch. 2009) (according to which, inside directors are more likely to be fully aware of the situation, while outside directors, given their reduced involvement in the daily management, usually do not have a strong knowledge about illegal transaction and inadequacy of internal control, which could affect the decision of the existence of scienter for the breach of oversight duty. "Not surprisingly, the strength of the control ma[kes] it easier [...] to

could be aware of the fact that internal controls were inadequate, rather than focusing on each director's scienter. Similarly, in another circumstance, the Court underlined that "[a] claim that an audit committee or board had notice of serious misconduct and simply failed to investigate, for example, would survive a motion to dismiss."<sup>139</sup>

#### B. *Delaware Cases on Inapt, Incompetent or Dishonest Management Liabilities*

In the light of what has been discussed so far, when any plaintiff challenges a decision the business judgment rule could apply. When she succeeds in rebutting the presumption of the business judgment rule, the eventual breach of fiduciary duty by the directors is determined by whether the decision taken is entirely fair or not. Should the second hypothesis apply, the Court will find all the directors who agreed with the decision breached their fiduciary duty without deliberating each director's breach.<sup>140</sup>

Similarly, in a previous case,<sup>141</sup> minority shareholder brought action against two inside directors and an outside one, challenging a cash-out going private merger with the entity owned by two inside directors, who also controlled the shareholders. The Court, based on the fact that the majority of directors stood on both sides of the operation, held that the defendants "are liable to the plaintiffs for breaching their fiduciary duty of loyalty",<sup>142</sup> stating outside directors were liable without deliberating the breach of such duty by each director. When the plaintiff rebuts the presumption and the challenged decision is not found as entirely fair, the Court would affirm the liability, regardless of the *status* of inside or outside directors and the knowledge retained by each of them. This feature is a peculiarity under Delaware law. Japanese law does not apply the business judgment rule to the entire board, but only to directors singularly considered when the Court assesses whether the director performed information collection, investigation and deliberation to a reasonable extent.<sup>143</sup>

Furthermore, should the bylaw of the corporation include an exculpatory provision, the director is exculpated from the monetary liability of a breach of the duty of care, and the plaintiff is required to establish the facts showing a breach of the duty of loyalty or bad faith. Only when the plaintiff rebuts the presumption above by alleging that most of directors were not totally disinterested, so that a duty of loyalty was claimed against the interested directors, the plaintiff shall show the breach of the duty of loyalty or good faith against each director.<sup>144</sup> The presence of an exculpatory provision implies that the mere fact that outside directors agreed with

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infer the existence of knowledge. Such inference would be unlikely in the case of outside directors, who do not commonly exercise such control." Pan, *supra* note 125, at 736.

<sup>139</sup> South v. Baker, 62 A.3d 1, 15 (Del. Ch. 2012); David B. Shaev Profit Sharing Account v. Armstrong, No. Civ. A. 1449-N, 2006 WL 391931, at \*5 (Del. Ch. Feb. 13, 2006).

<sup>140</sup> Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442 (Del. Ch. 2011).

<sup>141</sup> Ryan v. Tad's Enter., Inc., 709 A.2d 682 (Del. Ch. 1996).

<sup>142</sup> *Id.*

<sup>143</sup> See Saitama Chihō Saibansho [Saitama Dist. Ct.] March 26, 2010, Hei 19 (wa) no. 2817, 1344 KIN'YU SHŌJI JANFREI [KINHAN] 47.

<sup>144</sup> See *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at \*38-40.

the (not entirely fair) decision taken would not result in a form of “personal liability”. Should the transaction be unfair, this should not automatically imply the liability of the independent director protected by an exculpation clause since

[t]he entire fairness standard ill suits the inquiry whether *disinterested directors* who approve a self-dealing transaction and are protected by an exculpatory charter provision authorized by Del. C. § 102(b)(7) can be held liable for breach of fiduciary duties. Unless there are facts suggesting that the directors consciously approved an unfair transaction, the bad faith preference for some other interest than that of the company and the stockholders that is critical to disloyalty is absent. The fact that the transaction is found to be unfair is of course relevant, but hardly sufficient, to that separate, individualized inquiry.<sup>145</sup>

In assessing a (potential) breach of the duty of good faith, proper showing that directors knew that they were not discharging their fiduciary obligations is required<sup>146</sup> and the lack of knowledge or information pertaining to the decision or transaction carried out by any outside director could shape the decision taken by the Court. This happened in *Gesoff v. IIC Indus., Inc.*, a class action brought by shareholders against directors, mainly challenging the going-private transaction between the company itself and its parent company.<sup>147</sup> In *Gesoff*, the Court, after careful consideration, determined that the price and the dealing were not fair since the corporation’s advisors were not independent from the parent company, and, in particular, the financial consultants had even voluntarily and deliberately informed the parent company of confidential (and extremely important) information belonging to the ‘special committee.’ In its assessment of the breach, the Court held that the independent director failed to fulfill his duty of good care but denied liability due to the exculpation clause.<sup>148</sup> The court held that the independent director’s negligence did not rise to the level of disloyalty or bad faith and denied his personal liability, as he had not been made aware that the consultant had a connection with the other company and had a conflicting interest. The consultant provided incorrect information in order to generate a decision which was not in line with the needs of the company. However, the court determined that, by virtue of the exemption clause and based on the fact that there was no evidence that the independent director had intentionally, voluntarily or deliberately plotted to undertake an unfair and unequal negotiation, the director was no liable.<sup>149</sup>

In the light of the above, then, entail the autonomous determination of the responsibility of the director (whether inside or outside),<sup>150</sup> given that negligence or

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<sup>145</sup> In re S. Peru Copper Corp. S’holder Derivative Litig., 52 A.3d 761, 787 n.72 (Del. Ch. 2011).

<sup>146</sup> *Lyondell Chemical Co.*, 970 A.2d at 240 (citing *Stone*, 911 A.2d at 370).

<sup>147</sup> *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130 (Del. Ch. 2006).

<sup>148</sup> *Id.* at 1167 (“Simon attempted to fulfill his responsibilities as the sole member of the special committee, but failed to do so effectively in part as a result of the carelessness and negligence, through which he failed to fulfill his duty of due care.”).

<sup>149</sup> *Id.*

<sup>150</sup> The Court has similarly refused to presume that an independent director is not entitled to the protection of the business judgement rule solely because the controlling shareholder may itself be subject

carelessness with regards to both information and Board processes and decisions may still not be sufficient to give rise to a claim of violation of good faith.

C. *Japanese Cases on monitoring and supervision liabilities*

Directors' fiduciary duties include the duty to monitor the performance of other directors and the employees of the company,<sup>151</sup> and that directors' fiduciary duties include the duty to establish and keep appropriate internal control system to prevent misconduct committed by officers or employees depending on the size and character of the company business.<sup>152</sup> Therefore, Sapporo District Court affirmed that directors shall be deemed liable for failing to monitor the misconduct of other directors or employees only when the director knew or could have known other directors' or employee's misconduct.<sup>153</sup> Several cases focused on outside directors' oversight liability, whose limited participation in corporate daily activities obviously impact on the knowledge of directors' or employees' misconduct. Still, their role implies the need to take some measures to prevent or stop the misconduct when a specific fact invoking the doubt of misconduct happens.

In the *Neo Daikyo* case,<sup>154</sup> a real estate brokerage business tied together a company and one of its affiliated companies, which was trying to avoid the collapse of bubble economy. The two companies shared the same representative director, who planned the transaction with the obvious intent of improving the economic situation of the weaker company. This plan was adopted by the Board at a meeting in which the external (part-time) director (and chairman) did not vote, simply avoiding expressing any preference in one direction or another. After a certain period of time, it was found that the market price was much lower than the purchase price and the directors were sued for breach of the duty of supervision of the transaction, which

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to liability for breach of the duty of loyalty if the transaction was not entirely fair to the minority stockholders. See *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1183 (Del. 2015). So, even when plaintiffs rebut the presumption of business judgement rule, the entire fairness standard only applies to interested directors. In the absence of the exculpatory provision, the Court is not so clear in determining if the liability of each director should be determined by a different standard or not; still, such a provision apparently is a prerequisite to invoke a director-by-director analysis, due to the fact that "the existence of Section 102(b)(7) provision would compel a director-by-director analysis to determine which defendants are personally liable," as stated in *Ryan*, 709 A.2d at 479; See also Borden, *supra* note 127, at 934.

<sup>151</sup> EGASHIRA, *supra* note 47, at 466.

<sup>152</sup> See *Osaka Chihō Saibansho* [Osaka Dist. Ct.] Sept. 29, 2000, Hei 10 (wa) no. 8677, Hei 10 (wa) no. 9278, Hei 7 (wa) no. 11994, Hei 8 (wa) no. 4676, Hei 9 (wa) no. 1939, 1047 HANREI TAIMUZU [HANTA] 86.

<sup>153</sup> In the specific case, notwithstanding the company was insolvent, the representative director issued promissory notes on behalf of the corporation, but the Court did not consider any other director to operate in breach of any oversight duty, since she was totally unaware of what was happening. (*Sapporo Chihō Saibansho* [Sapporo District Ct.] July 30, 1976, Sho 49 (wo) no. 966, 348 HANREI TAIMUZU [HANTA] 303), or, at least, the situation could not be clear to her with little (or no) trouble (*Tokyo Chihō Saibansho* [Tokyo District Ct.] April 22, 1980, Sho (wa) no. 6199, 983 HANREI JIHO [HANJI] 120). It is therefore crystal clear that gross negligence or willful misconduct are required when the third party alleges a breach of fiduciary duty.

<sup>154</sup> See *Osaka Kōtō Saibansho* [Osaka High Ct.] Jan. 20, 1998, Hei (ne) no. 3166, 981 Hanrei Trimuzi [Hanta] 238.

proved (as could easily have been predicted *ex ante*) unfair for the stronger company. However, according to the court, given his total lack of knowledge and experience in the real estate sector, the director was not aware of the potential damage that the company could suffer and therefore merely expressed his determination on the valuation report provided to him for this purpose, with respect to which he did not have the necessary tools to understand whether or not it was reliable.<sup>155</sup>

The judgment in the *Neo Daikyo* case is part of a series of decisions regarding cases concerning actions brought separately and directly against external directors, but the nuances between some of the cases are different and deserve to be underlined in this paper.

For instance, take the case of an external director who decided to plan the sale of shares to individual investors in order to raise capital. The external director arranged the team with the investment traders who would actually deal with the shares, so that their employees would sell the shares. However, that same director also told the unsuspecting investors that in the near future the shares would be listed and that a listing plan would be drawn up shortly. The shares were never listed and no such plan was drawn up. The Court held that the representing director and financial intermediaries were liable for fraud and the purchasers of the shares sued the outside director for breach of their supervisory obligation.<sup>156</sup> At this point, the different nuances in the interpretation by the courts must be stressed.

In one case, the court reaffirmed the responsibility of the outside director, who was unable to fulfil his supervisory obligation, by omitting the adoption of measures to prevent incorrect conduct by the representative director.<sup>157</sup> The court looked at the circumstances in light of significant facts, including the fact that during the period in question the company's Board approved the issuance of new shares with an exceptional frequency, upon proposals by the director, without adequate and necessary discussion at meetings.

In two other cases arising from the same transaction, other courts gave greater weight to the fact that he was an external director, and, moreover, part-time.<sup>158</sup> These courts did not give great weight to the importance of the causal link between the issuance of the shares and the (potentially fraudulent) methods of selling them and, consequently, have denied the existence of a breach of the obligation to supervise.<sup>159</sup> Another court, also dealing with the same transaction, also gave greater weight to the fact that the director was external (and part-time) and therefore did not find any breach of the obligation to supervise. A final court found that there was no negligence in the duty of supervision and that the director was therefore not liable.<sup>160</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> See Tokyo Chihō *infra*, note 157.

