

# 1 || Constitutionalism and China

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Many Chinese view constitutionalism as the ideal political system in the modern age, but there is less consensus on what constitutionalism is, its core elements, and the reforms that would be necessary in the existing political system to enable constitutionalism to be practiced in China. To answer these questions requires solving several theoretical and ideological issues. This article discusses the nature of constitutionalism, identifies its three key elements, justifies them within the context of a theoretical rationale that makes sense in China, and discusses the prospects for the implementation of Chinese constitutionalism.

## I. What Is Constitutionalism

Mao Zedong once said, "Constitutionalism is democratic politics."<sup>(1)</sup> When he made this statement, the Communist Party of China was using the call for constitutionalism as a weapon in the struggle against the Kuomintang. Mao put forward the concept of "a free and democratic China". This meant a country in which all levels of government, including its central government, would be created

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(1) Mao Zedong, "Constitutionalism of New Democracy", *Selected Works of Mao Zedong*, vol.2., 1952, p.726.

by universal and fair elections using the secret ballot. Government officials at all levels would be accountable to the people who elected them. According to Mao, constitutionalism would realize sun Yat-sen's Three People's Principles, Lincoln's principle of "government of the people, by the people, and for the people", and Roosevelt's "Four Freedoms".<sup>[2]</sup> Around the same time, the Communist Party of China's well known jurist, Zhang Youyu, wrote a series of articles to explain constitutionalism.<sup>[3]</sup>

After 1949, Chinese leaders ceased to mention this concept, and few scholars wrote about it. The topic received some attention after 1978, but scholars have generally equated constitutionalism with the constitution.<sup>[4]</sup> Only recently, with the convening of two conferences in December 1992, have scholars begun to elaborate the problem in a fairly systematic way.<sup>[5]</sup>

I define constitutionalism as a political system which regards the realization of a series of democratic principles and system as its main content, rule of law as its basic guarantee, and the fulfillment of the

[2] "The Twelve Issues Answered to Gabriel" in *Reference Materials for the Teaching of the History of Chinese Communist Party*.

[3] Zhang Youyu wrote in his "Constitution and Constitutionalism" that, "what is called constitutionalism is a political formation of which the Constitution provides the state structure, organizations of power, and the relationships of mutual rights and duties between the government and the people. The government and people are both subjected to those provisions. They enjoy all their rights and assume all their duties, and none of them can violate those provisions to take actions free". See *Treatise on Constitutionalism*, vol.1, pp.97-103; pp.138-140, and pp.141-145.

[4] For example, Mr. Chen Yunsheng at the Law Institute of Chinese Social Sciences Academy took "constitutionalism" and "constitution" as synonyms in his *New Waves on Democratic Constitutionalism*, People's Publishing House, 1988.

[5] One of these two conferences, The International Conference on Constitution and Democracy, was presided over by professor Xu Chongde; the other one, The Second National Conference on Comparative Studies of Constitutions was organized by professor Li Buyun. The author of this article put forward the idea of "three elements of constitutionalism" (democracy, rule of law and human rights). Other scholars from China as well as other countries also approached this problem from all sides.

most extensive human rights as its goal. Under constitutionalism, a country is managed by the constitution which embodies the ideals of modern civilization. Of the three key elements of constitutionalism, democracy is the foundation, rule of law is one of the important conditions, and the guarantee of human rights is the goal.

Constitutionalism and the constitution are related to each other, but they are different. A country under a constitutional system must have a good constitution, but the existence of a constitution is no guarantee of constitutionalism, as suggested by the example of Hitler's Germany.

There are at least the following differences between the constitution and constitutionalism. First, a constitution is a law, a type of social norm, while constitutionalism is a type of political system. A constitution exists on paper, while constitutionalism exists in practice. If a constitution is the legal expression of constitutionalism, constitutionalism is the substantive content of the constitution — although some stipulations in constitutions such as the national flag, the national emblem, or the national anthem are not key elements of constitutionalism.

Second, there have been both good and bad constitutions in modern times. For example, the South African constitution under apartheid was not a good one. Because it maintained a system that seriously violated fundamental human rights, it was a constitution without constitutionalism.

Third, even if a country has a good constitution, its political leaders may neglect it and exercise dictatorship.

In short, constitutionalism in practice requires a good constitution as a legal basis and as a weapon; on the other hand, the ideals of constitutionalism must be the basis for making and implementing a constitution.

The concept of constitutionalism is not static. Traditional constitutionalism had two key elements: democracy and rule of law. These concepts are constantly changing and developing. In addition, with the advance of material and spiritual civilization and increasing international contacts after the disaster of World War II, protection

of human rights has become a fundamental goal for proponents of constitutionalism .

Constitutionalist theory and practice combine universal values with particular forms of implementation. The basic principles of democracy, rule of law, and human rights are applicable everywhere. But differences in economic, political, cultural, and historical traditions and the actual conditions of countries require different concrete forms of constitutionalism and different steps to realize constitutional ideals. Neither the universality nor the particularity of constitutionalism should be denied; neither should any of these characteristics be exaggerated.

## II. Democracy

Popular sovereignty is the essence of democracy. Under this principle, first, all state power belongs to the people; the government must not overstep the authority which is provided to it by the constitution, or it will be illegal. Second, the people are the masters of the country and the government is the servant; the government exercises power on behalf of the people, and should be supervised by the people. Finally, the government in all of its activities should work for the happiness of the people, not for one organization, one group or party, or for the private interests of minorities.

The Chinese experience shows why four institutional components are universally valid for all countries in implementing the principle of popular sovereignty. These components are: free and fair general elections which represent the genuine will of the voters; actual possession by all elected power organs of their mandated powers, without being superseded by individuals or organizations which are not created by general elections; separation of powers and checking mechanisms within the national power structure in order to prevent corruption as a result of unbalanced power; and rights to information, participation, discussion of political issues, and supervision of the government to guarantee that state power is

controlled by the people through parliament.

The first component is general elections for the national government offices. The legitimacy of the government needs to be recognized by the people; one basic way to accomplish this is that the people elect and change the government by elections. Most countries are too large to practice direct democracy, in which the people themselves would form organizations to exercise legislative, judicial, and executive power. Instead, most countries practice parliamentary systems and form governments through general elections. The government controls and exercises power on behalf of the people. It is important that elections be fair. For a variety of reasons, in many places elections are still illegally interfered with, manipulated and controlled by dictators, armies and parties. This is incompatible with constitutionalism. Today there is a tendency for countries to invite internationally well-known personages to supervise domestic elections because of internal conflicts in some countries becoming intensified, or because of the United Nations acting as a supervisor (e.g. Cambodia), or the willingness of some countries to give up their sovereignty.

Some people have argued that the parliamentary system is "the organizational form of political power in capitalist countries." This is wrong.<sup>[6]</sup> China's People's Congress system is one form of the parliamentary system. In 1953, China stipulated its first electoral law and began to practice universal elections. Its principles included the universality and equality of elections, the combination of direct and indirect elections and secret ballot. In July 1979, China issued a new election Law, which was later revised. As revised, the law provided that Candidates could be recommended by the Communist Party of China, democratic parties, and people's organizations, either jointly or independently. "Any three or more voters or representatives can nominate candidates for the Congress." Indirect elections at the county level were changed to direct elections.

