Civil-Military Relations in China: An Obstacle to Constitutionalism?

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I. INTRODUCTION

> The armed forces have three massive political advantages over civilian organizations: a marked superiority in organization, a highly emotionalized symbolic status, and a monopoly of arms. They form a prestigious corporation or Order, enjoying overwhelming superiority in the means of applying force. The wonder, therefore, is not why this rebels against its civilian masters, but why it ever obeys them.[1]

A standing army can pose a threat to the stability of any civilian regime. Constitutional regimes have evolved legal mechanisms to assure the subordination of the military to civilian authorities. However, given the advantages of the military in terms of both physical force and organization noted by Finer above, restraining military power requires much more than legal texts. When armed force was used to reassert authority in June 1989, the Communist Party of China demonstrated the paramount importance of the role that civil-military relations play in the current regime.

Civilian control is both a matter of the organization of civil society in a manner which neutralizes the organizational advantages of the military, as well as of the subjective inculcation of a military ethic to habituate the military to civilian control. As observed by Tuan-sheng

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Edited by Frances F Mi.

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The author would like to thank Prof. Andrew Nathan for soliciting this paper for the China and Constitutionalism project and for his generous comments on an earlier draft of this text. Andrew Scobell also provided positive commentary. The author would also like to acknowledge Professors Randle Edwards and Louis Henkin for so graciously welcoming my participation in the China and Constitutionalism seminar at Columbia University Law School in 1993. The diligent work of the editors of the Journal of Chinese Law merits special appreciation.

1. S.E. Finer, The Man on Horseback: The Role of the Military in Politics 6 (rev. ed. 1976).

Ch'ien, there is a tendency for the military to idealize obedience, all the while recognizing their pivotal role in government.[2] The way then to diminish military dominance in times of peace is to develop a political force with equal or greater organization and power than the military.[3]

This article begins with a discussion of various ideals of constitutionalism and of civil-military relations thereunder. The focus then turns to the status of civil-military relations in pre-revolutionary, revolutionary, and modern China. Finally, this article explores the relationship between the Chinese Communist Party (the "CCP" or the "Party") and the Chinese armed forces, the People's Liberation Army (the "PLA") and its affiliated paramilitary police, the People's Armed Police, with a view to establishing the minimum conditions under which civil-military relations in China could be made to conform to constitutional rule.

II. CONSTITUTIONALISM DEFINED

The role of civil-military relations in constitutionalism is, on the face of it, straight-forward. If constitutionalism is defined minimally in *Rechtsstaat* terms, as the formation and exercise of governmental authority by strict reference to positive law,[4] then the armed forces — as an institution established and maintained by state authority — must themselves be subject to the explicit sources of that authority Military authority would be defined in law, and all legitimate military activities would have a lawful basis grounded in statute.

The legitimate exercise of military power would require even more rigorous restriction if we accept the six principles of constitutionalism set out by Professor Louis Henkin: sovereignty of the people; government exercised only in accordance to law; limited government subject to a bill of individual rights; separation of powers; judicial review; and prohibition of the suspension of constitutional rule by extra-constitutional means.[5] Henkin's principles would imply civilian control in two senses:

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2. Tuan-sheng Ch'ien, The Government and Politics of China 180-81 (1950).

3. Id.

4. Here I mean to employ *Rechtsstaat* as a minimum kind of constitutionalism, i.e. a state of laws. By this standard, "commands should be issued and coercion be applied only on the basis of announced rules." Henry W Ehrmann, Comparative Legal Cultures 48 (1976).

5. See Louis Henkin, Constitutionalism and the Elements of Constitutionalism 2-3 (June 18-20, 1990) (unpublished manuscript prepared for the American Council on Learned Societies Conference on Constitutionalism and the Transition to Democracy in Eastern Europe, Pecs,

first, the scope of military command and control would be defined and articulated by a civil government installed through a constitutional process; and, second, constitutional avenues independent of the military chain of command would establish the authority to invoke military force and interpret the scope of military authority once invoked. Whereas constitutionalism of the *Rechtsstaat* variety simply requires a lawful basis to establish armed forces and demands a legal basis for its operational activities, Henkin's principles demand further inquiry into the framework of the civilian authority which legislates and administers the rule of law. Before passing to the problems of elaborating such an intricately articulated system of civilian constitutional control, it is appropriate to begin by reviewing the problems which may be encountered in establishing civil control of the simpler type.

It is generally accepted, following Max Weber, that the very definition of state authority involves the exclusive control of the organized use of force.[6] This implies not only that the control of military force is a defining feature of state authority, but conversely also, that military force is a defining feature of state sovereignty.[7] While the definition of state authority may well imply civilian control of the military (i.e. that the military is a tool of the state), the definition of state sovereignty directs attention to the reasons why in practice civilian control may be difficult to achieve. So long as military power defines the exercise of state sovereignty, it may be difficult to establish superordinate power over the armed forces. If the full exercise of civilian control may have as much to do with habits of obedience as with legal and constitutional texts, then we can also see how those habits of obedience may be destabilized in a crisis which threatens territorial sovereignty or the practical exercise of civilian legal authority over state institutions.[8]

Hungary, on file with author).

6. Max Weber: The Theory of Social and Economic Organization 156 (Talcott Parsons ed., The Free Press 1964) (1947).

7. Authority is exercised in many areas of human activity, not only by states, but by individuals as well. State authority refers to the particular form of imperative control exercised by governments in society. Sovereignty, however, is an exclusive property of states. The state exercises its sovereignty when it legitimately raises armies, but exercises its authority when it commands them. It is the latter power, the monopoly over the legitimate use of force which defines a state as a state.

8. S.E. Finer sees the propensity for military intervention in polities as a product of factors along three dimensions: the "motive," the "mood," and the "opportunity" for intervention. As for the "level" of intervention, Finer sees "the level of political culture" — corresponding to what we

The eminent English jurist A.V Dicey sees the problem of the army with respect to constitutionalism as "the means by which the maintenance of military discipline has been reconciled with the maintenance of freedom, or to use a more accurate expression, with the supremacy of the law of the land."[9] Dicey states:

> A permanent army of paid soldiers, whose main duty is one of absolute obedience to commands, appears at first sight to be an institution inconsistent with that rule of law or submission to the civil authorities, and especially to the judges, which is essential to popular or Parliamentary government. [10]

The peculiarity of the military as an institution in a constitutional order arises from the twofold relation of the soldier: s/he stands simultaneously in a particular relation to her/his fellow citizens outside the army at the same time as s/he stands in a special relation to the members of the army, especially towards her/his military superiors. "Any man, in short, subject to military law has duties and rights as a citizen as well as duties and rights as a soldier."[11]

The most important element of civil-military relations from the perspective of constitutionalism is that a soldier is subject to all the duties and liabilities of an ordinary citizen. S/he cannot be shielded from the legal consequences of obeying an order, and the civil courts are superior in respect of adjudicating the scope of military law and military obedience. Military force may be lawfully used to uphold the civil peace, but the civil courts may review in time of peace even those actions taken in the grip of a civil crisis.[12] In other words, constitutionalism in civil-

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have called here "habits of obedience" surrounding a particular political formula — as having a decisive importance. An internal or external crisis would affect both the mood and the opportunity for intervention, as well as provide a precipitating motive. See Finer, supra note 1.

9. A.V Dicey, Introduction to the Study of the Law of the Constitution 295 (8th ed. 1924) (London, MacMillan 1885).

10. Id. at 293.

11. Id. at 296.

12. The point here is not to contradict the lawfulness of emergency powers. The point is to confirm that — emergency powers within a constitutional order must be defined. So long as the scope of emergency powers is defined in law, then actions taken under emergency powers must be reviewable within the limits of the legislation establishing emergency powers. Otherwise emergency powers would vitiate constitutionalism. In this context we could note the postwar German reading of Hitler's actions undertaken by legal reference to the enabling acts passed under the Weimar Constitution as "*Ungerechtichs Recht*," or "unlawful law." Put differently, one may contemplate the suspension of civil rights under emergency conditions but not the suspension of

military relations would not allow the military to define the extent of its own lawful role.

