

# 全球化与宪政

Globalization and  
Constitutional Government



莫纪宏 主编

德国阿登纳基金会资助项目

# 全球化与宪政

莫纪宏 主编

法律出版社

**图书在版编目(CIP)数据**

全球化与宪政/莫纪宏主编. —北京:法律出版社,2005.9  
ISBN 7-5036-5850-9

I. 全… II. 莫… III. 国际化-影响-宪法-研究  
IV. D911.04

中国版本图书馆 CIP 数据核字(2005)第 105804 号

©法律出版社·中国

责任编辑/刘彦洋 卞学琪	装帧设计/乔智炜
出版/法律出版社	编辑统筹/法律学术出版分社
总发行/中国法律图书有限公司	经销/新华书店
印刷/北京北苑印刷有限责任公司	责任印制/陶松
开本/A5	印张/8 字数/188 千
版本/2005 年 9 月第 1 版	印次/2005 年 9 月第 1 次印刷
法律出版社/北京市丰台区莲花池西里 7 号(100073)	
电子邮件/info@lawpress.com.cn	销售热线/010-63939792/9779
网址/www.lawpress.com.cn	咨询电话/010-63939796
中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)	
全国各地中法图分、子公司电话:	
第一法律书店/010-63939781/9782	西安分公司/029-85388843
	重庆公司/023-65382816/2908
上海公司/021-62071010/1636	北京分公司/010-62534456
深圳公司/0755-83072995	苏州公司/0512-65193110
书号:ISBN 7-5036-5850-9/D·5567	定价:16.00 元
(如有缺页或倒装,中国法律图书有限公司负责退换)	

## 前 言

全球化、宪政是近年来各国理论界探讨的热门话题。不管学术上对全球化和宪政做何种角度的定义,作为一种社会现象,人们是可以清晰地感觉到它们彼此的存在以及对于我们今天的工作和生活所带来的巨大影响。人类社会不同文明形态的发展正在逐步靠近并且呈现出某种趋同性。在今天,任何一个民族、国家都无法脱离国际社会的总体生存环境来片面地谈论自身的发展。各国之间必须通过有效的沟通和合作,来共同处理人类社会所面临的一些共同的问题,包括环境污染、预防和打击国际犯罪、打击恐怖主义以及在人权保护领域实行有效的国际合作等等。

马克思主义认为,社会的发展是由社会自身的经济条件决定的,但是,包括法律制度在内的社会意识形态在人类社会文明发展的进程中也并不是被动的,上层建筑在一定程度上又会推动或者是制约社会经济基础的发展。所以,WTO 的日益壮大,给世界各国带来的不仅仅是以世界统一大市场为基础的经济全球化,还包括随之而来的各种意识形态和法律制度的相互融合和相互吸收以及借鉴。特别值得一提的是,第二次世界大战后产生的联合国,在推动全球化的发展、各种文明之间的相互交流与合作、促进普遍人权在各国的普遍实现、宣传现代法治社会的基本法治原则以及人权保障思想等诸多方面发挥了巨大作用。

中国也是世界大家庭中的一个成员,20 世纪曾经饱受列强的欺辱和内战的创伤,可以说,在全球化的早期阶段,全球化观念并没有给中国带来真正的繁荣,相反却是屈辱和悲伤。新中国成立后,中国政府奉行独立自主、自力更生的独立原则,曾经一度对世界关上了大

门,延续了近一个世纪的全球化浪潮的影响一度被迫中断。改革开放以后,中国政府领导人在分析当今世界政治、经济和文化发展格局的前提下,提出了以和平与发展为主题的新型国际交往政策。中国也开始从传统观念中走出来,日益融入国际社会。这种融合不仅是经济上的接纳,如中国加入世界最大的经济贸易组织 WTO,而且也表现为中国政府日益认同目前国际社会所倡导的主流价值,包括以人权的国际保护为核心的一系列新型的治理观和发展观。2004 年十届全国人大二次会议通过的宪法修正案,将“国家尊重和保障人权”写进了宪法,可以说,中国政府在意识形态领域,特别在宪政建设领域是逐渐与国际社会主流价值形态靠近的。当然,由于我们曾经在相当长的一段时间内走的是独立发展的道路,因而,当中国向世界打开大门的时候,很显然,会遇到各种各样的新生事物,会遇到许多新的挑战。这就需要我们z从理论上深入加以研究,在制度上逐步加以吸收和接纳。只有中国真正地融入国际社会,在世界范围内发生的全球化现象才能真正地具有全球化的特征。