[6] *A Summary of the Discussion of Some questions on the Study of Chinese Constitution*, Ji Lin University Press, 1992, p.186.

However, earlier malpractices, summarized as the "higher level decides the list and the lower level agrees", have still not been changed in a fundamental way. The key to reforming the Chinese electoral system lies in solving some ideological problems. We should understand that CPC and its members can maintain youthful vigor only by continually facing fair competition internally and externally. This is the condition for avoiding stagnation, retrogression and corruption. Thus, competitive mechanisms must be fully introduced into elections. Second, the masses need to be fully trusted. Allowing voters to name their own candidates and conduct multi-candidate elections is basic requirements for democracy. A political system cannot achieve good results if it relies on a minority to select candidates for elections and does not trust the majority of the people.

The second element of democracy is that the officials elected by the people should control the power of the state, and not be superseded by any individual or organization who is not elected by the people. If the latter occurs, three kinds of situations may arise. In the first case, national power is controlled by unelected dictators who come to power either by legal succession or by illegal usurpation. In the second case, power is controlled by the army which has replaced the government for a substantial period of time. (I am not referring to the exceptional case in which the army exercises power for a short time under special circumstances of war, natural disaster or political crisis.) In the third case, national power is actually controlled by a party which acts in violation of democratic principles: that is, it is internally undemocratic itself to deny other parties an equal status, and to override the authority of state organs. Any country which exists under the above-mentioned situations should not be considered as a constitutional state.

Since the Third Plenary of the eleventh Central Committee of the CPC, the CPC has been criticizing personal cult and patriarchal rule in order to improve democracy within the Party. It has also striven to improve the relationship between the CPC and other democratic parties, to increase the independent quality (character) of democratic

parties as modern parties, to overcome the malpractice of "mixture of party and government" and of "the party overriding the government, and rejecting the incorrect practice of taking the National People's Congress as a 'rubber stamp'". Indeed, all these efforts are right. However, reforms in these three aspects are far from perfect. One key issue in the political reform in China is to improve the leadership of the Party in the process of the implement of democracy, rule of law and human rights. This has been widely understood.

The third element of democracy is the principle of separation of powers and check and balance, whatever political structure a country may take. This can avoid over-concentration of power and prevent certain organizations or individuals from abusing their authority. It is universal that unchecked power will lead to corruption. The theory of separation of powers was created by Locke and developed and improved by Montesquieu, who developed the idea of two powers into three. The United States is the first country that successfully applied the theory of check and balance to its political system. On the one hand, the American constitution established a political system that separated legislative, executive and judicial bodies; on the other hand, also by successfully applying this theory, the U.S. set up the principle of separation of powers between the federal government and the states.

Most Chinese scholars believe that separation of the three powers is the main application of the principle of separation of powers. They do not understand that the theory of separation of powers can also be applied to the relationship between the central and local government. The advantages of the U. S. constitution's successful application of the principle of separation of powers are: (1) it guarantees the regular operation of a democratic system and prevents the emergence of dictatorship, so political stability over a long period of time is secured; (2) it guarantees the relative correctness of national policy and law and makes it possible to avoid major mistakes; (3) it arouses the initiative and enthusiasm of central and local government organs.

China has launched campaigns to criticize the theory of "separation of three powers" since 1978. However, the criticism was untenable theoretically. First, some people argue that national sovereignty is unified and can not be separated. Dr. Sun Yat-sen answered this question long ago. He suggested in his exposition of "constitution of five powers"<sup>[7]</sup> that sovereignty and the right to govern be two different concepts. The separation of legislative, executive and judicial powers are just the division of the rights to govern instead of the split of sovereignty.

Second, some people argue that separation of powers will lead to disputes over trifles, causing inefficiency of the government. In the area of politics and administration, there do exist some contradictions between democracy and efficiency. Check and balance sometimes affect the speed and efficiency of decision making. But separation of powers can prevent dictatorship, guarantee the correctness of decision making and avoid detours. So overall, the system is much more efficient. In addition, constitutions often empower certain authorities to exercise emergency power when the country is in the state of crisis and efficiency must temporarily be heightened.

Third, some people argue that because of different national conditions, separation of powers cannot be indiscriminately imitated. This is true. But it also should not be denied that powers need to be separated and balanced, and this is the true meaning of democracy. Those who object to a specific form of separation of powers are using this as an excuse to reject the reasonable substance of separation of powers.

Fourth, some people argue that separation of powers is founded on the basis of a Western pluralistic development of a commodity economy and economic interests, so that it does not apply to socialist countries. This sounds reasonable to some degree. But it has been

[7] Dr. Sun Yat-sen suggested the separation of five powers (legislative power, judicial power, executive power, examination power and supervisory power). This is a creative application of the theory of separation of powers.

proved that the highly centralized planned economy not only hampered the rapid growth of production, but also became the economic source of excessive concentration of political power. China is now transforming a planned economy into a market economy. Under this circumstance, both the functions of state authorities and the allocation of central and local government powers will be changed to a great degree. So it is becoming more necessary to separate and check and balance powers.

In 1962, Mao mentioned several times in his well-known talk with Marshal Montgomery that China had not handled well the relations between centralization and decentralization. In over forty years since the foundation of the PRC, China has still not made progress in this area. Although China tried many times to adjust the power relations between the central government and localities, sometimes decentralizing and sometimes recentralizing, the central government still held excessive power and the local governments lacked initiative, enthusiasm and creativity. In the constitution, except for the five national autonomous districts, the provinces enjoy few autonomous rights.<sup>[8]</sup> And in practice, the emphasis on unified policy and unified coordination make it difficult for local authorities to realize even the degree of independence and autonomy provided by the constitution.

This situation can be changed only under the condition of a market economy. In 1988, the First Session of the Seventh National People's Congress passed a resolution to grant legislative power to Shenzhen. This is an example of how a market economy will require the enlargement of local autonomy. Today all local governments at provincial, district and county levels are rapidly expanding and strengthening their powers. This has expedited economic development, and will have a major impact on the construction of China's democratic constitutionalism. The expansion of local powers

[8] Zhang Youyu wrote an article, "On the Separation of Power of Local Government in China", *The Study of Law in China*, vol.2, 1985. It briefly introduced and analyzed the relative constitutional provisions and current situations.

is just beginning, and China needs to accumulate experience in the development of a market economy for some years. Only in the future can the best way of reasonably allocating powers between central and local governments be determined.

The fourth basic element of democracy is that people must have full rights to information, participation, discussion, in order to exercise the authority to supervise the government. Under parliamentary democracy, the enjoyment of these rights is an important guarantee of the people's ability to exercise their sovereignty.