III. CIVIL-MILITARY RELATIONS IN PRE-REVOLUTIONARY AND REVOLUTIONARY CHINA

Although the traditional Chinese political culture was decidedly anti-militarist,[13] the crisis of external aggression and internal upheaval which absorbed much of China's energies over the past century and a half has given the military a prominent and even dominant role in the state, preempting civilian control and inhibiting the exercise of constitutional authority If what is meant by constitutionalism involves the search for effective means to establish a constitutional order and not just an ideological posture in favor of subordinating the State to legal controls, then we must examine not only the juridical lacunae which describe the imperfect subordination of the military to constitutional control in China, but also the factors which may foster the acceptance of subordination to constitutional control, and conduct a comparative investigation of the transition to a constitutional order.

The "power of the purse" may be the most effective means of controlling militarism. Therefore the existence of a civilian bureaucracy as well as the processes of legitimation arising from the stable exercise of tax gathering and the relationship between taxation and consent, if not actual representation, therein, enables a civilian leadership to establish hegemony over the military at least in the medium term. In dynastic China, the civilian bureaucracy usually gained the upper hand over the military within a generation of the establishment of a new dynasty by military means. The most famous Chinese comment on this phenomenon is attributed to Yelü Chucai, the sinified minister to Ghengis Khan: "the empire may be won on horseback, but it cannot be ruled from horseback."[14] Successive efforts to retain a prominent role for the

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constitutionalism.

13. For a discussion of the place of the military in the Chinese political tradition, see Ping-ti Ho, Salient Aspects of China's Heritage, in 1 China in Crisis: China's Heritage and the Communist Political System 1-37 (Ping-ti Ho & Tang Tsou eds., 1968). See also the ensuing supplementary notes by H.G. Creel, id. at 59-78 and especially the addendum by Ping-ti Ho, id. at 84-85.

14. Da Lintai, Hubilie de Junshi Zhexue Sixiang, in Junshi Bianzhengfa Xinlun 171 (Liu Guangyan ed., Beijing: Junshi Kexue Chubanshe 1990) (citing Song Zizhen, Zhongshuling Yelugong Shendao Bei). For more on Yelü Chucai, see Igor de Rachewiltz, Yeh-lü Ch'u-ts'ai (1189-1243): Buddhist Idealist and Confucian Statesman, in Confucian Personalities 189-216 (Arthur F. Wright and Denis Twitchett eds., 1962).

military, either by the military colonization scheme established by Zhu Yuanzhang at the beginning of the Ming dynasty, or by the Banner system of the Qing dynasty, failed to maintain a competent military, let alone a politically vigorous one.[15]

The failure of Chinese constitutionalism in the first half of this century follows a path not dissimilar to one already taken by many developing countries in the post-war era and which is not dissimilar to the pattern to be seen in nineteenth and twentieth century Latin America. The Revolution of 1911 began as a series of mutinies which culminated in the formation of the Nanjing Provisional Government. The success of Yuan Shikai in securing the so-called "Reorganization Loan" from the Western imperial powers in 1913 gave him the leverage, based on his military dominance, to have himself named President of the Republic.[16] The combination of foreign financial and diplomatic support and access to domestic instruments of coercion freed him, and as a result, the military, from any dependence on constitutional structures. Ironically, new sources of funding enabled Chinese militarists, in a way not unlike contemporary military regimes elsewhere in the world, to escape revenue constraints. Banks and international agencies may today play the role that tribute played in the establishment and maintenance of traditional, military-bureaucratic empires.

Access to foreign sources of funding preempted the process which in dynastic times had engendered civilian preeminence in the state — reliance on a stable and specialized bureaucratic apparatus to supply the

15. The founder of the Ming dynasty, Zhu Yuanzhang, was conscious of the weak state of military preparedness which had allowed the Song dynasty to fall to the Mongols. He instituted a system which was designed to provide a standing army of hereditary soldiers in military colonies, or *tuntian*, as part of the *weisuo* system on the military frontier. Regarding this system see Romeyn Taylor, *Yüan Origins of the Wei-so System*, in Chinese Government in Ming Times: Seven Studies 23-40 (Charles O. Hucker ed., 1969). For the decline of this system, see Frederic Wakeman Jr., The Great Enterprise: The Manchu Reconstruction of Imperial Order in Seventeenth-Century China (1985). The Manchus, who founded the Qing dynasty, also set up a system of hereditary military regiments encamped throughout China. The "green standard" and "banners" were intended both to ensure the supremacy of the Manchus over their Chinese subjects as well as to provide a permanent standing military force. Just as the earlier military colonies of the Ming failed to repel the Manchus or the native rebellions which preceded them, the banner system proved unable to resist either the domestic rebellion of the Taipings or the invasions of the Western imperial powers in the mid-nineteenth century. See Edmond A. McCord, The Power of the Gun: The Emergence of Modern Chinese Warlordism 19-24 (1993).

16. For the background to the "reorganization loan" and its role in consolidating Yuan's power see Ernest P Young, The Presidency of Yuan Shih-k'ai: Liberalism and Dictatorship in Early Republican China 123-29 (1977).

revenue needed to administer a far flung empire. Instead, Yuan and succeeding warlord governments seated in Beijing relied on a bureaucratic apparatus staffed by foreigners and attuned to notions of sovereignty and legitimacy as interpreted in terms of international law by the Western powers — the China Maritime Customs Service, for revenue.[17] When Yuan's transparent flouting of China's own constitutional structures led to a renewal of the "War of North and South" the only terms of political argument which remained were military Political power was established and maintained by military force right up until the establishment of the People's Republic of China (the "PRC") in 1949

The armed Communist revolution in China did not unfold as a revolt against an established constitutional order, but rather as a split between the two competing revolutionary visions for China of the Kuomintang (the "KMT" or the "Nationalist Party") and the CCP Both sides gave lip-service to popular sovereignty, but in the case of the Nationalists, popular sovereignty was ultimately embodied in the struggle for national sovereignty, whereas the Communists saw "the people" and popular sovereignty in class terms. At the time of the Nanchang Uprising, which marks the founding of the Communist armed forces on August 1, 1927, there was no established constitutional order, only a warlord-dominated government seated in Beijing under challenge from the KMT, headquartered in the lower Yangtze. Chiang Kai-shek would not proclaim a provisional constitution for the Nanjing (or Nanking) government until the following year.

Unlike the French and American revolutions, the Communist revolt did not begin with an inquiry into the roots of legitimate government. It was, in the words of Stalin often quoted approvingly by the Chinese Communists, a case of "the armed revolution fighting the armed counter revolution."[18] In a confusion which is exploited by Communist authorities down to the present, "revolution" or "national revolution" in

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17. See C. Martin Wilbur, Military Separatism and the Process of Reunification Under the Nationalist Regime 1922-37, in 1 China in Crisis: China's Heritage and the Communist Political System 203-263 (Ping-ti Ho & Tang Tsou eds., 1968). On the particular question of finances, see id. at 210.

