

# *Revolutionary Constitutions and their Constitutionalism: The Internalization of Fear as Process and the Performance of Crisis in the Service of Stability*

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*Abstract:* The object of revolutionary constitutionalism—the fundamental basis of constitutional design and perception since the late 18<sup>th</sup> century (though with antecedents well before then), is to preserve a revolutionary settlement of a political-economic order by cultivating revolutionary dialectic (rather than suppressing them) within revolutionary structures, now memorialized in a constitutional document. The object is redirection—from the utilization of revolutionary dialectics against a post-revolutionary apparatus now in power to an instrument for the preservation and affirmation of that post-revolutionary apparatus. It becomes a mimetic device denatured and now serving an apparatus. Stability is not forever; it retains its power at least until the fundamental contradictions of this revolutionary constitutional order collapse the system. At some point, the revolutionary dialectics that produced the post-revolutionary order will itself target that ordering from the outside. What remains is the cyclicity of dialectic—fear, response-reconstruction—rather than the systems to which it furthers from one to another stage of human historical development. It is to the preservation of that emotional explosion, and its alignment with core constitutional text, that constitutions devote time and effort, usually in its preambular text, and sometimes in extraconstitutional documents with quasi-constitutional significance. If powerful enough, the emotive semiotic of constitutional explosion can affect not just its political community but those of other political communities looking for a way to rationalize and direct their own collective political emotion. The focus of this essay, then, will be on the way that emotive context is transposed from revolution to post-revolutionary constitutional text in distinctive contexts—a revolution to preserve traditional values; a communist revolution within a multi-state imperial power; a revolution with a long fuse grounded in anti-colonialism and anti-imperialism; and an ethno-revolution embedded within multilateral managerialism. To those ends the essay first looks to a powerful instance of emotive semiotics, the U.S. Declaration of Independence (1776), and its reflection in the subtextual mimetic dialectics of threat and crisis and resolution in the U.S. federal Constitution (1789). It then considers its value as a template for the constitutionalization of separation in the 21<sup>st</sup> century through the lens of the preambular texts of the Chinese (1982) and Cuban (2019) constitutions. All of these emotive revolutionary impulses are then transposed into and as the constitutional settlement within which the revolutionary is to be distilled, tamed, and contained within their respective ideological cages.

## ***Contents:***

1. Introduction.
  - 1.1. Revolutionary Constitutionalism.
  - 1.2. The Constitutional State of Fear
2. American Constitutional Convulsions in the Search for the Structures of a More Perfect Union.
3. The Marxist-Leninist Variations: A Glimpse at China and Cuba and Foreign Corruption.
4. From the State to the Techno-Bureaucratization of Dialectics of Fear and Crisis: A Glimpse at Kosovo.
5. From Template to the Mimetic Constitutionalization of Fear/Crisis.
6. Conclusion.

## 1. Introduction

### *1.1 Revolutionary Constitutionalism*

Revolutions are born out of fear. At one end of the spectrums of fear are the threats to idealized order. These may be understood or rationalized as a foundational set of popular liberties which are threatened by the thrust of innovation of those who exercise the power of *gubernaculum*.<sup>1</sup> For others it may be a fear springing from the exercise of *gubernaculum* in ways that threaten social solidarity—of a religion, ethnicity or way of life.<sup>2</sup> At the other end of the fear spectrum, revolution may be rationalized within notions of threat to the loss of an opportunity to move forward progress of radical change that is either inevitable (in accordance with the premises of the revolutionary movement) or necessary to preserve or move a society closer to its inevitable ideal.<sup>3</sup> These are to the two ends of a spectrum that circles in on itself and in which the ends join. The resulting revolutionary phenomenology—the cognitive realization of itself through the application of the idea of itself to a contemporary context<sup>4</sup>—provides both meaning and the dialectics of its own performance which gives it shape and direction.<sup>5</sup>

Constitutions—and proto-constitutional documents from before the 18<sup>th</sup> century when constitutions assumes their current form—undertake two specific objectives of principal interest for the discussion that follows.<sup>6</sup> First they are meant to institutionalize and fulfill the promise of the (successful) revolutionary effort. Constitutions serve as the memorialization of the revolutionary ideals now institutionalized and made perpetual by the magic of text and the will of the community to apply that text going forward in time. Second, and perhaps less often remembered, constitutions are meant to internalize the active element of revolutionary passion—its dialectics, processes, and impulses. The systems themselves, which institutionalize the revolutionary ideals, also internalize revolutionary methods. In this sense constitutions provide a space for revolutionary mimesis<sup>7</sup> within rather than

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<sup>1</sup> Larry Catá Backer, ‘Reifying Law— Government, Law and the Rule of Law in Governance Systems,’ (2008) 26 Penn State International Law Review 521-563.

<sup>2</sup> Larry Catá Backer, ‘Theocratic Constitutionalism: An Introduction to a New Legal Ordering,’ (2006) 16(1) Indiana Journal of Global Legal Studies 85-172.

<sup>3</sup> Maximilien Francois Marie Isidore Joseph de Robespierre, ‘Discours applaudi de Robespierre sur les grands principes moraux du gouvernement français, lors de la séance du 17 pluviôse an II (5 février 1794), in Archives Parlementaires de la Révolution Française Année 1962 84 pp. 330-337; available [https://www.persee.fr/doc/arcpa\_0000-0000\_1962\_num\_84\_1\_34787\_t1\_0330\_0000\_5], last accessed 21 October 2024.

<sup>4</sup> Judith N. Shklar, ‘Hegel’s Phenomenology: Paths to Revolution,’ in Klaus Beyme (ed) *Theory and Politics / Theorie und Politik: Festschrift zum 70. Geburtstag für Carl Joachim Friedrich* (Den Haag: Martinus Nijhof, 1971), pp. 162-184.

<sup>5</sup> P. L. Geschiere and H.G. Schulte Nordholt, ‘The Phenomenology of Revolution,’ (1969) 19(3) *CrossCurrents* 319-337.

<sup>6</sup> Larry Catá Backer, ‘From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems,’ (2008-2009) 113 *Dickinson Law Review* 671-732 (“Once a belief in the power of states to construct themselves by reference to the characteristics of their own unique populations, a well-behaved constitutionalism was thought necessarily limited to matters of transposing contextual characteristics into a document that required interpretation true to the underlying belief systems from out of which it was created.” *Ibid.*, 731).

<sup>7</sup> D. Robert CeChaine, ‘Magic, mimesis, and revolutionary praxis: Illuminating Walter Benjamin’s rhetoric of redemption,’ (2000) 64(3) *Western Journal of Communications* 285-307; Deborah Jenson, *Trauma and its representations: the social life of mimesis in post-revolutionary France* (Baltimore: Johns Hopkins University Press, 2001). See generally Erich Auerbach and Edward Said, *Mimesis: The Representation of Reality in Western Literature* (Princeton University Press, 1953).

outside, of the perimeters of constitutional stability. They preserve the revolution precisely by transposing the revolutionary performance from outside the constitutional state (and thus a threat to it) to become a method, a performance of the revolutionary trajectories now in the service of constitutional stability, or at least solidity. Its purpose is no longer to overturn or challenge the constitutional system but to affirm it and bring it closer to “perfection.” It is in this sense that terror, in all of its forms, becomes an essential element of the constitutional form.<sup>8</sup>

It ought to follow that revolutionary constitutions are not an end point of revolutionary dialectic. They are merely the instrument through which what was once “outside” could be confronted, overturned and replaced, and can now serve the revolutionary impulse “inside” the revolution’s manifestation as the ideology in power. It is in this sense that constitutional commentators sometimes suggest the absence of a constitutional crisis precisely because the central purpose of the post-revolutionary constitution is in fact to internalize the revolutionary dialectics “within the boundaries of law and the Constitution.”<sup>9</sup> The dialectics of revolution are turned inward; they become the process of a legalized politics and the discipline of an administrative apparatus which is meant to decant revolutionary practice into techno-bureaucratic expression as law or policy. Constitutions redirect and rationalize the revolutionary dialectics from out of which they emerge. In this sense, constitutions do not resolve the impulses, the perceptions and premises from out of which the emotive explosions of revolution can be ignited, stoked, and directed. At the same time, both the revolutionary dialectics that produced a successful revolutionary transformation and its internalization, may be translated and transposed as a model to serve contextually distinct environments.<sup>10</sup>

The contribution is organized as follows. First a brief theoretical introduction to the manifestation of an emotive semiotics of institutionalized constitutional structures within the revolutionary project. Second, a deeper analysis of the signification of preambular and extraconstitutional text as memory and as an intensification of direction with respect to constitutional framing and interpretation through the lens of the American revolutionary experience. Third, a consideration of that experience in the context of the Marxist-Leninist and liberation movements in China and Cuba, producing related but distinct ordering frameworks. Fourth, a consideration of these three distinct expressions of constitutional fear-threat structures within memories of the triumph of a revolutionary moment of separation, in the context of a revolutionary experience which is effectively detached in part from those undergoing revolutionary crisis. The contribution ends with an examination of the effects of what unites and separates these experiences as a phenomenology of dynamic mimetic dialectics, that is, of the re-experiencing over time of the revolutionary process as both the system of

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<sup>8</sup> Robespierre, *supra*; Mao Zedong, On the People’s Democratic Dictatorship (June 30 1949 “in Commemoration of the 28<sup>th</sup> Anniversary of the Communist Party of China, available [https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4\_65.htm], last accessed 30 October 2024); in more benign form, Brett Samuels, ‘Biden corrects himself after saying Trump should be locked up,’ *The Hill* (22 October 2024); available [https://thehill.com/homenews/administration/4948023-biden-warns-trump-political-persecution/], last accessed 30 October 2024.

<sup>9</sup> Jack M. Balkin, *The Cycles of Constitutional Time* (OUP, 2020) (Chapter 4 on Constitutional Crisis).

<sup>10</sup> Consider Fei Chen, ‘Translating and transplanting revolution: the circulation of discourses on the American Revolution between China and Japan, (2023) 34(1) *Journal of the Royal Asiatic Society* 129-153.

governance and the protection of that system from its own revolutionary impulses.<sup>11</sup> The focus will be on the way that the emotive context fuels fear and directs crisis in very different constitutional contexts—a revolution to preserve traditional values; a communist revolution within a multi-state imperial power; a revolution with a long fuse grounded in anti-colonialism and anti-imperialism; and an ethno-religious defensive rebellion within a larger imperial post-modern project.

## ***1.2 The Constitutional State of Revolutionary Fear***

Fear has returned to the constitutional state.<sup>12</sup> Or rather, a state of dread for the constitutional state, one “forced to it,— forced by dread causes.”<sup>13</sup> Forced, or compelled in the Sophoclean sense, by the very nature of the constitutional state; the liberal constitution as the textual expression of a constant state of fear.<sup>14</sup> The etymology of fear speaks to its connection to risk—the fear that comes with an event, process, choice or condition that may portend calamity, sudden danger or attack. It is the fear of things going wrong or of never having been gotten right. Its psychology is now well captured by the resurrection of the more ancient use of the term in the form of the fear spell of gaming: the projection of the image of an object’s worst fear that causes the object to flee,<sup>15</sup> constitutionally speaking. Though it doesn’t last long, its terror, the fear of the actualization of the manifestation of fear, lingers; always. What is cast once, can be cast again, and again. “‘constitution of fear’ is not a one-off occurrence. Quite the contrary. It crowns the politics of resentment. It becomes its manifesto.”<sup>16</sup> And it serves as an object lesson; there is indeed something worth fearing; in contemporary times the Soviet Union serves as the constitutional scary story par excellence—both for liberal democracy and Marxist-Leninist systems;<sup>17</sup> for those with longer memories, the Kaiserreich.<sup>18</sup>

At the start of the 21<sup>st</sup> century fear, the dread of what might be, was manifested in its old monsters. At their core were questions that generated interest within the debates about the viability and essential character of liberal democracy at least with respect to its interactions with organized (and

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<sup>11</sup> Theodore Adorno, *Negative Dialectics* (E.B. Ashton (trans; London: Routledge, 1973); Pierre-François Noppen, ‘Adorno on Mimetic Rationality: Three Puzzles,’ (2017) 1(1) Adorno Studies 79-100.

<sup>12</sup> Tomasz Tadeusz Koncewicz, *A Constitution of fear*, *Verfassungsblog* (16 November 2017); available [], last accessed 15 September 2024 (“The new brand of constitutionalism on the rise in Poland is defined by a „constitution of fear”. Fear is the leitmotif of the constitution-making process defined by suspicion, exclusion, drive for retribution and settling the scores.” *Ibid.*).