The right to information means that, except for important military or security secrets, all political, economic and cultural activities of the government should be made known to the public. People have the right to keep abreast of current developments in every field at home, acquaint themselves with the process of policy formulation and law making, and comprehend the stand and viewpoint of their elected representatives in all activities of state affairs. This is the basic prerequisite of exercising other political rights. Keeping everything "secret" from the public conflicts with modern constitutionalism.

In addition to the right to vote and stand for elections, the right to participation also includes direct discussion of the making and enforcement of state policies and law, and the right to participate in nationwide public determination of vital state affairs. The right to discussion means that people can fully enjoy their freedom of speech and express their views on political issues. The authority to supervise includes supervision of the masses over the people's representatives and personnel of organs of state. People have rights to criticize, expose and denounce, and accuse officials at all levels, even leaders at the highest level of the state.

In order to further safeguard political rights, China needs to quicken its pace in establishing laws pertaining to information, association, publication, and state compensation among others. These laws should be guided by the principle of protection of rights and freedom, rather than making unreasonable restrictions on their

exercise. China should also take practical measures to guarantee people's full enjoyment of their political rights and freedoms. In this respect, China still has a long way to go.

### III. Rule of Law

The second element of constitutionalism is rule of law. The antithesis between rule of law and rule of man has existed for several thousand years, in both West and East.<sup>(9)</sup> The ancient concept of rule of law was not democratic: for Aristotle, it did not apply to slaves, and for the Legalists, it was a tool of autocracy. But rule of law in the modern sense is the product of the bourgeois democratic revolution and stipulates that all citizens have equal legal rights. It includes the following fundamental principles.

First, a state needs to stipulate a complete set of laws based on a constitution, and all of these laws should be in accord with the spirit of constitutionalism.

Second, all state organizations, parties and leaders should act in accordance with the law. They do not possess any privileges that override the constitution and laws.

Third, the making and enforcement of the constitution and laws should follow democratic procedures. This can also fully guarantee democratic system and human rights.

Fourth, all citizens are equal before the law. The law provides the same protection and punishment to all.

Fifth, the judiciary should be independent in order to guarantee the fairness and authority of the law.

Rule of law in the modern sense is not only the outcome of

(9) In ancient China, the Confucianists advocated for rule by people, while the legalists believed in rule by law; Plato in ancient Greece advocate rule by people, but Aristotle favored rule by law. These two great debates had produced great impact on the developments of Chinese and western history. From then on, people have never stopped the arguments of the advantages and disadvantages of rule by law and rule by people.

modern civilization but also its expression. Today the idea of rule of law is widely accepted among scholars and statesmen, and democracy under law has become a common ideal of mankind. Only in a country ruled by law can political situations be stabilized over a long period of time. Only by such a stabilization can the national economy be kept at a steady increase, overall social progress be made, justice and fairness be firmly established, and human rights be reliably secured.

Since the beginning of 1990s, there has been a great debate in Chinese academic circles about rule of law versus rule of man. Three views dominate. The "rule by law" group think that rule of law and rule of man are antithetical, and favor the former. The "combinationist" group think that both concepts are equally important and favor integration of the two. The "abolitionist" group think that the idea of rule of law is not scientific and should be eliminated.

The debate is continuous, but the first view is now dominant. Some important party and government documents have affirmed the slogan of "ruling the country by law", and some leaders have accepted this concept in their speeches. To build a country ruled by law has become one of the major guiding principles for the construction of Chinese legal system.

The issue is complex in details but simple in essence. The combinationists argue that law is inflexible, and must be applied through the judgments of men, just as a weapon must be wielded by a soldier. But this misses the point. The issue is not whether law or man is more important. In historical context, the concepts of rule of law and rule of man have developed specific meanings in contrast to each other. First, as a theory of the government, those who believe in rule of law hold that the realization of growth and prosperity as well as order and stability over a long period of time relies on law and institutions, not on one or two wise leaders. Those who believe in rule of man hold the opposite viewpoint, which is that "the government depends on men; the vicissitudes of politics follows the rise and fall of great leaders." Plato, for example, favored rule by

philosopher-kings, while Aristotle stressed the importance of institutions. Likewise, the Legalists favored rule by laws in distinction to Confucius who favored rule by sages.<sup>[10]</sup> Second, as a principle of management of state affairs, those who believe in rule of law propose that law should have absolute authority. All leaders and organizations must act in accordance with the law. Contrary to this view, those who believe in rule of man emphasize the authority of the government deriving from the leaders.

The doctrine of rule of law is becoming popular in China for practical reasons. Both elites and the public have experienced the unfortunate consequences of placing their hopes on a few good leaders. This led to many political malpractices, such as the failure to use legal and systematic means to prevent the occurrence of the "Cultural Revolution". People realize that if the law is not respected and blind faith is placed in leaders, power will prevail over law leading to more serious problems. To advocate rule of law and oppose rule of man is to aim at overcoming these difficulties.

Just as the combinationists have misunderstood the issues, the abolitionists fail to understand the true meaning of rule of law. They argue that law is too rigid to rule a country. They also put the question, if "rule of law" is correct, why can we not propose "rule by party" or "rule by education", given that party and education also play important roles in the management of state affairs. Such arguments lose contact with the specific meaning of rule by law and become a game of semantics.<sup>[11]</sup>

China has made progress in the area of theories toward building a system of rule of law. But the major tasks remain to establish and strengthen an effective system that embodies the spirit of rule of law. In this aspect, a great gap exists between the ideal

[10] Li Buyun, "The Antithesis between Rule by Law and Rule by People", *Legality, Democracy, and Freedom*, pp.121 - 138.

[11] Li Buyun, "The Scientific Conception of Rule by Law", *Legality, Democracy, and Freedom*, pp.139 - 155.

and practice.

The key to rule of law is to acknowledge the paramount authority of law. Of course, to do so requires many conditions, among which a good political system is the most basic requirement. The western experience shows that to establish and improve a system of constitutional supervision is crucial to realizing rule of law. A system of constitutional supervision takes judicial review as the key link, but its content is more extensive. It should also include impeachment of leaders, recall of the people's representatives and the power to interpret the constitution and to protect rights, etc.

Different countries have different organizational formats to carry out the functions of constitutional supervision. In the U.S., the Supreme Court is in charge of constitutional review. Germany has a Constitutional Court, and France has a Constitutional Committee. There are other organizational forms of constitutional supervision, and their functions and procedures are different, but what they have in common is that a special organ exists to deal with constitutional supervision. This organ must be independent and authentic. Its functions and powers must be clearly defined, and it must have a complete working and legal procedure.

Article 67 of the 1982 Chinese Constitution provides that the National People's Congress and its Standing Committee will "supervise the execution of the constitution." However, because there is no special organ or procedure, this article is empty. Not only has the NPCSC not reviewed any alleged violation of the constitution since this constitution was adopted, but it has not performed any other function of constitutional supervision. From the drafting of the constitution to today, many scholars and NPC representatives have recommended the establishment of a special organ of constitutional review. But the Chinese leaders have ruled that because of inadequate experience, this problem can not be solved immediately. This view is erroneous. Over a decade has been wasted since the promulgation of the 1982 Constitution without any progress on this point.