18. J.V Stalin, The Prospects of the Revolution in China, in On the Opposition 499, 505 (Foreign Languages Press 1974) (1928). For examples of its citation by the Chinese Communists, see Mao Tse-tung, Problems of War and Strategy, in 2 Selected Works of Mao Tse-tung 219, 221 (1975); Zhou Enlai, On the Sixth Congress of the Party, in 1 Selected Works of Zhou Enlai 177, 183 (1980).

the 1920's referred as much to the establishment of a sovereign state in the international system as it did to the establishment of a legitimate government. Chiang Kai-shek exploited the fact that in Sun Yat-sen's theory of stages in the national revolution, military power was a prerequisite to the establishment of popular power.[19] So long as the Nationalist regime remained under military threat, popular power could be postponed indefinitely Chiang's version of Sun's Three People's Principles was a kind of military vanguardism, in which the Nationalist Party and its ideology played a subordinate role.[20] Chiang, was primarily a military leader, who held power by maintaining hegemony over military factions. To him, the army formed the visible symbol of revived national power. In a Nationalist struggle, merely to achieve state power and national sovereignty was for Chiang a sufficient symbol of legitimacy [21]

For the Communists, revolutionary struggle was self-justifying and if ultimately successful, self-legitimating. Marxism teaches that revolutions are the locomotives of history Thus the role of the Communist armed forces is legitimated by revolutionary victory If Mao Tse-tung's version of Leninist vanguardism bore traces of Caesarist populism,[22] it also had a uniquely militarist flavor unlike anything in the Soviet revolution. Revolutionary victory was accomplished by an army in uniform, albeit indoctrinated in Marxism, and led by a Leninist vanguard party In any case, the chiliastic belief in the historical necessity of revolution based on Marxist historicism made any further inquiry into legitimacy superfluous. A revolutionary regime was legitimate by definition.[23] Since victory was impossible without popular

19. See Sun Yat-sen, The Outline of National Reconstruction: April 12, 1924, in Sun Yat-sen, His Political and Social Ideas: A Source Book 85 (Leonard S. Hsu trans., 1933).

20. See Tatsuo Yamada, The Foundation and Limits of State Power in Guomindang Ideology: Government, Party and People, in The Foundation and Limits of State Power in China 187-202 (Stuart R. Schram ed., 1987).

21. Chiang listed the abolition of extraterritorial rights by the Western imperial powers and the abolition of the treaty-port system as the achievements of the "national revolution."

22. Mao was both an orthodox and an unorthodox Leninist. His orthodoxy consisted in his absolute insistence on the indispensability of Party leadership in all areas of life and particularly with respect to the armed forces, even when the armed forces and the Party were virtually synonymous. His unorthodoxy was particularly evident during the Cultural Revolution, when he mobilized students against the organized structures of the CCP Chalmers Johnson refers to this kind of quasi-charismatic mass mobilization as a form of "Caesarism." See Chalmers Johnson, Caesarism in China, Encounter, Dec. 1976, at 76-82.

23. See J. Paltiel, De-Stalinization and De-Maoization: Leadership Succession and Reform in Leninist Regimes (1984) (unpublished Ph.D. dissertation, University of California, Berkeley).

class mobilization and popular support, the Communist armed forces became the embodiment of popular destiny and historical inevitability [24]

IV CIVIL-MILITARY RELATIONS IN COMMUNIST AND CONTEMPORARY CHINA

Mao Tse-tung's famous maxim "political power grows out of the barrel of a gun" is not a simple formula for militarist government.[25] At least as significant is its continuation: "Our principle is that the Party commands the gun and the gun must never be allowed to command the Party."[26] The first part of the statement is a general proposition concerning the source of sovereign power. The second part of the statement defines the particular formula for the exercise of military power used by the Chinese Communists. From the outset, therefore, the Chinese Communist formula for civil-military relations was peculiar from the perspective of constitutionalism — the military was to be subordinated to a party organization and not to any constitutionally mandated authority However, considerable ambiguity remained with respect to the proper definition of Party control. Party and army maintained a symbiotic fusion, as Stuart Schram pointed out:

> The most important and most typical experience of the Party for Mao was, however, as a soul or parasite inhabiting the body of the Red Army Although the two were theoretically distinct, the de facto symbiosis between them, persisting as it did over a long period of time, could not fail to affect the

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24. The Preamble to the 1982 Constitution of the PRC reads in part:

> After waging hard, protracted and tortuous struggles, armed and otherwise, the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism, and boureaucrat-capitalism [sic], won the great victory of the new-democratic revolution and founded the People's Republic of China. Thereupon the Chinese people took state power into their own hands and became masters of the country.

Constitution of the People's Republic of China, pmbl. (adopted Dec. 4, 1982), translated in Constance A. Johnson, Constitution of the People's Republic of China, 4 Constitutions of the Countries of the World 36 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992) [hereinafter 1982 Constitution]. While the precise formulation has varied, the preamble of each previous constitution of the PRC contained the essential formula equating popular struggle with the leadership of the communist party and the legitimacy of the state as resting on that struggle.

25. Mao, supra note 18, at 219, 224.

26. Id.

> manner in which the Chinese Communists perceived the Party "[27]

A unique historical feature of Chinese Communism has been the fact that in crucial periods, such as in the late 1920's and especially during the Long March of 1934-35, the Party has existed all but exclusively as a nucleus of the armed forces. Throughout the revolutionary civil war and persisting after the establishment of the PRC, the PLA has been a major, if not the main avenue, for recruitment into the Party [28] In the early years of Mao's guerilla activity in the Jinggang Mountains on the Hunan-Jiangxi border Mao established a norm of maintaining a one-to-one ratio of Party members to nonmembers among combat soldiers.[29] Eventually, a ratio of one Party member to two nonmembers was deemed adequate.[30]

This peculiar historical relationship of the CCP to the PLA has fostered a symbiotic relationship between the two organizations. The genesis of the CCP in a militarized, partisan movement has meant that "civil-military relations" are simply two faces of the same, organized elite.[31] No less an authority than Deng Xiaoping himself has admitted

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27. Stuart R. Schram, The Party in Chinese Communist Ideology, in Party Leadership and Revolutionary Power in China 170, 171 (John W Lewis ed., 1970).

28. During the civil war, 20 percent of all Party members were also in the PLA, giving a figure of 1.25 million out of a total of 5.8 million Party members in 1950. See John Gittings, Army-Party Relations in the Light of the Cultural Revolution, in Party Leadership and Revolutionary Power in China 373, 393 (John Wilson Lewis ed., 1970). More recently, David Shambaugh estimates that 1.2-1.5 million PLA members out of a total 2.5 million PLA members are also Party members. However, this represents a much smaller proportion of the now 50 million Party members. David Shambaugh, The Soldier and the State in China: The Political Work System in the People's Liberation Army, 127 China Q. 527, 550 n.85 (1991).

29. Mao Tse-tung, The Struggle in Chingkang Mountains, in 1 Selected Works of Mao Tse-tung 73, 84 (1965).

30. Id. at 104 n.15. Some sources claim that as part of an effort to reform and streamline the military, the Central Military Commission under Deng Xiaoping directed in the early 1980's that the percentage of military, Party members be reduced to 20 percent with the military academies providing the bulk of recruits. See Chu-yuan Cheng, Behind the Tiananmen Massacre 108 (1990). See also Alastair I. Johnston, Party Rectification in the People's Liberation Army, 1983-87, 112 China Q. 603 (1987).

31. Cheng Hsiao-shih, Party-Military Relations in the PRC and Taiwan: Paradoxes of Control 4-5 (1990). The concept of a "dual-role elite" derives from the work of Amos Perlmutter and William M. LeoGrande. See Amos Perlmutter & William M. LeoGrande, The Party in Uniform: Toward a Theory of Civil-Military Relations in Communist Political Systems, 76 American Political Science Review 778, 778-79 (1982).

the peculiar identity of an army which is simultaneously the military arm of the socialist state and of a political party [32]

A. *The Military in the Constitution*

From the outset there has been ambiguity in the Chinese Communist formula for sovereignty and legitimacy While Chinese constitutions since 1949 vested sovereignty in the people, all have also, implicitly or explicitly, subordinated the State to the Party Moreover, one effective index of the extent of subordination to the Party has been the explicit subordination of the armed forces to the Party The Constitutions of 1975 and 1978 explicitly subordinated the armed forces to the command of the Chairman of the CCP [33] Like other aspects of the Chinese state and society, since 1978 the military has not only been placed under the framework of the Constitution, but has also, in particular since 1988, gradually had more of its activities covered and defined in law.[34] Every effort, however, has been taken to ensure that this process does not attenuate or dilute Party leadership. In other words, there have been concentrated efforts to provide a framework of "rule by law" as distinct from strict adherence to "rule of law" The distinction lies in the elaboration of a body of laws to cover military activities without a corresponding structure to make government and Party authorities accountable before the law. The signs of this effort can be seen both in legal doctrine as well as reflected in the structures of the military There is no pretence of legal or judicial independence: the Military Procurate and the Military Court are directly subordinated to the General Political Department of the PLA, which as we have seen, is directly subordinated to the Party's military commission under the Party constitution and is specifically charged with carrying out the will of the Central Committee.