<sup>157</sup> See Tokyo Chihō Saibansho [Tokyo Dist. Ct.] Nov. 30, 2011, Hei 22 (wa) no. 1559-3, 279 SARIMONOTORIHIKI SAIBANREISHŪ.

<sup>158</sup> See Tokyo Chihō Saibansho [Tokyo Dist. Ct.]. Jan. 30, 2012, Hei 21 (wa) 12837, 2012WLJPCA01308012; Tokyo Chihō Saibansho [Tokyo Dist. Ct.]. Sep. 30; 2014, Hei 23 (wa) no. 37804, Hei 25 (wa) no. 316, 2014WLJPCA09308026.

<sup>159</sup> *Id.*

<sup>160</sup> See Tokyo Chihō Saibansho [Tokyo Dist. Ct.]. Nov. 25, 2013, Hei 22 (wa) no. 32162, 2013WLJPCA11258006.

In light of the above, outside directors are not required to carry out a detailed review. However, in order to be protected under the duty of oversight, they are required to assess the information provided, to understand the financial situation, and, in case an implication of wrongdoing exists, to investigate various issues or request information that executive directors or employees might provide them with.

D. *Japanese Cases on Inapt, Incompetent or Dishonest Management Liabilities*

In the Japanese context, two leading cases—the *Duskin* case<sup>161</sup> and the *Sato Shokuhin Kogyo* case<sup>162</sup>—show how appellate Courts considered the decisions taken by the lower Courts as unjustifiable and held that both inside and outside directors breached their fiduciary duties by simply agreeing with the decision taken. In other words, the appellate Courts will not consider the difference between the two types of directors when outside directors agree with wrongful Board decisions.

The *Duskin* case regards a food franchise that imports and distributes food products containing artificial additives which are prohibited in Japan. The Board did not reveal to the public that the additives were not permitted until the Public Health Center started its investigation and issued a fine to the corporation for contravening the Clean Food Act. Consequently, liability proceedings were brought against the directors, claiming that they did not act in the exercise of their fiduciary duties by failing to communicate the facts correctly, appropriately and adequately and by not even trying to mitigate the harm caused to the company. Given the growing sensitivity of the matter, the Court granted the shareholders' request: it stated that the actions of the Director evidently (and significantly) damaged the reputation of the firm. The non-disclosure of additives by the directors or the failure to implement reasonable measures to prevent reputational damages was deemed to be a breach of their fiduciary duties.

The *Sato Shokuhin Kogyo* case regards a corporation ('company A') which subscribed some commercial papers of its parent corporation ('company B') to invest overfunding, despite the steady deterioration of the financial conditions of company B. Hence, worsening of the economic situation of company A, which was guilty of not stopping its subscription. Thereafter, Company A proposed to Company B, through a director (who held a director position in both companies), a settlement of the matter: to offer shares in Company A to the prospective public takeover bid offered by another company (C), so that Company B could only buy back the commercial paper by selling the shares held in Company A. The Board of Company B, under the advice of the said director, agreed to the proposed arrangement and endorsed it. Afterwards, though, due to a lack of takeover bids, the plan failed and Company B went bankrupt. Accordingly, Company B sued its directors on the grounds that by approving the subscription they infringed their fiduciary duties. This was a general violation of all directors, a form of collective liability of inside and

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<sup>161</sup> Osaka Kōtō Saibansho [Osaka High Ct.] June 9, 2006, Hei 17 (ne) no. 568, 115 Hanrei Taimzu [Hanta] 1214.

<sup>162</sup> Nagaoyo Kōtō Saibansho [Nagoya High Ct.] March 28, 2013, Hei 23 (ne) no. 1366, 1418 Kin'yu shōji Janfrei [Kinhan] 38.

outside directors. As a first step, the Nagoya District Court denied the existence of that infringement since the issuance/purchase of the commercial paper stemmed from a thorough corporate resolution and a reasoned decision.<sup>163</sup> The Court said that the directors should have periodically monitored the transaction and the inherent risks. Liability would hence apply equally to all directors (outside or inside ones) who had intended to underwrite the subscription, irrespective of their knowledge of the profit and loss status of the parent company.<sup>164</sup>

#### IV. CONCLUSION

As discussed, though the fundamental functions of the Board did not change under the Committee System in light of the reform bill of the Japanese Companies Act, under the Committee System there is a separation of the daily management authorities from the Board. The Board is released from the lifetime employment system and enabled to adopt the optimal Board composition for efficient Board functions.

In evaluating requests related to the recovery for damages caused by Board decisions, Japanese courts take into account just the wrongful corporate decisions taken. However, Delaware courts consider if the decision taken by the entire board is truly fair, in both cases without distinguishing between outside and inside directors. In the most well-known American courts, those which regularly deal with corporate affairs, when outside directors agree with the rest of the Board, they are liable. If the bylaws contain an exculpatory provision courts will analyze the decision of each director to find out whether they breached their duty. Any misconduct or lack of information may turn out to be a breach of good faith of a director as an individual.

In evaluating requests related to the liability for failing to monitor the misconduct of both director or employees, Delaware courts require directors' awareness and knowledge about corporate affairs. However, Japanese courts merely require directors' possibility of awareness. In practice, Delaware judges – who have only rarely affirmed outside directors' oversight liability – have adopted higher standards of oversight liability as compared to Japanese judges, who do not impose severe oversight duty on outside directors.

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<sup>163</sup> Nagoya Chihō Saibansho [Nagoya Dist. Ct.] Nov. 24, 2011, Hei 24 (wa) no. 6931, 1418 Kin'Yu Shōji Hanrei [Kinhan] 54.

<sup>164</sup> Makiko Kimura, *Oyakaisha CP hikiuke wo suishinshita kenninn torishimariyuko no sekininn* [Liability of subsidiary's director serving as director in parent company who proceeded subscription of parent company's CP], 1475 JURIST 108, 111 (2015).





## MAPS SERVING AS FACTS OR LAW IN INTERNATIONAL LAW

*William Thomas Worster* \*

### *Abstract*

*Maps are often used as evidence in international relations, but their function can be much broader. In fact, their function can include proving facts, establishing legal relations and even creating new law. Maps can be used as evidence for both questions of law and questions of fact. Maps can prove the existence of a geographic feature but can also help determine what, if any, legal obligations might exist based on those geographic features. Maps themselves can be legal acts – the creation of a map itself can be a legal act, and legal obligations can flow from the features included in the map. This paper will consider the role of maps as evidence of facts, evidence of normativity, evidence of normative content, legal facts, elements of legal acts, and self-contained legal acts.*

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## INTRODUCTION

While maps are used as evidence in international relations, their precise function is much broader than this simple description. Actual use varies for differing objectives, whether those objectives are proving facts, establishing legal relations or creating new law. Ian Brownlie has previously observed that maps serve a variety of functions.<sup>1</sup> Among these functions he identifies are preparatory work, subsequent practice, interpretation and other forms of proof of facts. Notwithstanding his use of the terms “preparatory work,” “subsequent practice,” and “interpretation,” Brownlie classifies maps as only serving the purpose of proving something, be it proving fact or law. This paper proposes to more clearly distinguish between proof of fact and proof of law, and to further distinguish between proof of the binding quality of law and proof of the content of the law. This paper will go beyond the categories that Brownlie introduced and consider the role of these documents as evidence of facts, evidence of normativity, evidence of normative content, legal facts, elements of legal acts, and self-contained legal acts.

## I. MAP AS EVIDENCE

The most common and obvious use of the map is as evidence. The map might be a fact, or law, or it could be a fact which in turn satisfies the conditions of the law.

A. *Question of Fact*

There are several types of facts that a map could prove. The first is the existence and placement of some geographic feature<sup>2</sup> (such as a watershed or an island<sup>3</sup>), and

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<sup>1</sup> See IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 156-61 (1998).

<sup>2</sup> See *Land & Maritime Boundary between Cameroon & Nigeria* (Cameroon v. Nigeria), Preliminary Objection, 1998 I.C.J. 1, ¶ 30 (Mar. 2):

As for Tysan, the village is in Nigeria. It was founded, after the 1961 plebiscite, on the west bank of the River Tysan. The river forms the boundary. Kontcha is 2 or 3 km east of the river [See satellite photograph in Judges' Folders at Tab [13].] You will now see on the screen, Mr. President, a satellite photograph—Tab 12 in the folders—clearly demonstrating the relationship of Tysan, the River Tysan, and Kontcha.

<sup>3</sup> See *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. 61, ¶ 184 (Feb. 3):

According to Ukraine, Serpents' Island is indisputably an 'island' under Article 121, paragraph 2, of UNCLOS, rather than a 'rock'. Ukraine contends that the evidence shows that Serpents' Island can readily sustain human habitation and that it is well established that it can sustain an economic life of its own. In particular, the island has vegetation and a sufficient supply of fresh water. Ukraine further asserts that Serpents' Island 'is an island with appropriate buildings and accommodation for an active population'.

its placement relative to other geographic features. In the *Burkina Faso/Mali Frontier Dispute* case<sup>4</sup>, or *Minquiers and Ecrehos* case<sup>5</sup>, among other cases, maps were used as tools to establish these kinds of facts.<sup>6</sup> Along these lines, maps have been used generally to familiarize the bench with a certain area,<sup>7</sup> or specifically to identify the locations of natural features<sup>8</sup> and man-made constructions.<sup>9</sup> They have also been used to identify distances between features<sup>10</sup> and even to extrapolate relationships between features, for example identifying possible lines of sight.<sup>11</sup> Some have even attempted to use the general boundary feature on a map, such as a line or mathematical curve as a “signature,” in order to project where the boundary would go in an unclear area.<sup>12</sup> In some cases, the map is being used to establish facts

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<sup>4</sup> See generally *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 554 (Dec. 22).

<sup>5</sup> See generally *The Minquiers & Ecrehos Case (Fr./U.K.)*, Judgment, 1953 I.C.J. 47 (Nov. 17).

<sup>6</sup> See *Land & Maritime Boundary between Cameroon & Nigeria*, *supra* note 2; *Kasikili/Sedudu Island (Bots. v. Namib.)*, Verbatim Record, 1999 CR 2 at 69 (Feb. 16); *Maritime Delimitation & Terr. Qs between Qatar & Bahrain (Qatar v. Bahr.)*, Judgment, 2001 I.C.J. Rep. 40, 29-31 (Mar. 16).

<sup>7</sup> See *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgement, ¶ 805, (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 5, 2003):

The Trial Chamber noted that the purpose of an on-site visit was for it to become better acquainted with certain locations in Sarajevo and its surroundings. It however found that those places were described by witnesses, that photographs and maps of the locations were shown, that videos were played during trial, and that ‘such visualization was of substantial assistance to the Trial Chamber in its process of adopting an image of the terrain’.

<sup>8</sup> See *Boundary Dispute Between Argentina and Chile Concerning the Frontier Line Between Boundary Post 62 and Mount Fitzroy*, 22 R.I.A.A. 3, ¶ 166 (Oct. 21, 1994) (“In analysing this fact, regardless of whether it is fully authenticated, it must be borne in mind that those official maps not only established the line of the frontier but also indicated geographical features, in particular hydrographic basins.”).

