

人权与宪政

Human Rights and Constitutionalism

中国—瑞士宪法国际研讨会文集

A Collection of Papers from the Chinese-Swiss
Symposium on Constitutional Law



主编 刘海年 李 林 (中国)

托马斯·弗莱纳 (瑞士)

Editors-in-Chief Liu Hainian, Li Lin (China)

Thomas Fleiner (Switzerland)

中国法制出版社

China Legal System Publishing House

人权与宪政

中国—瑞士宪法国际研讨会文集

主编 刘海年 李林(中国)
托马斯·弗莱纳(瑞士)

中国法制出版社

FF48/1P

Human Rights and Constitutionalism

**A Collection of Papers from the Chinese-Swiss
Symposium on Constitutional Law**

**Editors-in-Chief Liu Hainian, Li Lin (China)
Thomas Fleiner (Switzerland)**

China Legal System Publishing House

图书在版编目(CIP)数据

人权与宪政:中国—瑞士宪法国际研讨会文集/刘海年
等主编. —北京:中国法制出版社,1999.11

ISBN 7-80083-641-X

I. 人… II. 刘… III. 宪法-理论-国际学术会议-文
集 IV. D911.01

中国版本图书馆 CIP 数据核字(1999)第 63647 号

人权与宪政

RENQUAN YU XIANZHENG

主编/刘海年 李林 托马斯·弗莱纳(瑞士)

经销/新华书店

印刷/河北省三河市实验小学印刷厂

开本/850×1168 毫米 32 印张/25.75 字数/626 千

版次/1999 年 11 月北京第 1 版 1999 年 11 月北京第 1 次印刷

中国法制出版社出版

书号 ISBN 7-80083-641-X/D·617

(北京西单横二条 2 号 邮政编码 100031) 定价:40.00 元

(如发现印装问题请与本社发行部联系 电话:66062752)

前 言（一）

宪法是国家的根本大法,在一个国家的法律体系中居于首要地位。一部好的宪法对于民主、法治、人权保障和社会经济发展都有重要意义。正因为如此,各个国家都很注意根据本国的实际情况制定并且不断完善自己国家的宪法。宪法发展的历史表明,现代国家宪法凝聚着特定民族和整个人类社会发展的文明成果。为使宪法不断完善,各国都很注意在不断总结自己国家制宪和修宪历史经验的基础上,借鉴其他国家这方面的经验。

中国和瑞士相距遥远,无论在自然环境、历史文化、生活习惯和社会制度上均有很大差异。瑞士地处欧洲腹地,中国位于亚洲大陆东部;瑞士人口 700 余万,中国人口近 13 亿;瑞士是 13 世纪开始在各州逐步联合的基础上形成的联邦制国家,中国国家形成于公元前 21 世纪的夏王朝,虽然开始也是以部落联盟的方式相联结,但中华各民族早在公元前 200 多年秦始皇统一中国时已融合为一个整体,成为单一制国家;比之于中国,瑞士国家历史虽然不长,但却拥有一部 1848 年制定的宪法(世界上最早的宪法之一),至今已有 150 年的制宪史,而中国的制宪史从清末《十九信条》算起也只始于本世纪初。新中国成立后第一部宪法制定于 1954 年,现行宪法则重定于 1982 年,制宪史要比瑞士短得多;依照宪法规定,瑞士实行的是在“露天议会”基础上形成的直接民主与间接民

主相结合的议会制,而中国则实行人民代表大会制度。中瑞两国尽管有许多不同,但两国都是多民族国家;两国人民都曾为民族独立和国家统一而斗争,都十分酷爱和平;两国都很注意处理好中央(联邦)与地方(州)的关系,处理好各民族之间的关系;两国都处于和平与发展的年代,面对即将到来的新世纪,两国都注意使宪法和法律更适应客观形势发展的要求,以更好地保障人权。

面对中瑞两国的异同,我们中瑞两国学者共聚一堂,对两国宪法和法治进行比较研究,必将增进相互了解,推动各自宪法和法治的进一步完善。

经验证明,制定一部好宪法固然重要,但制定宪法的目的是为了将其付诸实施并进而实现宪政。世界各个国家的宪法条文和宪法实施之间都存在一定差距。所以,作为法学和宪法学者,除对宪法进行理论研究、关注宪法条文的解释说明、为宪法的完善作出努力外,还要注意对宪法实施中的问题进行研究,此点,世界上不少国家都有较成熟的经验,应当相互借鉴。