<sup>13</sup> Sophocles, *Electra* (R.C. Jebb (trans) (410 BC)) available [<http://classics.mit.edu/Sophocles/electra.html>] last accessed 30 September 2024.

<sup>14</sup> Frederick Schauer, ‘The Constitution of Fear’ (1995) 353 *Constitutional Commentary* 203-206.

<sup>15</sup> Fear, *DND 5<sup>th</sup> Edition Community Wiki*, available [<https://dnd5e.wikidot.com/spell:fear>] last accessed 29 September 2024.

<sup>16</sup> Koncewicz, *A Constitution of fear*, *supra*.

<sup>17</sup> Robert Sharlet, *Soviet Constitutional Crisis* (NY: Routledge 2016); Kunal Sharma, ‘What China Learned from the Collapse of the USSR,’ *The Diplomat* (& Dec. 2021); available [<https://thediplomat.com/2021/12/what-china-learned-from-the-collapse-of-the-ussr/>], last accessed 21 September 2024.

<sup>18</sup> Mark Hewitson, ‘The Kaiserreich in Question: Constitutional Crisis in Germany Before the First World War,’ (2001) 73 *The Journal of Modern History*

perhaps disorganized) religion.<sup>19</sup> Today that fear has taken a more foundational turn. It is a fear of *constitutional entropy* in its sense of a gradual (or perhaps precipitous) decline into disorder.<sup>20</sup> One encounters, in modern form, the insights of Abd al Rachman ibn Khaldun respecting the inevitability of the dissipation of group solidarity (‘assabiyah) across time.<sup>21</sup> In its modern forms it has touched on all constituted systems,<sup>22</sup> and states.<sup>23</sup>

Does a crisis of the contemporary constitutional state follow? We appear to be in the age of constitutional crisis. The intelligentsia has been curating the notion in interesting ways,<sup>24</sup> and in its more elaborate forms, from its academic leading forces.<sup>25</sup> And not just the state is reconceived in the imaginaries of crisis.<sup>26</sup> The lifeworld of that crisis requires the cultivation of fear, and especially the fear that the inhabitants of the structures built through constitutional text are ready to leave the building.<sup>27</sup> Fear is the soil in which constitutional crisis can be cultured, nourished, and eventually harvested. That cultivation is also an essential element of the dialectic of constitutional systems, especially that between the theory of the constitutional object and the fulfillment of its intent (assuming a consensus around the meaning of that notion) in fact. “It is a longstanding theme of critical literature on American politics that the system of government of the United States is an eighteenth century edifice which has serious difficulties in coming to grips with the challenges of the twentieth century.”<sup>28</sup>

The word crisis is itself richly semiotic. Beyond its fairly straightforward contemporary usage crisis points to its richer etymological sub-text.<sup>29</sup> Its origins are embedded in judgment of a specific kind—of the determination in the decisive point of the course of disease at which change must come, for

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<sup>19</sup> Larry Catá Backer, ‘The Crisis of Secular Liberalism and the Constitutional State in Comparative Perspective: Religion, Rule of Law, and Democratic Organization of Religion Privileging States,’ (2015) 48 *Cornell International Law Journal* 51-104

<sup>20</sup> Cf., Alexander V. Mantzaris & George-Rafael Domenikos, ‘Exploring the entropic nature of political polarization through its formulation as an isolated thermodynamic system,’ (2013) 13 *Nature Portfolio* 4419; available [<https://doi.org/10.1038/s41598-023-31585-w>] last accessed 21 September 2024; .

<sup>21</sup> Abd al Rachman ibn Khaldun, *The Muquaddimah: An Introduction to History* (Franz Rosenthal (trans) NJ Dawood (ed); Princeton University Press, 2015 (1377)).

<sup>22</sup> Parag Khanna, ‘The Coming Entropy of Our World Order: How Do We Reconcile an Increasingly Fractured Order With an Increasingly Planetary Reality?’, *Noema* (7 May 2024), available [<https://www.noemamag.com/the-coming-entropy-of-our-world-order/>], last accessed 20 September 2024; Robert D. Kaplan, ‘The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of Our Planet,’ *The Atlantic* (February 1994), pp. 44-76; available [<https://www.theatlantic.com/magazine/archive/1994/02/the-coming-anarchy/304670/>], last accessed 20 September 2024.

<sup>23</sup> Armin von Bogdandy and Pál Sonnevend, *Constitutional Crisis in the European Constitutional Area* (Oxford: Hart, 2015);

<sup>24</sup> Jack M. Balkin, ‘Constitutional Crisis and Constitutional Rot,’ (2017) 77 *Maryland Law Review* 147 (constitutional crisis defined as the point where “the Constitution is about to fail in its central task” *ibid*); Keith E. Whittington, ‘Yet Another Constitutional Crisis?’, (2001) 43 *William & Mary Law Review* 2093 (distinguishing between crises of operation and of fidelity);

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<sup>26</sup> W. Michael Reisman, ‘The Constitutional Crisis of the United Nations,’ (1993) 87(1) *American Journal of International Law* 83-100.

<sup>27</sup> Louis M. Seidman and Mark V. Tushnet, *Remnants of Belief* (OUP, 1996).

<sup>28</sup> Philip Cerny, ‘Political Entropy and American decline (1989) 18(1) *Millenium: Journal of International Studies* 47-63, 47.

<sup>29</sup> Etymology Online, crisis, available [<https://www.etymonline.com/search?q=crisis>] last accessed 30 September 2024.

better or worse. More literally crisis signifies a point of judgment (from its Proto-Indo-European root \*krei), a point that separates what was possible before and what was likely after. Fear may be found at that point of separation. Crisis, then, objectifies a course of events at specific temporal points, which it then signifies (going back/going forward/going sideways/going up or down), and which then imbues that signification with meaning (success/failure/good/bad). The essence of crisis is also entropic in the sense that the indeterminacy of systemic rules as a function of its application inevitably opens systems (this generates the constancy of fear) to points of signification that may change the character of a system from what was (conceived or experienced) to what will be.<sup>30</sup>

*Constitutional* crisis, and its imaginaries of fear, add a particular quality to this semiosis. Crisis is the interpretation (judgement) of the signification (the principles and assumptions embedded in the constitution) of an object (the constitution itself). When one speaks to the imaginaries of constitutional crisis, then, one speaks to the semiotics of instability, of a deviation, from the expectations and trajectories that are supposed to affirm that the system is working “correctly.” One also speaks to the temporalities of that crisis—one that changes character from the moment of constitutional inception through the moment of constitutional disintegration. In this sense, then, what is permanent is a state of constitutional crisis;<sup>31</sup> what Mao Zedong described as continuous revolution,<sup>32</sup> in contradistinction to Leon Trotsky’s more objective based concept of permanent revolution,<sup>33</sup> reformulated for consumption beyond the narrow lens of Marxist-Leninist theory. What is mutable is the constitution itself as a function of the dread around which crisis is manifested and response produced.

Constitutions, however, are more likely studied as rational expressions of political calculus aligned in time, space, and place. One understands reason here in its more ancient sense—as an explanation or justification adapting action (constitution) to ends (government), but also in its contemporary sense as an understanding with universal validity.<sup>34</sup> That rationality has been parsed in a variety of different ways, each perhaps a better reflection of their starting point than of the constitutional end point. One might speak to constitutions as contracts for the organization of a political collective as property in the hands of their members.<sup>35</sup> Conversely, one might invert this ordering premise to speak to constitutions as contracts for the organization of social relations against the apparatus of government.<sup>36</sup> One can speak to the constitution of sovereignty, or of the sovereign constitution, as if these objects were either inevitable or immutable. And hovering over all of this is what has become the constitutional

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<sup>30</sup> Cf., Ted Sichelman, ‘Quantifying Legal Entropy,’ (2021) 9 *Frontiers in Physics* [<https://doi.org/10.3389/fphy.2021.665054>] last accessed 23 September 2024.

<sup>31</sup> Arthur S. Miller, ‘Constitutional Law: Crisis Government Becomes the Norm,’ (1978) 39 *Ohio State Law Journal*

<sup>32</sup> Stuart R. Schram, ‘Mao Tse-tung and the Theory of the Permanent Revolution, 1958–69,’ (1971) 46 *The China Quarterly* 221-244.

<sup>33</sup> Nikolai Bukharin, ‘The Theory of Permanent Revolution,’ (1925) 5(10) *Communist Review* reprinted in Marxists.org website; available [<https://www.marxists.org/archive/bukharin/works/1924/permanent-revolution/index.htm>] last accessed 23 September 2024.

<sup>34</sup> Etymology Online reason, available [<https://www.etymonline.com/search?q=reason>] last accessed 29 September 2024.

<sup>35</sup> John O. McGinnis, ‘The Original Constitution and Its Decline: A Public Choice Perspective’ (1997) 21 *Harvard Journal Law & Public Policy* 195-209; Douglas C. North and Barry R. Weingast, ‘Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England’ (1989) 49 *Journal of Economic History* 803-837..

<sup>36</sup> Mark F. Grady and Michael T. McGuire, ‘The Nature of Constitutions’ (1999) 1 *Journal of Bioeconomics* 227-240.

incantation *par excellence* in this century— one that performs a sort of dialectics between rule of law in and as its own constitution.<sup>37</sup>

To speak of constitutional rationality, then, is to engage in the process of constitutional rationalization in the sense of justification. The former implies an innate quality of constitutions; the later an effort to invest that quality in constitutions. Both express the impulse toward perfection—in the sense of the Christian doctrine of justification,<sup>38</sup> but to different ends. That rationalization—our constitutions—express, perform, signify and fulfill the premises of the political-economic model to which it gives expression, a phenomenological expression in acts of faith in the perfection rationalized within that political-economic model. In this sense, constitutional rationality has its own psychology—as a phenomenon of the mind. One does not speak of psychology as a science but rather as an application of the philosophy of solidarity—of the construction of orthodoxy and deviance, and of the development of structures for the privileging of the one and the suppression (or cure) of the other. Psychology in this sense is the rationalization of a phenomenology of orthodoxy built on the mimetics of behaviors that are themselves not just dialectical (and thus intersubjective) but also managed within strictly its bell curves.<sup>39</sup> What is natural about constitutions, then, from this perspective are its bell curves which are themselves the manifestation of its ordering premises in the actions and structures that reaffirm their value.

Constitutions, observed from their rear-ends, are well positioned to be presumed rational expressions of the unstoppable urge of humans toward the rational—especially when it comes to their highest order social relations;<sup>40</sup> a rational phenomenology in the style of Husserl.<sup>41</sup> But constitutions are not ordinarily “made” in an antiseptic political laboratory; constitutions are not conceived and drafted in themselves; constitutions are not fabricated dispassionately as a product of rational thought detached from the context in which they appear—much as one might want to theorize that possibility. Since the seventeenth century, certainly, many constitutional orders have emerged from out of the womb of conflict.<sup>42</sup> They are born from fear and crisis in the passion of circumstances that made it possible to constitute a nation, a state, and its apparatus, and also to tear it apart<sup>43</sup>—anger, vindication, joy, and faith in a shared future must be cultivated, and so cultivated, they must be transposed into the normative and institutional text around which the state is organized. And the object of that fear—either from the perspective of preservation or of forward movement to align with the times, is the fundamental mythos of

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<sup>37</sup> Randall Peerenboom, *China’s Long March Toward Rule of Law* (CUP, 2002).

<sup>38</sup> Romans 3:23-25.

<sup>39</sup> For a revealing but controversial exposure, see Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (NY: Free Press, 1994).

<sup>40</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg (trans), Cambridge: Polity Press, 1996).

<sup>41</sup> Konstantinos Kavoulakos, ‘On Jürgen Habermas’s *Between Facts and Norms*,’ (1999) 096 *Radical Philosophy* 33-41; available [<https://www.radicalphilosophy.com/article/constitutional-state-and-democracy>] last accessed 19 September 2024) (“Thus, beside the ‘instrumental rationalization’ of the systems, we have a ‘communicative rationalization’ of the so-called ‘lifeworld’ (Lebenswelt) – that is, the world-images, moral beliefs, and fundamental institutions that govern social life.” *Ibid.*, p. 33)

<sup>42</sup> Chris Thornhill, ‘Constitutional Law and Cultures of Violence,’ (2024) 49(2) *Historical Social Research / Historische Sozialforschung* 34-64.