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32. Deng Xiaoping, Deng Xiaoping Wenxuan III 334 (Renmin Chubanshe, 1993).

33. Constitution of the People's Republic of China, art. 15 (1975) (Foreign Languages Press); Constitution of the People's Republic of China, art. 19 (1978) (Foreign Languages Press).

34. Not until 1987 did the Chinese State Education Commission establish military law as a separate course of study. Only in June 1988 did the CMC establish a "Legal System Bureau" (or *Fazhi Ju*). The first association for the study of military law was founded in Beijing in 1990, and in December 1991 a research association in military law was established under the Chinese Legal Association (or *Zhongguo Faxuehui*) and organized the publication of a periodical entitled "The Chinese Military Legal System" (or *Zhongguo Junshi Fazhi*). See Junshi Faxue Jiaocheng 13-14 (Tu Men ed., Falu Chubanshe 1992).

With consistency and candor, Chinese military-legal doctrine expressly subordinates the armed forces to the Party:

> The legal relationship between the armed forces of the People's Republic of China and the Chinese Communist Party includes both the jurisdiction of the CCP over the armed forces of the PRC and the obligations of the armed forces to the CCP Speaking generally, the CCP has *de facto* absolute leadership power over the armed forces of the PRC, and the Party Committees at various levels and the company level Party branches are the unified leadership core of the troops.[35]

In addition to the above jurisdiction recognized in law, the armed forces owe a reciprocal duty to the CCP:

> In general, the armed forces have the following obligations to the CCP: they must remain under the absolute leadership of the CCP, they must follow and obey the leadership and command of the Party Central Committee and Central Military Commission [of the Party], to be eternally loyal to the Chinese Communist Party Concretely, this includes the following aspects: (1) To carry through and carry out the Party line, orientation and policies, especially the line, orientation and policies respecting national defence; (2) Absolutely follow the command of the Central Committee and the Central Military Commission; (3) Resolutely carry out the important decisions of the Central Committee and Central Military Commission concerning the construction of the armed forces; (4) to maintain a high level of unanimity with the Central Committee and Central Military Committee in thought, action and politics; (5) military and political commanders, according to the division of labour under the Party commander have joint responsibility to the units they are subordinated to.[36]

The legal principle of absolute leadership of the Party even applies to the independent role of military courts, as is illustrated in the following textbook explanation:

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35. Id. at 86-87.
36. Id.

> The military court is a judicial organ of the State, and the military procurate is the supervisory organ of the State. This quality determines their special status within the military, i.e. that they must be independent of any military administrative organ or commander, and must have a guarantee of independently carrying out its jurisdiction. The military court, and the military procurate must obey Party leadership while independently exercising their judgement and supervision. The correct leadership of the Party is the basic guarantee of the independent exercise of their jurisdiction.[37]

Since both the Party and State constitutions constrain all individuals and organizations to act within the law and the PRC Constitution,[38] there is potential ambiguity between the legal authority of constitutional bodies like the NPC and the political and legal obligation imposed on the PLA and other armed forces (including the People's Armed Police) to obey the orders of the CCP This ambiguity is only avoided by the dominance of the CCP in the NPC. From this, we can draw the conclusion that not only does the constitutional theory of the PRC presuppose a monopoly of power by the CCP, but that a special and unique role in maintaining that monopoly devolves on the PLA. In effect, the political role of the PLA is a defining feature of the CCP's monopoly of power.

B. The Central Military Commission

Where the 1954 Constitution had vested control over the armed forces in the President of the PRC and the 1975 and 1978 counterparts had brazenly vested control in the Chairman of the CCP, the 1982 Constitution of the PRC established a Central Military Commission (the "CMC") which formally subordinated the military to an organ of the State. However, great pains were taken to expressly emphasize that the

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37. Id. at 335.

38. Article 5 of the 1982 Constitution of the People's Republic of China reads in part: "All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the constitution and the law. All acts in violation of the constitution and the law must be looked into." 1982 Constitution, supra note 24, art. 5. The General Programme of the 1982 Constitution of the Communist Party of China reads in part: "The party must conduct its activities within the limits permitted by the constitution and the laws of the state." Id.

establishment of this institution "in no way" weakens the Party's leadership over the military [39] At the time of the drafting of the current Constitution, discussion centered not around whether leadership of the armed forces ought to be removed from the Party, but rather whether the constitution should make any reference to the subordination of the army to the State at all:

> [One] opinion considered it unnecessary to establish a Central Military Commission, feeling that the absolute leadership status of the Chinese Communist Party over the Army was already formed through the long revolutionary struggle, so therefore any other reference in the constitution was unnecessary The constitutional revision committee later chose the first opinion, and established the CMC in the constitution. *In this way the Party can more effectively lead the Army through the state organs.*[40]

Prior to 1982, the "Central Military Commission" (or *Zhongyang Junwei*) always referred to the internal command organ of the CCP with power over the armed forces. Thereafter, the 1982 Constitutional provisions concerning the CMC were drafted in a manner conducive to ensuring the continued direct dominance of the CCP over the military Article 94 makes the Chairman of the CMC responsible to the National People's Congress (the "NPC") but makes no requirement on him to report to it or its Standing Committee.[41] Furthermore, while the Chairman is elected by the NPC, the other members of the CMC including its Vice-Chairmen, are nominated by the Chairman. Finally, since its establishment in 1982, the membership of the CMC has always been cognate with that of the military commission of the CCP A commentary on the Chinese Constitution explains the relationship between the two military commissions this way·

> The Party CMC is an internal Party organ. In its makeup, the personnel making up the Party CMC duplicate exactly the personnel of the State CMC, such that through discussion

39. See Zhonghua Renmin Gongheguo Xianfa Shiyi 205 (Zhu Feng et al. eds., 1993).

40. Xiao Weiyun, Woguo Zianxing Xianfa de Dansheng 73-74 (Beijing Daxue Chubanshe, 1986) (emphasis added).

41. 1982 Constitution, supra note 24, art. 94.

> between the Chinese Communist Party and the democratic parties the Chairman, vice-Chairmen and members of the Party CMC are nominated as candidates at the time when the State CMC is being formed by the NPC, and through election they become the Chairman, vice-Chairmen and members of the State CMC. In this way the functions of the Party and the state are distinguished, completing the structures of the state as well as consolidating the leadership of the Party over the Army [42]

Article 93 does not specify the duties of the CMC in detail, only that "[t]he Central Military Commission of the People's Republic of China directs the armed forces of the country" [43] The same Article states that "[t]he Chairman of the Central Military Commission has overall responsibility for the Commission."[44] Plainly stated, the "new" institution is a legal fiction: the 1982 Constitution attempted to "constitutionalize" the existing Party CMC within the PRC State structure without altering the organizational channels subordinating the Chinese armed forces to the CCP The existing CMC of the Communist Party simply acquired an additional signboard designating it as the State CMC as well.

This new legal position in some ways confounded the mechanism which had earlier anchored the armed forces in the State hierarchy, since the PRC also has a Defence Minister in the State Council. The Defence Ministry, like the State CMC, however, is only another facade for the Party's military commission. Prior to the establishment of the CMC and before Deng Xiaoping established overall paramountcy in the Party and its military commission at the Third Plenum of the 11th Central Committee in December 1978, the Defence Minister was normally the Party military commission's Senior Vice-Chairman.[45] The Defence Ministry, however, is really an empty shell whose functions are largely undertaken by the CMC. Indeed, while the CCP Constitution is even more terse about the functions of its own military commission than the PRC Constitution is about those of the State CMC, Article 23 of the

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42. See Zhonghua Renmin Gongheguo Xianfa Shiyi 205 (Zhu Feng et al. eds., 1993).