<sup>9</sup> See *Prosecutor v. Galić*, *supra* note 7, ¶ 233:

Mirsad Kucanin, a criminal investigator from Sarajevo, indicated on a map the location of four fifteen-storey buildings on Lenjinova Street, in the vicinity of the left bank of the Miljacka River, from where there was constant sniper fire. He also located the Grbavica shopping centre, a group of three twenty-storey buildings which he knew from personal experience were frequently used as firing positions to target civilians in the centre of the town and along Titova Street. (internal footnotes omitted);

*Id.* ¶ 402 (“Eldar Hafizovic indicated the location of his apartment on a map.”); *id.* ¶ 424 (“Menzilovic clearly intended to point to the area around the isolated house close to the sign ‘Brijesce’ on the maps tendered into evidence.”).

<sup>10</sup> See *id.* ¶ 257 (“It establishes, on the basis of the evidence and of maps available to the Trial Chamber, that the distance between the site where the incident occurred and the boundaries of the Jewish Cemetery was approximately 500 metres.”); *id.* ¶ 535 (“Hinchliffe measured the distance from Anisa Pita’s house to Baba Stijena to be 895 metres and maps tendered by the Defence in relation to this incident indicate that distance to be on the order of 900 metres.”) (internal footnotes omitted).

<sup>11</sup> See *id.* ¶ 365 (“A close examination of the map P3728 (incident 22) shows that indeed there is no line of sight because high buildings located along the Bulevar Branioca Dobrinja obstruct the view.”).

<sup>12</sup> See *Decision Regarding Delimitation of Border Between Eritrea and Ethiopia (Eri./Eth.)*, 25 R.I.A.A. 83, ¶¶ 3.23-3.24 (Apr. 13, 2002):

but not because the fact is really at issue, but rather because the existence of some other fact would impeach a witness.<sup>13</sup>

However, whether a fact exists is often a question of the application of the law. Mountains and rivers are often used as natural borders.<sup>14</sup> This use is partly psychological and partly practical in that mountains and rivers can provide a certain amount of natural border security.<sup>15</sup> The states may need to physically demarcate the border in an inaccessible region.<sup>16</sup> Clearly, when a river is designated as a border,<sup>17</sup> then the existence of the waterway establishes the legal perimeter.<sup>18</sup> When a border is established by a natural feature, a map can evidence where a river runs or mount peak sits, and in turn, provide evidence for the border. However, in order for the natural feature to qualify as the feature named in the law pertaining to the border, the natural feature must qualify as the natural feature mentioned in the title.<sup>19</sup> Even natural borders can be problematic in that parties have to agree which elevations form part of the mountain range and may experience border shift when a river changes course.<sup>20</sup> In addition, the river must first qualify as the determinative river under the terms of the border agreement, and states and boundaries are not natural in

It was contended that a boundary can be determined by reference to its "signature" – that is, its general shape, silhouette, contour or outline on maps, as distinct, that is, from its particular details ... The Commission does not reject this contention, but approaches it with caution. It is of the nature of boundaries that they need to be geographically specific. A general shape may not have that degree of specificity, or be capable of interpretation with sufficient clarity or definition, to allow for its accurate transposition to maps of a suitably large scale.

<sup>13</sup> See *Prosecutor v. Galić*, *supra* note 7, ¶ 455 ("The Trial Chamber notes that a close examination of the confrontation lines marked on maps in evidence are consistent as to the position of the confrontation lines.").

<sup>14</sup> See *Sargsyan v. Azerbaijan*, App. No. 40167/06, 42015 Eur. Ct. H.R. 45, ¶ 136 (2015) ("[T]he river Indzachay, which constitutes a natural dividing line."); Andrew Burghardt, *The Bases of Territorial Claims*, 63 GEO. REV. 225, 235–37 (1973).

<sup>15</sup> See AO CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW* 19–22 (Oceana Publications, 1967).

<sup>16</sup> See NORMAN HILL, *CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS* 24 (Oxford University Press, 1945).

<sup>17</sup> See *Frontier Dispute*, *supra* note 4; see generally *West Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16).

<sup>18</sup> See *Sargsyan v. Azer.*, *supra* note 14, ¶ 136.

<sup>19</sup> See U.S. Dep't of State, Cable GENEVA 06120, ¶¶ 1-2, 6 (Apr. 10, 1979):

Soviet Union displayed the following new maps and charts at UNCLOS : ... At a 10:00 a.m., April 3, briefing by approximately 100 delegates, Kazmin said USSR had analyzing effects of Irish formula and have concluded that the uncertainties in the delineation of the TOE of the slope and the thickness of sediments at the outer edge of the margin make it unworkable (without precisely the evidence) ... Their peers during the question so the presentation, which was low-key in oral portion, has been effective and has served undermine support for Irish formula. Assessment not yet possible, if presentation has had positive effect for Soviet proposal.

<sup>20</sup> See HILL, *supra* note 16, at 24; CUKWURAH, *supra* note 15, at 27-29; BRADFORD L. THOMAS, *REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY* 87, 94 (George J. Demko & William B. Wood, eds., 1994).

the sense that a mountain or river is natural.<sup>21</sup> These rules interact with legal rules in that international law may explicitly or implicitly define an island or other geographic feature. Thus, no matter how scientifically accurate the depiction, the map might not necessarily prove the correctness of a boundary.<sup>22</sup> In this case, the law will establish conditions that must be satisfied and the map identifies features that meet those legal conditions. In this sense, the map is attesting to a legal conclusion. This conclusion is not necessarily always the case as some maps might employ definitions of features that are variance with international law definitions. However, other geographic features may not be defined at all under international law, such as certain mountains or forests, and in this case, the map may not need to employ legal definitions to identify qualifying features.

Another fact that could be proved by a map is human behavior relative to geographical features. These kinds of location-specific behavior would include borders and administrative regions,<sup>23</sup> effectivities,<sup>24</sup> military positions,<sup>25</sup> lines of control or “confrontation,”<sup>26</sup> exercise of jurisdiction,<sup>27</sup> and general zones of exercise of sovereignty,<sup>28</sup> etc. Fact-finders may even need to identify traditional hunting

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<sup>21</sup> See generally Martti Koskenniemi, *National Self-determination Today: Problems of Legal Theory and Practice*, 43 INT’L & COMP. L.Q. 241 (1994).

<sup>22</sup> See Charles C. Hyde, *Maps as Evidence in International Boundary Disputes*, 27 AM. J. INT’L L. 311, 316 (1933).

<sup>23</sup> See *Sargsyan v Azer.*, *supra* note 14, ¶ 60, 69:

A map of Nagorno Karabakh submitted by the Armenian Government in *Chiragov and Others v. Armenia* (cited above). The map shows Gulistan on the very border of the “NKR” to the north of a river. A map of Azerbaijan published in 2006 by the State Land and Cartography Committee of the Republic of Azerbaijan. The map shows Gulistan on the very border of the area occupied by the “NKR”. On the map the occupied areas are shaded and surrounded by a red line; Gulistan is on that red line but outside the shaded area, to the north of a river ... A map of Gulistan and its surroundings, which shows the entire village on the north bank of the river Idzachay;

Location of boundary markers in Taba between Egypt and Israel, 20 R.I.A.A. 1, ¶ 46 (Arb. Trib., Sep. 29, 1988) (“The Agreement, signed at Rafah on 1 October 1906, reads in Article 1: The administrative separating line, as shown on map attached to this Agreement ...”); *id.* ¶ 165 (“The relevant Article II of the Treaty of Peace of 26 March 1979 stipulates, *inter alia*: The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II ...”); *id.* ¶ 201 (“Article 1 of the 1906 Agreement reads in its initial part as follows: The administrative separating line, as shown on the map attached to this Agreement ...”).

<sup>24</sup> See *Frontier Disp. (Burk. Faso/Mali)*, *supra* note 4, at 596-97, 602-3 (considering interpretation of colonial law on administrative boundaries and mapping); see generally *Delimitation of Border (Eri./Eth)*, *supra* note 12.

<sup>25</sup> See *Sargsyan v. Azer.*, *supra* note 14, ¶ 55, 60, 69, 136; *Prosecutor v. Galić*, *supra* note 7, ¶¶ 589, 711.

<sup>26</sup> See *id.* ¶¶ 205, 227, 241, 379, 425, 528; see also *Prosecutor v. Galić*, Case No. IT-98-29-T, Separate & Dissenting Opinion, ¶ 20 (I.C.C., Dec. 5, 2003) (“When reviewing a map tendered by the Prosecution regarding this incident, ABiH general Vahid Karavelic stated that the confrontation lines appearing thereon were correct.”).

<sup>27</sup> See *BROWNLIE*, *supra* note 1, at 156-61.

<sup>28</sup> See *id.*

grounds.<sup>29</sup> In addition, maps might be used to deduce probable locations of past human activity<sup>30</sup> or identify future projected human activity.<sup>31</sup> A map drafter may seek to document human activity that requires legal analysis. For example, a map that pinpoints areas of military activity might suggest an analysis of whether or not the threshold for the use of force has been reached,<sup>32</sup> or a map depicting closely located islands as an archipelago.<sup>33</sup> Such a map prepared by a non-lawyer could easily disregard international legal definitions of which human behavior is qualifying as such, although in principle, a map drafter should not identify borders other than were international law regards human activity as qualifying them.<sup>34</sup> It is obviously quite easy for political considerations rather than legal analysis to justify certain depictions of human activity on a map.<sup>35</sup>

In general, when international tribunals assess maps as evidence, they adopt a cautious and restrictive approach.<sup>36</sup> Evidence in international law, especially when a

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<sup>29</sup> See *Howard v. Canada*, Case No. CCPR/C/84/D/879/1999, ¶ 11.12 (U.N. Hum. Rts. Comm'n, August 4, 2005):

In reply to the State party's assertion that the author has not provided evidence that Lake Scugog and other lakes and rivers of neighbouring fishing divisions are outside the traditional fishing grounds of the Hiawatha First Nation, the author refers to a map indicating Mississauga family hunting territories, based on the description of these territories made during testimony to the Williams Treaty Commissioners in 1923. According to the author the map shows that Hiawatha traditional hunting territory was located near Rice Lake and did not include Lake Scugog.

<sup>30</sup> See *Prosecutor v. Galić*, *supra* note 7, ¶¶ 314, 443; see also *Dissenting Opinion*, *supra* note 26 ¶¶ 20, 54.

<sup>31</sup> See *Länsman, et al. v Finland*, Case No. CCPR/C/83/D/1023/2001, ¶ 8.2 (U.N. Hum. Rts. Comm'n, April 15, 2005) ("The authors contest the State party's denial that it intends to carry out logging in Kippalrova and provides a map which it purports to prove otherwise. In October 2003 the National Forest and Park Service announced that it was preparing a further logging plan in Paadarskaidi").

<sup>32</sup> See *Letter Dated 16 September 1980 from the Permanent Representative of Democratic Kampuchea to the United Nations Addressed to the Secretary-General*, UN Doc. A/35/459, S/14175 (Sep. 17, 1980) (including a map of the "military situation", featuring "hot battle", "field areas", "guerrilla", and "fighting areas"); *Letter Dated 30 May 1980 from the Permanent Representative of Democratic Kampuchea to the United Nations Addressed to the Secretary-General*, UN Doc. A/35/276, S/13973 (June 2, 1980) (including a map of the same).

<sup>33</sup> See Arif Havas Oegroseno, *Archipelagic States: From Concept to Law*, THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW 125-35 (David Attard, Malgosia Fitzmaurice & Norman A. Gutierrez-Martinez eds., 2015).