<sup>43</sup> Michael F. Conklin, *The Constitutional Origins of the American Civil War* (CUP, 2019).

the constitutional order itself, the purpose of which is to avoid the externalization of revolutionary dialectic. That mythos, it has been argued by some, is itself both the container of the revolutionary impulse, and the basis on which that constitutional containment can be shattered by reference to a failure of mythos in the experience of the times.<sup>44</sup> Of course efforts to shatter mythos in the name of preservation are as old, and as often failed, as the story of the modern constitution itself, whatever its popularity among the scholarly and policy aristocracy whose plaything mythos and the management of dialectical phenomenology might be.

The term “emotion” is understood in its classical sense—as a moving, or stirring or agitation, “from Old French *emouvoir* “stir up” (12c.), from Latin *emovere* “move out, remove, agitate.”<sup>45</sup> The agitator, of course, is fear and crisis. The agitation implies mental rather than physical movement—a state of agitation, and it adds a psychological layer to the psychology of constitutional rationality. It also implies a movement that is not necessarily tied to a direction or form—emotion stirs up feeling; and emotion may in turn be stirred up in the process of constitutional conception, gestation, and birth. And it continues to stir during the course of the “life” of a constitutional order until that order is overturned and the process begins again. Between the inception of revolutionary agitation and abandonment of the state of the things against which agitation is directed lies preservation of the object of agitation—or at least the idealization of that object as an aspirational end point. In Freudian terms emotion may be understood as the manifestation of the id to the superego of the rationalization that produces the ego of the constitutional text. In Jungian terms, perhaps, one dives into the subconscious of collective solidarity which is as solid as the life of the generations called on (trained to) its orthodoxies and invested in its fears. And its drivers—fear of and as crisis.

Fear and crisis define the heart of the constitutional compulsion that both defines the constitution as object and that signifies its structures and processes: compulsion; challenge; agitation; reform/protection; orthodoxy; heresy; abandonment—rinse and repeat. It would follow that constitutional emotion, its agitation, is distilled so that it might survive the moment of its realization. as the foundational premises, the way of looking at the world and the course of events that led to constitutional emergence, that are then elaborated in constitutional text, or in text that inform constitutional frameworks. Those fundamental premises are not lost in the process of constitutional crafting, neither are the emotional states in which they are forged. Transposition and preservation provide the ground on which constitutions are developed and their normative structures cultivated.

It is the existence and profundity of the emotional state of constitution (fear and crisis), and its response (preservation through iterative mimetic repetition of action within its structures), perhaps more than the calculus of rational governance, that propels a people to statehood, and statehood to take its particular form, and compels mutation (even in the face of unchanging text) of that state as one generation gives way to another. The state of emotion must be maintained, honored, and performed, if it is to carry the state forward from the moment of its emergence, through the long period of time when the

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<sup>44</sup> Aziz Rana, *The Constitutional Bind: How Americans Came to Idolize a Document that Fails Them* (University of Chicago Press, 2024).

<sup>45</sup> Etymology Online, ‘emotion’ available [<https://www.etymonline.com/word/emotion>], last accessed 30 September 2024.



founding generation, and their emotional imaginaries are long dead, and the context in which that emotion was felt and understood become incomprehensible outside of its time.

It is to the preservation of that emotional explosion, and its alignment with core constitutional text, that constitutions devote time and effort, usually in their preambular texts, and sometimes in extraconstitutional documents with quasi-constitutional significance. If powerful enough, the emotive semiotics of constitutional explosion can affect not just its political community but those of other political communities looking for a way to rationalize and direct their own collective political emotion. This relational framing suggests a semiotics of constitutional emotion; and a connection between the semiotics of constitutive emotion and constitutional text—as norm and form.<sup>46</sup> This semiotics is built on constitutional emotion as an object (the preambular materials), as the signification of the quality of “objectivity” (the text of these objects as an ordering system), and as a signified object that elaborates a way of understanding and applying the signified object (the constitutional text itself).

Where does that lead one? This contribution examines powerful instances of emotive semiotics shaping collective constitutional meaning making through a semiotic lens. The focus will be on the way that emotive context shapes constitutional form—in a revolution to preserve traditional values; in a communist revolution within a multi-state imperial power; and in a revolution with a long fuse grounded in anti-colonialism and anti-imperialism. To those ends the essay first looks to a powerful instance of emotive semiotics, the U.S. Declaration of Independence (1776), and its reflection in the subtextual mimetic dialectics of threat and crisis and resolution in the U.S. federal Constitution (1789). It then considers its value as a template for the constitutionalization of separation in the 21st century through the lens of the preambular texts of the Chinese (1982) and Cuban (2019) constitutions. Lastly, its transnationalization—yet another revolutionary instance, but this time at a meta-constitutional level, is considered in the context of the Kosovo Declaration of Independence (2008). All of these emotive revolutionary impulses are then transposed into and as the constitutional settlement within which the revolutionary is to be distilled, tamed, and contained within their respective ideological cages.

Each of these serve as dialectical templates and templates of the constitutional structures within which the revolutionary emotive dialectics are to be caged. Each express anger driven clusters of emotion as the triggering form of dialectic (anger grounded in one state of idealized social relations and their expectations against another state that is antagonistic, threatening or irreconcilable with the generative state) but from very different starting and ending points. For the United States, the starting point was the protection of traditional forms of popular solidarity and independence—and grounded in fear, crisis and its resolution, and originating in and manifested through popular action (even if elite directed) to resist the revolutionary consequences of the emerging system of an imperial sovereign Parliamentary system.<sup>47</sup> For Cuba and China, variations on liberation from foreign domination and toward an embrace of a

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<sup>46</sup> Charles Sanders Peirce, ‘Two Letters to Lady Welby,’ in Jan M. Broekman and Larry Catá Backer (Eds.) *Signs in Law—A Source Book (The Semiotics of Law in Legal Education III)* (Dordrecht Springer, 2015), pp. 95-116.

<sup>47</sup> Its Irish analogue, grounded in similar acts of resistance, though some more ancient, took more than a century longer to successfully manifest itself in a new constitutional order. See Larry Catá Backer, ‘Some Thoughts on the American Declaration of Independence and its Irish/European Connections at Century’s End,’ (2000) 8(1) *Tulsa Journal of Comparative & International Law* 87-98.

radically different framing of the perception of politics and its social relations. For Kosovo, the emerging form (at least for subaltern states) is embedded in a hierarchically constituted set of principles of transnational constitutionalism<sup>48</sup>—also grounded in fear, crisis and resolution, but enveloped in a network of expectation and approval from more power and transnational actors.<sup>49</sup>

The circle is now complete. Constitutional revolution, in the sense elaborated here, is a reflection not merely of ideological crisis, but more fundamentally of the crisis of reason<sup>50</sup>—which can be rationalized into a system—which has been modernity’s principal contradiction.<sup>51</sup> Constitutionalism posits a constitutional starting point from the moment of constitutional conception. Yet that ignores two fundamentally important elements of the constitutional project. The first is the quite contextually embedded manifested revolutionary emotion within which the dialectics of revolutionary action are framed. The second is that the constitutional “settlement” after the revolutionary moment reflects and diverts that revolutionary dialectics inward rather than marking a break from the dynamic dialectics that produced and fueled the revolution in the first place. In this sense the impassioned dialectics of the American Revolution has been domesticated in its constitution. These manifest both the enemy of revolutionary action—a unified power within a state apparatus—and designates the modalities of revolutionary action against it within the structures and operating systems of the constitution itself. The same can be said for the Chinese and Cuban constitutions. Each reflect the enemy of revolutionary action—the inward projection of foreign imperialism against a dissipated domestic state apparatus. Each designate the modalities of revolutionary actions within the apparatus imposed in the wake of the triumph of the revolutionary movements—Leninist vanguardism cabined by the core premises of a Marxist-Leninist political-economic order, manifested through structures of an administrative apparatus that manages and guides the masses toward the revolutionary objective grounded in the progressive dialectics of Leninist Marxism. Lastly, Kosovo reflects constitutional revolutionary post-modernity. It is a revolutionary experience that has been experienced on the ground in Kosovo but managed from an international establishment that since 1918 has overseen first the constitution of Kosovo within an aggregated entity built from out of the detritus of the Austro-Hungarian Empire-Kingdom, and then reconstituted again from out of the fracturing of that 1918 aggregation. In both cases the revolution was fragmented—violence on the ground based on ethno-religious separatism, and in the constitution of the post-revolutionary state under the supervision of multilateral collectives of States substituting for the old imperial masters of the region. Its constitution reflects its dependence as well as its ethno-religious fragmentation, now continued within rather than against the reigning constitutional order.

## **2. American Constitutional Convulsions in the Search for the Structures of a More Perfect Union**

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<sup>48</sup> Christian Joerges, Inger-Johanne Sand, and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (London: Bloomsbury, 2004); Nicholas Tsagourias, *Transnational Constitutionalism: International and European Perspectives* (CUP, 2009).

<sup>49</sup> Larry Catá Backer, ‘God(s) Over Constitution:

<sup>50</sup> Discussed from the perspective of phenomenology in Brainard, Marcus, *Belief and its Neutralization: Husserl’s System of Phenomenology in Ideas I* (State University of New York Press, 2002), p. 7.

<sup>51</sup> Mao Zedong, *On Contradiction*.

The sense of constitutional crisis—the fear of that crisis, and the efforts to prove that this fear is indeed manifesting in the experience of the American constitutional system—has, since the election of Mr. Trump to the U.S. presidency in 2016, been quite important to the American intellectual classes.<sup>52</sup> The herd instincts of intellectuals,<sup>53</sup> whose search for detached principles usefully extracted has become a sort of intellectual *tic*, in the sense of appearing uncontrollable and repetitive,<sup>54</sup> tends to suffuse and perhaps suffocate the narratives of constitutional ordering. The power of its repetition is both self-affirming and affirms a certain social mood<sup>55</sup> among a disciplinary intellectual group;<sup>56</sup> though there is comfort in a repetition that mimics and thus affirms, if only through citation patterns.<sup>57</sup>

The emotive response to that presidency, and the rise of a more generalized fear of democratic backsliding<sup>58</sup> and authoritarian (liberal) democracy<sup>59</sup> has sometimes produced an exhuming of the principles (even if sometimes uncited). This exhumation is strategically unpacked to achieve the ends of emerging wars of “liberation” as these things tend to be undertaken in an age in which the more abstracted control of the mechanics of *asabiyah* (group feeling among the masses)<sup>60</sup> is substituted (in many ways quite mercifully) for the more straightforward violence of the past.<sup>61</sup>

Americans don’t think much in ideological terms; Americans think even less in historical terms, except perhaps to the extent necessary to reach back to a term useful in new ways for current debates. Americans invoke ideology instrumentally, especially in defense of their customs and traditions, or sometimes against them, in either case with sometimes profound effects. And sometimes Americans use their ideology strategically to manage or rework historical perception-

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<sup>52</sup> Robert Jervis, *Chaos in the liberal order: the Trump presidency and international politics in the 21st century* (NY: Columbia University Press, 2018); Julia Simon, ‘Problematizing Modern Democracy in the United States: An ‘Insurrection of Subjugated Knowledges’ in the Wake of the 2020 Presidential Election,’ (2024) 65 *Politische Vierteljahresschrift* 367-394.

<sup>53</sup> Wifred Trotter, *Instincts of the Herd in Peace & War* (Cosmo Classics, 2005 (1919)).

<sup>54</sup> “Provisional Tic Disorder,” *Psychology Today*; available [https://www.psychologytoday.com/us/conditions/provisional-tic-disorder], last accessed 20 September 2024.

<sup>55</sup> Mikko Ketovuori, *Socionomics* (London: Routledge, 2024).

<sup>56</sup> Pierre Bourdieu, *Homo Academicus* (Peter Collier (trans); Oxford: Polity Press, 1988); Remi Lenoir, ‘Scientific Habitus: Pierre Bourdieu and the Collective Intellectual,’ (2006) 23(6) *Theory, Culture & Society* 25-43.

<sup>57</sup> Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature* (1984) 132(3) *University of Pennsylvania Law Review* 561-578; Larry Catá Backer, ‘Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement,’ (2000) 33 *U.C. Davis Law Review* 1173.