In recent years, the relevant authorities have been working on a law of supervision for the National People's Congress and its Standing Committee. One of the most important features of this law is the attempt to establish a special organ, and determine its functions and procedures. This legislation has proceeded with great difficulty. It is easy to work out a model, but the crux of the matter is whether or not the authorities want to make that organ powerful and effective.

One of the issues is whether the Central Military Committee should be supervised by the National People's Congress and its Standing Committee. According to the Constitution, the Central Military Committee is part of the state apparatus and is under the leadership of the NPC and its Standing Committee. The Central Military Committee is supposed to report to these two organs on its work, but it has never done so during the time the Constitution has been in force. Although some secret issues in military affairs might be exempted from such a reporting requirement, most of them should be reported to the national authority. It would help promote the authority of the national power organs and the practice of constitutionalism if the chairman of the Central Military Committee, formerly Deng Xiaoping and currently Jiang Zemin, reported regularly on their work to the National People's Congress.

Another issue has been whether the Communist Party should be supervised by the National People's Congress and its Standing Committee. The preamble states, "all state organizations and armed forces, all parties and all social organizations, and all enterprises and institutions shall abide by the Constitution and laws. All violations should be investigated and affixed." Here "all parties" obviously include the CPC. It is the role of the party to make new policies in accord with changing situations and levels of understanding. Before the policies are enforced, they must be put into the form of government laws or policy enactments. The policy role of the party cannot be practiced at the expense of the law-making role of the state, or it would violate the Constitution. An institution created to



supervise the Constitution will constrain the power of the party in a way that is necessary and helpful.

The independence of the judiciary is another important feature of rule of law. It is also an important link in the implementation of check and balance. It is crucial to guarantee justice and the authority of law, to defend the integrity of the legal system, and to safeguard democracy and human rights. Although the situation has improved, there are still three major obstacles to judicial independence. First, imperfections still exist in legislation. Articles on judicial independence were absent from both the 1975 and 1978 Constitutions. The 1982 Constitution made progress by adding relevant articles, but it is still imperfect. Article 126 provides that "people's courts exercise judicial authority independently according to legal provisions, and they may exempt themselves from interference by executive organizations, social groups and individuals." Does this mean that legislative organizations and the Communist Party organizations can interfere? Of course not. "Interfere" is a derogatory term. It is totally different from "leadership". Legislative organizations (power organs) and the party in power can "lead" judiciary organization, but can never "interfere" in its exercise of independent authority. When the "counter-revolutionary group of Lin Biao and Jiang Qing" was brought to trial in 1980, the Standing Committee of the National People's Congress simply approved the establishment of a "Special Judiciary Court" and a "Special Procuratorate". Only the "Special Procuratorate" can resolve their guilt and impose an appropriate penalty for the crime. So this article should be revised. Perhaps it is appropriate to restore the article in the 1954 Constitution which provided that the "People's Court exercise judiciary authority independently and only obey laws."

Second, closely related to constitutional provisions on independent judiciary authority, the Party Committee has also exercised judiciary authority in some cases. This system should be

abolished.<sup>[12]</sup> In September 1979 the Central Committee of the CPC gave an instruction to terminate this system. But it was partly restored when the country adopted a policy to punish crimes "quickly and severely". In principle, even controversial cases which cannot be settled by judicial court, procuratorial court, or public security organizations, or cases that remain unsolvable, can not be tried by the Party Committee or the Committee of Political and Legal Affairs.<sup>[13]</sup> It is normal that difference in opinions over some cases exist between these two organs, otherwise, there would be no need to separate them and exercise check and balance. Moreover, detailed procuratorial procedures have been provided in laws to settle disputes. The independent authority that the court exercises is

[12] The system that Party Committee examine and approve cases had been internally applied over a long period of time. Although the origin of the system needs to be further studied, its basic contents include: Only after those procuratorial approved arresting is reported and approved by the Party Committee at the same level can they be enforce by the procuratorial organs; concerning the measurement of penalty of the criminal cases, the court can only make its decision and sentence after the cases have been approved by the local Party Committee at the same level. The Party's approval has two major forms, "examine first and then approve," and "approve first and then examine". As to the first case, the court investigates, interrogates and proposes whether there is a crime of how to decide the measurement of the penalty. Then, it makes a final decision after the local Party Committee at the same level examines and approves the case. As to the second case, the court primarily investigates the case, then sends it to the local Party Committee for discussion. Only after the Party Committee decides what kinds of measurements of penalty should be applied can the court enforce the trial procedures and formalities. Because the Party Committee need discuss and handle all affairs, sometimes the cases are decided exclusively by the secretariat of the Party Committee who is in charge of political and legal affairs.

[13] "The Committee of Political and Legal Affairs" is an organization within the local Party Committee. Its components include those leaders who are in political and legal affairs, as well as other leaders from the court, procuratorate, judicial department, public security, and civil administration organs. The main task of the committee is to coordinate and handle the important issues at the local level. Of course, the committee has a right to examine and approve any case.

bestowed by the Constitution. If in some cases the final trial and the measure of punishment were decided by the Party Committee or the Committee of Political and Legal Affairs, then we could say that a secret supreme "judiciary" organs which was even more powerful than the judiciary existed. This would violate the Constitution.

Third, methods of administrative management cannot be applied to the work of the court. For example, the chairman of the court and the chief procuratorate used to examine and approve cases.<sup>[14]</sup> Now the Supreme Court has accepted the wise suggestion of scholars and has canceled this practice. In recent years, a new system of "requesting instruction" demonstrates that lower levels of court often ask higher levels of courts for instructions before they reach any decision in disputed cases. This is also harmful because once the higher level of court expresses its views, the appeal process becomes a formality.

One fundamental question in realizing rule of law in any one-party state, the East or the West, is how to correctly handle the relationship between party policy and the law of the state, as it applies to legislation, judicial work, and governmental administration. Chinese scholars have sharply different views on this question. The following three problems need to be settled.

First, some scholars argue that, "party policy is the soul of law, and law is the tool of party policy." Textbooks compiled by the Ministry of Education and certain other works of jurisprudence maintain this standpoint. I do not agree with it.<sup>[15]</sup> Both party policy and law should reflect the will and aspirations of the people,

[14] It is still unclear when the "system of the president of court examining and approving cases" was established. However, the system implies that the judicial court must submit its proposal of handling to its president for approval. Only those approved can be finally decided and sentenced. The president of the court may change the nature of a case and its handing. See Liu Chunmao, "Inquire into the system of the president of court examining and approving cases." In *Law Magazine*, vol.2, 1980. This article made a suggestion to cancel the system.

[15] See Li Buyun, "Policy and Law", *Legality, Democracy, and Freedom*, pp.62-65; "On the Reform of Legal System," *The Study of Law*, vol.2, 1989.

safeguard their interests, and satisfy their requests. They should also represent the rule of social development and the spirit of modern times, and contribute to the advancement of material and spiritual civilization. If party policy is the soul of law, what is the soul of party policy? If there are mistakes in party policy, will not the same be true of law?