43. 1982 Constitution, supra note 24, art. 93.

44. Id.

45. Harvey L. Nelsen, The Chinese Military System: An Organizational Study of the Chinese People's Liberation Army 46-47 (2d ed. 1981).

Party Constitution does specify that the General Political Department (the "GPD") of the PLA "is the political-work organ of the [CCP] Military Commission; it directs Party and political work in the army The organizational system and organs of the party in the armed forces will be prescribed by the [CCP] Military Commission."[46] Other sources imply that both the General Staff Department and the General Logistics Departments are departments of the CMC.[47] Nevertheless, legal commentaries on the Party Constitution recognize a division of functions with respect to the military between the state CMC and the Defence Ministry of the State Council:

> The CMC is the leadership organ for the armed forces of the whole country, it is the state's military decisionmaking department, it commands and directs the armed forces of the whole country As for matters relating to the construction of military force, such as the personnel system of the armed forces, its budget, expenses, equipment and the military service system, etc., these are the responsibility of the Defence Ministry The Ministry of Defence is the state administrative organ exclusively charged with the construction of the armed forces under the leadership of the State Council.[48]

Today, the Defence Minister, while always a member of the CMC, ranks no higher than third within the CMC structure. Currently, while President and Party Secretary General Jiang Zemin is Chairman of the CMC, its First Vice-Chairman is Liu Huaqing and its Second Vice-Chairman is General Zhang Zhen. Defence Minister Chi Haotian is not even a CMC Vice-Chairman, and is, therefore, the fourth-ranking on a commission of eight.

While there is, apparently, no legal or other requirement specified in any document, the Defence Minister has always been a uniformed officer of the PLA. Indeed, in the 1980's this practice of having a senior ranking officer as Defence Minister meant that even as younger ministers

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46. Constitution of the Communist Party of China, art. 23 (September 1982).

47. See Junshi Faxue Jiaocheng, supra note 34, at 179-180. Confirmation of this may be found in the works of Deng Xiaoping. See, e.g., Deng Xiaoping, Speech at a Forum of the Military Commission of the Central Committee of the CCP, in 1 Selected Works of Deng Xiaoping, 1975-1982, 386, 388 (Foreign Language Press 1984) (1982).

48. Xianfa Yu Fa de Lilun Jianghua 116 (Lu Ning et al. ed., Zhongguo Guangbo Dianshe Chubanshe 1991).

were appointed to other State Council posts, Defence Ministers, like Xu Xiangqian and Zhang Aiping, served into their seventies and eighties. If Chi Haotian is in his sixties, those outranking him on the CMC, with the exception of Jiang Zemin, are at least a decade older. Both the fact that the Defence Minister is an active duty officer, and the fact that the CMC is dominated by senior military personnel illustrate the ambiguity of "civilian leadership" in China.

C. *"Professionalism" and Civil-Military Relations in China*[49]

The literature on civil-military relations has been profoundly influenced by the framework offered by Samuel Huntington in *The Soldier and the State*.[50] He identifies two models of civilian control: subjective and objective. The subjective model focuses on the role of the military in civilian politics and power struggles:

> The simplest way of minimizing military power would appear to be the maximizing of the power of civilian groups in relation to the military The large number, varied character, and conflicting interests of civilian groups, however, make it impossible to maximize their power as a whole with respect to the military Consequently, the maximizing of civilian power always means the maximizing of the power of some particular civilian group or groups. This is subjective civilian control. The general concept of civilian control is identified with the specific interests of one or more civilian groups. Consequently, subjective civilian control involves the power relations among civilian groups. It is advanced by one civilian group as a means to enhance its power at the expense of other civilian groups.[51]

The objective model, is distinguished from subjective civilian control in that the military is "professionalized" and removed from civilian power plays:

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49. The discussion in the following pages develops substantially the arguments presented in the Author's article "PLA Allegiance on Parade: Civil-Military Relations in Transition." Jeremy T. Paltiel, PLA Allegiance on Parade: Civil-Military Relations in Transition, China Q. (forthcoming September 1995).

50. Samuel P. Huntington, The Soldier and the State (1957).

51. Id. at 80.

> Civilian control in the objective sense is the maximizing of military professionalism. More precisely, it is that distribution of political power between military and civilian groups which is most conducive to the emergence of professional attitudes and behavior among the members of the officer corps. Objective civilian control achieves its end by militarizing the military, making them the tool of the state. The antithesis of objective civilian control is military participation in politics: civilian control decreases as the military become progressively involved in institutional, class, and constitutional politics. Subjective civilian control, on the other hand, presupposes this involvement. The essence of objective civilian control is the recognition of autonomous military professionalism; the essence of subjective civilian control is the denial of an independent military sphere.[52]

According to Huntington, the general formula for civilian control over the military in the PRC, as in all communist regimes, is subjective, whereas constitutional control over the military should ideally take the objective form.

A substantial literature has grown around the application of "professionalism" to the military in Communist regimes and in the PRC in particular. The significance of the political commissar system, which Leon Trotsky instituted in the Soviet Red Army during the Russian Civil War, has been the touchstone of debate surrounding professionalism in Communist armies both in China and in the former Soviet Union. One view holds that the dual command structure involving the political commissars formed an effective check on the professionalism of the Soviet military and was a source of tension and conflict between professional soldiers and political officers in the military.[53] Other commentators, notably Timothy Colton and William Odom, dispute the fact that any overt tension existed. Colton argues that the political commissar system was functional to the operation of a professional military, and does not view the political commissars and the system controlled by the Main Political Directorate (or Glavnoye Politicheskoye

52. Id. at 83.

53. See Roman Kolkowicz, Interest Groups in Soviet Politics: The Case of the Military, in Civil-Military Relations in Communist Systems 9-25 (Dale R. Herspring & Ivan Volgyes eds., 1978).

Upravlenie) as an alien Communist Party "penetration" of the armed forces.[54] Odom, on the other hand, tends to reject the applicability of Huntington's dichotomy of civilian control and disputes the extent to which "professionalism" can be identified as a distinct analytical category.[55]

With regards to the Chinese armed forces, a number of authors have regarded the PLA as on a trajectory from a revolutionary military towards a "professional" armed forces with the concomitant corporate ethic among the officer corps. This has been the view of Ellis Joffe,[56] and, in particular, Harlan Jencks.[57] Jencks goes so far as to conclude that the decision to support the repression of the demonstrators in 1989 was itself an indication of the professional judgment of the military that it was better to support a bad policy than to succumb to factional fighting.[58]

Cheng Hsiao-shih, another commentator, has challenged the way in which the civilian control problem has generally been posed with respect to the Chinese military He argues that both the political work system of the PLA and the network of Party committees — a system without exact parallel in the former Soviet Red Army — function in fact as an institution for the realization of army dominance in the Party and State rather than the other way around. The density of Party institutions in the PLA as well as the overlapping institutions of the PLA and Party provide military personnel with permanent representation on the highest decision-making bodies of the Party, and, by implication, also the State.[59] Rather than realize Party dominance over the PLA, the CMC ensures Party dominance in the State, and so by implication, significant military influence over the State.

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54. Timothy Colton, Commissars, Commanders, and Civilian Authority: The Structure of Soviet Military Politics (1979).

55. William E. Odom, The Party-Military Connection: A Critique, in Civil-Military Relations in Communist Systems 27-52 (Dale R. Herspring & Ivan Volgyes eds., 1978).

56. See Ellis Joffe, Party and Army: Professionalism and Political Control in the Chinese Officer Corps, 1949-1964 (1965); Ellis Joffe, The Chinese Army After Mao (1987).