<sup>58</sup> Michael W. Bauer, Speyer, B. Guy Peters, Jon Pierre, Kutsal Yesilkagit, and Stefan Becker (eds) *Democratic Backsliding and Public Administration: How Populist in Government Transform State Bureaucracies* (CUP, 2021); Leonardo R. Arriola, Lise Rakner, and Nicolas van de Walle (eds.), *Democratic Backsliding in Africa?: Autocratization, Resilience, and Contention* (OUP, 2022); Stephen Gardbaum, ‘Courts and Democratic Backsliding: A Comparative Perspective on the United States’ (2024) 46(4) *Law & Policy* 349-357; Robert R. Kaufman and Stephen Haggard, ‘Democratic Decline in the United States: What Can We Learn from Middle-Income Backsliding?,’ (2019) 17(2) *Perspectives on Politics* 417-432.

<sup>59</sup> Helen Kirsch and Christian Welzel, ‘Democracy Misunderstood: Authoritarian Notions of Democracy around the Globe,’ (2019) 98(1) *Social Forces* 59-92.

<sup>60</sup> Ibn Khaldun, *supra*.

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-but only when it is practical, that is when it furthers some political, social, economic or cultural objective with respect to which sufficient political mobilization can be cultivated.<sup>62</sup>

Americans, however, know fear, and they respond to crisis—sometimes violently. That might be understood as the foundational genesis of their solidarity.<sup>63</sup> The target around which fear and crisis manifest, at least in the United States, is the unmaking of the customs and traditions of the people, and among a class of intellectuals, its founders,<sup>64</sup> That, in turn has produced the states of anxiety that have been much in evidence at least rhetorically, sometimes a striving towards a hegemony of counter-hegemony.<sup>65</sup> Are these trajectories merely the anticipated playing out of the dialectics of fear, crisis, response, fear, crisis, etc. that might be understood as the core of the constitutional text of states (and other actors)? That is, are the core principles and the institutional structures built around them, both a response to fear and crisis and an acknowledgement that fear is constant and crisis is inevitable in a dialectic of hegemony and counter hegemon that might be managed?

A return to the original sources around the founding of the Republic and the distillation of fear and crisis to text, and text to a cage of presumptions and structures that are meant to protect the Republic against itself might provide clues. These texts that set out the principles around which constitutional cages are erected suggest less that they represent a settlement of crisis; instead they are meant to develop a cage around the dialectics in the form of ideological barriers within which the processes of fear and crisis can perhaps better serve the ideological aspirations that are represented by the cage itself; a caging, perhaps, of the common will<sup>66</sup> in ways that represent that will but also recognize that fear and crisis may overcome both a conception of that will and its expression in social relations (the revolutionary tendency that either evolves, preferred, or explodes, that is feared).

This provides a useful context in which to re-consider those *facts, acts, relations,* and *aesthetics*,<sup>67</sup> to which the generative principles of the Declaration of Independence were meant to give meaning and suggest action. From these facts, perhaps, there is a foundation for whatever truth it is we think we seek—whether that is to reaffirm a determination to detach principle from historical context, or to find in that context useful lessons for their application in this “new era” of colonial independence. For there ought to be more to the Declaration of Independence than its edges. And what has occurred over

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<sup>62</sup> Larry Catá Backer, *Democracy Part 36: Representative Democracy in an Age Beyond the State, Law at the End of the Day* (4 July 2016; available [https://lbackerblogger.blogspot.com/2016/07/democracy-part-36-american.html], last accessed 20 September 2024).

<sup>63</sup> Rochelle DuFord, *Solidarity on Conflict: A Democratic Theory* (Stanford University Press, 2022); Charles H. T. Lesch, ‘Democratic Solidarity in a Secular Age? Habermas and the “Linguistification of the Sacred”,’ (2019) 81(3) *The Journal of Politics* 862-877.

<sup>64</sup> Jeff King, *Judging Social Rights* (CUP, 2012); Amna A. Akbar, ‘Toward a Radical Imagination of Law,’ (2018) 93 *New York University Law Review* 405.

<sup>65</sup> Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2000); Owen Worth, ‘The Janus-Like Character of Counter Hegemony: Progressive and Nationalist Responses to Neoliberalism,’ (2002) 16(3) *Global Society* 297; Robert Henry Cox, Albert Schilthuis, ‘Hegemony and Counterhegemony,’ in George Ritzer (ed), *Encyclopedia of Globalization*, (Boston, MA: Wiley Blackwell, 2012), pp. 923-927.

<sup>66</sup> Cf. Bruno Leoni, *Freedom and the Law* (3<sup>rd</sup> ed; Indianapolis: Liberty Fund, 1991), pp. 133-152.

<sup>67</sup> Crispin Sartwell, *Political Aesthetics* (Ithaca, NY: Cornell University Press 2010).

the last two centuries is that its admirers are far more attached to the frame of the document than to textual representation within that frame.<sup>68</sup>

The U.S. Declaration of Independence is best remembered for its edges rather than for its substance. These edges, include two well-known parts; the first include the animating principles and expectations that it is the responsibility of the State to protect; the second the consequences of a betrayal of the principles without remediation. And yet it is the substance within the frame of the principles of the first part of the document and the consequences that make up its concluding paragraphs that bear consideration for its constitution of the phenomenology of fear, of crisis, and of a resolution that will achieve structural form in a constitution, eventually. Nonetheless, the frame is important; it sets out the guardrails for fear, and the rage of betrayal that produces the crisis that, in the case of the United States, produced a semiotics of separation.

The initial paragraphs provided the basis through which the course of crisis and the understanding of the fear that drove them ought to be understood and assessed, and against which great political decisions might be legitimately made. The first principle touches on the mutability of political solidarity—it is possible for peoples (and the territories they occupy) to drift apart to the point that independence is inevitable.<sup>69</sup> That separation requires recognition of the emerging differences among a people, and the development of a justification for that conscious distinctiveness that marks the end of an era of historical development and the start of another. The second consists of a (now well known) listing of the core set of principles around which the political collective is to be organized—the political-economic model, fidelity to which is a central element of political solidarity.<sup>70</sup> With respect to the first, the consciousness of distinctiveness is a predicate for what comes; it is the memorialization of a break. But it remains in the proving of it that the fear, rage, and crisis that produced it, and that shapes its contours emerges. With respect to the second, the essence of distinctiveness is embedded in its foundational principles, and the political economic model around which it is realized. That distinctiveness sometimes produces a territorial separation—in the case of the American colonies. After

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<sup>68</sup> Larry Catá Backer, *Some Thoughts on the American Declaration of Independence and its Irish/European Connections at Century’s End*, (2000) 8(1) *Tulsa Journal of Comparative & International Law* 87-98.

<sup>69</sup> “WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.”

<sup>70</sup> “WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such form, as to them shall seem most likely to affect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security.”

the 20<sup>th</sup> century it can evidence distinctiveness grounded in the ideological framing of a collective sense of itself—as exemplified in the Cuban revolution of 1959 and Chinese revolution of 1949.

The second included the closing paragraphs in which the necessary consequence of application of principle to context was announced—the political separation of the colonies from both King and Parliament. There is a ritualized declaration of separation—of distinctiveness. More importantly, perhaps, there is an acknowledgement that this declaration can be fulfilled only by victory against those from whom they separate.<sup>71</sup> It is clear that a declaration of distinctiveness and with it a determination to separate, will be tested by (violent) contestation. In some cases, the declaration and its objects fails—the effort to win the independence of the Confederate States of America is a pointed illustration. And sometimes it succeeds—for example in the case of the Irish independence movement—but only after a protracted period of cycles of violence.

Nonetheless, one might consider whether the great principles, and its inevitable conclusion, these framing elements, were not the point of the Declaration of Independence, but rather the framing context through which meaning and action could be described, assessed and justified. These *edges* of the Declaration provided a structure within which it was hoped that the great litany of grievances could be analyzed, understood, and assessed. It then suggested the assessment made by those “thought leaders” of the time, grounded in their assessment framework, with the hope of inducing others to share their view. To that end, though, it was the litany of grievances, rather than the abstract structure against which they were to be assessed, that served as the central element of the Declaration.

Indeed, one might better understand the document as a *declaration of grievances* from which a decision was taken, rather than the manifestation of principle within the context of a rebellious colonial society America. *It was the grievances that mattered; the principles were meant to give reaction a direction—in this case toward independence.* Principle and consequence, then, provided the structurally necessary entry and exit point for the main event; they drew the eye to the great context—the long history of engagement, from which principles could be applied and consequences announced. Transposition of the dialectics of grievance then become the essential structuring element of the Chinese, Cuban and Kosovar revolutions. Each can be understood as the constitution of grievance in which the grievance serves as the starting point of revolutionary (and then constitutional) dialectics.<sup>72</sup> Grievance may change but they do not disappear. In the U.S. grievance greases the wheels toward the perfection of the Union,; un China it is the foundation of the dialectics of contradiction; in Cuba it serves as the basis for resistance; and in Kosovo the basis for engagement with their multilateral masters.

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<sup>71</sup> “And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our fortunes, and our sacred Honor.”

<sup>72</sup> Consider the related discussion in Indra de Soysa, Krishna Vadlamannati, and Henning Finseraas, ‘Group Grievances & Civil War: Some Theory and Empirics on Competing Mechanisms, 1990-2017 (2021) Advance. July 19, 2021. DOI: 10.31124/advance.14958093.v1; Steven Pfaff and Michael Hechter, Grievances and the Genesis of Rebellion: Why Governance Matters, Broadstreet (5 February 5, 2021); available [<https://broadstreet.blog/2021/02/05/grievances-and-the-genesis-of-rebellion-why-governance-matters/>], last accessed 31 October 2024.

The list of grievances, themselves, provide the surest way to understand the utility and meaning of principle, and the method of assessment from which legitimate consequences could be determined. But more than that, they provide the measure of the fear and rage that they generate, when measured against the principles for which each represents a betrayal. It translates the qualitative state of fear into a quantitatively decisive state of crisis, towards the resolution of which the principles at the start of the document point, and the consequences of that resolution the end of the document declare. First, there must be injury, injury that may be assessed against the principle of solidarity measured by conformity to an operational set of values.<sup>73</sup> These must be evidenced by acts, the intention of which is to be judged against the core principles.<sup>74</sup> And they all flow from the executive authority—the Crown as the source of gubernaculum in the ancient sense.<sup>75</sup>

What follows are the evidentiary acts of tyranny, no one of which might be sufficient in itself to make the case, but all of which together suggest a necessary quantum for that assessment. One set of evidence goes to arbitrariness and neglect in the exercise of discretionary authority measured against a public good.<sup>76</sup> Another goes to the migration policy of the Crown, one which was deemed against the interests of the colonial establishments.<sup>77</sup> Another takes a swipe at the Crown in Parliament within the Westminster system as it emerged in the 18<sup>th</sup> century, one adopted without local consent,<sup>78</sup> with its consequences: (1) taxation without representation;<sup>79</sup> and (2) managing external trade.<sup>80</sup> But the anger extended beyond the innovations of the Westminster system and its consequences for the peripheries of Empire (including Ireland). These carried forward the consequences of the American fear of Westminster to a structural point of no return: (1) by establishing crown colonies without popular governance;<sup>81</sup> (2) by effectively imposing what in the 21<sup>st</sup> century has come to be understood as unconstitutional amendments;<sup>82</sup>

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<sup>73</sup> “The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States.”

<sup>74</sup> “To prove this, let Facts be submitted to a candid World.”

<sup>75</sup> Larry Catá Backer, ‘Reifying Law - Government, Law and the Rule of Law in Governance Systems,’ (2008) 26 Penn State International Law Review 521-563

<sup>76</sup> “He has refused his Assent to Laws, the most wholesome and necessary for the public Good. He has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.”

<sup>77</sup> “He has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.”

<sup>78</sup> “He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation.”

<sup>79</sup> “For imposing Taxes on us without our Consent.”

<sup>80</sup> “For cutting off our Trade with all Parts of the World.”

<sup>81</sup> “For abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies.”

<sup>82</sup> “For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the forms of our Governments” . . . “For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.”