Certainly party policy in power affects the law of the state to some degree. However, non-party members in the legislature also have the rights to criticize, reject, or revise some policies of the party in power. This is a basic requirement of modern democracy. The standpoint that views the law of state as the tool or execution of party policy reverses the relationship between them. To view the law of state as the tool of party policy is to see the state itself as the tool of the party in power. The party in power may play an important and leading role in national political life, but it can never place itself over the state organizations. The party in power should serve the country, not the reverse.

Second, when conflicts between party policy and the law of state occur, should we act in accordance with party policy or the law of state? On this there are three views in Chinese academia. The first suggests that we should act in accordance with party policy; the second favors the primacy of law; the third recommends that each person make the decision on a case-by-case basis. I support the second view.

Those who favor the primacy of party policy argue, first, that policy is the spirit of law, and law is the tool of party policy, which I have already shown is erroneous. Second, they point out that law is more stable, while party policies can reflect the changes of real life quickly. However, party policy is simply the stance of the party in power. It has binding force only on the party's members. Only the law of state has universal binding force on all citizens. To turn party policy into the law of the state requires strict and complete legislative procedures. So the law of state is more valid and more authoritative than party policy. In modern democracy, the party in power can stipulate new policies according to changes of circumstance, but it

cannot enforce those policies at the expense of the law of state. It also should implement its political stand by revising laws or stipulating new laws. The third view is clearly wrong. Confusion will result if everyone acts on his or her own judgement.

Third, the policy of the party in power and the law of the state should be strictly separated. It was wrong not to do so in the past, both theoretically and practically speaking. Only by certain democratic procedure can party policy turn into national policy. Following this democratic procedure will be advantageous to the democratization of political life in a country.<sup>[16]</sup>

#### IV. Human Rights

The third fundamental element of constitutionalism is fully guaranteed human rights. Democracy and rule of law are means to realize human rights because citizen's political rights and justice are among the ends of the government. They are means because democratic procedures and rule of law are necessary to protect human rights. Human rights themselves, however, are not means, but are the highest material and spiritual needs of mankind.

Securing citizens' rights is one of two fundamental functions of modern constitutions; the other is stipulating the forms, authorities, procedures and relationships of state power. Both of them are related, because in dealing with state power the constitution provides the rights that every citizen should enjoy, such as personal security and freedom, and political, economic, social and cultural rights. The ultimate purpose of defining state power is not power itself, but rights. The constitution assigns power to state organizations and their personnel so that these "servants" can render services to their "masters" in fully guaranteeing their rights.

[16] See Li Buyun, "Policy and Law". In addition, it is worthwhile to mention that party and state organizations must not jointly sign and issue normal documents anymore. It is a clear expression of the disadvantage of "no distinction between the party and the government".

Some argue that the central theme of the Chinese Constitution is to develop the national economy rather than to protect human rights. These two tasks do not conflict. Economic development is a crucial issue but it is not the final goal. Economic progress serves to raise living standard of the people, and to create economic conditions for other improvements. It makes itself felt in the fulfillment of people's economic rights and other rights.

Human rights have many dimensions. The State Council's white paper explains that the spectrum of human rights is extensive. It argues that the right to survival is the most important right. Economic development serves to guarantee the right to survive, and to improve the quality of life. It is right that the document places economic development as serving the purpose of human rights.

Three theoretical questions need to be answered to provide a basis for fulfillment of human rights in China.

First, what is the source of human rights? The origin of human rights lies in human nature: human rights should be defined as rights that a human being enjoys in accord with both his natural attributes and his social essence. On the one hand, the ultimate origin of rights lies in human nature. The rights to life, security, freedom of thought and the person, and to the pursuit of happiness seek to satisfy human's needs for personal freedom, and for material and spiritual satisfaction. On the other hand, rights are defined socially, in terms of people's relationships with one another. And because social, political, economic, and cultural levels of development affect the existence and development of human rights, we undertake social reform and development in order to enable people to enjoy more happiness.

It is important to insist on the two-sided origins of human rights. The theory that focuses exclusively, as some Chinese scholars do, on man's social nature as the source of rights, views human beings as creatures of society, and ignores their self-motivated quality, their intrinsic desires and their ability to seek goals rationally. By ignoring the directedness of human behavior, they make it impossible to explain the origin of human rights. By claiming that human rights are bestowed by the external world, it deprives people of a powerful

weapon in the struggle for human rights. A view that only admits man's social attributes and rejects man's natural attribute will overlook the study of humanity itself. Human rights protection will lose its bearings and goals. But if we only admit man's natural attributes and ignore man's social attributes, as the theory of natural rights suggests, we will overlook the importance of reforms of social systems and economic, political and cultural developments for the protection of human rights.

The second theoretical issue is the relationship between political rights and economic, social, and cultural rights, one much debated question between the North and the South. The developed countries have criticized the developing countries for not adequately protecting political rights. The developing countries have argued freedom of speech is meaningless to a person who is hungry every day. The South in turn criticizes the North for placing one-sided emphasis on political rights, and the North replies that living has no purpose if one is deprived of freedom of speech.

In my view, economic rights are indeed prior, because man must eat and be clothed before he can engage in political, scientific and artistic activities. However, as the material and spiritual civilization of mankind has developed to a high degree today, one can no longer be satisfied with overcoming the problem of food and clothing. All countries should pay equal attention on these two kinds of rights. Contemporary international human rights documents stress the interdependence and inseparability of these two kinds of rights.

National strategies for realizing human rights will vary according to national conditions. Each nation must choose its own priorities and pay special attention to overcoming the one-sidedness of its own past experience regarding the two kinds of rights. In China's case, this means rectifying the overemphasis on economic rights. As a developing country, China rightly took economic development as the central task. In principle, we are pursuing economic reforms and political reform simultaneously. But in fact, over a long period of time, China like other socialist countries, emphasized economic rights and neglected political rights. The historic tragedy of the

Cultural Revolution was the consequence at the level of practice of this failure. This is why the Chinese people today wish to hasten the pace of political reforms and attain more effective guarantees of political rights and freedoms.

The third theoretical issue is the relationship between individual rights and collective rights. Some scholars equate political rights with individual rights, and economic rights with collective rights. However, both individual and collective rights include economic and political contents. Collective rights include minorities' rights, women's rights, children's rights, the rights of the disabled, the rights of self-determination, and the rights to development. It is also erroneous to regard collective rights as being opposed to individual rights. Individual rights are the basis of collective rights, because any collective is composed of individuals. Unless individuals are the ultimate beneficiaries, collective rights are meaningless. Thus protection of human rights should be based on the protection of individual rights. Western countries have emphasized individual rights, and now face issues of social harmony, the gap between the rich and the poor, racial discrimination and sexual inequality. In contrast, socialist countries have emphasize national interests and collective interests while neglecting individual rights. Whether this problem can be solved is crucial to the reputation of socialism.