57. See Harlan Jencks, From Muskets to Missiles: Politics and Professionalism in the Chinese Army, 1945-1981 (1982).

58. Harlan Jencks, Civil-Military Relations in China: Tiananmen and After, 40 Problems of Communism 24-25 (1991).

59. At the most recently elected National People's Congress, just under 9% of the delegates were active service PLA personnel. While by no means a dominant proportion of delegates, it still over represents the military with respect to the overall adult population by an enormous order of magnitude. See Zhongguo 1994, at 29 (1994).

As Cheng Hsiao-shih has noted:

> [W]hat was generally called "party-military relations" in the party control model in fact refers to *civil-military relations within the Party* Unless the Party is no more the structure of the state and the party-state has changed its nature, conflicts between civilian and military elites are intra-Party elite conflicts first and civilian-military conflicts second.[60]

In addition to the political commissar system, the CCP subordinates military commanders at each level to the corresponding Party committee. Cheng argues that this in fact constitutes the main locus of Party control in China. In contrast with Joffe,[61] Jencks,[62] and White,[63] David Shambaugh leans towards a thesis more consistent with Roman Kolkowicz.[64] Despite his approving references to William Odom, Shambaugh argues that at least in the immediate aftermath of the Tiananmen repression, the professionalization of the PLA has been countered by intensive politicization instituted through the GPD Even accepting that the Tiananmen repression was an aberration within a secular trend towards the professionalization of the Chinese military, the periodic reiteration of "political work" on behalf of the Party supports the contention that the GPD functions as an external agent of indoctrination. The GPD thus appears as an alien arm of the Party inside the professional military·

> From one perspective, it could be argued that the two [the Party and the PLA] are locked in a symbiotic relationship in which they sustain each other. From another, the structures and processes of control suggest that Party *control* of the military remains a more viable paradigm for understanding the relationship (particularly from 1959-78 and since 1987). If the

60. Cheng Hsiao-shih, supra note 31, at 5 (discussing Nelsen, supra note 45, and Odom, supra note 55).

61. See supra note 56 and accompanying text.

62. See supra notes 57-58 and accompanying text.

63. For Lynn White's views on the growth of military professionalism, see Li Cheng & Lynn White, The Army in the Succession to Deng Xiaoping: Familiar Features and Technocratic Trends, 33 Asian Survey 757-86 (1993).

64. See supra note 53 and accompanying text.

> relationship were more symbiotic, the Party would not go to such lengths to assert control over the PLA.
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> Alternatively, perhaps the proper explanation is that the relationship of the soldier and state in China has evolved over time from one of symbiosis to control.[65]

Diverse observers, such as Eberhard Sandschneider,[66] Gerald Segal,[67] and Harry Harding, have all agreed that the Chinese military is unable to act as a cohesive group against civilian Party authorities. Harding believes that the incapacity of the military to behave in a politically cohesive manner stems from the fact that the coherence of the military is undercut by deep and complex internal cleavages, in addition to the institutions of Party control.[68] By contrast, Sandschneider points to the integration of the Party elite as the factor which inhibits the articulation of distinctive military interests. He states that: "Historical heritages and common belief systems resulted in high complexity and integration with the overall PRC leadership. Institutional control mechanisms could therefore never work properly."[69]

The continued relevance of the military as an arm of the CCP rather than the State is documented in the "political work", i.e. indoctrination, materials issued in the aftermath of the 1989 repression. These highlight "absolute leadership of the Party" and explicitly repudiate the doctrine of political neutrality·

> The Party's absolute leadership over the Army is a basic principle of our Army's construction, and is a reliable guarantee ensuring that the Army is always politically qualified. A handful of people who obstinately adhere to the stand of bourgeois liberalization advocate so-called non-Party involvement in the military, the apoliticization of the Army and a "division between the Party and the Army," in a vain

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65. Shambaugh, supra note 28, at 567-68.

66. See infra note 69 and accompanying text.

67. "In sum, we are unable to lend much credence to the claim that the PLA operates as an identifiable group on professional issues." Gerald Segal, The Military as a Group in Chinese Politics, in Groups and Politics in the PRC 90 (David S.G. Goodman ed., 1984).

68. Harry Harding, The Role of the Military in Chinese Politics, in Citizens and Groups in Contemporary China 213, 222-25 (Victor Falkenheim ed., 1987).

69. Eberhard Sandschneider, Military and Politics in the PRC, in Chinese Defense and Foreign Policy 331, 335 (June T. Dreyer ed., 1989).

> attempt to cause our Army to break away from the leadership of the Party These erroneous remarks and tendencies must be resolutely resisted and opposed. The Communist Party of China is the party in power and the core of the leadership of the socialist cause representing the fundamental interests of the country and the people. The leadership of the Party over the Army is the same as the leadership of the state over the Army, and the two should never be set against one another. The emphasis of the leadership of the state over the Army should not be used to weaken the Party's leadership over the Army Our Army's purpose is to carry out the Party's programmes and serve the Party line and both the nature of our Party and the class nature of our Army determine that our Army must accept the absolute leadership of the Party [70]

From the constitutional standpoint there is little difference between a recognition that the Party penetrates the armed forces or that the two symbiotically dominate the State. Neither alternative is compatible with the principles of constitutionalism, and both violate the sovereignty of the people as formally expressed in the Chinese Constitution.[71] However, from the perspective of the possible constitutional evolution, the distinction is significant. If the Chinese military is moving towards professionalism, then the Party institutions penetrating the military are the only, albeit substantial obstacle to moving civil-military relations in a constitutional direction. If the hypothesis of

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70. Chinese Communist Party Central Committee Circular, Concerning Several Questions Related to Strengthening and Improving the Army's Political Work Under the New Situation, (Central Document No. 4, 1990), reprinted in 131 China Q. 876, 883-84 (1992). For the speech by Yang Baibing introducing the document, see Yang Baibing, An Explanation of "Several Questions Concerning Strengthening and Improving the Political work of the Army Under the New Situation," 131 China Q. 897 (1992).

71. Of course, the sovereignty of the people is, in China, already limited by the doctrine of "The People's Democratic Dictatorship" which defines "the People" in exclusive terms as the working class, the peasantry, the urban petty bourgeoisie and the national bourgeoisie. Those not included in the definition of "the People" are denied democratic rights (and hence sovereignty). See Mao Tse-Tung, On the People's Democratic Dictatorship, in 4 Selected Works of Mao Tse-tung 411, 417-18 (1975).

symbiosis is correct, then interests within the armed forces may obstruct and inhibit movement towards constitutionalism.[72]

The problem of CCP domination arises in questioning whether devotion to the Party cause continues to have a clear meaning. Cheng Hsiao-shih, for example, argues that under the current ideological and institutional setup, Party loyalty is merely equivalent to loyalty to the sovereign.[73] Furthermore, the current PRC Constitution obliges the military to promote modernization and regularization of the armed forces.[74] The real question is whether the goals of the Party are distinct from those of the state and national defence. In what circumstances would these various goals cease to be congruent, and obedience to the Party hierarchy compromise the substantive goals promoted by political indoctrination? Post-revolutionary parties like the CCP no longer have distinct political goals or agendas which favor one set of societal interests over all others. The Party is able to maintain a monopoly of power so long as it monopolizes politics. That monopoly depends on the extent to which the Party manages to co-opt political demands and deliver a substantive program which distributes rewards among powerful interests. Only when the Party fails to effectively co-opt societal interests is there a serious opportunity for the development of extra-Party opposition. The emergence of an opposition creates the structural conditions to distinguish Party loyalty from loyalty to the State. However mendacious the sovereignty of the People may appear in PRC practice, its core presence in the legitimation theory not only of the State but of the Party and the PLA as well creates a potential for division between loyalty to a Party leadership and to the interests of the people.

Twice in the history of the PRC, Party leaders have been able to shunt aside the civilian basis of institutional rule by resorting to

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72. Perlmutter and Leogrande apply the concept of the "party in uniform" to show that in any intra-Party crisis, the military has the potential to intervene, but that this intervention is done in order to uphold Party power, not in contradiction to it. See Perlmutter & Leogrande, supra note 31.