Another group of abuses goes to the misapplication or corruption of the institutions of government: (1) by the use of legislative power as a bargaining chip for waiving fundamental rights, particularly the right of representation in the legislative body,<sup>83</sup> (2) by asserting legitimate power for illegitimate ends—in particular to weaken or interfere with the participation of individuals in the exercise of their political rights;<sup>84</sup> (3) by exercising the power to dissolve the legislature to suppress a (loyal) opposition;<sup>85</sup> (4) by failing to permit the installation of a successor government, effectively usurping their authority;<sup>86</sup> and (5) by operating a large and oppressive administrative apparatus meant to further state rather than popular objectives.<sup>87</sup> Yet another set of evidence (grievances) touch on the expected role and administration of justice through the courts: (1) by refusing to appoint judges;<sup>88</sup> (2) by refusing to respect their independence when appointed;<sup>89</sup> (3) by restricting the customary availability of trial by jury;<sup>90</sup> and (4) by shifting venue beyond the jurisdiction of the state.<sup>91</sup> Still another point to the abuse of the military/police power: (1) by keeping standing armies without local legislative consent;<sup>92</sup> (2) by detaching the military from civilian control;<sup>93</sup> (3) by quartering troops among the civilian population;<sup>94</sup> and (4) shielding them from the application of local law and custom.<sup>95</sup>

From these fears, the evidence suggests a consequential crisis. That crisis is characterized by an armed opposition to the resistance of the colonial collectives against the fear of the consequences of the listed usurpations.<sup>96</sup> It is precipitated by the refusal to negotiate (on terms satisfactory to the colonial

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<sup>83</sup> “He has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.”

<sup>84</sup> “He has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.”

<sup>85</sup> “He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.”

<sup>86</sup> “He has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the meantime exposed to all the Dangers of Invasion from without, and Convulsions within.”

<sup>87</sup> “He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance.”

<sup>88</sup> “He has obstructed the Administration of Justice, by refusing his assent to Laws for establishing Judiciary Powers.”

<sup>89</sup> “He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.”

<sup>90</sup> “For depriving us, in many Cases, of the Benefits of Trial by Jury.”

<sup>91</sup> “For transporting us beyond Seas to be tried for pre-tended Offences.”

<sup>92</sup> “He has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.”

<sup>93</sup> “He has affected to render the Military independent of and superior to the Civil Power.”

<sup>94</sup> “For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States.”

<sup>95</sup> “For quartering large Bodies of Armed Troops among us.”

<sup>96</sup> “He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People. He is, at this Time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy of the Head of a civilized Nation. . . . He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their friends and Brethren, or to fall themselves by their Hands.”



opposition);<sup>97</sup> and by the indifference of the rest of the British political community.<sup>98</sup> Fear realized, and founded in the corruption of the core principles on which political and social solidarity were constituted matured into crisis that, by the mutual violence of the parties<sup>99</sup> made a necessary separation unavoidable.<sup>100</sup>

The semiotics of independence, and its structural phenomenological consequences—evidenced first in the Articles of Confederation,<sup>101</sup> and then more definitively in the federal Constitution<sup>102</sup> (and thereafter in the Confederate State<sup>103</sup> variation fulfilled in a way through the project of European integration)<sup>104</sup>—clearly emerges. One starts with baseline principles—the genesis of the core principles of the political economic model that must be protected, defended, and fulfilled. One then develops the narratives of fear to crisis. One ends with the inevitability of response and resistance to realized fear for the integrity of the political-economic model. That ending is also a beginning. The object of resistance, and separation, is to return to the road of perfection, in this case of “a more perfect union”<sup>105</sup> that aligns with and protects the political-economic model’s core principles from threats internal and external. Fear and the inevitability of crisis—a political principle of an “eternal recurrence” in the conceptual language of Nietzsche<sup>106</sup> or of the dissipation of *asabiyyah*, in the more historical-sociological language of ibn Khaldun<sup>107</sup>—serve as the guard rails of the structures within which this process is meant to be contained. Its object, the preservation of the core premises of the political-economic (ideological) model against

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<sup>97</sup> “In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.

<sup>98</sup> “Nor have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and of Consanguinity.”

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<sup>100</sup> “We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace, Friends.”

<sup>101</sup> United States, Articles of Confederation and Perpetual Union (entered into force 1 March 1781).

<sup>102</sup> United States Constitution (1789 as amended).

<sup>103</sup> Constitution of the Confederate States of America, 1861

<sup>104</sup> Larry Catá Backer, ‘The Extra-National State: American Confederate Federalism and the European Union,’ (2001) 7 Columbia Journal of European Law 159.

<sup>105</sup> Constitution of the United States, preamble ; available [https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm], last accessed 29 September 2024 (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”)

<sup>106</sup> Friedrich Nietzsche, Thus Spoke Zarathustra in Walter Kaufmann (ed), The Portable Nietzsche (NY: Viking Press, 1954), p. 435.

<sup>107</sup> Ibn Khaldun, *supra* (positing crisis over several generations in a sort of temporal-sociological process of growth, dissipation, crisis and renewal).

itself as well as against external threat. Read in this light, the Federalist Papers add some support for this construction. Consider its defense of the structuring of the then proposed federal constitution—one grounded on the need to protect the body politic against itself for the purpose of protecting the core values of the system. The model is built against the fear of crisis described in detail in the form of the indictment of the usurpations of the Crown in the Declaration of independence, most of which found its way into the structures of the federal constitution’s structuring provisions. This then becomes the template, and with it, the incorporation of the permeance of crisis within the structure of the documents that are meant to manage them.

### **3. The Marxist-Leninist Variations: A Glimpse at China and Cuba and Foreign Corruption.**

The Cuban and Chinese constitutions suggest mimetic variations on the performative semiotics of its American progenitor. What distinguishes these efforts are context and the founding ideologies that caused produced threat-fear-crisis-resolution reflexes to manifest (in both cases with some success).<sup>108</sup> In the three variation, however, the mimesis of threat-fear-crisis-resolution is embedded in the constituting documents in relation to the founding ideology against which the signification of threat, of fear, of crisis, and of resolution can be assessed.

The preambular text of the 2019 Cuban Constitution<sup>109</sup> provides the cotemporary analogue of the forms and thrust of the American Declaration of Independence. It starts with the assumption of a singular peoplehood for the inhabitants of Cuba, one that developed over the course of Cuban development from the time of its organization as a Spanish colony.<sup>110</sup> It recounts the arc of historical struggle by this Cuban people, to establish “a free, independent, sovereign, and democratic homeland of social justice and human solidarity, forged through the sacrifice of our ancestors.”<sup>111</sup> But it also included the elements of a long existing vanguard of leading social forces—labor, farmers and students, who first guided the development of Marxist-Leninist conceptions of the social-political order and who worked toward the triumph of that vision as the foundation on which to build a state cleansed of foreign

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<sup>108</sup> I have considered this in earlier work. See, Larry Catá Backer, Flora Sapio, and James Korman, *Popular Participation in the Constitution of the Illiberal State—An Empirical Study of Popular Engagement and Constitutional Reform in Cuba and the Contours of Cuban Socialist Democracy 2.0*, (2020) 34(1) *Emory International Law Review* 183-276; Larry Catá Backer, *Chinese Constitutionalism in the ‘New Era’: The Emerging Idea and Practice of Constitution in the Wake of Xi Jinping’s Report to the 19th Chinese Communist Party*, (2018) 33(2) *Connecticut Journal of International Law* 163-213. This essay focuses solely on the quite narrow question of the dialectical mimetic reflex that may be extracted from their constitutive texts. A richer analysis is beyond the scope of this short essay.

<sup>109</sup> *Constitución de la República de Cuba* (2019); available [<https://www.granma.cu/file/pdf/gaceta/Nueva%20Constituci%C3%B3n%20240%20KB-1.pdf>], last accessed 1 October 2024 *Constitution of the Republic of Cuba* (English translation) available [[https://www.constituteproject.org/constitution/Cuba\\_2019](https://www.constituteproject.org/constitution/Cuba_2019)], last accessed 1 October 2024.

<sup>110</sup> See, Larry Catá Backer, ‘From Hatuey to Che: Indigenous Cuba Without Indians and the U.N. Declaration on the Rights of Indigenous Peoples,’ (2008-2009) 33(1) *American Indian Law Review* 201-238. The Constitutional preamble identifies indigenous and enslaved peoples who rebelled against their masters and overlords as well as patriotic elements among the colonizers who fought for independence to advance the core ideological values around which Cuban peoplehood could be formed. *Cuba Constitution*, preamble.

<sup>111</sup> *Cuban Constitution*, *supra*, Preamble.

domination.<sup>112</sup> Thus, two elements came together to form the essence of Cuban peoplehood—the fusion of its various individual elements, and a fidelity to the *lebenswelt* of the Marxist-Leninist international.<sup>113</sup>

Like the American Declaration’s incarnation of threat as the threat of foreign forces (the reconceptualization of Britain as foreign) producing a crisis of core principles of liberties (the evolution and imposition of the Croen.in Parliament model of the later 18<sup>th</sup> century), the Cuban preambular text speaks to the threat of domination by foreigners (Spanish colonizers etc.) producing a crisis fueled by the fear of the imposition of a foreign (to their thinking) political-economic model, in this case capitalism (as they constructed it).<sup>114</sup> The objective of the revolution and of the succeeding revolutionary leadership, then, is to achieve the separation of peoples grounded in a patriotic ideology,<sup>115</sup> and then to develop structures within which those triumphs could be protected against internal (unpatriotic counter-revolutionaries) and external (for Cuba the American hegemon and successor to Spain) threat.<sup>116</sup> Those structures are necessarily Leninist, legitimated by the success of the armed struggle that brought the Leninist vanguard to power.<sup>117</sup> Again the later paragraphs of the American Declaration find their echo here. Struggle never ends. The resulting constitutional text is then directed toward both the reification of the revolutionary triumph but also in its preservation by constructing through constitutional text the structures of revolutionary responses to threats to foundational principles (now ideological frameworks) fear of the deprivation of which fueled the crisis that produced separation and the constitution of a distinctive political-economic model.

The preambular text of the Chinese State Constitution<sup>118</sup> follows a similar path.<sup>119</sup> Again, like the Cuban and unlike the American context, the revolutionary aspiration did not involve territorial

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid. (“Guided by the most advanced revolutionary, anti-imperialist, Cuban-Marxist, Latin American, and universal thought, in particular by the ideal and example of Martí and Fidel, as well as the social emancipation ideas of Marx, Engels, and Lenin” . . . “supported in proletariat internationalism, fraternal friendship, the help, cooperation, and solidarity of the peoples of the world, particularly those of Latin America and the Caribbean”).

<sup>114</sup> Ibid. (“Committed to Cuba never returning to capitalism as a regime sustained by the exploitation of man by man, and that it is only in socialism and communism that a human being can achieve his or her full dignity”).

<sup>115</sup> That was the essence of Robespierre’s defense of the Terror in 1794. See Robespierre, *supra*. It was also the basis for Mao Zedong’s elaboration of what became a people’s democratic dictatorship. See, Mao Zedong, ‘On the People’s Democratic Dictatorship (30 June 1949); available [https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4\_65.htm], last accessed 21 October 2024 (“The combination of these two aspects, democracy for the people and dictatorship over the reactionaries, is the people’s democratic dictatorship.”).

<sup>116</sup> Ibid. (“Identified with the tenets displayed in the concept of Revolution, as expressed by the Commander in Chief Fidel Castro on the 1st of May of the year 2000”).

<sup>117</sup> Ibid. (“Conscious that national unity and the leadership of the Communist Party of Cuba, born through the unitary will of the organizations that decisively contributed to the triumph of the Revolution and legitimized by the people, constitute fundamental pillars and guarantees of our economic, social and political order”).

<sup>118</sup> *Zhonghua Renmin Gongheguo Xianfa* (1982 as amended) (“Xianfa”); available [https://english.www.gov.cn/archive/lawsregulations/201911/20/content\_WS5ed8856cc6d0b3f0e9499913.html] last accessed 30 September 2024..

<sup>119</sup> It ought to be remembered that there is a lively debate about the locus of constitutional authority within the Chinese political-economic model. Some have taken the position that the Chinese State constitution reflects the organization of public administrative authority but that the political constitution of the nation is lodged within the constituting documents of the vanguard Communist Party of China. See, Larry Catá Backer, ‘Jiang Shigong 强世功 on “Written and Unwritten

separation as much as ideological transformation within a specific territory. To those ends the inevitable historical trajectories of a distinct people was essential.<sup>120</sup> Nonetheless, like the Cuban context, territory does play a role. In both the Cuban and Chinese case, the context is imperial domination by foreigners, rather than the distinctive development of a colonial people from their parent state (the American context).<sup>121</sup> That, of course, suits the times and the performance of domination as it shifted from its 18<sup>th</sup> to its 19<sup>th</sup> century practices.

Those threats, and the realization of the fear of its effects on the sovereign distinctiveness of the Chinese people (as so understood) produced a crisis manifested by revolutionary resistance. That first required eliminating the corrupted detritus of the failed structures of Chinese governance.<sup>122</sup> But that initial cleansing merely provided the space within which a more profound change, one that it was asserted suited the times, took place.