Three measures are necessary to improve the situation of human rights in China. First, we must acknowledge the protection of human rights as a task. No country has a perfect record of human rights, but in some countries the situation of human rights is bad, while in others it is better. Some people have denied that China has problems of human rights. This is neither objective nor constructive. It is important to study the theory of human rights, but the main purpose of study should be to enhance the protection of human rights in practice. It is necessary to propagate China's achievements, but it will only be convincing if human rights in China are well safeguarded. Every propaganda has two aspects. It needs to acknowledge success, as well as problems. The issues of human rights have domestic and international implications. We cannot make progress abroad unless

we take care of matters in our backyard. We should not only protect our own and others' national sovereignty against interference in domestic affairs, but also should enthusiastically support and participate in international human rights, protection, while accepting reasonable and lawful international criticism and supervision. It is incorrect and injurious to limit the meaning of theories of Marxist human rights to the two points of opposition to the Western "human rights offensive" and criticism of bourgeois liberal ideas at home.

Second, we need to analyze the objective and subjective conditions for realization of human rights, to facilitate the construction of mechanisms to safeguard rights. The main reason that human rights were violated in China, for example, during the "Cultural Revolution" of 1966-1976, and that various problems still exist today is: the planned economic system has serious drawbacks; the strengthening of democracy and rule of law are still lagging behind; the consciousness of human rights among the masses, especially some leaders, is still weak; the level of social, economic and cultural development is not high. These four reasons point to the fundamental conditions that need to be addressed for the promotion of human rights in China. Along with the development of the market economy and the strengthening of democracy and rule of law, the construction of political institutions to safeguard human rights should be simultaneously pursued. It will be wrong not to do so. The realization of many human rights, including human dignity, political rights and economic rights, is not directly dictated by economic and cultural development. Thus it is wrong if we do nothing to improve the situation of human rights except to emphasize the backwardness of China's economic and cultural life.

Third, in the process of improving mechanisms to safeguard rights in China, we need to incorporate and use all of advanced experience of other countries in the world. Full realization of human rights is an ideal pursued by all mankind. All the achievements, either in theory or in practice, are the outcome of the struggle of all mankind. Institutions to safeguard human rights in China cannot copy foreign models, but the universal characteristics of human rights,

theory and systems should be assimilated.

As a basic element of constitutionalism, the full realization of human rights requires that every country stipulate and complete laws acknowledging and safeguarding human rights. Although China has made some progress in legislation, it has a long way to go. The basic rights that are guaranteed by the Constitution have not yet been worked out in detail in common laws. At present, the major laws in the field, including those which have not been yet promulgated, are Information Law, Press Law, Law of Free Association, Religious Law, Law for Equal Rights of Minorities, Law for Elders, Labor Law, Family Planning Law, State Compensation Law, Law for Supervision by the National People's Congress, Lawyer Law, Judge Law, and Law for the Public Procurator. In addition, some other laws need to be improved. They include Criminal Law, Law for Reforming Criminals, Civil Suit Law, and Marriage Law. In each of these laws, we need to find the proper demarcation line between protection of human rights as the basic standpoint and restrictions imposed only for the purpose of improving protection of rights. The law for regulating demonstrations was drafted and adopted some years ago, which contained so many restrictions that some people described it as a law for forbidding demonstrations. The delay in adopting many laws in this field is because of continuing controversy over the proper boundaries between rights and restrictions, generated by the continued influence of conservative ideology.

Realization of human rights also requires a complete system for the administration of justice. China needs to solve three major problems in this area. First, we need correctly handle the relationship between the protection of social stability and individual rights. This is particularly important in dealing with criminal cases. In past decades, China put undue emphasis on social stability. This was related to the fact that China emphasized collective rights rather than individual rights.

Second, we need to keep in mind that protection of human rights should be the fundamental principle and the guiding ideology of our judicial work. We should insist on judicial humanitarianism

and oppose inhumane treatment of criminals. Because a defendant in the process of criminal lawsuit often suffer unfavorable conditions, it is necessary to apply the principle of "favoring the defendant" and "presumption of innocence". These principles aim to investigate and apply the law to the cases, not "to absolve criminals from guilt or blame". Also, as the "lesser punishment" is the world trend, the policy of "fewer death penalties" should be implemented in China. And the decrease of the criminal cases should rely on the implementation of the "comprehensive administrative policy".

Third, the "detention and investigation" (shourong shenca) system should be abolished as soon as possible. Article 37 of the 1982 Constitution provides for the inviolability of the person and states: "No citizen shall be imprisoned except for being approved or decided by the People's Procuratorate or determined by the People's Court, and carried out by the Public Security organs." Although detention and investigation is not a formal arrest, it has similar effects in the restriction of people's security and freedom. Security and freedom are basic human rights, and only the National People's Congress and its Standing Committee have the power to stipulate laws that deprive people's freedom. The Ministry of Public Security has no such power. Even the State Council does not have the power to issue any administrative rules or regulations that restrict citizens's freedom and security, unless it is authorized by the legislative organs. The National People's Congress and its Standing Committee had never, and will never have, the right to confer such an authority.<sup>[17]</sup>

[17] According to one circular of the State Council (Feb. 29, 1980) and two circulars of the Ministry of Public Security (Jul. 31, 1985; Jul. 31, 1986), targets of "take in and investigate" include: those who are suspected of floating criminals and those of dubious background who have committed a crime but refused to tell their real name and address. The "take in and investigate" policy is limited to one month. By the approval of the public security department at the provincial level, it can extend up to three months. However, the actual practice of "take in and investigate" often exceed these two above-mentioned restrictions.

Concerning international human rights, constitutionalism requires that a national state make a positive contribution to participate in international protection and cooperation of human rights. The principles of national sovereignty and the protection of human rights are both basic principles of international law. They need to be unified and well coordinated. They are not opposed to each other. So it is not right to suggest in general that human rights be more important than national sovereignty, or vice versa. If a conflict between the two occurs, the decision should depend on the circumstances of the case. When human rights belong to domestic affairs and international society and other countries should not interfere, national sovereignty is above human rights; when issues about human rights threaten world peace and security, international society should act. When a national state violates international treaties of human rights of which it is a party, the United Nations and other parties to the treaty have the right to interfere, and thus, human rights will be above national sovereignty. In such a case, national sovereignty is not absolute. In the contemporary world, the idea of "absolute sovereignty" is outdated.

Some arguments in the West that "human rights have no boundaries" and some counterarguments in China that "human rights are the affairs of each country" are equally erroneous. If it is the first case we mentioned above, human rights have boundaries; if it is the second, human rights do not have boundaries. It should be confirmed that there exists a "common standard" of international human rights which every nation should follow. This standard is the expression of the universality of human rights. This is why countries have signed and participated some international documents of human rights, and why joint actions of international protection of human rights have a legal basis. Every country is supposed to respect the provisions of Universal Declaration of Human Rights. However, in some aspects of human rights, different countries have different

national conditions, and therefore have different right standards. Human rights have a political nature, but are not restricted to it. It is impossible to totally separate international human rights from national foreign policy. Nonetheless, the standpoint to deal with most issues of human rights should be the safeguarding of the common interests of mankind, and the respect for common principles of morality. It is wrong to put partial interests and special ideological consideration over them.