受德国阿登纳基金会的资助,我们组织了一些很有朝气、同时又具有很好的理论素质的年轻学者,组成“全球化与宪政”研究课题组,对全球化给民族国家宪政建设所产生的主要影响进行深入地研究和探讨。本书就是在课题组成员认真研究和相互切磋的基础上产生的初步研究成果。我们相信,随着中国对外开放政策的不断完善,随着理论界对全球化与宪政关系的更加关注,会有越来越多的学者与我们一道来共同探讨全球化与宪政这一崭新的研究主题。

莫纪宏

# Globalization and Constitutionalism

## Preface

Globalization and constitutionalism are the hot topics discussed in the theoretic field of the world. No matter how their content can be defined, as one sort of special social phenomena, the people may feel their existence and influence on the present and future life. The development of different civilizations in the world reflects the common tendency in some degree. Today it is very difficult for any state to say that it can develop independently.

Therefore, it is necessary for the states in the world to cooperate and communicate so as to deal with the common problems, including pollution of environment, prevention and shock of international crimes, blowing terrorism and the effective cooperation in the field of protection of human rights.

According to Marxism, social development depends on economic growth, and this social ideology contains the importance of a legal system in the development of a state. In particular, with growing importance of the WTO, economic globalization based on the world market gives rise to the states in the sphere of ideology and legal system. It is worth noting that the United Nations after the World War II has played a very important role in promoting the development of globalization and cooperation among the different civilizations, especially in the domain of protection of

human rights and the rule of law.

In the 20 century, China experiences an immense disgrace and inner wars. In the early stage of globalization, the idea of globalization didn't bring the real prosperity but on the contrary insult and sadness to China. After the foundation of the new China, China's government pursued the policy of paddling its own canoe and so closed the door to the foreign world.

In 1978, China's government exercised the policy of opening to the outside world and began to accept all kinds of ideas existing in the world and to communicate with the international organizations and other countries. With the development of economic and social development and progress, more and more measures have been taken by China's government in order to put China into the framework of globalization. In 1997 and 1998, the two international covenants on human rights (CCPR and CESCR) were signed by China's government, later CESCR was ratified by the Standing Committee of NPC in 2001. In 2002, China's government joined the World Trade Organization, and the rules of WTO have been accepted effectively in China. In 2004 the first article concerning protection of human rights "Human Rights Shall be Guaranteed and Protected by the State" was written in the Chinese Constitution. This implies that the conception of human rights in the international conventions on human rights has been grown popular both at the governmental and at the public level in China.

Thus globalization isn't a theoretical but a practical concept in the modern China. The importance in the public life has grown, particularly in the field of constitutional construction. The ideas about democracy, liberty, human rights and the rule of law based on the background of globalization have deeply changed the political reforms and legal construction in China.

On the basis of financial aid by the Konrad Adenauer Foundation, we organized a group of young scholars to analyze the relationship between globalization and constitutionalism in order to regard especially the influence of globalization on the democratic and legal construction in the future of China.

We have confidence in the significance of such research and we wish the topic on globalization and constitutionalism would become a hot issue in the academic field of legal construction.

The book on "Globalization and Constitutionalism" edited generally by Professor Mo Jihong, vice president of Chinese Association of Constitutional Law, consists of eight chapters.

The first chapter is called as globalization and constitutionalism, containing the following matters as the conception and characteristic of globalization and constitutionalism, the main impact of globalization on constitutionalism and the effect of constitutionalism in promoting globalization.