<sup>34</sup> See Joint Rep. of the Security Council Comm'n, *Report by the Consular Commission at Batavia, Map of Java*, UN Doc. S/586/Add.1 (Oct. 22, 1947) (using expressions "line reached", "demarcation line", and "enemy concentration").

<sup>35</sup> See *Delimitation of Border (Eri./Eth.)*, *supra* note 12, ¶ 3.19 ("When man-made features are superimposed, such as places of habitation or territorial limits, there is room for political factors to play a part. Particularly in the case of maps portraying a boundary which is in the interests of the Party responsible for the map, the possibility exists that they are self-serving.")

<sup>36</sup> See *Indo-Pakistan W. Boundary (Rann of Kutch) (India v. Pak.)*, 17 R.I.A.A. 1, ¶¶ 83-88 (Arb. Trib., Feb. 19, 1968); *Dispute between Argentina and Chile concerning the Beagle Channel (Arg./Chile)*, 21 R.I.A.A. 53, ¶ 137 (Arb. Trib., Feb. 18, 1977); *Continental Shelf (Tunis./Libya)*, Judgment, 1982 I.C.J. Reps. 18 (Feb. 24); *Delimitation of the Maritime Boundary of the Gulf of Maine Area (Can./US)*, Judgment, 1984 I.C.J. Reps. 246 (Oct. 12); *Continental Shelf (Libya/Malta)*, Judgment, 1985 I.C.J. Reps.

question is being litigated before an international court, may be challenged on several grounds. The International Court of Justice (ICJ) has been very reluctant to give value to maps, and views maps as secondary evidence,<sup>37</sup> easily contradicted by other, more reliable, information,<sup>38</sup> or perhaps even other maps.<sup>39</sup> For some, a map is essentially hearsay evidence to the degree to which it is not based upon an original scientific survey or expressly adopted by officials empowered to bind the state.<sup>40</sup> These authorities have easily dismissed maps, although not always with the most clarity on whether the map was not probative, demonstrative, or reliable.<sup>41</sup> For example, a tribunal may reject a map that is poorly sourced, merely derivative, inauthentic, inaccurate or inconsistent.<sup>42</sup> In addition, a tribunal may reject a map that has clear bias. The ICJ does implicitly admit that the politics of the map maker are important, for example, when it relies on maps it perceives as neutral.<sup>43</sup> Partly due these concerns, many tribunals, including the ICJ, are empowered to appoint their own mapping experts.<sup>44</sup>

That being said, ICJ has considered maps evidentiary<sup>45</sup> on the merits<sup>46</sup> and their precise evidentiary value is still subject to debate.<sup>47</sup> In some situations, maps have

13 (June 3); *See* Burk. Faso/Mali, *supra* note 4, ¶¶ 55-56; *see* Eritrea/Ethiopia, *supra* note 12, ¶ 3.18; *see* BROWNIE, *supra* note 1, at 156.

<sup>37</sup> *See* Island of Palmas (US v. Neths.), Award, 2 R.I.A.A. 829, at 831, 852 (Arb. Trib. Apr. 4, 1928); *see* Minquiers & Ecrehos, *supra* note 5; *see* Burk. Faso/Mali, *supra* note 4, ¶ 54.

<sup>38</sup> *See* Kasikili/Sedudu Island (Bots. v. Namib.), Judgment, 1999 I.C.J. Reps. 1045, ¶ 84 (Dec. 13); Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon./Malay.), Judgment, 2002 I.C.J. Reps. 102, ¶ 88 (Dec. 17).

<sup>39</sup> *See* Delimitation of Border (Eri./Eth.), *supra* note 12, ¶ 3.21.

<sup>40</sup> *See e.g.*, Indo-Pakistan W. Boundary, *supra* note 36, ¶ 85; DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 229 (2d ed., 1975).

<sup>41</sup> *See* Maritime Dispute (Peru v. Chile), Judgment, 2014 ICJ Reps. \_\_, ¶ 148 (Jan. 27) (“Given its date, the Court does not consider as significant a sketch-map said to be part of the Chilean Navy’s Rules of Engagement in the early 1990s and which depicts a Special Maritime Frontier Zone stretching out to the 200-nautical-mile limit...”).

<sup>42</sup> *See* Island of Palmas, *supra* note 37, at 831, 852; *see* Indo-Pakistan W. Boundary, *supra* note 36, at 535; *see* Burk. Faso/Mali, *supra* note 4, ¶ 54; *see* SANDIFER, *supra* note 40, at 184; *see also* Prosecutor. v Ayyash et al, Case No. STL-11-01, Decision on the Admissibility of Documents Published on the WikiLeaks Website, ¶ 33–34 (Spec. Trib. for Leb., May 21, 2015).

<sup>43</sup> *See* Border Disp. (Burk. Faso/Mali), *supra* note 4, ¶ 56.

<sup>44</sup> *See* Statute of the International Court of Justice art. 50, Apr. 18, 1946, 59 Stat., TS 993, 3 Bevans 1153 (“The Court may, at any time, entrust any individual body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion”).

<sup>45</sup> *See* Maritime Dispute (Peru v. Chile), *supra* note 41, ¶170 (“In order to determine the starting-point of the maritime boundary, the Court has considered cartographic evidence presented by the Parties.”).

<sup>46</sup> *See* Minquiers & Ecrehos, *supra* note 5 Case (Fr./UK), Merits, Judgment, 1953 ICJ Reps. 47 (Nov. 17); Sovereignty over Certain Frontier Land (Belg./Neths.), Judgment, 1959 I.C.J. Reps. 209 (June 20); Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 ICJ Rep. 6 (June 15); Arg./Chile, *supra* note 36, ¶ 137 (“Latterly, certain decisions of the International Court of Justice have manifested a greater disposition to treat map evidence on its merits”).

<sup>47</sup> *See* Maritime Delimitation (Eritrea/Yemen), Phase 1 (Territorial Sovereignty and Scope of the Dispute), Award, 21 R.I.A.A. 209, ¶ 80 (Arb. Trib., Oct. 9, 1998); *see also* Guenther Weissberg, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, 57 AM. J. INT’L L. 781 (1963).

been regarded as primary or at least highly significant evidentiary sources,<sup>48</sup> for example where the map has received a high degree of publicity.<sup>49</sup> A tribunal can also rely on different maps drafted for different purposes for different questions<sup>50</sup> and even maps that may have inherent bias can still have some probative value.<sup>51</sup> For all these reasons, maps can serve as evidence, with caution.

## B. QUESTION OF LAW

However, maps are not only used to answer questions of fact. They may also be used for questions of law. We have already observed that in reaching a finding of fact, a map drafter may need to already reach findings of law in order to qualify the facts. Such questions of the location of the border are deeply interconnected questions of fact and law. In this section, we are considering how law is applied to produce facts, but rather, whether a law exists at all. Distinguishing the question further, there are two purposes of evidence of law: evidence of the existence of a binding obligation and evidence of the content of that obligation.

The ICJ specifically held that, in determining the delimitation of maritime areas by treaty (as with any question of treaty application), the Court must first establish whether the agreement is a treaty and only then determine the content of the treaty.<sup>52</sup> Thus, we can separate the question of whether a map is potentially evidentiary of whether the agreement is legally binding from the question of how a map evidences the meaning of the treaty terms. For the former, the attachment of a map to an agreement may help establish whether the instrument qualifies as a treaty under the Vienna Convention on the Law of Treaties (VCLT), including, *inter alia*, the intent of the parties to be bound by international law. For proof of this question, we do not usually apply the typical rules of evidence that we associate with proof of facts, although we might apply the spirit of those rules. Thus, for this question, a designation as hearsay might not be a problem.

In addition, a map might be used to understand a legal obligation with greater clarity. There are several ways this result can happen. Firstly, one party could submit a map as a part of its legal conclusion on its obligations. For example, various states have attached maps to their responses to the projects undertaken by the International Law Commission (ILC), supporting their conclusions on the content of the law,<sup>53</sup> for

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<sup>48</sup> See *Minquiers & Ecrehos*, *supra* note 5; *Temple of Preah Vihear*, *supra* note 46; *Arg./Chile*, *supra* note 36, ¶ 6 (“maritime jurisdiction does not exist as a separate concept divorced from dependence on territorial jurisdiction. To draw a boundary between the maritime jurisdiction of States, involves first attributing to them, or recognizing as being theirs, the title over the territories that generate such jurisdiction.”); *Burk. Faso/Mali*, *supra* note 4, ¶ 54; *Pulau Ligitan & Pulau Sipadan*, *supra* note 38, at 625; *SANDIFER*, *supra* note 40, at 230.

<sup>49</sup> See *Delimitation of Border (Eri. v. Eth.)*, *supra* note 12, ¶ 3.21.

<sup>50</sup> See *Maritime Delimitation (Eritrea/Yemen)*, *supra* note 47, ¶¶ 363, 367.

<sup>51</sup> See *id.* ¶ 368.

<sup>52</sup> See *Maritime Dispute (Peru v. Chile)*, *supra* note 41, ¶¶ 48-50.

<sup>53</sup> See H. Lauterpacht, *Law of Treaties*, 1953 Y.B. INT'L. L. COMM'N 90, UN Doc. A/CN.4/63, (discussing practice on fraud in entering into treaties) (“[W]riters have occasionally discussed the propriety of the action of Mr. Webster, the United States Secretary of State, in not bringing to the attention

example, a state might tender a map showing its continental shelf claims as evidence on how it understands the law on the continental shelf.<sup>54</sup> Secondly, a map could be introduced to prove the intentions or understandings of the parties in reaching their *negotium*, for example, a secretly prepared map that is later exposed might demonstrate that a party desired a particular outcome.<sup>55</sup> In this way, the map might be considered part of the *travaux préparatoires* of the treaty,<sup>56</sup> that could give greater clarity to the contemporary usage of terms,<sup>57</sup> understanding of text<sup>58</sup> and general

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of the British negotiators a map privately discovered and showing the boundary line in a manner favourable to the British contention.”); *Comments and observations received from Governments and relevant intergovernmental organizations, Comments and observations on the questionnaire on shared resources received from Governments and intergovernmental organizations*, 2005 Y.B. INT’L L. COMM’N 94, UN Doc. A/CN.4/555 & Add.1 II(1) (observing that the replies of Burkina Faso and Colombia attached maps to document the existence of shared groundwaters).

<sup>54</sup> See *Comments by Governments on the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951*, 1953 Y.B. INT’L L. COMM’N, UN Doc. A/CN.4/8ER. A/1953/Add. 1 (reprinting *Communication from the Ministry for Foreign Affairs of Iceland* (May 5, 1952) (stating the views of Iceland regarding fisheries jurisdiction on the continent shelf, citing an attached “provisional” map).

<sup>55</sup> See Dep’t St., Cable No. 1978CAIRO00139\_d, paras. 1-2 (Jan. 3, 1978):

I’ve noted several recent messages making mention of a map which Primin Begin allegedly gave to Ceausescu on how Israel intends solve Palestinian problem ... In my meeting with Ismail Fahmy yesterday (Reftel), he alluded to such a map. He said Ceausescu had shown it to Sadat during their late November meeting in Bucharest. Although Fahmy admits that he did not personally see the map, he says Sadat described it to him as showing an area forty-five kilometers in length along the Mediterranean coast, the Israeli/Lebanese border and extending southward to just below Haifa. The strip apparently extends inland, but not as far as the eastern borders of Israel. The map was apparently written in Hebrew characters. Begin's intention, according to Sadat as related to the latter by Ceausescu, is to resettle all West Bank and Gaza Palestinians in this strip. The Israelis now in the strip would be resettled in the West Bank and Gaza. The Palestinian strip would nevertheless remain part of Israel. Fahmy said he tried to get a copy of the map before the Sadat party left Bucharest, but was unsuccessful. As might be expected, Fahmy sees this as evidence that Begin has no intention of permitting the West Bank and Gaza to become Palestinian territory.