1996年中国国民经济和社会发展“九五”计划和2010年远景目标发展纲要规定,到2000年,在人口比1980年增长了3亿左右的情况下,实现人均国民生产总值比1980年翻两番;到2010年,实现人均国民生产总值比2000年翻一番,那时中国将形成比较完善的社会主义市场经济体制。1997年中国进一步明确提出要健全社会主义民主,尊重和保障人权,加强社会主义法制,依法治国,建设社会主义法治国家,并提出到2010年形成有中国特色社会主义法律体系。中国政府还先后于1997年和1998年签署了联合国《经济、社会、文化权利国际公约》和《公民权利和政治权利国际公约》。这标志中国的经济、法治和文化发展将步入新阶段。为适应

新形势的要求,现行宪法于1988年4月和1993年3月两次修正之后,今年还要对某些内容作新的修正。今后宪法的实施与监督将会更突出地提上议事日程。中国的宪法学者一定会一如既往地在这个过程中发挥积极作用。

多年来,瑞士联邦外交部和瑞士驻华大使馆对于中瑞两国法学交流一直给予了热情支持并取得了有益的成果。中瑞宪法比较研究是众多交流项目之一。我相信,通过两国学者的研究和讨论,对两国宪法的完善和宪政建设以及法治发展和人权保障都将产生有益的影响。在此文集付梓之际,我谨对瑞士外交部和瑞士驻华大使馆,特别是周铎勉大使表示谢意。

刘海年
1999年春节
于北京

Foreword I

Constitution is fundamental law which occupying a primary place in legal system of any state. A good constitution is of great significance to democracy, rule of law, protection of human rights as well as to social and economic development. Each state, therefore, attaches importance to the formulation and perfection of its constitution according to its own actual conditions. History of evolution of constitutions proves that constitutions of modern states embrace achievements of civilization of both a particular nation and the development of society of the whole mankind. In order to steadily perfect constitution, each country has laid emphasis on continuous summing up of its own experience in formulation and revision of constitution and learning from advanced experience of other countries in this respect.

China and Switzerland are a long way away from each other and differ tremendously in natural environment, history and culture, customs and habits and social system. Switzerland, with a population of about 7 million, is situated in the hinterland of Europe, while China, with a population of approximately 1.3 billion, lies in the eastern part of Asia. Switzerland is a federal state formed on the basis of gradual alliance of various cantons beginning in the 13th century.

China came into being in the Xia Dynasty in the 21st century B. C. . Though jointed together by means of coalition of tribes, various nationalities in China had already integrated into one whole nation as early as the time when the first Emperor of the Qin Dynasty (221-207 B. C.) unified the country, thus became a unitary state . Comparing with China, in despite of its short history, Switzerland possesses a constitution made in the year 1848, one of the oldest constitutions in the world. China, nevertheless, had its own history of constitution, that was, the 19 Tenets of the late Qing Dynasty, only starting from the beginning of this century. After the establishment of the new China, the first Constitution was enacted in 1954, and the present constitution was adopted in 1982. So the history of constitution of China is much shorter than that of the Switzerland. According to our respective constitutions, Switzerland follows a system of parliament with a combination of direct and indirect democracy on the basis of "open-air parliament"; whereas China practices a system of people's congresses. Though there are differences between China and Switzerland, yet the two countries have something in common. Both are multi-national states. Peoples of the two countries have striven after national independence and unity of the state and have cherished peace ardently. Both countries attach importance to properly handling relations between the central (federal) and local (cantons) governments and relations among various nationalities. And both countries, in entering the new century, lay stress on adaptation of the constitution and the law to the demands of the development of

objective situation in an era of peace and development, so to better protect human rights.

With these differences and similarities, scholars of the two countries sit together to make a comparative study on the constitutions and rule of law. This will certainly strengthen mutual understandings and promote further improvement of our respective constitutions and rule of law in the two countries.

Experience demonstrates that formulation of a good constitution is no doubt important, but the very purpose of making a constitution lies in its actual enforcement and realization of constitutionalism. In every country all over the world, there is always gap between provisions of the constitution and enforcement of the constitution. Being law and constitutional law scholars, we must not only conduct theoretical studies on the constitution and pay attention to interpretations of provisions of the constitution, but also stress studies on issues coming up during the enforcement of the constitution. A lot of countries have accumulated advanced experiences in this respect and I think there is much we can learn from each other.

In accordance with our Ninth Five-year Plan for National Economic and Social Development and the Program for the Development of Long-range Objective for the year 2010, we plan to quadruple the 1980 per capita GNP by 2000, even though China's population will be then have increased by about 300 million over that of 1980. By 2010, the GNP will have doubled that of 2000. A relatively perfect system of socialist market economy will take shape then. In 1997,

China further exerted her efforts to promotion of socialist democracy, respect for and guarantee of human rights, strengthening of socialist legal system, governing the country according to law and building-up of a socialist country with rule of law. Moreover, the plan to form a socialist legal system with Chinese characteristics by 2010 has been put forward. The Chinese government also signed the two international covenants, the Covenant on Economic, Social and Cultural Rights and the Covenant on Political and Civil Rights, in 1997 and 1998. This indicates that the development of economy, rule of law and culture in China will enter into a new period. Following the two revisions of the constitution made in April, 1988 and March, 1993, some new constitutional amendments will be made this year, so to meet the needs of new situation. The enforcement and supervision of the constitution will become more pressing issues on the agenda. Chinese scholars of constitutional law are surely to play an active role in this process as they have always done in the past.