The second chapter contains the influence of globalization on the activity of making constitution, including the national state and the traditional idea of constitution-making, its influence of foreign constitutions, its influence of international conventions on human rights and the partly releasing of sovereignty and legality by the constitution of the EU.

The third chapter comprises the influence of international protection of human rights on the constitutionalism in the national state, involved in the following issues as the birth, evolution and development of human rights, the basic legal framework of the relations of international human rights, the influence of international conventions on human rights of the member states and the significant and developing tendency of universal human rights in the constitution of China.

The fourth chapter is called as global democratization and the party



politics in the national state containing the historical tendency of development of the party politics, its influence of globalization and the issue of their legality and standardization.

The fifth chapter comprises freedom of association and internationalization of NGOs, divided into the following three issues: the historical evolution of legal protection of freedom of association, the role of NGOs in the international and national protection of human rights and the influence of freedom of association in implementing two international covenants on human rights in China.

The sixth chapter contains environmental law and global protection of zoology, involved in the following points: the global issue of zoology and the birth of the conception of environmental law, its concern in the different states, the situation of the environmental protection in China and its legal remedy.

The seventh chapter comprises globalization and protection of the rights of foreigners, including its origin, its natural and basic content and the issue of its protection in our constitution and laws.

The eighth chapter is called as constitutional litigation and internationalization of individual appealing mechanism, concerning the following points as the content of constitutionalism of globalization and the tendency of constitutional litigation, the rational choice of the modern constitutionalism through conferring the power to interpreting constitution to the judge, the common function and purpose of constitutional litigation, a historical survey of its system, the diversity of its forms and the development of individuals appealing mechanism to the system of constitutional litigation.

The ninth chapter contains the education and international cooperation and communication of human rights, its purpose, approach and mode of education, the role of research and propagation of human rights

in the process of disseminating its idea, and promoting international co-operation and communication of its education further.

The title of the tenth chapter is globalization and the developing tendency of the contemporary constitutionalism, involved in the three issues as international democratic principle; one possible political purpose, the coming era of the world citizen and whether global governance implies the developing direction of constitutionalism under the background of globalization.

To sum it up, the authors try to express the new ideas about every issue based on collecting the abundant materials and discussing them deeply. The concrete ideas have been unveiled in each chapter. The most obvious characteristic of each chapter is the different writing mode of each author. The above research is able to make understand the significance of globalization and constitutionalism. The following parts will focus on the main ideas in each chapter.

In the first chapter, the author points out that the conception of globalization isn't very clear, but there are some standards which can identify its historical evolution and main meaning. The early origin of globalization stems from the capitalistic colonialism in form of input and output of the international capital. The actual birth of globalization can be seen in the forming process of the United Nations which has enhanced the co-operation and communication among the national states and promoted the development of protection of human rights through a series of international conventions on human rights since 1948. The World Trade Organization has become a global economic organization in the world which has established the basic economic order.

However the category and extent of globalization isn't definitively complete, particularly the conception of globalization didn't comprise legal and political factors. Legal but not economic globalization is more

concerned in the academic and practical sense. According to the understanding of the author, constitutionalism is a common conception which meaning can be accepted in the academic field. It refers to the domain of democracy, liberty, rule of law and protection of human rights both in traditional and modern sense. Constitutionalism possesses universal values relied on the background of market economy. With the development of the economy and the society, the ideas of constitutionalism may grow up automatically in a specified society and state in support of globalization.

In this chapter, the author emphasizes that the democratic movement is the stable tendency in the cultural environment of constitutionalism. Without the development of democratic values, the political, economic and cultural system can't be really established and maintained smoothly. Therefore, the reciprocal influence and impact between globalization and constitutionalism can be found in the process of modernization in the world.

In China, since 1978, the democratic system is restored from the devastation during the "Cultural Revolution"; legal system has been improved by adopting a great number of laws, regulations and rules. Moreover the conception of human rights has entered into the Constitution of China. The above changes come from the inner reforms and outside impulses. The political policy of ruling a state according to the laws has been replaced by that of ruling a state in accordance with the constitution.