<sup>56</sup> See Vienna Convention on the Law of Treaties, May 23, 1969, art. 32, 1155 UNTS 331; *Boundaries in the Island of Timor* (Neths. v Port.), Award (Arb., Perm. Ct. Arb., June 25, 1914), reprinted at GEORGE GRAFTON WILSON, *THE HAGUE ARBITRATION CASES* (1915); SCOTT, *HAGUE COURT REPORTS* 355 et seq (1916) (interpreting erroneous geographical description by examining records of the treaty negotiations); Eritrea/Ethiopia, *supra* note 12, ¶ 3.21; BROWNIE, *supra* note 1.

<sup>57</sup> See Eritrea/Ethiopia, *supra* note 12.

<sup>58</sup> See *id.* ¶ 5.17:

The determination of the meaning and effect of a geographical name used in a treaty, whether of a place or of a river, depends upon the contemporary understanding of the location to which that name related at the time of the treaty. If the location can be identified without difference of opinion, interpretation is relatively simple. But when the maps available at the time vary in their placement of the feature, difficulties emerge. That is to some extent the problem in the present case;

BROWNIE, *supra* note 1.

intention of the parties.<sup>59</sup> Additionally, if a map differs from the actual facts on the ground, the map used in negotiations might qualify the negotiated legal outcome as erroneous, and subject to invalidity under the VCLT.<sup>60</sup>

Drafting choices may have considerable influence during negotiations, informing our understanding of the obligations in the agreement. Consider, for example, Yasser Arafat's reaction to the map produced by Israel during the Oslo Accords negotiations. This map shows a coloring scheme for the A, B, and C zones that made the Palestinian Liberation Organization's (PLO's) territorial administration gains appear to be insignificant and fragmented, and the settlements to be lawful territory of Israel, which in turn almost scuttled the negotiations,<sup>61</sup> and forced Israel to make even more substantive concessions later.<sup>62</sup> Subsequent maps produced for the negotiations chose different coloring schemes that made the territorial administration gains appear far more significant and coherent, and to separate the legal identity of Israeli territory from settlements territory. Both maps depicted reality, yet a different meaning was implied and communicated. In turn, these maps might inform our understanding of the meaning of the Oslo Accords. For example, the change in coloring might suggest a view of Palestine as being more or less cohesive or dependent on outside powers.<sup>63</sup>

Thirdly, where a map does not create a legal obligation, which will be discussed in more detail in the sections to follow, the map might still provide assistance in interpreting the treaty terms that are binding.<sup>64</sup> A map might demonstrate "ordinary

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<sup>59</sup> See Arg./Chile, *supra* note 36, ¶ 137 ("Thus maps or charts in existence previous to the conclusion of the Treaty in 1881 might be relevant if, in the circumstances, they could (for instance) throw light on the intentions of the Parties, or give graphic expression to a situation of fact generally known at the time or within the actual, or to be presumed, knowledge of the negotiators....").

<sup>60</sup> See Vienna Convention, *supra* note 56, art. 48. More often, however, an adjudicator may only order revision of the treaty terms when the error comes to light. See e.g. ILC, Lauterpacht, *Report, Law of Treaties*, *supra* note 53 (discussing practice on mistake in entering into treaties) ("It is possible that interpretation, and not reality of consent, is the proper *sedes materiae* with regard to what is believed to be the most frequent example of mistake in international practice, namely, a discrepancy between maps or geographical facts and the apparent intention of the parties as expressed in the treaty.") (citing J. B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS 65 *et seq* (1898)); *U.S. v. Texas*, 162 U.S. 1, 37-42 (1896) (correcting an error regarding geographical description in a treaty).

<sup>61</sup> See Shari Motro, *Lessons From the Swiss Cheese Map*, LEGAL AFF'RS 46 (Sept.-Oct. 2005) ("Swiss cheese' map . . . was introduced just 24 hours before the agreement was to be signed. When Yasir Arafat saw it, he stormed out of the negotiating room. . . . 'These are cantons! You want me to accept cantons! You want to destroy me!'") (emphasis in original).

<sup>62</sup> See *id.*, at 47 ("Following Arafat's dramatic walkout, the Israelis increased their initial proposal for the yellow areas, Area B, by 5 percent, and the Palestinian leader signed the agreement.")

<sup>63</sup> See *id.* (observing that the colors used for indicating the West Bank areas that would remain under Israeli control or shift to Palestinian control were shades of the same colors used to indicate Israeli and Jordanian territory proper, suggesting political allegiances that might not have been meant to be suggested).

<sup>64</sup> See Legal Status of E. Greenland (Nor. V. Den.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 49 (Apr. 5) ("The geographical meaning of the word 'Greenland', i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention."); *Second Report on the Regime of the Territorial Sea*, [1953] 2 Y.B. INT'L L. COMM'N 57, U.N. Doc. A/CN.4/61; *Regime of the Territorial Sea - Information and Observations Submitted by Governments Regarding the Question of the Delimitation of the Territorial*

meaning” (or agreed meaning) of certain terms, especially where the underlying treaty might use multiple languages.<sup>65</sup> Also, a map prepared or promulgated after the conclusion of a treaty could go towards establishing subsequent agreements or practice of the parties pursuant to the treaty.<sup>66</sup>

It is not entirely clear whether the textual elements of the map would also follow the interpretive methodology of the “general rule” in the VCLT. In the view of the ICJ and Special Tribunal for Lebanon, we do see that at least UN Security Council resolutions are interpreted using the same rule as that for treaty textual interpretation.<sup>67</sup> It is perhaps even less clear whether non-textual, pictorial markings on a map (lines, dashes, colors, marks, etc.) can also somehow be interpreted using the VCLT methodology, although at least one tribunal has asserted that this is also the case.<sup>68</sup> The “ordinary meaning” of a dashed line versus that of a solid or dotted line, is difficult to fathom.

## II. MAP AS A LEGAL FACT

Another way in which the map might impact international law is its very existence being a legal fact. A legal fact can be distinguished from evidence in that evidence is information that proves facts,<sup>69</sup> whereas facts directly trigger the application of law. In the section above, we saw that maps can serve as evidence of certain facts or existence of legal obligations, but in this section, we will consider whether the map itself could be the fact.

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*Sea of Two Adjacent States, Communications from Governments*, [1953] II Y.B. INT'L L. COMM'N 79, U.N. Doc. A/CN.4/71 & ADD.1-2 (reprinting a Note Verbale from the Government of the United States (Mar. 16, 1953)) (observing that the U.S. and Canada settled the delimitation of their respective territorial waters, and produced a map for the ILC demonstrating the settlement); Draft Articles on the Law of Treaties: Text as Finally Adopted by the Commission on 18 July 1966, [1966] II Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/190 177 (discussing the general rule of interpretation and the use of text versions that were not authenticated, and referencing an 1897 boundary treaty between Great Britain and Ethiopia that was drawn up in English and Amharic as authentic languages but ordered that a French translation would be used to resolve disputes) (citing 1 EDWARD HERTSLET, *THE MAP OF AFRICA BY TREATY* 42-7 (3d ed. 1909)).

<sup>65</sup> See *Decision Regarding Delimitation of the Border Between Eritrea and Ethiopia*, 25 REP. INT'L ARB. AWARDS 83, 106-07 (2005).

<sup>66</sup> See Vienna Convention on the Law of Treaties, art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331; *Decision Regarding Delimitation of the Border Between Eritrea and Ethiopia*, *supra* note 65; IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS*, 156-61 (1998).

<sup>67</sup> See Accord. with Int'l L. of the Unilateral Decl. of Indep. in Respect of Kos., Adv. Op., 2010 I.C.J. Rep. 141, 132-37 (July 22) (separate opinion by Trindade, J.); *Pros. v Ayyash*, *supra* note 42, at 33-34 (applying the Vienna Convention interpretation textual methodology to non-treaty instruments such as U.N. Security Council Resolutions because the rules on interpretation apply to “any internationally binding instrument, whatever its normative source”).

<sup>68</sup> See *Decision Regarding Delimitation of the Border Between Eritrea and Ethiopia*, *supra* note 65, at 143.

<sup>69</sup> See R. Wolfrum, *International Courts and Tribunals, Evidence*, in 5 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 552 (R. Wolfrum, ed., 2012).

Firstly, there may be a legal obligation of mapping. In some instances, there is a legal obligation to create a map,<sup>70</sup> so lack of its existence might be a violation. In making the map, some treaties provide that only certain mapping techniques may be used,<sup>71</sup> or that the only authoritative maps will be produced by independent commissions set up by the parties.<sup>72</sup> These demands, in turn, raise certain mapping frailties concerning the impact on the map of choice of drafting, technique, etc. Thus, it might be that there is an international legal obligation to create a map that will not be an impartial product or that produces a non-scientific result. In addition, the parties might have an obligation to disclose the existence of maps, or risk treaty invalidity due to error or mistake.<sup>73</sup>

Secondly, the map itself, not only the act and process of mapping, might violate international law. This possibility is more theoretical, but cannot be excluded. Mark Monmonier has documented extensive mapping outcomes that have been designed to exacerbate international relations.<sup>74</sup> Following this thinking, a mapping outcome might be unlawful conduct.<sup>75</sup> One possibility is an official map incorporating occupied territory as evidence of state control and thus responsibility for violations of human rights by local governing authority.<sup>76</sup> This role should be distinguished

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<sup>70</sup> See *Boundary Case Between Costa-Rica and Panama*, 11 REP. INT'L ARB. AWARDS 519 (1961) (underlying convention for the settlement of the controversy empowering the sole arbitrator to appoint a mapping commission which will have the duty to produce a map); Comm'n Dec. 92/176/EEC, *Concerning Maps to be Provided for Use for the Animo Network*, 1992 O.J. (L. 80) 33 (EC) (requiring EU member states to prepare and transmit certain maps to the Commission).

<sup>71</sup> See Agreement Between Greece and Turkey Concerning the Control of Hydraulic Works on both banks of the River Maritza-Ebros, June 20, 1934, Greek Off. Gazette No. 474 (Oct. 27, 1936), summarized in Int'l L. Comm'n, *Long-Term Programme of Work, Including: Consideration of Recommendation Concerning Commencement of the Work on the Law of Non-Navigational Uses of International Watercourses, Legal problems relating to the utilization and use of international rivers, Report by the Secretary-General*, U.N. Doc. A/5409, II(2) YB INT'L L. COMM'N 145-46 (1974), U.N. Doc. A/CN.4/SER.A/1974/Add.I (Part 2) (providing for procedures and rules for mapping in preparation for hydraulic works); Agreement Between the Government of the People's Republic of China and the Government of Mongolia on the Protection and Utilization of Transboundary Waters, China-Mong., art. 3, Apr. 29, 1994, FAOLEX No. LEX-FAOC017921 (providing for a framework for technological exchanges including maps of the relevant transboundary waters).

<sup>72</sup> See Boundary Agreement Between China and Pakistan, Mar. 2, 1963, reprinted at *China and Pakistan: Boundary Agreement*, 2 INT'L L. MATS. 541 (1963) (establishing a Joint Boundary Demarcation Commission that will, *inter alia*, prepare a detailed map and attach it to a protocol drawn up by the commission).

<sup>73</sup> See Int'l L. Comm'n, Rep. on the Work of Its Fifteenth Session, U.N. Doc. A/CN.4/SER.A/1963/ADD.1, at 194 (1963) (finding that in one case there may not have been an obligation to disclose the existence of a map).