However, the historic mission of the Chinese people to oppose imperialism and feudalism was not yet accomplished. In 1949, after engaging in protracted, arduous and tortuous struggles, armed and in other forms, the Chinese people of all ethnic groups led by the Communist Party of China with Chairman Mao Zedong as its leader finally overthrew the rule of imperialism, feudalism and bureaucrat-capitalism, won a great victory in the New Democratic Revolution, and founded the People’s Republic of China. The Chinese people thus secured power and became masters of their own country.<sup>123</sup>

Implicit in this rendering of history, in a way that echoes the American variation, is the understanding of unfinished revolution. That is, that the triumph of separation as a means of protecting the core ideologies on which the distinctiveness of a people were manifested, was merely the first step in a long process. That process, for the Americans involved preservation, and its instrumentalities of State were then constructed toward those ends. In China (and to some extent in Cuba though manifested differently),<sup>124</sup> that process involved protection of the core principles and the imposition of a structure within which its aspirational objectives might be realized through the leadership of a vanguard collective.

Within the narratives of the Chinese Constitution’s preamble, that consisted of the recounting of the initial victory against those who stood between the vanguard and its leadership of the nation.<sup>125</sup> More importantly it signaled the transposition of that dialectic of victory into an internal and external struggle

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Constitutions” and Its Relevance to Chinese Constitutionalism/强世功对“不成文宪法”以及中国宪政秩序的研究。’ (2014) 40(2) *Modern China* 119-132.

<sup>120</sup> Xianfa, preamble (“China is one of the countries with the longest histories in the world. The Chinese people of all ethnic groups jointly created its magnificent culture and have a proud revolutionary tradition.”).

<sup>121</sup> Ibid. (“After 1840, feudal China gradually became a semi-colonial, semi-feudal country. The Chinese people, wave upon wave, waged heroic struggles for national independence and liberation and for democracy and freedom.”).

<sup>122</sup> Ibid. (“The Revolution of 1911, led by Dr. Sun Yat-sen, abolished the feudal monarchy and gave birth to the Republic of China.”).

<sup>123</sup> Ibid.

<sup>124</sup> Larry Catá Backer, ‘Central Planning Versus Markets Marxism: Their Differences and Consequences for the International Ordering of State, Law, Politics, and Economy,’ (2016) 32(1) *Connecticut Journal of International Law* 1-47.

<sup>125</sup> Xianfa, preamble.

both to preserve revolutionary victory and to move forward with revolutionary objectives. The first focused on the mechanics of defeating internal and external enemies—enemies that continue to produce fear of threat and crisis within the nation<sup>126</sup>—and by moving the project of Marxism along the Chinese Socialist path.<sup>127</sup> That suggested the historical completion of one phase of the revolutionary process, but also the continuing revolution.

Through the long process of revolution, development and reform, a broad patriotic united front has formed under the leadership of the Communist Party of China, with the participation of other political parties and people’s organizations and including all socialist working people, people involved in building socialism, patriots who support socialism, and patriots who support China’s reunification and are dedicated to the rejuvenation of the Chinese nation.<sup>128</sup>

That, in turn, required protection against external threats from defeated hostile foreign elements, an apparatus for the development of the masses, and protective discipline within the vanguard itself. Each of these posed a threat, the fear of which was manifested in the structuring of the administrative apparatus that emerges within the Chinese constitutional text. The first involves both the initial defeat of foreign hostile forces but also the continued vigilance against “imperialist and hegemonic aggression, sabotage and armed provocations.”<sup>129</sup> It also involves, like its Cuban counterpart, a connection with global revolutionary collectives.<sup>130</sup> The second involved the constitution of the people’s democratic dictatorship.<sup>131</sup> And the third involved the constitution of the vanguard party itself within its own constituting instruments, meant to express the normative cage within which the political and leadership work of the vanguard was to be undertaken.<sup>132</sup>

The resulting constitution is then a semiotic signifier of this historical trajectory, of this arc of the dialectics of threat, crisis and response, and of the institutionalized forms of continuous revolution (继续

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<sup>126</sup> Ibid (“the people’s democratic dictatorship led by the working class and based on an alliance of workers and peasants, which in essence is a dictatorship of the proletariat, has been consolidated and developed.”).

<sup>127</sup> Ibid. (“The fundamental task for our country is to concentrate on achieving socialist modernization along the road of socialism with Chinese characteristics.”).

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid. (“The achievements of China’s revolution, development and reform would have been impossible without the support of the world’s people. The future of China is closely bound up with the future of the world”).

<sup>131</sup> Ibid (“The people’s democratic dictatorship led by the working class and based on an alliance of workers and peasants, which in essence is a dictatorship of the proletariat, has been consolidated and developed.”).

<sup>132</sup> Larry Catá Backer, ‘Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System,’ (2012) 30(1) Boston University International Law Journal 331-408 (2012). Xianfa, *supra* (“Both the victory in China’s New Democratic Revolution and the successes in its socialist cause have been achieved by the Chinese people of all ethnic groups under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought by upholding truth, correcting errors, and surmounting many difficulties and obstacles. Our country will long remain in the primary stage of socialism”).

革命论)<sup>133</sup> grounded in the fundamental principle of contradiction<sup>134</sup> also built into the normative bedrock of Chinese Marxist-Leninism. The revolutionary cycle is built into the structures of self-revolution, of criticism self-criticism, and on the dialectical nature of the progress of the political-economic model towards its ultimate goal of establishing a communist society. It is at that point that the revolutionary cycle may be completed. Ideology changes the conceptualization but not the modalities of the threat-crisis-response-resolution cycles (dialectics) that are built into the constitutional text. For the Americans the object was to preserve; for the Cubans and the Chinese, the object was to purify and fulfill. In each case that objective reflects a forward projecting mimesis of the moment or process of origin; that is what the constitutive text is built for—the engine within which the repeated explosions of political dialectics is meant to be contained within the ideological principles that framed the initial explosion. And that points to the ultimate fear—the fear that the engine will break down or be abandoned. For the Americans that produces the fear built into the rhetoric of democratic backsliding;<sup>135</sup> for the Chinese and Cubans the fear produced is reflected in the rhetoric of “left” and “right” error.<sup>136</sup> That fear—the fear of the failure of the project of independence, is what haunts each of these machines.

#### **4. From the State to the Techno-Bureaucratization of Dialectics of Fear and Crisis: A Glimpse at Kosovo**

The fulfilment of independence, of separation, for the American colonies, and for the establishment of both the Cuban and Chinese Marxist-Leninist variations on that theme, were each in turn, to be tested by force of arms. In each case, failure would have extinguished the threat, but also the separatist aspirations of the revolutionary collectives. That certainly, was the fate of the Confederate States of America. It was also the case for the more abstracted separation of the Kuomintang revolutionary forces in China,<sup>137</sup> and the liberal democratic impulses suffocated in Cuba first by the Spanish imperium, then by the American protectorate, and then by their own actions. Had the colonists lost, then the Declaration would have perished with them. As it happened, the united colonies were successful and the Declaration of Independence acquired an influence that exceeds that of most other products of the political mind. Many peoples since that time have sought to rely on the framework of the

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<sup>133</sup> John Bryce Starr, ‘Conceptual Foundations of Mao Tse-Tung’s Theory of Continuous Revolution,’ (1971) 11(6) *Asian Survey* 610-628. Contrast the notion of permanent revolution. See Leon Trotsky, *The Permanent Revolution* (1930), available Marxists.com [https://www.marxists.org/archive/trotsky/1931/tpr/pr-index.htm], last accessed 21 September 2024.

<sup>134</sup> Mao Zedong, *On Contradiction* (August 1937); available Marxists.com [https://www.marxists.org/reference/archive/mao/selected-works/volume-1/mswv1\_17.htm], last accessed 30 September 2024.

<sup>135</sup> Thomas Carothers and Brendan Hartnett, ‘Misunderstanding Democratic Backsliding,’ (2024) 35(3) *Journal of Democracy* 24-37.

<sup>136</sup> Deng Xiaoping, ‘On Opposing Wrong Ideological Tendencies (27 March 1981); available in Marxists.com [https://www.marxists.org/reference/archive/deng-xiaoping/1981/166.htm], last accessed 5 October 2024; Mao Zedong, ‘On the People’s Democratic Dictatorship (30 June 1949,’ available at Marxists.com [https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4\_65.htm], last accessed 7 October 2024.

<sup>137</sup> Robert E. Bedeski, ‘The Tutelary State and National Revolution in Kuomintang Ideology, 1928-31,’ (1971) *The China Quarterly* 308-330; Mary C. Wright, *From Revolution to Restoration: The Transformation of Kuomintang Ideology*, (1955) 14(4) *Far Eastern Quarterly* 515-532.

Declaration—and many have failed in that effort when tested by force of arms. And that is the point—the Declaration of Independence—for all that it was a lawyer’s document was meant to make law through force. This was the application of the “higher law” of states to which no recourse to the courts could be made.<sup>138</sup>

How different the experience of states in 2008. And yet how similar. Like much else in global political life, such declarations are now carefully managed by an international apparatus designed to limit the violent effect of such national aspirations, and to manage the process of separation through a political model grounded in bureaucratic order and judicial restraint. On February 17, 2008, the people constituting themselves as the Republic of Kosovo, declared their independence. The announcement of that event was memorialized, like that of their American predecessors, with a writing—the Kosovo Declaration of Independence.<sup>139</sup>

This is no lawyer’s brief; it is a multilateral instrument that binds only its drafter, in contract form.<sup>140</sup> This is no act of self-constitution. This is an apology, in the form of an international contract between the people of Kosovo and its managers within the United Nations. Still—this is the form in which independence is declared today—with permission and subject to administration by those supra-national institutions that can guarantee that such a declaration will *not* be tested by force of arms. Indeed, the declaration can be reduced to little more than an assent to the conclusion and suggestions of a pair of reports prepared by the United Nations.<sup>141</sup>

The declaration is both a statement of the Assembly of Kosovo, and an affirmation of the international settlement of the issue of Kosovo’s “place” in the world. It starts with a set of recitals. Several suggest the nature of events leading to the declaration—especially the disastrous relations with Serbia.<sup>142</sup> One suggests the aberrational nature of the event: “*Observing* that Kosovo is a special case arising from Yugoslavia’s non-consensual breakup and is not a precedent for any other situation.”<sup>143</sup> This is emphasized in the body of the Declaration itself: “Our independence brings to an end the process of Yugoslavia’s violent dissolution.” (Ibid., para. 10). Yet, though relations were disastrous, and the cause of independence, still, the Kosovars recognize a desire for good relations with the “Republic of Serbia with whom we have deep historical, commercial and social ties that we seek to develop further in the near future.” (Ibid., at para. 11).

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<sup>138</sup> Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (Indianapolis: Liberty Fund, 2008 (1954)).

<sup>139</sup> Kosovo Declaration of Independence (17 February 2008); available [https://www.refworld.org/legal/legislation/natlegbod/2008/en/56552], last accessed 30 September 2024.

<sup>140</sup> Kosovo Declaration of Independence ¶ 12 (“We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan.”).

<sup>141</sup> United Nations Office for the Special Envoy to Kosovo, [Report of the Special Envoy of the Secretary-General on Kosovo’s future status](#), S/2007/168, March 26, 2007, and United Nations Office for the Special Envoy to Kosovo, [Comprehensive proposal for the Kosovo Status Settlement](#), S/2007/168 Add.1, March 26, 2007.

<sup>142</sup> Kosovo Declaration of Independence, recitals.

<sup>143</sup> Ibid.

A number suggest that despite the ethnic/religious nature of the decision to secede, the resulting state will be multi-ethnic, democratic, human rights loving and international good citizen state, “in line with the highest European standards of human rights and good governance.”<sup>144</sup> And the most important suggests the framework within which the declaration is made possible—the United Nations Report recommending a sort of independent status for Kosovo.<sup>145</sup>

The declaration itself is contingent. It must simultaneously reflect the will of the masses and conform to the expectations (and limitations) of that exercise of will by a superior managerial sovereign power.<sup>146</sup>

After stressing the democratic and multi-ethnic secular character of the state,<sup>147</sup> the Declaration binds itself to the administration of the United Nations.