73. Cheng Hsiao-shih, supra note 31, at 76.

74. Article 29 states:

> The armed forces of the People's Republic of China belong to the people. Their tasks are to strengthen national defence, resist aggression, defend the motherland, safeguard the people's peaceful labour, participate in national reconstruction, and work hard to serve the people.
>
> The state strengthens the revolutionization, modernization and regularization of the armed forces in order to increase the national defence capability.

1982 Constitution, supra note 24, art. 29.

privileged access to the military high command. The first was Mao's deployment of the military to "support the left" in 1967 The second was Deng Xiaoping's deployment of the military both against the Beijing demonstrators at Tiananmen and against Zhao Ziyang in May and June 1989 These two instances well illustrate the ambiguity of civilian leadership in the PRC and the resultant structural weakness undermining constitutionalism. As Timothy Brook concluded in his study of the military repression of 1989, "no Chinese political leader can act independently of the military The fact of the matter is that the Party man who controls the Army controls the Party "[75]

Mao's deployment of the military in 1967 clearly violated the 1954 Constitution, which stated that the state president, then Liu Shaoqi, was the commander in chief.[76] Deng's deployment of the military in 1989 at least conformed to the letter of the law Deng Xiaoping was Chairman of the CMC, and there was constitutional provision for the declaration of martial law [77] Nevertheless there were irregularities concerning both the convening of the CMC of which Zhao was Vice-Chairman,[78] and the abortive effort to call the NPC Standing Committee into session.

Interlocking and overlapping personal relations at the senior elite level of the Party and State perpetuate a vicious circle and preempt the demarcation of political authority along institutional lines. So long as consensus is achieved informally within a tight interlocking elite, the need for clearly defined institutional boundaries is obviated. Moreover, such elite groups may be regarded as an obstacle to consensus formation. Indeed, the gap between the military-political system in China and the norms demanded by constitutionalism as a state of laws, is, at root, the result of Leninism as an "organizational" regime. There may well be an

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75. Timothy Brook, Quelling the People: The Military Suppression of the Beijing Democracy Movement 30 (1992).

76. Article 42 of the 1954 Constitution states: "The Chairman of the People's Republic of China commands the armed forces of the state, and is Chairman of the Council of National Defence." N.M. Tripathi Private Ltd., Constitutions of Asian Countries 170 (1968).

77. Article 89(16) gives the State Council the power "to decide on the enforcement of martial law in parts of provinces, autonomous regions and municipalities directly under the central government." 1982 Constitution, supra note 24, art. 89(16).

78. Despite the fact that Zhao Ziyang was previously reported to have day-to-day charge of the work of the CMC through his position of Vice-Chairman, he was excluded from the deliberations on the disposition of military force in Beijing. See generally Jonathan M. Pollack, Structure and Process in the Chinese Military System, in Bureaucracy, Politics, and Decision Making in Post-Mao China 151 (Kenneth G. Lieberthal & David M. Lampton eds., 1991).

elective affinity between the cultural values of Chinese society and *guanxi*, but the role of personal connections in the political system is fundamentally determined by the role of the Party organization as the personnel matrix of the political regime.

VI. CONCLUSION

A clear differentiation of institutional authority translated into a justiciable set of legal norms, in the sense that C.H. McIlwain identifies as *jurisdictio*,[79] is at least a minimum requirement of constitutionalism.[80] These norms are currently absent. Instead, a senior leader acts as the "core" (or *hexin*) of the interlocking hierarchy.[81] This "core leader" is himself unchecked and unaccountable, except when bargaining is needed to achieve consensus among feuding functional hierarchies. This contradicts constitutionalism, allowing the armed forces to bargain for the right sort of "deal" from their nominal "superiors" in return for allegiance.

The growing complexity of the Chinese state and economy together with the emergence of younger generations of leadership with a more professional orientation means that the cohesive band of leaders united by common guerilla experience around a core leadership may no longer be sustainable.[82] Younger PLA commanders, political and

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79. McIlwain explains the development of constitutionalism in terms of the expansion of *jurisdictio* or the domain of law as interpreted by the courts, against the *gubernaculum*, the domain of arbitrary will of the government or sovereign. See generally Charles H. McIlwain, Constitutionalism Ancient and Modern 134-40 (1940).

80. The effort at the height of political reform after the 13th Party congress in 1987-88 did not go much further than defining administrative boundaries. The Guo Luoji case discussed elsewhere shows the limits of administrative litigation in China.

81. Any leadership collective has to have a core. Without a core the leadership is unreliable. Chairman Mao was the core of the leadership collective of the first generation. Because there was Chairman Mao to play the role of leadership core, the 'Cultural Revolution' did not overthrow the Communist Party. In the second generation, actually I am the core. Because there is this core, even though there have been two leadership changes [i.e. Hu Yaobang in 1987 and Zhao Ziyang in 1989] these have not affected the leadership of our Party. Party leadership has remained stable.

Deng Xiaoping, Disandai Lingdao Jiti de Dangwu Zhi Ji, in Deng Xiaoping Wenxuan III, supra note 32, at 310. Note the contrast Deng draws between the indispensability of the "core leader" and the dispensibility of other leaders. In effect "Party leadership" is identified with the "core."

82. Political indoctrination documents in the post 1989 period indirectly address this problem. One such document declares:

> [A]dhering to the leadership of the Communist Party is the core of the four cardinal principles; whether or not we take the socialist road and need the party's leadership is

military, do not share a common set of experiences with other Party elites.[83] While this by no means inevitably augurs civil-military conflict within the Party, it will transform the personal ties within the higher echelons of the Party which have heretofore produced a consensus around a core. Both Deng and Mao used their personal authority and personal ties to consolidate their leadership even in the face of policy differences coming from inside the military.[84] Deng placed his personal secretary and head of the Deng Xiaoping Office, General Wang Ruilin, at the highest echelon of the PLA — inside the secretariat of the CMC and as deputy director of the GPD. As if to confirm the ambiguous progress of legal and institutional reform in the Deng era, he has superimposed his personal *guanxi* on the formal chain of command. Notwithstanding Deng's express desire to bequeath a consensus to Jiang Zemin, the social-psychological preconditions for the formation of a core leadership in the past are obviously lacking today.[85]

Despite changes in the underlying command structure and career paths of the military, PLA representatives retain a substantial portion of the seats on the Party Central Committee.[86] Military representation in

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> the focal point of antagonism between the four cardinal principles and bourgeois liberalization. For some time, some of our comrades are still puzzled by such issues as the superiority of the socialist system and its prospects. Because most of the cadres and fighters are young people, they do not have a profound understanding of China's national conditions. In education, it is necessary to organize them to study the history of social development and the modern history of China, so that from the general trend of development of human society, they will clearly understand the objective necessity of socialism replacing capitalism and, from the process of China's social changes in the last 100 years or so, clearly understand that taking the socialist road is the only correct option the Chinese people have made in the protracted struggle.

Jiefangjun Bao, Special Commentator, Pay Close Attention to Main Subject of Political Education — Discussing Our Army's Political Construction, 90-098 FBIS-China 42 (1990).

83. For example, Chi Haotian, currently defense minister and former chief of staff, has spent his entire career in the military in command, staff, and political commissar roles. "More than 95.5 percent of the current military leaders have served in the Armed Forces only." Xiaowei Zang, Professionalism and the Leadership Transition in the Post-Mao Army, 10 J. Northeast Asian Stud. 52 (1991). Conversely, "only 3.4 percent of the 1988 provincial leaders were former soldiers." Id. at 53. For characteristics of other leading commanders, see also Cheng & White, supra note 63; Ngok Lee, China's Defence Modernisation and Military Leadership (1989).

84. For military resistance to Deng's reform program, see Alastair I. Johnson, Changing Party-Army Relations in China, 1979-1984, 24 Asian Survey 1012 (1984). Mao was able to overcome opposition from Peng Dehuai in 1959 as well as Lin Biao in 1971.