In the recent year, Chinese communist party as the ruling party enhances the ruling idea of exercising the power according to the constitution. The new ruling program shows the apparent progress in the development of constitutional construction. It is possible to predict that the real democratic system can be set up and fortified in the wide back-

ground of internationalization and globalization.

In the second chapter, the author refers to the influence of globalization on the activity of making a constitution in the national state.

In the author's view, the traditional view of constitution-making stems from the academic school of the people's sovereignty in form of the theoretical basis of the right to make a constitution. The identity of the subject of constitution-making determines the concrete process of accepting the people's will and forming the content of constitutional law. In the early time of constitution-making, a lot of countries copied the mode of the Constitution of the United States, France and England. In the process of constitution-making, more and more countries have learned from one other, for instance, the Spanish Constitution of 1931 was imitated by Italia, the Switzerland and France, on contrary the Spanish Constitution of 1978 was influenced by the Italian Constitution, the French Constitution and so forth.

It seems that the reciprocity of constitution-making in the traditional countries is obvious. In the modern society, on the basis of the system of international protection of human rights, a series of international conventions on human rights create a strong impact on constitution-making in the member states. The universal value about protection of human rights has been accepted in the different constitutional laws. In particular, the Constitution of the EU at the end of 2004 will put a great impact on the member states of the EU through the political process of constitution-making.

Constitution-making is becoming a global movement. In 2004, when the Constitution of China was amended, regarding the fact of ratifying and signing two international covenants on human rights, the important sentence which specifies the state respects and guarantees human rights was stipulated in the Constitution of 1982. It states the tendency of inter-

national protection of human rights has put substantial impact on constitution-making procedure in China.

In the third chapter, the author points out that human rights emerged in the process of anti-inhuman treatment in time of wars. In the early twentieth century, international labor organizations and the other international organs played a very important role in protecting human rights mainly in the field of minorities and labors. After the Second World War, in regard of the lesson caused by the fascist authorities in violating human rights and disregarding the human dignity, Universal Declaration of Human Rights was adopted and proclaimed by General Assembly Resolution 217A (III) of 10 December 1948. It settled the foundation of protection of human rights in the sphere of the world. It was the first time to proclaim human rights which were equally suitable to everyone without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

On the basis of all provisions in Universal Declaration of Human Rights, in 1966, both International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights were adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December. In the subsequent period, two optional protocols to CCPR have been past and got into effect for the ratified member states. Until now, the above international documents constitute the legal framework of international protection of human rights.

It is worth noting that international conventions on human rights have played a substantial influence on constitution-making and policy-making in the field of protection of human rights in the member states. Lots of member states have wholly accepted the views of universal human

rights affirmed in international conventions on human rights. The common standard of protection of human rights for all people and all nations as showed in Universal Declaration of Human Rights has been established both among the people of member states themselves and among the people of territories under their jurisdiction.

In the process of accepting the views of universal human rights, there exist many value contradictions which need to be resolved both in the theoretical and practical sense. The most important issue is the relation between international conventions on human rights and the laws of protection of human rights in the member states, particularly in form of connections between universal human rights and the rights protected by the inner laws in member states. According to the understanding of the author, when we discuss the relationship between international conventions on human rights and international laws in the member states, in essence, we need to probe into the relationship between the rule of law and the protection of human rights. Without the conformity or a kind of consensus of the international and internal principles of the rule of law, the value of human rights is able to become softened because a great number of value contradictions among member states and other states could not be resolved peacefully.

It is very important on the level of national states that the dialogue and mutual understanding shall be established so that all states can be respected and encouraged in the field of protection of human rights. Since the beginning of 1990s, the universal view of human rights have been confirmed and respected by the peoples and the government in China. Although there is a long way in China to improve the situation of protection of human rights, the substantial reform has been found in the process of constitution-making and policy-making. It can't be doubted that universal views of human rights would be accepted completely both

in the institutional level and in the theoretical level.