There are many examples revealing the supra-class and supra-ideological nature of international human rights, such as the joint sanctions of the international society toward South Africa, Israel, and Iraq, all of which seriously violated human rights, and the international protection of some rights with humanitarian nature, for example, the rights of refugees, the rights of people without nationality, and the rights of the disabled. At the international level, no country should adopt a double standard in dealing with human rights, no matter where the problem exists. Nor should any country overemphasize its own national interests or ideology. Perhaps this is why China has opposed politicization and making an ideological issue of human rights. These principles are not directed against a particular country.

China as one of the permanent members of the UN Security Council has a great responsibility to promote international human rights and cooperation among different countries on this issue. The first step China may take is to sign and ratify the two international covenants, namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. These two documents have been signed by 110 countries in the world. Most countries, except the U.S., which did not sign the International Covenant on Economic, Social, and Cultural Rights, have signed the treaties. Clearly, it is the world trend and represents the will of the people. From a legislative perspective, China is still not qualified according to the requirement

of the two covenants.<sup>[18]</sup> However, this can be resolved if Chinese legislation is perfected in the future. China can take reservations from some articles, or explain its understanding of them. It is foreseeable that the internal situation of human rights will be greatly ameliorated if China join the treaty. And the international image of China could also be greatly improved.

### V. Future Prospects

The People's Republic of China has achieved great success in strengthening constitutionalism. This is particularly true when compared to the Kuomintang rule prior to 1949. However, even today, the PRC has not implemented constitutionalism, and

[18] The differences between Chinese legislation on human rights and the International Bill involve the following aspects. First, Article 2 of the "International Convention of Civil and Political Rights" provides that "dissidents" have equal rights. China does not have this kind of provision. Article 2, 9, and 14 maintain that people have the right to be relieved when their civil rights are violated. China does not have any law on state compensation. Article 6 provides that those criminals under age 18 cannot be sentenced to death. The Criminal Code of China stipulates that those who are more than 16 years old may have a death sentence if they committed a very serious crime. Article 9 makes it clear that nobody can be arrested or taken into custody unless legal procedures are presented. The "take in and investigate" system is very different. Article 12 explains that people have freedom of mobility and that they are free to go abroad as well as return to their motherland. China does not have this kind of stipulation. Article 14 provides that a defendant cannot be compelled to confess or admit his guilt. The policy of "Leniency to those who confess their crimes and severity to those who refuse" is still practiced in China. Article 22 guarantees freedom of association. In China, the Law of Association is still in the process of being drafted. It is a difficult problem to guarantee freedom of association in China. Second, Article 6 of the "International Convention of Economic, Social, and Cultural Rights" affirms that people have rights to select or accept jobs freely. However, the Chinese people do not have any right to freely select their occupation. Article 8 stipulates that people have rights to organize a labor union or to join the labor union of their choosing. China just allows only one labor union to exist. Article 8 provides the right to strike. China has already abolished this right.

therefore, it has not achieved the advanced standards of modern constitutionalism. China's government and party leaders are aware of the unsolved problems concerning democracy, rule of law, and human rights. As to democracy, both of the preface of the Constitution and the Constitution of the CPC provide that the construction of a high level of socialist democracy will be the objective of struggle over a long period of time. The resolutions of the 13<sup>th</sup> and 14<sup>th</sup> Party Congresses have acknowledged this problem as well. As to rule of law, Peng Zhen, the former chairman of the Standing Committee of the National People's Congress, referred to it in his talk with senior leader(s) of People's Daily just before the new Constitution was adopted. He suggested that China need to "transform from rule by man to rule by law." As to the human rights, the General Secretary of the CPC, Jiang Zemin said, "China will realize higher and more extensive human rights along with the development of modernization." All these statements show that China has not achieved constitutional rule. Constitutionalism is a lofty ideal to be realized.

Some people may ask, if not constitutional rule, what is now in practice in China? It seems that China is in transition to constitutionalism. The purpose of studying the concept, the basic elements and the content of constitutionalism is to seek a clear goal for future political reform. We have analyzed the drawbacks of the present Chinese political system to make a thorough inquiry into the possibilities of the future development of political reform.

There are two opposing views on the prospects of development of China's constitutionalism. I am among the optimists. I believe that, first of all, China is determined to build market economy, and that this is absolutely inevitable. Democracy, rule of law, and human rights are incompatible with planned economy, but have a close relation to market economy. A cardinal principle of Marxism emphasizes that it is economics that determines politics. From a long term point of view, market economy will be the determining condition for China's future constitutionalism.

Second, realization of democracy, making great effort to

establish rule of law, and safeguarding human rights are the strong desire of 1.1 billion Chinese people. This desire comes from human nature. The PRC's positive and negative experiences in the past 40 years have inspired the Chinese people in favor of democratic ideas. It has strengthened the people's sense of responsibility toward rule of law and human rights. From now on, every leader needs to consider this fact.

Third, China will have younger and better-educated leaders. The past overemphasis on personal wisdom and personal reputation were the result of historical development under certain circumstance. The trend is toward collective leadership, democracy, and rule of law.

Fourth, modern world trends are helpful for constitutionalism. These include the rapid development of science and technology, and the improvement of material and spiritual civilization of all mankind, and the trend toward global integration, interdependence, mutual influences, and cooperation among nations in economics, politics and cultural exchange. Under these historical circumstances, no country can close itself to international intercourse. China must take the same road as the world develops quickly. These are the international conditions for Chinese constitutionalism in the future.

Let us take a closer look at the relationship between market economy and constitutionalism. Market economy will bring four major political and legal changes to those countries moving away from centralized planned economies. First, planned economy led to a situation of "big government, small society". Government was enlarged, and state interests were placed above all other interests. Individual rights were neglected. People had little freedom, and individual initiative, enthusiasm, and creativity were restricted. In market economy, the government and enterprises will be separated and the government functions will be reduced. The Government will concentrate on service rather than management, in order to develop a structure of "small government and big society". Individual rights will be respected and people will enjoy more freedom. Individuals' potentials will be developed more fully. In general, the change of the



state functions will lead to the change of the status of state and individual, the role they play, and the relationships between them.

Second, the high degree of centralization of economic power in planned economy resulted in a high degree of centralization of political power. It required that a small number of party and governmental leaders at all levels control power, and that state power be centralized, leaving local governments relatively weak. Things are different in market economy. Government organizations, schools, factories, and research institutes will be more independent, and the decisions made by individuals will be more democratic and scientific. At the same time, as local economic autonomy expands, local authorities will also enjoy more political autonomy, and have more political rights. Changes in these two aspects will greatly strengthen political democracy.

Third, planned economy mainly relied on administrative means and methods of management. Market economy will mainly depend on legal means and methods to control, manage, and coordinate. Market economy is an economy of rule of law. It will provide economic conditions for the transition from personal rule to rule of law.