85. See Deng, supra note 32.

86. Li Cheng and Lynn White calculate that the Fourteenth Central Committee elected in October 1992 has the highest percentage of military representation since the Eleventh Central Committee in 1977. Nearly one quarter of the full members are military elites, as are nearly one

the higher political echelons increased following the repression of the Tiananmen protests in 1989 However, the number of officers disciplined for refusing orders in the May-June crisis may reflect general military unease concerning the wisdom of deploying troops against unarmed demonstrators.[87] In the future, therefore, the military may not automatically support the Party in the face of popular opposition. If so, this may lay the groundwork for what the Brazilians call an *abertura* or "opening," where the military employs its political leverage to transform the regime.[88]

A fully constitutional civil-military order in China would entail the following steps:

> 1. *The complete institutionalization of the armed forces hierarchy with a clear definition of the scope of military orders and the authority to command armed force.*
>
> This means the establishment of an unambiguous chain of command, with clear and explicit definition of the political authority to which the military hierarchy is subordinated. In other words, power must be vested in offices not in persons.
>
> 2. *The elimination of privileged access to, and informal participation in the State leadership, emphasizing that the role of the armed forces is to obey, not to command the constitutional order This would also imply the explicit prohibition of active-service military personnel taking part in the government or partisan political activity.*

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third of the newly elected full members. See Cheng & White, supra note 63, at 757-59.

87. As of December 1989, 21 senior officers were court-martialled, including General Xu Qinxin, commander of the 38 Army Corps. Shambaugh, supra note 28, at 552.

88. "[T]he military began to withdraw when it became clear that it could not resolve the problems it thought it could resolve and that civilians had been unable to deal with adequately. By initiating the transition and controlling the form and timetable it has in fact broadened its support while still retaining control." Thomas Bruneau, Transitions from Authoritarian Regimes: The Contrasting Cases of Brazil and Portugal, in Constitutional Democracy: Essays in Comparative Politics 470, 489 (Fred Eidlin ed., 1983).

This requirement is directly at odds with the ideology and practice advocated by the CCP and written into the law Conceivably, the CCP could follow the example of the Nationalists on Taiwan and retain dominance of the legislature and executive. However, command over the armed forces would then be the outcome of legitimate political processes not the result of legalized privilege.

3. *The elimination of all sources of extra-budgetary funds allowed to the military, including both the proceeds from military sales as well as non-military economic activities, such that the sole source of income for military personnel as well as funding for logistics would come from centralized allocations out of the state budget.*

This provision reflects the fundamental constitutional principle that legislative oversight is exercised through the control of the budget. Partial independence from the state budget is widespread in Chinese government departments. However, with respect to the military, the problem calls into question the military's commitment to state sovereignty The fact that China's leaders have tolerated "extra budgetary funds" at all reflects a perception that Party sovereignty is maintained and exercised through the control of the personnel system rather than through control over the state budget.[89]

4. *The transformation of military "political education" towards an emphasis on obedience to the rule*

89. PLA policies actively encourage military entrepreneurship. In 1990, revenues from productive activities by the PLA were equivalent to two-thirds of the state defense budget. Thirty percent of earnings are spent on troop costs, 30 percent on maintaining barracks and 4 percent on training. For the extent and manner in which military units are involved in entrepreneurial activities, see Brian Murray, Red Army Swords and Free Market Plowshares, 10 J. N.E. Asian Stud. 26 (1991). See also Arthur S. Ding, The Nature and Impact of the PLA's Business Activities, 29 Issues and Studies 85-100 n.8 (1993). Foreign military sales account for a small portion of military business activities, but one with profound international implications. See Eric Hyer, China's Arms Merchants: Profits in Command, 132 China Q. 1101 (1992).

of law over any partisan loyalty and service to the state. The code of honor followed by the military must not imply any privileged historical role, but the priority of serving the State as embodied in the civilian authorities empowered by law to govern.

So long as the legitimation formula employed by the CCP and indoctrinated into the PLA privileges the armed forces through their connection with the Party, then the loyalty and accountability of the armed forces to the civilian leadership, represented in the institutions of the NPC and the civilian executive of the State Council, is compromised in theory if not in fact. Only by removing the ambiguity in the legitimation formula and ceasing its propagation within the military can accountability before civilian representative institutions be assured.

The shortcomings of the current Chinese structure both de facto and de jure, point out directions for instituting the above changes. Democratizing regimes from East Asia to Latin America have entailed graduated rather than precipitous withdrawal of the military from privileged roles in the political system. However, examples of continued privileges still exist, including amnesties for crimes committed under orders and continued participation of active and retired military officers in important political and administrative posts (note that the opening of Taiwan's political system involved the enlistment of Hau Pei-ts'un as Premier[90]; and democratization in Korea was facilitated by the election of Roh Tae-woo). In Latin America the democratic opening often took shape as a semi-formalized "pact" between the military and civilian politicians.[91] While authoritarian rule in China is demonstrably different

90. At the time of his appointment, Hau was Taiwan's sole four star General. See James C. Wang, Comparative Asian Politics 127 (1994). Significantly, Hau had been associated with a faction of the KMT which opposed the election of Lee Teng-hui as President. See Peter R. Moody Jr., Tradition and Modernization in China and Japan 275 (1995).

91. I have been guided in this discussion by the essays in Guillermo O'Donnell & Philippe C. Schmitter, Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies (1986) and also by the other books in the series, Transitions from Authoritarian Rule: Comparative Perspectives (Guillermo O'Donnell et al. eds., 1986); Transitions from Authoritarian Rule: Latin America (Guillermo O'Donnell et al. eds., 1986). See also Authoritarians and Democrats: Regime Transition in Latin America (James M. Malloy & Mitchell A. Seligson eds.,

from that of Latin American praetorian regimes, the peculiarity of Chinese civil-military relations is such that the military do have some say in who will lead them.[92] It appears nearly certain, therefore, that the Chinese military will play some role in any constitutional transition.

Marking the different experience of each country, the common threshold distinguishing the democratizing regime from its non-democratic, and usually unconstitutional predecessors is agreement of the military to permit open political activity by a political opposition and to respect the results of elections, whatever the outcome. A central feature of constitutionalism, as Adam Przeworski has remarked with respect to democracy, is its unpredictability or uncertainty [93] It, therefore, remains to be seen whether the Chinese military will permit an open-ended resolution of political disputes involving the CCP

The elaborate ambiguity of China's legal and political institutions has shielded the Chinese armed forces from a choice between loyalty to the Party and obedience to the State. So long as the Party dominates the State, they may never be faced with such a choice. The constitutional doctrine expounded by the CCP contains a self-contradictory legitimation formula. On the one hand, the State is founded on a doctrine of popular sovereignty expressed through the NPC as the highest organ of State power. On the other hand, the CCP is said to carry the destiny of the Chinese people through its role in the revolutionary struggle and therefore has identical interests with that of the People. In this formula the PLA plays a pivotal role: through the direct leadership of the Party the PLA exercises a guardian role over the State. An identity of interests cannot be assured, and one day therefore, the Chinese military may be called upon to impose a resolution between the two formulas.

The current ideological-institutional complex implicates the senior ranks of the military to permit, or veto, future change. The test of civilian leadership will come if and only if the military elites are confronted by a civilian leadership of the state which is not necessarily the Party leadership. In 1989 it might have been possible for the PLA to refuse its orders although that would have entailed a revolution rather than the practice of constitutionalism. It is very likely, however, that the

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1987) and Alfred Stepan, Rethinking Military Politics: Brazil and the Southern Cone (1988).

92. This is one of the conclusions of Lynn White. See Lynn T. White, The Liberation Army and the Chinese People, in Political Participation Under Military Regimes 115 (Henry Bienen & David Morell eds., 1976).

93. Adam Przeworski, Some Problems in the Transition to Democracy, in Transitions from Authoritarian Rule: Comparative Perspectives 58 (Guillermo O'Donnell et al. eds., 1986).

next time the PLA is called upon to "defend" the Chinese state, it may well, in fact, be forced to define it.