We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.<sup>148</sup>

Indeed, the declaration stresses the relationship with the United Nations in terms of dependency, past and future: “We express our deep gratitude to the United Nations for the work it has done to help us recover and rebuild from war and build institutions of democracy. We are committed to working constructively with the United Nations as it continues its work in the period ahead.”<sup>149</sup>

The dependence serving as the substructure of Kosovar independence extends to the subordination of the popular will to the higher law of the management by the United Nations. Thus, the Kosovo Declaration of Independence severely limits the scope of constitution making: “The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.”<sup>150</sup> This is stark evidence of a perhaps exaggerated form of institutionalized transnational constitutionalism that had its start after 1945 with the constitutions of Germany and Japan.<sup>151</sup> And, indeed, transforms the fear-rage-crisis-resolution trajectories of the American Declaration into a set of networked techno-bureaucratic processes for the exercise of discretion, in which the fear, crisis and resolution are detached from its source, pushed up to the transnational sphere, and there transformed into a question of transnational convenience, the answer to which is to be delegated back to its source.

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<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Kosovo Declaration of Independence ¶ 1 (“We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.”).

<sup>147</sup> Ibid., ¶ 2.

<sup>148</sup> Ibid., ¶ 3.

<sup>149</sup> Ibid., ¶ 7.

<sup>150</sup> Kosovo Declaration of Independence ¶ 4.

<sup>151</sup> See Larry Catá Backer, [God\(s\) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century](#), Mississippi Law Review, Vol. 27, 2008.



But this is more than a submission to the limitations of the principles of transnational constitutionalism. This is an independence prematurely conceived and dependent for its success on the tutelage of others. One gets a sense of this not merely contingent but subaltern assenting effort within the Declaration itself; the contrast with the last paragraphs of the American Declaration are quite evident:

We welcome the international community’s continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo’s future peace, prosperity and stability.<sup>152</sup>

And indeed, the dependent nature of Kosovar independence is conceded by the Declaration’s stated intent to cede sovereignty almost as soon as it acquires a modicum of independence by seeking membership within the European Union.<sup>153</sup> One gets the sense that Kosovo’s independence is possible only as a dependent member of a larger supra-national community. Kosovo is not the only example of this reconstitution of power from state to supra national entity. There are sub national ethnic groups within Europe seeking independence from a traditional state but within the safety of the governmental structure of the European Union.<sup>154</sup>

The obligation to establish a constitution is only one of a number of contract like provisions inserted into the Declaration. In addition, for example, the Declaration expresses a commitment to “undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part.”<sup>155</sup> But perhaps most importantly, it declares that “Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan.”<sup>156</sup>

It seems that in the 21st century, risk has been taken from political events. Independence is no longer a self-constituting event—violent, self-referential and ready to be tested. Instead, independence is a contingent event. It is managed, subject to conditions, and acquired with the permission of those who

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<sup>152</sup> Kosovo Declaration of Independence ¶ 5.

<sup>153</sup> *Ibid.*, ¶ 6.

<sup>154</sup> See Larry Catá Backer, ‘The Euro and the European Demos: A Reconstitution,’ (2002) 21 *Yearbook of European Law* (England) 13.

<sup>155</sup> Kosovo Declaration of Independence ¶ 9.

<sup>156</sup> *Ibid.*, ¶ 12.

are willing, by their suzerainty over events and parties, avoid violence by controlling the form and effectiveness of such declarations. As the Kosovo Declaration itself seems to declare—this is an odd independence, if it is independence at all. As Americans contemplate their own Declaration of Independence, asserted without management, subject to no condition but those of a common understanding of the legitimating authority of higher law, and subject to a conscious understanding of the need to defend the Declaration by force of arms—and to be prepared to continue to do so preserve it independence in the future, the Kosovo Declaration of Independence reminds us of the way in which that world has passed away. Nations are now managed into existence—or managed out of existence. Declarations are now morphed into agreements to abide by the rules of that web of obligations and commitments designed to make resort to proof by arms obsolete (except perhaps in the case of Israel, which is still subject it seems to the old rules).

And most important of all, the character of the contingency of independence has changed dramatically. The effectiveness of the American Declaration of Independence was grounded in an ability to defend it against military challenge. Once effective, the Americans were substantially unconstrained by foreign powers in the constitution of its government and the elaboration of its political organization. The effectiveness of the Kosovo Declaration of Independence, in contrast, is grounded on the ability of the international community to manage the process of separation. Once effective, the Kosovars will be able to organize their state, but subject to the constraints imposed by the guarantors of Kosovar independence—from the constitution of its government to the normative framework within which that government will be constrained. Kosovo reminds us of the ways in which independence has changed character in the centuries since 1776. That change represents a substantial evolution in notions of sovereignty, of power and power relationships. It suggests the strength of the international community, and the critical importance of supra national organizations in the constitution of states—especially small ethnically homogenous tribal states.

### **5. From Template to the Mimetic Constitutionalization of Fear/Crisis**

Of course, once independence was achieved, it was not clear that anyone cared much about either principle or grievance—both had served their purposes. And yet both proved durable, precisely because they served as quite malleable tools to later generations seeking to construct prisons of their own tyranny against which liberation was necessary—from slave holding secessionists to contemporary factions that would remake the United States and its culture in their own image. At their base, though, their power is derived from their context. And that context suggests that principle was to be bent to the customs and traditions of the locality against efforts to reform (change) them originating from beyond. The Declaration of Independence appears clear that there was no quibble with the traditional organization of society, its economic, religious, social, gender, and ethnic structures. Quite the reverse; it was in efforts to reduce and move beyond the quirks of the local in the service of different principles of governance that rebellion seemed inevitable.

Reading the edges of the Declaration of Independence against its core, then, reveals an affinity for a geography of principles that endures to this day. It is one in which, while granting inalienable rights to all people in equal measure, make the measure of those rights dependent on those to whom custom

and tradition vests that authority. While the scope of that core principle has changed substantially over the centuries, the nature of rights continues to depend on the government instituted among individuals by their consent, and exercising those powers only as so as they might be suffered to do so. The Declaration, then, reminds us of the precariousness of government, and of an authority to sweep it away, irrespective of the majesty of whatever constitutional instrument might be shaped to ensure that this does not occur should the time come when a government is viewed (by those with the power to defend those views against their opponents) as destructive of the ends of furthering the life, liberty and the pursuit of happiness (as those might be understood in each historical era) of those to whom it is obliged.

There are a number of important insights that might be extracted (at least for our purposes here) from this list of grievances. These suggest the contours of a mimetic constitutionalization, that is the structuring and representation of the nature and practice of fear of or as a crisis to the ideological presumptions on which the solidarity of the political community are sought to be made rigid.<sup>157</sup> It also reinforces the connection between the forces that create the conditions for constitutional formation and the constitutional form itself, in whatever form it takes.<sup>158</sup>

First, there is a connection between injuries and usurpations (two distinct concepts judged by its effects on the power relationships of traditional colonial society and its structures), its objective (the establishment of “tyranny”), and the trigger of a history of repetition. One-off injury is not enough, neither are usurpations without intent to establish tyranny. For these the ordinary courts, and the machinations of politics, might have sufficed. It is the accumulation of grievance, together with adequate notice of complaint (“We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable jurisdiction over us”) that serve as the basis for rebellion. Both Cuba and China have fine-tuned the performance of grievance as a predicate for the emotive explosion that makes the revolutionary moment possible. In the case of Cuba the focus is on centuries of colonial servitude within the Spanish Empire followed by a sort of mercantile vassalage under the patronage of the United States.<sup>159</sup> In the case of China is a the mythos of a century of imperial humiliation that contributed to the dissolution of the imperial apparatus, and then effective quasi partition followed by invasion in the period

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<sup>157</sup> Aristotle, *The Poetics of Aristotle* (S. H. Butcher (ed), Project Gutenberg eBook #1974), available [<https://www.gutenberg.org/files/1974/1974-h/1974-h.htm>] last accessed 21 September 2024; Walter Benjamin, ‘On the Mimetic Faculty,’ in Gershom Scholem, and Walter Benjamin, “Letters 27-34” *The Correspondence of Walter Benjamin and Gershom Scholem 1932-1940* (1st English ed., New York: Schocken, 1989) pp. 60–79.

<sup>158</sup> Larry Catá Backer, *American Apokalyptein and the Discursive Rituals of its Judge/Priests—Between Heaven and Pandemonium inside the Republic, Law at the Endo of the Day* (4 July 2024); available [<https://lbackerblog.blogspot.com/2024/07/american-apokalyptein-and-its-rituals.html>] last accessed 30 September 2024.

<sup>159</sup> *Constitution of the Republic of Cuba* (amended 2019, Preamble; available [[https://www.constituteproject.org/constitution/Cuba\\_2019](https://www.constituteproject.org/constitution/Cuba_2019)], last accessed 31 October 2024 (English translation).

through 1945.<sup>160</sup> For Kosovo it is the mythos of the ethno-religious subaltern in a shifting landscape of imperial others now an exemplar of the post-modern multi-ethnic state.<sup>161</sup>

Second, many of these usurpations and injuries are structural, institutional and political. Royal assent; restricting the traditional discretion of governors in lawmaking through legislative centralization; shrinking the scope of local lawmaking power and unresponsiveness to local (legislative) need; increasing the transaction costs of (and reducing popular) participation (by moving government); dissolving local legislatures that challenge the will of the superior institutions of state; and delaying elections for replacing dissolved legislative bodies reducing popular participation in government in perilous times—each of these grievances touch on the conventional political rights and privileges of those social ranks that had enjoyed them from the beginnings of colonization and settlement. New forms of government, new approaches to representation, and new social orders and rankings that went with them, were profoundly disturbing to colonial peoples grown accustomed to their *fueros* (traditional rights to self-government and the protection of local custom and traditions).<sup>162</sup> (These were protection against innovation as well as preservation of colonial notions of principles of representative government. These were protections of a *customary society*, substantially content with its social organization according to rank, religion, gender, etc. and the distribution of power as a consequence thereof in the organization of political, social, cultural and economic rights. This is no indictment of the present state of society, but it does serve to frame the context within which the meaning of principle is anchored. And that anchor is in the preservation of local order, its customs and traditions. Not customs and traditions themselves, but local control over their manifestation and institutionalization within the structures of the state, appear to matter, and to trigger rebellion.

Third, several of the usurpations and injuries touch on the administration of the Common Law and the control of the judicial power.<sup>163</sup> These grievances touch on judicial dependence on the largess of the Crown (an issue not unknown in contemporary America). Yet for all that these grievances speak to judicial independence and legal autonomy, it does not suggest independence of either. The autonomy of law, after all would be a creature of legislative supremacy. That it might be abolished by the executive and another system substituted for it appeared to define arbitrary conduct (of the executive authority, in one instance, and of a superior legislative authority, in another). And the autonomy of judges did not suggest the absence of an executive authority to supervise and discipline judges. It was the source and manner of that discipline that was at the core of the grievance, not the obligation of the executive to discipline, “in accordance with and subject to the limitations of law.” Ironically, obstruction of justice was as politically charged a concept in the 1770s as it appears to be in contemporary American society—politics clothed in law. And there is a political and societal element as well—the loss of trial by jury was not merely an issue of

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<sup>160</sup> State Constitution of China (1982 as amended through 2019), Preamble, available [https://english.www.gov.cn/archive/lawsregulations/201911/20/content\_WS5ed8856ec6d0b3f0e9499913.html], last accessed 31 October 2024.

<sup>161</sup> Albert Rohan, ‘Kosovo’s Path Toward Independence,’ European Council on Foreign Relations (2 February 2018); available [https://ecfr.eu/article/commentary\_kosovos\_path\_to\_independence/], last accessed 31 October 2024.

<sup>162</sup> Enric Guinot Rodríguez, ‘De los fueros locales al fuero de Valencia en el marco del proceso de instauración de la sociedad feudal del siglo XIII en el reino de Valencia,’ (2018) 35(2) *Storia Historica/Historia Medieval* 37-862.

<sup>163</sup> Backer, *Reifying Law*, *supra*.

the distribution of power between individuals and judges, but also of the authority of custom and tradition against a professionalized corpus of jurists whose loyalty to society might now be suspect given their necessary allegiance to the Crown. This debate, of course, has never died, it has just shifted its targets—but the combatants remain the same—elites against the rest.