Fourth, modern human rights, which are based on the fundamental principles of freedom, equality, and humanitarianism, emerge as a companion of the capitalist commodity economy. The major characteristics of the production and exchange of commodities are free exchange of equal objects at equal value. So, the conditions of commodity economy is bound to increase individual's consciousness of subjectivity, consciousness of rights, ideological freedom, and sense of equality. All these will lay an ideological base for the realization of human rights. How to carry out market economy and democratic constitutionalism is two pressing tasks for many developing countries in the world. As a matter of fact, these two issues are closely related with each other. In China, the people's sense of democracy, rule of law and human rights have begun to change quietly, as market economy has been established step by step. The change is especially clear in economically booming areas

like Shenzhen and Hainan.

Among those who are pessimistic about the future of China's constitutionalism are some advocates of the "new authoritarianism". Most of them do not believe that "new authoritarianism" is better than constitutionalism, but they underestimate people's desire for democracy and the quality of the people and fail fully to understand the effects of market economy on constitutionalism. The historical experiences of the Chinese people, including the "Cultural Revolution", have developed the democratic consciousness of the masses. They have tremendous political potential. So it would be wrong to assume, as advocates of "new authoritarianism" have speculated, that "democracy can only bring about chaos". Their analyses of the economic experiences of the "Four Little Dragons" in East Asian were static, and they did not notice the dynamic possibilities for change. Furthermore, the new authoritarianism places great hopes on few "strong political men", or "outstanding leaders" rather than on a good system. Party newspapers, state laws and leaders' talks all emphasize the construction of political democracy, simultaneous political reform with economic reform, and transition from rule by men to constitutionalism. The new authoritarianism, with its belief in strong man politics, will limit the future progress of political democracy.

Constitutionalism is an inevitable trend for China as for other countries, because its rationale is deeply rooted in human nature. But every country has its own historical traditions, and different economic, political and social conditions. So the concrete form of constitutionalism will differ accordingly. Five characteristics of the future development of Chinese constitutionalism need to be emphasized and handled correctly.

First, the Chinese cultural tradition has both positive and negative effects on the future of constitutionalism. Its positive aspects include the idea that people are fundamental forces of history development, the idea of the great harmony, and the ethical inclination. The negative effects include absolutism, patriarchal thought, ideas of privilege, hierarchical thinking, neglect of human

rights, and neglect of individuals. The negative effects are greater than the positive effects. This is different from western history and western traditions. In western history, the commodity economy emerged earlier. Individuals and rights were emphasized. In the building process of China's constitutionalism, we need to carry on the essence of traditional culture imbued with democracy and the spirit of government by the people; meanwhile, we need to also criticize and eliminate the traditional malpractices which are incompatible with modern democracy, rule of law, and human rights.

Second, the practice of socialism emphasized collectivity which benefited the masses of the people in these countries and made contributions to world progress. However, it despised individual rights and personal freedom, and thus had not attached importance to people's initiative, enthusiasm and creativity. So great attention to the defense of individual rights, especially political rights, will be one major characteristic of socialist constitutionalism. Compared with socialist countries, western countries had a different experience. They showed great respect to individual interests and rights. This greatly advanced western civilization in the last two centuries. Now the major issue in the west is to protect harmony among peoples in society.

Third, freedom and equality are two principles of constitutionalism. They are both lofty goals of mankind. However, sometimes there exist some contradictions between these two principles, such as the conflict between fairness and efficiency. In ideology, policy making, and institution building, China has in the past overestimated equality. Now, we need to eliminate equalitarianism, expand freedom, and unfetter local governments, enterprises, and individuals. This aims at mobilizing the enthusiasm of the masses, enhancing efficiency and creating more material and spiritual wealth. Only by doing so can we free ourselves from poverty and backwardness; only by doing so can we move towards common prosperity. So, between freedom and equality, China needs to readjust its value orientations toward freedom. The opposite is the

case in the west. There is too much freedom and too little equality in the west (a few countries may be exceptions, such as Sweden). These countries need to work out solutions concerning the inequality between the rich and the poor, different nationalities, gender groups, and the disempowered.

Fourth, principles of competition will be implemented in the construction of constitutionalism. Without competition, there is no vitality. This is a universal law. Competition is being implemented in the economic reform in China. The political reforms should also do so. The organizations of state power should be elected by secret ballot. The civil service system should give priority to the most qualified candidates by examination. The party and social organizations, factories, schools, and research institutions should also introduce competitive systems. There is no need to worry about the competition between a communist party member and a non-party member, or among communist party members themselves. One of the best ways to train qualified personnel, make correct policies, encourage vitality, and prevent corruption is to introduce competition into the political arena, as well as the ideological and cultural fields. Although some people have not yet fully understood it, it will become an important major trend of China's constitutionalism.

Fifth, China is vast in territory, and has a large population. It has more than 50 nationalities. Economic and cultural development are imbalanced among different regions. So in the process of advancing constitutionalism, it is necessary for China to lay stress on social stability, advancing political reform in order and step by step. It is in the people's interest to avoid social turbulence. However, this assumes a basic premise, that the Party's policy is correct. The key question here is that the Party in power needs to adapt itself to the historical trend of world development. It needs to satisfy peoples' desire to advance in economic and political reforms, take firm and unshakable steps in developing market economy, and democratic constitutionalism. Time is urgent and there is no other way.

## Postscript:

The article was made up of a series of speeches by the author in the Seminar on Constitutionalism and China held in Columbia University, New York, USA from February to May in 1993. The article was published in *Comparative Research Corpus on Constitution ( II )* presided by the author (China's Democratic and Legal Publishing House, the first edition, July 1993). Japanese professor Shycusyncila translated the article into Japanese which was published in No. 3 volume 46 of *Banda Law* in 1996. Because the article comprehensively discussed the issues of democracy, rule of law and human rights to the point and with certain forward looking, the article was used as the preface of the author's book *March to Rule of Law*.

1979

## 2 || On Ruling the Country by Law

Bi Xiaoqing\*

Today is the 30<sup>th</sup> anniversary of the establishment of the People's Republic of China. During the past 30 years China has made many glorious achievements, but also suffered numerous serious setbacks. The summarization of China's experiences in the past 30 years has revealed an objective truth of Marxism: the working class must attach great importance to the role of the legal system and rule their country through a socialist legal system. At the Second Session of the Fifth National People's Congress, an event of great historical significance, China adopted the amendment to the Constitution and seven important laws, including the Criminal Law and the Criminal Procedure Law, thereby further strengthening the socialist democracy and socialist legal system and making a big step towards ruling the country by law. Now the work of improving the economic regulations and administrative regulations has been speeded up and it has become a common practice to strictly observe the law, to resolutely implement the law and to fight against privileges outside the law. Ruling the country by law has become the trend of development, the common aspiration of the people, and an important sign that the revolution in China has entered into a new historical stage. The communists and all progressive members of the Chinese people are resolved to be reformers and the promoters of ruling the country by law.

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