<sup>74</sup> See generally MARK MONMIER, *FROM SQUAW TIT TO WHOREHOUSE MEADOW: HOW MAPS NAME, CLAIM AND INFLAME* (2006) (discussing international disputes over use of certain, objectionable, place names on maps).

<sup>75</sup> See Eritrea/Ethiopia, Decision Regarding Delimitation of Border, at 3.16 (Eritrea-Ethiopia Boundary Comm'n, Apr. 13, 2002).

<sup>76</sup> See *Chiragov et al. v Armenia*, Appl. No. 13216/05, Judgment (Merits), ¶. 85 (Eur. Ct. H.R., June 16, 2015):

D. Relations between the Republic of Armenia and the 'Republic of Nagorno-Karabakh'...3. Financial and other support... The Azerbaijani Government pointed out that the National Atlas of Armenia, published in 2007 by the State Committee

from a map that evidences the probable location of activities. In this case, the mapping sources, choices and method are evidencing a violation of international law. Thus, it is not the markings on the map that are evidencing a fact, but rather the markings evidence a process that went into making the map.

But a map might go farther and potentially violate international law itself. True, the possession of a map might be a legal violation.<sup>77</sup> A map might be sourced from copyrighted material.<sup>78</sup> The map might have been made in the course of an investigation, and the map produced was so poor that the subsequent conviction on that ground violates human rights.<sup>79</sup> States have, in addition, regarded other state's depictions on maps as unfriendly acts.<sup>80</sup> Consider, for example, the *Interim Accord* case. In that case, Greece objected to the name of the state of "Macedonia" as itself being a potentially unlawful act, citing to elementary school maps in FYROM/Macedonia. Part of Greece's concern over the name, and any associated maps, is whether those acts, which might otherwise be entirely within the discretion of the state, might amount to an unlawful threat of the use of force, i.e., threat to annex the Greek region of Makedonia.

In a like manner, a state might place a map on its currency or flag, or other object of national promulgation, using the map as a symbol of the state. Perhaps such an act constitutes the failure to respect territorial integrity or threat of the use of force against its neighbors? Most authorities agree that the Turkish part of Cyprus is

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of the Real Estate Cadastre, adjunct to the Government of the Republic of Armenia and thus allegedly an official publication, consistently on various types of maps incorporated the 'NKR' and the surrounding occupied territories within the boundaries of the Republic of Armenia.

<sup>77</sup> Cf. *Boodoo v Trin. & Tob.*, Comm. No. 721/1996, U.N. Doc. CCPR/C/74/D/721/1996, at 2.2 (Hum. Rts. Comm., Apr. 15, 2002) (observing that possession of a prison map while in prison was an offense itself) with *Ahmet Gunan v. Kyrgyz.*, Comm. No. 1545/2007, U.N. Doc. CCPR/C/102/D/1545/2007, ¶ 2.9 (Hum. Rts. Comm., Sep. 1, 2011) (observing that possession of a map was evidentiary of planning a crime); *Mbongo Akwanga v Cameroon*, Comm. No. 1813/2008, U.N. Doc. CCPR/C/101/D/1813/2008, ¶ 2.6 (Hum. Rts. Comm., May 19, 2011) ("On 8 April 1999, the author was given papers in prison that he was to be arraigned at Yaoundé military court on 14 April 1999. ... The evidence presented consisted of a map of Southern Cameroons, Southern Cameroons National Council membership cards, fund-raising collection boxes, bows and arrows, and four 'den guns'.").

<sup>78</sup> See *Case C-490/14, Freistaat Bayern v. Verlag Esterbauer GmbH*, Judgment, ¶ 28-29 (Ct. Just. EU, 2d Ch., Oct. 29, 2015) (concluding that a database of topographic information does constitute independent materials which are copyright protected).

<sup>79</sup> See *Tanrikulu v Turk.*, Appl. No. 23763/94, Judgment, ¶ 105 (Eur. Ct. H.R., July 8, 1999) ("The Court, like the Commission, notes with concern the lack of precision and detail on the sketch map drawn by one of the police officers. It observes that the whole of the investigation was characterized by inadequate and imprecise reporting of the steps that were taken.").

<sup>80</sup> See U.S. Dep't of State, Cable STATE183494\_d, ¶ 2 (July 20, 1978) (accessed through WikiLeaks):

In this connection, the Academy of Sciences of the USSR lodges a determined protest with the (US) Geological Survey of the USA and reminds it that there exists only one state border between the USSR and PRC, which has been confirmed in Russo-Chinese agreement documents and which no one has the right to question. Soviet scientists view the preparation and publication in the USA of the above mentioned map as an unfriendly act in relations to the USSR.

unlawfully separated from the remainder of the Cypriot State, and Cyprus includes the entirety of the island on its flag. The European Union felt confident enough in this legal determination to place a map of unified Cyprus on the Euro currency. Yet these claims to territory being depicted are not expressive of the *de facto* reality, though, in this case, they do comport with the *de jure* situation. Contrast that case, with that of the annexation of Crimea. The Russian Federation has minted special commemorative coins depicting a map of Crimea as Russian territory.<sup>81</sup> In yet another case, Argentina has produced stamps with the Falklands/Malvinas Islands depicted as part of state territory.<sup>82</sup> Even more on point, Turkey has produced official state maps that include territory in Greece, Syria and Iraq as being Turkish territory.<sup>83</sup> Could the production of these maps themselves be unlawful acts? After all, Kosovo has called trains that travel from Serbia to Kosovo with the words “Kosovo is Serbia” painted on the side a threat to Kosovo’s sovereignty.<sup>84</sup> Such depictions, in certain cases, might rise to the level of a threat to peace, sovereignty and territory integrity.

### III. MAP AS A LEGAL ACT

Under this next topic, we consider whether maps can create legal obligations. Brownlie identified the function maps can play as a part of the preparatory work, subsequent practice or contemporaneous interpretation, even admissions and acquiescence.<sup>85</sup> However, in all of these cases he was contemplating the map as proof of fact, not as legal act. In his view, the map could provide evidence of facts on which the parties relied when drafting, adopting, interpreting or implementing a treaty,<sup>86</sup>

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<sup>81</sup> See Mik Woodgate, *Russian Mint Strikes One-Kilo Medal Commemorating Invasion of Crimea*, AGAUNews (Apr. 24, 2014) available at <http://agaunews.com/russian-mint-strikes-one-kilo-medal-commemorating-invasion-crimea/> (“Whatever you may think of Russian intervention in the Crimean peninsula and the current trouble in Eastern Ukraine, the announcement of a coin commemorating the event while it’s still a major ongoing world issue does strike us as a little opportunistic to say the least.”).

<sup>82</sup> See generally Monnier, *HOW TO LIE WITH MAPS* (1996) (documenting Argentine postage stamps that purport to show ownership of the Malvinas Islands).

<sup>83</sup> See Nick Danforth, *Turkey’s New Maps Are Reclaiming the Ottoman Empire*, FOREIGN POL’Y (Oct. 23, 2016) available at <http://foreignpolicy.com/2016/10/23/turkeys-religious-nationalists-want-ottoman-borders-iraq-erdogan/>:

Erdogan’s aggressive nationalism is now spilling over Turkey’s borders, grabbing land in Greece and Iraq ... The maps, in particular, reveal the continued relevance of Turkish nationalism, a long-standing element of the country’s statecraft, now reinvigorated with some revised history and an added dose of religion ... These maps purport to show the borders laid out in Turkey’s National Pact, a document Erdogan recently suggested the prime minister of Iraq should read to understand his country’s interest in Mosul.

<sup>84</sup> “The introduction of an illegal rail service represents interference which threatens our sovereignty and proves Serbia is seeking to destabilize Kosovo”, said Edita Tahiri, who leads Kosovo’s negotiating team with Belgrade.” *Serbia launches provocative train service to Kosovo’s Serbian north*, AFP, (Jan. 14, 2017) <https://www.yahoo.com/news/serbia-launches-provocative-train-kosovos-serbian-north-151519483.html>.

<sup>85</sup> See BROWNLIE, *supra* note 1, at 161.

<sup>86</sup> *Id.*

but not as giving rise to legal obligations themselves. This section considers whether maps might actually go so far as to prescribe legal obligations. Certainly, maps can be disputed,<sup>87</sup> but the dispute alone does not mean that the map has legal value. There are two ways that a map can function as a legal act, either as the act creating a legal obligation or as an element in a legal instrument.

A. *Map as a Legal Act in its Entirety*

The ICJ has held that maps themselves are not legal instruments and do not produce legal obligations,<sup>88</sup> and while this is generally true, it overlooks the ways in which a map can indeed produce legal obligations. In order to create legal obligations, subjects of international law must adopt a legal instrument, such as a treaty, by the force of their own will. The map is not a legal instrument known to international law, so it cannot create legal obligations alone.<sup>89</sup> Thus, a map can offer good evidence of a legal obligation and can even be used for definitive demarcation,

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<sup>87</sup> See U.S. Dep't of State, Cable TELAV 25182, ¶ 1 (1979) (accessed through WikiLeaks):

Clarifications are under way at present between Israel and Egypt regarding the demarcation of the international border between the two countries, as sketched in the official map appended to the peace treaty. These clarifications were begun when it transpired that as per the markings set down in the peace map, a bite of Israeli territory has been taken out of the area Nea Eilat. In the Gaza Strip, too, the international border marked on the official map is located further south than it was on the Israeli maps.

<sup>88</sup> See Case Concerning the Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. Repts. 554, 582, ¶ 54 (Dec. 22).

[M]aps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part.

<sup>89</sup> See Dispute between Argentina and Chile concerning the Beagle Channel (Arg. v. Chile), XXI UNRIAA 53, 137 (Arb. Trib., Feb. 18, 1977) (“the evidence of a map could certainly never *per se* override an attribution made, or a boundary-line defined, by Treaty”); Eritrea/Ethiopia, Decision Regarding Delimitation of Border, ¶. 3.2 (Eritrea-Ethiopia Boundary Comm'n, Apr. 13, 2002).

In these instances it is not the maps “in themselves alone” (to use the language of the Chamber of the International Court of Justice in the *Frontier Dispute* case) which produce legally significant effects, but rather the maps in association with other circumstances. A map *per se* may have little legal weight: but if the map is cartographically satisfactory in relevant respects, it may, as the material basis for, e.g., acquiescent behaviour, be of great legal significance. (internal footnotes omitted).

but in itself could not give rise to legal title to territory.<sup>90</sup> This is correct, but it is not the entire story.

Maps could be attached and integrated into a treaty and become part of the binding text of that instrument.<sup>91</sup> When a map is adopted as a part of the treaty text, it has the same legal value as the treaty terms.<sup>92</sup> Thus, while it is correct to say that the map is binding, that conclusion is not based on its being a map, but rather because it is part of a treaty, which is a legal instrument. What is crucial is that treaty authenticates and identifies the map as containing the binding terms,<sup>93</sup> not being

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<sup>90</sup> See Frontier Disp. (Burk. Faso/ Mali), *supra* note 36, ¶ 54.

<sup>91</sup> See Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon./Malay.), *supra* note 38, at 102, 625.