In the fourth chapter, the author puts her focus on global democratization and the party politics in the national state. In the author's view, the party politics roots in the democratic movement which manifests the tendency of globalization based on the academic school of "the People's Sovereignty" and "Proletarian Revolution in the Whole World" in a traditional sense. In modern society, it is apparent that a lot of the political parties are created in purpose of globalization such as the movement of green earth and the common ideology. At present, the green party has played a bigger role in the process of general election in many states.

The other worth-noting phenomenon is the regionalizing development of the political party in order to play a more important role in the inner affairs of regional organizations such as the EU. With the development of the party politics, the party programs for the political parties in similar nature in different countries have been concerned and disseminated effectively on the background of globalization. The democratization of the political party and the globalization of the party politics are turning into the main subject of the modern democratic politics. Such tendency possesses some influence on the political reform in China in the coming future. The slogan of enhancing the ability of exercising the power has its important meaning in developing the modern party politics.

In the fifth chapter, the author discusses the relationship between freedom of association and internationalization of NGOs. The author mentions the historical evolution of freedom of association, and points out that the birth of NGOs at the international level can be contributed to the development of freedom of association in the civil society. In the theoretical sense, freedom of association is the basis of the civil society and the premise of the complete democracy. Freedom of association is helpful to guarantee the rights of minorities and the weak groups in the society.

After the Second World War, some international non-governmental organizations began to play a very important role in the field of international protection of human rights through the working mechanism of the United Nations. NGOs at the international level are very active in providing consultation and suggestion to promote human rights and to settle the bridge between UN and the member states and so forth. In the domestic domain, NGOs play a positive role in participating in the democratic process and in becoming the leaders of public opinions.

It is worth noting that NGOs can play a very important role in hoisting the development of globalization in the sphere of organizing international congresses of NGOs in the world and disseminating the non-governmental culture and politics and so on.

In China, freedom of association has been respected and protected in the Constitution of China, but there do exist lots of factors which need to be improved such as freedom of the trade union, political and religious organizations. Thus we need to reform our legal system and allow more forms of non-governmental organizations to survive for their contribution to the establishment of the democratic and legal society in order to protect human rights more effectively.

In particular, there should be wider channel for the individual to set up the non-governmental organizations without the political interference so that international conventions on human rights can be implemented really and completely.

In the sixth chapter, the author runs back over the history of environmental law, and points out that environmental protection consists of a group of legal rights both in international field and internal domain. The author earnestly insights into all kinds of provisions concerning the environmental awareness in the constitutions of different states, and finds the present protection mainly focuses on the governmental liability but lack of



individual duties. In this part, the author puts more attention to the right to understand the environmental messages. According to the author, understanding the environmental information is one of most important duties, containing seeking, imparting and accepting all kinds of environmental information in order to avoid the environmental disaster and damage.

The author points out that the cause of the environmental disaster is the production of global industrialization, so environmental protection needs more common efforts made by all countries in form of common management of environmental pollution and disaster.

China is a developing country, which has the important task to co-operate with the other countries against environmental pollution.

Therefore it is necessary not only to put environmental protection into the Constitution of China but also to set up the judicial remedy mechanism for providing legal aid to the victims of environmental disaster.

In the seventh chapter, the author scrutinizes the history of foreigner's rights in the different constitutional laws, and points out that the foreigner's rights have been neglected in a long term by most of the national states. The foreigners were violated during the Second World War found on the racial discrimination and animosity.

The foreigners were regarded as the citizens at a second level inferior to the native citizens. After the Second World War, with the development of international protection of human rights, according to the spirit of the Universal Declaration of Human Rights, the member states have taken responsibility to protect everyone's rights in the domain of their territories under their jurisdiction. In the author's view, the development of protection of universal human rights supports the respect to foreigner's rights in the sovereign domain of national states.

In the recent years, in some countries such as Germany, Japan and