Fourth, the grievance against the usurpation of, and injury to, colonial constitutions continue to ring with overtones of contract, of status, and of rights. The abolition of colonial charters suggested a power of kingship (and later of Parliamentary supremacy) against notions of fundamental rights of locality that were affirmed—not created—through the charters. Yet this grievance speaks to the preservation of rights, traditions and customs as shaped by the locality, without the interference of the people as a whole constituted and represented as the national collective Crown-in-Parliament. That refusal to recognize emerging national instrumentalities of representation and government might have seen its last important political gasp intertwined with the issues that led to the separation of slave holding states in 1860. But this grievance remains a live one in contemporary society—whether the locality is understood in territorial or communal terms. In either case, the center—Crown in Parliament—is viewed both as an instrument (of protection against other localities and foreigners that remain un-absorbed) and as a threat (when it serves as a means of centralizing governmental power in some (always) far off place). In the case of Kosovo this relationship is inverted. It is only because of a Crown-in-Parliament structure, in the form of the E.U. ad multilateral instrumentalities, that it is possible for Kosovo to aspire to independence. Kosovo can separate precisely because it has no effect within Europe. There are other variations. Cuba independence as part of the fear rhetoric of the 1950 Revolution is grounded in a second order separation from imperialist colonialism, whether manifested in its original Spanish form or thereafter in the form of globalization.<sup>164</sup> In China after 1949, the fear-crisis, is a response to and an effort to separate from networks of imperial global hegemonies that were not centered in itself.<sup>165</sup>

Fifth, migration was as big an issue, and as important a cause of rebellion then, as it might appear in contemporary times. The context is eerily similar in some respects—a faraway superior apparatus of state (then the King, now the President) wishes to preserve the population in its current form and make up for reasons of state and perhaps of advancing the interests of those apex institutions. Local populations see things differently, and view the closing of the borders (and the control of naturalization) as a threat to economic and social stability in colonies still threatened by indigenous peoples and foreign colonial powers. But migration here was also tied to land—colonial administrators needed people and also land—and acquiring land required that it be taken from someone—indigenous people, foreign powers, or the Crown. It is not clear that this appetite for migration, settlement, and colonization has changed much—except for its rhetoric within the identity based factionalism of contemporary politics. In China, Cuba, and Kosovo, the issue is also present, but inverted—one worries about outmigration—rather than of the opening of the national territory to or suppression of immigration.

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<sup>164</sup> Larry Catá Backer, *Cuba’s Caribbean Marxism: Essays on Ideology, Government, Society, and Economy in the Post-Fidel Castro Era* (Little Sir Press, 2018); Larry Catá Backer and Flora Sapio, *Popular Consultation and Referendum in the Making of Contemporary Cuban Socialist Democracy Practice and Constitutional Theory*, (2019) 27(1) *University of Miami International Law Review* 37-130.

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Sixth, the grievances speak to a critical usurpation of the legislative (and as we have noted earlier the judicial) core of government by metastasizing the role and size of the executive. The grievances speak to the revulsion at the growth of what in later centuries will become the foundation for the administrative state. And the language sounds contemporary, in some respects.<sup>166</sup> Legislatures may serve the popular whim of those who control it, and judges serve the law as customarily accepted, but exercise of the executive prerogative appears to shift control back from both of these branches to an institution with historical ties to then contemporary fears of tyranny. This rings particularly modern in the grievance about the maintenance of armies without legislative consent. The armies were not the problem, the exercise of popular control through legislatures appeared to be. Interesting as well was what appeared to the notion that equated a large bureaucracy with a stifling of markets and autonomy. Those have the ring of contemporary discussion. But in that case, the principles of the Declaration, and its underlying facts, appear to point in an odd direction—one that reverses political polarity. China, Cuba, and Kosovo follow a similar pattern but with significant contextual differences. The issue for all three is not a return to the traditional ordering of government, but to the realization of the forms that government ought to take. That puts into focus the Marxist-Leninist perception of China and Cuba, but also the multilateral and interconnected sovereign order in Kosovo.

Seventh, in parallel with the grievances about the transformation of the exercise of the judicial power, were those respecting the control of military authority. Here the grievances speak to a loss of civilian control of the military, and of the transfer of civilian control from legislature to executive (the Crown). Here the grievances speak to inversion—in contradistinction to traditional American colonial *fueros* which demanded an autonomous judiciary and a servile military, the Crown in transforming democratic governance had sought to create a dependent judiciary and an independent military (independent of the popular authority of the legislature). The colonial military, thus detached, appeared to act like an army of foreign occupation—that is the heart of this cluster of grievances; ironically one that continues to have resonance in an age of the militarization of the police under the control of local and administrative apparatus directed by professionalized administrators. In that context, the creation and maintenance of systems of law that effectively insulate military and police from the consequences of their actions—where they deviate from law and custom—remains as important and volatile an issue in contemporary America as it did in the 1770s—just that the target of that fury, again, has changed. In the Cuban and Chinese context, of course, the grievance is molded by the imperialist turn; it is focused on the exercise of military control by foreigners and the need to regain the military power domestically. In the Kosovo context, the focus is similar, with an exceptional difference—that the military power is ceded effectively to the foreign inter-governmental forces on which the emerging constitutional order depends.

Eighth, the grievances touching on economic rights also resonate today. The colonial elites were concerned about governmental control of trade. They appeared to favor access to markets without

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<sup>166</sup> Larry Catá Backer, ‘From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems,’ (2009) 113(3) Penn State Law Review 671-732).

hindrance. They got control that served the interests of London instead. Not that they might not have suffered policies of trade contraction that favored local interests—but not national (or imperial) interests. Again, what emerges here are that cocktail of customs, traditions and local control, against nationalization of governmental power and the increasing remoteness of authority. The taxation grievance (no taxation without representation in the popular imaginary) are well known and remain curiously ironic. Kosovo cedes that discussion to the imperium within which its independence is to be undertaken and managed. And yet the centrality of economic rights remain crucial for the fear-response of the revolutionary movements, and the subsequent constitutional projects in China and Cuba.<sup>167</sup>

Ninth, and perhaps the most potent of the grievances go to the issue of legitimacy in the constitution and operation of government. These last set of grievances appear to suggest that even if arbitrary and far off government might be tolerated, what could not be tolerated was a state in which the government appeared to make war on its own subjects. Here the grievance actually suggests not so much a complaint as the observation of an abdication of authority. By their own hand, the Declaration suggests, the government had become a foreigner, an occupying power, in its own territories. That is the model followed in Kosovo, but also, in a sense in Cuba and China. In the later cases, the nature of the occupation changes, becomes more abstracted and rooted in the detritus of historical effect that must be overcome. Separation in those cases is as much from the grasp of history as it is from the effects of interlinking within what is now perceived as imperial inward projections (for example as “hostile forces” 敌对势力 (敌对势力), external threats).<sup>168</sup> These grievances ought to be the subject of more considered study—especially as they appear to aid in the embedding of meaning for the principles that add meaning to this conduct. Here the grievances suggest an inversion at the heart of the Declaration of Independence: *it is not the colonists who are rebelling against the Crown, but rather it is the Crown (in Parliament) that has rebelled against its own (colonial) peoples*. The object of Colonial action, then, is to restore a null state, rather than to advance some (progressive) project of governmental and social organization. In the face of the British project of constructing a modern nation state, the colonists fought valiantly to preserve an older order—one that secured the blessings of social and economic organization—as well as its privileges—as they had been established when each colony was formed and under which each operated along trajectories that diverged sharply from developments in London. In Kosovo, ethno-ordering within a superior political economic model is the way out of crisis. That represents an more ancient approach the perception and resolution of constitutional crisis within Empire.

When put together, one can begin to see the way in which constitutional fear, producing crisis and resolution is built into the structures of what emerges with the resolution of crisis. The American Declaration of Independence serves as both the genesis of the resulting (eventually) American federal constitution. But at the same time, that product is built on the structuring of elements designed to anticipate and contain mimetic appearances of similar crises. The framework for that is in the ideological foundational principles. These appear in the U.S. Declaration of Independence both as

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<sup>167</sup> Larry Catá Backer, ‘Central Planning Versus Markets Marxism: Their Differences and Consequences for the International Ordering of State, Law, Politics, and Economy,’ (2016) 32(1) Connecticut Journal of International Law 1-47 (2016).

<sup>168</sup> The China Media Project Dictionary, hostile forces; available [[https://chinamediaproject.org/the\\_ccp\\_dictionary/hostile-forces/](https://chinamediaproject.org/the_ccp_dictionary/hostile-forces/)], last accessed 2 November 2024.

abstract principles and as their fulfillment (in the negative) through the evidentiary list of the factual indictment of British betrayal. China, Cuba, and Kosovo follow similar path dependent trajectories. In each of these cases the revolutionary pathway served as the template around which a constitutional order was conceived and framed. For the Americans that produced a system of fractured power that would contain the threat of re-creating the late 18<sup>th</sup> Century British drift toward a Westminster system. For the Chinese and Cubans that produced a system dependent on the guidance and leadership of the revolutionary vanguard of social forces now organized as a Communist Party, presiding over an administrative apparatus that was to serve as the institutional structures for the confrontation of dialectical contradictions propelling these states toward revolutionary perfection. For Kosovo, that produced a sovereign enterprise that reflected the vision of a multi-cultural and secular Europe in which sovereignty was deeply embedded within webs of multi-lateral and supra-national governance, but also in which those webs would protect Kosovo from its older master.

## 6. Conclusion

What does it mean when one speaks to constitutions of fear? This essay attempted one way of grasping the subject. To that end it shifted the constitutional gaze from the text of the constitution to its emotive framework, that is to the articulation of the fears and crisis that produced it. I suggested that the victory of a revolutionary dialectic rather than the production of a constitution is the starting point for the organization of the state under the principles through which its government is constituted and social solidarity is based. Its ending point is the incorporation of that revolutionary dialectic as and in the constitutional order that the revolutionary triumph made possible. In this sense, revolutions do not end—they just shift orientation from states of being within the constitutional order or deployed to destroy that order in favor of another. Constitutions, themselves, then, operate as institutionalized revolutionary orders manifesting the contextually specific ideologies that drove revolution and its dialectics.

Shifting the constitutional gaze from the text of the constitution to its emotive framework, that is to the articulation of the fears and crisis that produced it, produces clarity in two respects of interest to the analysis attempted. The first is that constitutional formation is not a rational exercise detached from the messy and violent process of its origins. Indeed, constitutions are meant to reflect them. The second is that the nature of that reflection incorporates two distinct elements. The first is to transpose the crisis resolution into the structure of the text of the institutions created. The second is to develop a system that acknowledges that crisis is permanent and that seeks to embed in the constitutional document the strictures of resolution that preserve the core values that produced the initial crisis of separation. The object of the constitution, then, is both forward and backward looking. It is an object that signifies the past and at the same time is meant to push that signification forward in time to the present (and the future) through its institutionalization of containment and mimesis, of the expectation of a cyclicity of fear-crisis and its resolution.

The interpretive referent, in all three examples—the urtext of American lawyer’s brief, the dialectical historical progressivism of the Chinese and Cuban variations, and the managerial progressivism of multilateral fear-crisis dialectics—acquire their meaning through the ideological basis from which a collective can perceive threat, manifest fear, engage in conflict and seek a resolution. The



constitutional form, then, institutionalizes threat, crisis, and resolution within the originating framework that made the constitutional structuring possible. It provides the vessel within which a contained mimesis can be performed from one stage of historical development to another. The rest is a soothing propaganda—the notions of rationality and closure. The imaginaries of constitutions, instead, may be better approached as the engine within which the combustions of human nature may be utilized to propel the collective in whatever direction forward is defined within its ideological framework through the utilization of endlessly iterative replication of the original fear-threat-crisis-resolution arc. Constitutions, in this sense, are the stage within which origin stories are replayed, and in the replaying the origin story is reaffirmed and fulfilled in temporally relevant ways.

The lesson might be clear. The object of revolutionary constitutionalism—the fundamental basis of constitutional design and perception since the late 18<sup>th</sup> century (though with antecedents well before then), is to preserve a revolutionary settlement of a political-economic order by cultivating revolutionary dialectics (rather than suppressing them) within revolutionary structures, now memorialized in a constitutional document. The object is redirection—from the utilization of revolutionary dialectics against a post-revolutionary apparatus now in power to an instrument for the preservation and affirmation of that post-revolutionary apparatus. It becomes a mimetic device denatured and now serving an apparatus. Stability is not forever; it retains its power at least until the fundamental contradictions of this revolutionary constitutional order collapse the system. At some point, the revolutionary dialectics that produced the post-revolutionary order will themselves again target that ordering from the outside. What remains is the cyclicity of dialectic—fear, response-reconstruction—rather than the systems to which it furthers from one to another stage of human historical development.