<sup>92</sup> See Frontier Disp. (Burk. Faso/ Mali), *supra* note 36; Eritrea/Ethiopia, *supra* note 36, ¶ 2.26 (Eritrea-Ethiopia Boundary Comm'n, Apr. 13, 2002) ("As already stated, the 1900 line was traced on a map annexed to the Treaty. Both Parties agree that that map, being "annexed" to the Treaty, is a visual or linear exposition of its content and has the same force as the Treaty."); *id.* ¶ 3.18-3.20:

Those which are made authoritative by, for example, being annexed to a treaty as a definitive illustration of a boundary delimited by the treaty, are in a special category, since they "fall into the category of physical expressions of the will of the State or States concerned . . . As already noted, where a map is made part of a treaty then it shares the legal quality of the treaty and is binding on the parties.

*See also* Agreement between Norway and the Union of Soviet Socialist Republics on the utilization of water-power on the Pasvik (Paatso) River, Dec. 18, 1957, 312 UNTS 274 (treaty permits the parties to construct water-power installations but only in accordance with the positions shown on the annexed map); Supplementary Agreement to the Treaty concerning arrangements for co-operation in the Ems Estuary (Ems-Dollard Treaty), May 14, 1962, Germ.-Neths., 509 UNTS 2 (defining a "frontier area" and "line" by reference to a map annexed to the treaty).

<sup>93</sup> See Temple of Preah Vihear, *supra* note 46; Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon./Malay.), Merits, Judgment, 2002 ICJ Repts. 102, ¶ 31, 72, 91 (Dec. 17):

[It] considers that an examination of the map annexed to the 1915 Agreement reinforces the Court's interpretation of that Agreement. The Court observes that the map, together with the map annexed to the 1928 Agreement, is the only one which was agreed between the parties to the 1891 Convention. The Court notes on this map that an initial southward extension of the line indicating the boundary between the Netherlands possessions and the other States under British protection is shown beyond the western endpoint of the boundary defined in 1915, while a similar extension does not appear beyond the point situated on the east coast of Sebatik; that latter point was, in all probability, meant to indicate the spot where the boundary ended.... In sum, with exception of the map annexed to the 1915 Agreement... the cartographic material submitted by the Parties is inconclusive in respect of the interpretation of Article IV of the 1891 Convention.

Int'l L. Comm'n, Humphrey Waldock, Spec. Rapp., *Fifth Report on the Law of Treaties, Revision of part II of the draft articles in the light of the comments of Governments*, A/CN.4/183 & Add.1-4, II(2) YB INT'L L. COMM'N (1966), UN Doc. A/CN.4/SER. A/1966/Add. 1 (reporting on the comments of governments concerning error in treaty making):

The Thai delegation ... observes that the map in the *Temple of Preah Vihear* case, mentioned in paragraph (4) of the commentary, was neither a treaty nor part of a treaty because it had been drawn up by one party and not authenticated by the other party. In its view, therefore, the treaty could not be considered a treaty within the meaning of part I of the draft articles. (internal footnotes omitted).

merely indicative of the terms, so that the map is considered the operative binding text,<sup>94</sup> not merely illustrative. The ICJ admitted as much when it considered that this rule against maps creating legal obligations did not apply to maps that were the expression of the “will of the state.”<sup>95</sup> In some cases, the parties have been explicit that the map would be prepared and was intended to be part of the agreement.<sup>96</sup> For example, the treaty between the USSR and Poland concerning the demarcation of State frontier adjoining the Baltic Sea of March 5, 1957,<sup>97</sup> after describing the frontier, states that “This frontier line is shown on the Soviet and Polish maps annexed (1) to this Treaty, the scale of which is 1:1,000,000.” This language could suggest that the map forms a part of the binding treaty text. After all, the treaty provides that the map depicts the frontier, not other textual terms in the treaty. However, the USSR-Poland border agreement is not isolated. In fact, prominent treaties also attached maps, such as the peace treaty between Israel and Egypt,<sup>98</sup>

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<sup>94</sup> See Case concerning the location of boundary markers in Taba between Egypt and Israel, Decision, XX UNRIAA 1, ¶ 46-8 (Arb. Trib., Sep. 29, 1988):

The Agreement, signed at Rafah on 1 October 1906, reads in Article 1: The administrative separating line, as shown on map attached to this Agreement ... Egypt made a new translation of the Agreement directly into English in August 1987, which reads in its first part of Article 1: The Separating Line, as shown on map attached to this AGREEMENT, ... Israel disagrees with certain aspects of this translation and responded in its Rejoinder with another translation into English, rendering the same passage as follows: The separating line as shown on the map attached to this agreement... (emphasis in original);

*id.* ¶165 (“The relevant Article II of the Treaty of Peace of 26 March 1979 stipulates, *inter alia*: The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II...”); *id.* ¶ 201 (“Article 1 of the 1906 Agreement reads in its initial part as follows: The administrative separating line, as shown on the map attached to this Agreement...”).

<sup>95</sup> See Continental Shelf (Tunis/Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. 18, ¶ 87 (Feb. 24); Delimitation of the Maritime Boundary of the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246 (Oct. 12); Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. 13 (June 3); Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, ¶ 56 (Dec. 22); Eritrea/Ethiopia, Decision Regarding Delimitation of Border (Eritrea-Ethiopia Boundary Comm’n, Apr. 13, 2002).

<sup>96</sup> See The Chamizal Case (Mex. v. U.S.), 11 R.I.A.A. 309, 318 (Int’l. Boundary Comm’n 1911) (observing that the parties had agreed to boundaries shown on a jointly agreed map which was annexed to the *compromis*); *People’s Republic of China-Pakistan: Agreement on the Boundary Between China’s Sinkiang and the Contiguous Areas*, 57 AM. J. INT’L L. 713, 715 (1963) (establishing a Joint Boundary Demarcation Commission that will, *inter alia*, prepare a detailed map and attach it to a protocol drawn up by the commission); *Second Report on the Regime of the Territorial Sea*, *supra* note 64, at 82 (observing that Denmark delimited its territorial waters with Germany and with Sweden with mutual declarations attaching maps documenting deviations from the median line rule).

<sup>97</sup> See Treaty (with annexed maps) Concerning the Demarcation of the Existing Soviet-Polish State Frontier in the Sector Adjoining the Baltic Sea, U.S.S.R.-Pol., Mar. 5, 1957, 274 U.N.T.S. 133. The UNTS in the French and English translations adds a footnote observing that the map is inserted between pages 142 and 143 in volume 274, but it is missing from the online database.

<sup>98</sup> See Treaty of Peace (with annexes and maps), Egypt-Isr., art. II, IX, Mar. 26, 1979, 1138 U.N.T.S. 59.

The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown

although parties may disagree over whether it was their intention for the annexed treaty to have legal effect or be merely illustrative.<sup>99</sup> Parties have even been known to object to the inclusion of an annexed map over fears that its annexure would create legal obligations.<sup>100</sup>

If the map is itself an integral part of the binding treaty terms, it still remains unclear whether, or to what degree, the VCLT applies to this depiction. One can also consider the *Eritrea/Ethiopia* and *Eritrea/Yemen* cases in this regard. The VCLT is, of course, meant to establish the exclusive interpretive methodology for treaties, yet the VCLT states that interpretation of the meaning of the treaty must be based on text, context and the object and purpose of the agreement, potentially also supplemented by the *travaux préparatoires* and subsequent practice/agreements. It does not clearly contemplate maps. If we do consider an annexed map to be creating

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on the map at Annex II, without prejudice to the issue of the status of the Gaza Strip. The Parties recognize this boundary as inviolable. Each will respect the territorial integrity of the other, including their territorial waters and airspace ... All protocols, annexes, and maps attached to this Treaty shall be regarded as an integral part hereof.

<sup>99</sup> See U.S. Dep't of State, Cable TEL AV 25182 at 2-3 (Nov. 28, 1979) (obtained from Wikileaks):

When Israel raised the matter of discrepancies between the border demarcation acceptable to her and those held by Egypt, the Egyptians contended that the border demarcations as relied on by them are identical with those that appear on the official map attached to the peace treaty. This map is signed, inter alia, by Prime Minister Begin ... (c) Comment: Poloff Kulick spoke with Benziman to obtain background to the above story ... Benziman said he received a phone call from 'an aide to a senior Defense Ministry official' who ... implied that there was something to the story, however, by adding that the map attached to the treaty was not, in any case authoritative and that the boundary would be fixed on the basis of measurements that would have to be carried out two years from now. Kulick expressed puzzlement that the line could be in question since the international border is the same line that was fixed by the British and the Turks in 1906.

<sup>100</sup> See U.S. Dep't of State, Cable LIMA 1678 at 1-4 (Nov. 6, 2009).(obtained from Wikileaks):

Peru continues to oppose inclusion of the illustrative map found in the most recent proposed draft of the South Pacific Regional Fisheries Management Organization (SPRFMO) Convention, regardless of efforts to blur the portion of the maritime territory under contention between Chile and Peru. Expressing concern that inclusion of the map would incorporate it into Peruvian law, and in some manner undermine its position in boundary negotiations at The Hague, they underscored that the map must be removed, or reservation language must be accepted to exclude the map from application to Peru ... Regarding these references, Garcia explained that the Government of Peru generally tries to avoid entering into agreement that refer to other accords to which they are not signatories. However, the references noted reffer appeared to be acceptable under the circumstances. BUT A MAP IS UNACCEPTABLE ... However, Albarracin expressed strong concern over inclusion of the notational reference map of the SPRFMO Convention Area. He provided several reasons for Peru's objection to its inclusion: a. Since the Convention will be incorporated into Peruvian law, the map itself will become legally binding and might affect the negotiations underway at The Hague between Peru and Chile. (emphasis in original).

(not just evidencing) legal obligations, then how do we interpret a solid line, the dotted line, etc. as treaty “text”?

If not attached to a treaty, a map could be attached to another type of legally binding instrument such as a UNSC Chapter VII resolution or an international judgment.<sup>101</sup> As for the UNSC, the Council has rarely attached maps to its resolutions, with the exception being, e.g., the attachment of the Dayton Peace Accords to UNSC Resolution 1031, which themselves contained a map depicting the inter-entity boundary as an annex.<sup>102</sup>

Maps annexed to international judgments and awards are more commonly expressly identified as merely indicative. As a preliminary remark, we could wonder whether such an observation is *obiter dicta*. The ICJ has been careful to observe that a “sketch-map” including in its judgment was “prepared for illustrative purposes only.”<sup>103</sup> The same approach was taken, wisely, by the arbitral tribunal in the South China Sea case.<sup>104</sup> Thus generally maps produced by the Court are not part of the *dispositif*,<sup>105</sup> in fact, the judgments did not even include precise geographic coordinates, leaving final demarcation to the parties to determine in accordance with the principles determined in the judgment.<sup>106</sup> However, in cases where a map was annexed to an award without the notation that is merely illustrative, the map might be regarded as a part of the decision.<sup>107</sup>

<sup>101</sup> The U.N. G.A. has also attached maps to its resolutions, including, for example, U.N. G.A. Resolution 181 regarding the planned boundary of Israel/Palestine and Jerusalem. *See* G.A. Res. 181 (II), at Annex A, B.

<sup>102</sup> *See* S.C. Res. 1031, at 1 (Dec. 15, 1995) (“Welcoming the signing on 14 December 1995 at the Paris Peace Conference of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto (collectively the Peace Agreement, S/1995/999, annex) by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia and the other parties thereto”); U.N. GAOR, 50th Sess. at 47, 52, U.N. Doc. A/50/790 (Nov. 30, 1995) (“The boundary between the Federation of Bosnia and Herzegovina and the Republika Srpska (the ‘Inter-Entity Boundary Line’) shall be as delineated on the map at the Appendix.”).

