

CONSTITUTIONALISM AND CHINA 宪政与中国

李步云/著
Li Buyun



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Preface

In 1978, China entered into a new era of “reform and opening up”, in which four strategic transformations began to take place. “Taking class struggle as the key link” gave way to economic construction as the central task; isolation was replaced by opening up to the outside world; planned economy moved towards market economy and “rule of law” began to replace “rule of man.” Some of these transformations have already basically been completed, while others still need several decades to complete. Nevertheless, the achievements China has made in all four arenas are remarkable and have drawn attention from the world. I feel gratified and proud to be a witness to these historical transformations and to be an active participant in the construction of the modern rule of law in China.

Today, academic exchange between the Chinese and international law circles is on the rise. China needs to understand the world, just as the world needs to understand China. Yet, few Chinese legal scholars are able to write in English. Nor have many Chinese legal works been translated and published outside China. This has created great difficulties for foreign scholars in understanding the historical development and the current situation of legal studies in China. The purpose of this English collection of papers is to facilitate the academic exchange between Chinese and international law circles. I hope this book will provide some useful information and materials to foreign scholars who are interested in the construction of rule of law in China.

Of the 31 articles in this collection, all of them were originally published in Chinese and 12 have been published before in English in either Chinese or foreign journals or as chapters in books that are collections of articles. The rest are newly translated. It is important to note that although great changes have taken place in legislation and state policies since some of these papers were first published, no

modification has been made to any of them so as to truthfully reflect historical facts. The translators of this collection include Ms. Huang Jue from the Journal of China Social Science, and Professor Huang Lie and Mr. Bi Xiaoqing from the Law Institute of Chinese Academy of Social Sciences. I would like to express my sincere thanks to them for their hard work and kind help.

Some of the concepts that appear in this book are unique to China and, as a result, are translated into different English terms by different translators. For example, the Chinese term “Yi Fa Zhi Guo” has been translated into “ruling the country by law”, “governing the country according to law”, and so on. To respect the choices of words made by different translators, no attempt has been made to unify the English translations of these terms. The Chinese term “Yi Fa Zhi Guo” has the same meaning as that of the English term “rule of law”, as generally recognized by scholars throughout the world. And according to the understanding of most Chinese scholars, the term refers to rule of law in its substantive sense, rather than in its formal sense (“rule by law”).

According to my understanding, constitutionalism has three basic components: democracy, rule of law, and human rights. My own research has concentrated on rule of law and human rights and thus the articles in this collection mainly reflect my ideas on these two subjects. Although few of them are new, these ideas are of practical significance in China and they involve issues which even today are still followed with great interest by Chinese scholars, government officials and ordinary citizens. Moreover, the past 20 years in Chinese history has been a period of enlightenment with respect to the ideas of modern democracy, rule of law and human rights. Therefore, I believe this book will assist friends in other countries who would like to know more about China.

In the Preface to my collection of papers *The Pursuit of the Idea of Rule of Law*, co-edited by Professors Liu Zuoxiang, Zhang Zhiming and Mr. Liu Zhiwei and published in 2003, I wrote, “I belong to China as well as to the world.” During the past 20 years I have carried out research, conducted investigations, given lectures in 12

countries and completed over a dozen international collaboration projects. Almost all of these activities are funded by foreign sources. I would like to sincerely thank my friends and colleagues abroad for their kind support and the people of the countries I have visited for their great hospitality. To them, I dedicate this book.

In order to respect history, the papers of the English original text and Chinese translation in this book are included as the original appearance when they were published at the first time. No changes have been made to them. Despite that changes have taken place in legislative and judicial departments and various terms and names were changed in China, the papers are kept as their original looks. I hope this explanation would be helpful to readers.

Li Buyun
January 20, 2006

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1 || Constitutionalism and China

*Huang Lie**

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."^[1] 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 Democratism", *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".^[2] Around the same time, the Communist Party of China's well known jurist, Zhang Youyu, wrote a series of articles to explain constitutionalism.^[3]

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.^[4] Only recently, with the convening of two conferences in December 1992, have scholars begun to elaborate the problem in a fairly systematic way.^[5]

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.^[6] 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"^[7] 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.