<sup>103</sup> *See* Maritime Dispute (Peru v. Chile), Judgment, 2014 I.C.J. 3, at 14, 17, 68, 70 (Jan. 27); Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. 61, at 68-69 (Feb. 3) (“See sketch-map No. 1, p. 69, prepared for illustrative purposes only.”); *See also* Prosecutor v. Galić, Case No. IT-98-29-T, Judgment & Opinion, ¶ 7 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (“a set of two maps which are not authoritative and do not necessarily reflect any finding of the Trial Chamber but are attached exclusively in order to assist readers to better orient themselves.”).

<sup>104</sup> *See* In the Matter of the South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, ix (Mensah) (Jul. 12, 2016) (“The maps in this Award are illustrative only. Their use by the Tribunal is not intended to endorse any State’s position with respect to matters of land sovereignty or maritime boundaries.”).

<sup>105</sup> *Id.* ¶ 70.

<sup>106</sup> *See id.* ¶ 197:

In view of the circumstances of the present case, the Court has defined the course of the maritime boundary between the Parties without determining the precise geographical co-ordinates. Moreover, the Court has not been asked to do so in the Parties’ final submissions. The Court expects that the Parties will determine these co-ordinates in accordance with the present Judgment, in the spirit of good neighbourliness.

<sup>107</sup> *See* Boundary Dispute Between Argentina and Chile Concerning the Frontier Line Between Boundary Post 62 & Mount Fitzroy, *supra* note 8, ¶ 17:

In addition to including a map in a treaty or binding international resolution, judgment or award, a map might also function as a binding unilateral statement, as per the *Nuclear Tests* cases. Brownlie observed that a map might operate as an admission or acquiescence,<sup>108</sup> as did the *Rann of Kutch* tribunal.<sup>109</sup> That being said, Hyde argued that even where a map is accepted by the parties, it cannot amount to an agreement or admission.<sup>110</sup> A related question is whether a map might be an act of personality recognition. A state might implicitly recognize another entity as a state by depicting it as such in its mapping. For example, one might consider how differently state produced and privately produced maps of Taiwan depict that territory. States have been known to alter official maps markings in order to avoid the appearance of recognition, for example, for the zones of territorial control between India and China.<sup>111</sup> While private map making companies might more easily embrace the *de facto* reality that Taiwan operates as an independent country, state mapping organs must be far more careful to preserve their diplomatic positions. It is unclear whether an authoritative map produced by a state could be considered as an act of state recognition, but it is unlikely unless the map was explicitly produced for that purpose. Because of these concerns, states often include disclaimers on their maps,<sup>112</sup> which may evidence that states would regard a map as constituting recognition absent a disclaimer. After all, states do not take pains to ever place disclaimers on maps affirming that the map does constitute recognition, only the opposite. Nevertheless, disclaimers are not widely understood to relieve a state of the obligation to protest,<sup>113</sup> and states do take pains to protest objectionable

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On the next day King Edward VII signed the Arbitral Award. It describes the boundary line which had been decided upon and adds: A more detailed definition of the line of frontier will be found in the Report submitted to Us by Our Tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which we have decided upon has been delineated by the members of Our Tribunal, and approved by Us.

*Id.* ¶ 46 (“The Arbitral Award of 20 November 1902 established the boundary in this area as follows: ... The Award includes the corresponding maps (see para. 36)”); Arbitration Regarding the Delimitation of the Abyei Area (Sudan v. Sudan People’s Liberation Movement/Army) 30 R.I.A.A. 145 ¶ 771 (U.N. 2009) (“The boundary as defined above is illustrated on the map appended to this award on a scale of 1:750,000 and based on the WGS84 datum (see Appendix 1)”).

<sup>108</sup> See *The Minquiers and Ecrehos Case (Fr. v. U.K.)*, Judgment, 1953 I.C.J. Rep. 47, 71-2 (Nov. 17); *Territorial Sovereignty and Scope of the Dispute, (Eri. v. Yemen)* 22 R.I.A.A. 209, ¶ 368 (Arb. Trib. 1998); BROWNIE, *supra* note 1, at 156-61.

<sup>109</sup> See *The Indo-Pakistan W. Boundary (Rann of Kutch) between India and Pakistan, (India v. Pak.)*, 27 R.I.A.A. 1, 553 (Feb. 1968).

<sup>110</sup> See Hyde, *supra* note 22, at 315.

<sup>111</sup> See U.S. Dep’t of State, Cable MOSCOW 24754, 1 (Oct. 1978) (“These cartographic changes remove the anomaly of seeming Soviet recognition of Chinese ownership of territories also claimed by nations friendly to the USSR.”).

<sup>112</sup> See *Delimitation of the Border (Eri. v. Eth.)*, *supra* note 12, ¶ 3.26.

<sup>113</sup> See *id.* ¶ 3.28 (“As regards the State adversely affected by the map, a disclaimer cannot be assumed to relieve it of the need that might otherwise exist for it to protest against the representation of the feature in question.”).

mapping.<sup>114</sup> And, disclaimer or not, the map still does show that the drafter (even if a state<sup>115</sup>) believed and asserted certain features and/or human activity as depicted.<sup>116</sup>

### B. *Map as an Element of a Legal Act*

Another possibility is that the map is not a legal instrument (i.e., treaty) itself, but that it functions as one element in a legal act. One possibility for this effect is for the map to form one element in an estoppel, acquiescence or act *res judicata*.<sup>117</sup> Maps that are copies of earlier maps can prove consistent conduct.<sup>118</sup>

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<sup>114</sup> See U.S. Dept. of State, *supra* note 80, ¶ 1:

The following is an informal translation of the text of a Soviet non-paper protesting the border demarcations shown on a trans Pacific Ocean map prepared by the U.S. Geological Survey. The paper was presented by Soviet Embassy First Secretary Trepykhalin to EUR/SOV Deputy Director for changes during a call on July 18 ... In view of the level and nature of the protest, it appears the Soviets were only interested in placing their position on record. We do not plan a reply.

*Google Maps Alters Disputed South China Sea Shoal Name*, BBC NEWS (July 14, 2015), <http://www.bbc.com/news/world-asia-33518673>.

<sup>115</sup> See *Delimitation of the Border*, *supra* note 115, ¶ 3.28 (“Nor does the disclaimer (whatever may be its legal effect on the content of the map neutralize the fact that that State itself published the map in question.”).

<sup>116</sup> See *id.* ¶ 3.27 (“The Commission is of the view that such disclaimers do not automatically deprive a map of all evidential value. The map still stands as an indication that, at the time and place the map was made, a cartographer took a particular view of the features appearing on the map.”).

<sup>117</sup> See *id.* ¶¶ 3.21-3.22 (“But a map...which is...acted upon, or not reacted to, by the adversely affected party, can be expected to have significant legal consequences.”); Award in the Arbitration Regarding the Delimitation of the Abyei Area, *supra* note 110, ¶¶ 445, 447:

The SPLM/A [Sudan People’s Liberation Movement/Army] argues that the GoS [Government of Sudan] effectively waived its objections to the ABC Experts’ Report because it agreed, as provided in the ABC’s constitutive instruments, that the Report would be ‘final and binding.’ ... Insofar as there is any ground for a claim of estoppel (which is doubtful), the Tribunal would agree with the GoS that the SPLM/A, as a party to the Arbitration Agreement and, in particular, its Article 2, is estopped from objecting to the Tribunal’s review of the ABC Experts’ Report. (internal footnotes omitted).

*Id.* ¶¶ 449-51:

The SPLM/A further contends that the ABC Experts’ Report enjoys *res judicata* status and hence, cannot be impugned by the GoS ... The Tribunal sees no need to enter into an extended discourse on whether, as a matter of legal theory, the ABC Experts’ Report is of such a juridical nature that *res judicata* can attach to it ... Whatever the status of the ABC Experts’ Report, the Arbitration Agreement concluded by the Parties in 2008 had the effect of reopening questions that had been accepted as “final and binding,” thus novating the issues for decision in accordance with the contingencies in Article 2.

<sup>118</sup> See *Delimitation of the Border*, *supra* note 115, ¶ 3.17 (“While adding to the apparent number of different maps, they do not in substance do so – except as possibly showing a consistent course of conduct by a Party.”).

Probably the most likely appearance of a map in an estoppel obligation is for the map to function as an assertion or representation that would give rise to reasonable reliance or objection. In the *Temple of Preah Vihear* case,<sup>119</sup> France (on behalf of Cambodia) and Thailand entered into a treaty delimiting their border by identifying geographic features,<sup>120</sup> in particular the watershed line as agreed by a French/Thai commission.<sup>121</sup> Later, France ordered the area to be mapped.<sup>122</sup> The maps were published and shared with the Thai government. The maps described the watershed line differently and thus placed the Temple in Thailand.<sup>123</sup> In litigation before the ICJ, Thailand argued that the map contained “a material error, not explicable on the basis of any exercise of discretionary powers of adaptation which the Commission may have possessed,”<sup>124</sup> but that argument was never raised at the time, lying dormant for almost 50 years. The ICJ held that by failing to raise the claim at the time, Thailand had accepted the description of the border,<sup>125</sup> even though it may have contradicted the treaty. The Court rested its judgment on estoppel, i.e., Cambodia’s reliance on the map. The parties are now revising their maps accordingly.<sup>126</sup> Because the conclusion was an estoppel (or issue preclusion), the question is the role played by the map and we must conclude that it was the assertion on which Cambodia had relied. It was not challenged for its scientific value or accuracy. It did not create a legal obligation on its own. It “purported” to represent the watershed, and without objection, it was legally concluded to be the watershed as intended under the treaty. So the fact that it *did not* depict reality (according to Thailand) was the reason for its legal value. Thus, it functioned as an element of the estoppel.

#### CONCLUSION

Following on the above, maps have a far more broad and deep relationship with international law than is often observed. Generally, they are assumed only to be items of factual evidence, yet their role in international law touches on most of the most pressing considerations in establishing the legal relations between subjects of international law. Often a map is evidence for a fact at issue. In other cases, a map

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<sup>119</sup> See *Temple of Preah Vihear*, *supra* note 46; *Argentine-Chile Frontier Case (Arg. v. Chile)* 16 R.I.A.A. 109, 164 (Dec. 9, 1966) (upholding the estoppel rule pertaining to asserted maps expressed in the *Temple* case).

<sup>120</sup> See *Case Concerning the Temple of Preah Vihear*, *supra* note 46, at 16.

<sup>121</sup> See *id.* at 17.

<sup>122</sup> See *id.* at 20-21.

<sup>123</sup> See *id.* at 21.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.* at 23, 28, 32.

<sup>126</sup> See U.S. Dep’t of State, Cable BANGKOK 1818, 1 (June 2008), (“MFA Deputy Director General Pisanu Suvanajata told Poloff on June 11 that, after completion of an ongoing survey by the military and the Royal Thai Survey Department, the RTG would formulate a position on the Royal Government of Cambodia (RGC) map recently presented to the RTG in Paris.”); U.S. Dep’t of State, Cable BANGKOK 1877, at 1 (June 2008), <http://www.scoop.co.nz/stories/WL0806/S00354/cablegate-thai-cabinet-approves-cambodian-map-of-preahvihear.htm> (“On June 17, the Cabinet approved the Royal Government of Cambodia (RGC) map of Preah Vihear Temple, following approval by the National Security Council on June 16.”).

might still be used as evidence, but instead of evidence of a fact, it might be used as evidence of either the existence of a legal obligation or the content of the legal obligation. However, a map might also constitute a legal fact in its own right, triggering the application of a legal rule. Even more significantly, a map might constitute a legal act, being creative of new legal obligations, due to its link to a legal instrument, its role as an element of a legal instrument, or potentially on its own.