For many years, the Ministry of Foreign Affairs of Switzerland and Swiss Embassy to Beijing have provided us with enthusiastic supports and assistance in exchanges in the law field between our two countries, and we have benefited a great deal from these academic exchanges. The comparative study on Chinese and Swiss constitutions is one of the projects we have undertaken in the past few years. I believe, the research and discussions we have had will contribute greatly to the improvement of constitutions and the construction of constitutionalism in our two countries, and these exchanges

will also bring benefits to the development of rule of law and protection of human rights in our two countries. On the occasion of publication of this Collection of Papers, I would like to express my sincere gratitude to the Ministry of Foreign Affairs of Switzerland, the Swiss Embassy to Beijing, and especially, to His Excellency, Mr. Ambassador Dominique Dreyer for their very kind and effective assistance and cooperation.

Liu Hainian
the Spring Festival, 1999
Beijing

前 言 (二)

中国—瑞士宪法国际研讨会的召开是瑞士驻中国使馆与中国社会科学院法学研究所的领导共同协商的结果。瑞士和中国在宪法领域内交流意见和经验,有助于增进两国之间的相互了解。

从历史上看,瑞士虽然位于欧洲中部,但她却总是与其周围的国家有着非常不同的政治制度。这无疑是由她特殊的历史以及她将属于不同文化和民族的人民结合在一起的特殊需要所决定的。1848年瑞士通过了一个建立中央政府的联邦宪法。事实证明,该宪法在此后的150年中一直非常稳定。今年4月18日由公民投票通过的新修改的宪法可以被看作是对1848年建立的政治制度的稳定性的一种肯定。

这一政治制度无疑给瑞士带来了许多利益。这些利益主要包括社会的稳定和经济的高度繁荣。正是由于这个原因,瑞士的政治制度引起了很多外国法学家和政治学家的兴趣。以权力分散和高度的公众民主参政为主要特征的瑞士政府制度培养出了其特有的政治文化。寻求问题的实际解决方法意识以及避免复杂和教条的抽象概念的倾向可以被看作是该文化的一种反映。它也可以被看作是瑞士法律思想的一个主要的特征。

1998年10月召开的中国—瑞士宪法国际研讨会是史无前例的。在这次非常成功的会议上两国的法学专家们就法律改革这一

敏感的问题展开了热烈的讨论并相互交换了意见。虽然这次研讨会发言的中心话题是中国和瑞士的法律制度,但它的重要性超出了这一话题的范围。该研讨会可以被看做是中国实行改革政策以来与欧洲之间发展起来的更为广泛、更为深入的对话的一个组成部分。

在这里我要感谢所有为这次研讨会的成功作出贡献的人,尤其是中国社会科学院法学研究所的王家福教授、刘海年教授、李林教授以及该所参加这次研讨会组织工作的其他人员。在瑞士方面,这次研讨会的召开是与弗里堡联邦研究所所长托马斯·弗莱纳教授以及在该所负责国际研究中心的利迪亚·芭斯塔教授的热情支持分不开的。另外,我还要对为这次会议提供了道义上和物质上的支持的瑞士外交部的第四政治司和瑞士发展与合作署表示衷心的感谢。

周铎勉

瑞士驻中国使馆大使

Foreword II

The Sino-Swiss International Symposium on Constitutional Law came about as a result of conversation this Embassy had with leading members of the Institute of Law of the Chinese Academy of Social Sciences. We believe that the exchange of ideas and experience in the field of constitutional law will enhance the understanding in China and in Switzerland of both countries.

Throughout history, Switzerland, although located in the centre of Europe, has always had a political system quite different from the one of the countries around her. This was certainly the result of her particular history and of the need to integrate populations belonging to different cultures and different ethnic groups. The federal constitution establishing a central government adopted in 1848 has proved remarkably stable throughout the following 150 years. The revised new constitution, adopted by popular vote on April 18th of this year, may be seen as a confirmation of the solidity of the political system established in 1848.

This political system has certainly brought many benefits to Switzerland, mainly a stable society and a very prosperous economy. For that reason, it also has attracted the attention of foreign lawyers and foreign political scientists. The Swiss political institutions, large-

ly decentralized with a high degree of popular democratic participation, have produced a political culture of its own. The sense for practical solutions and the tendency to shy away from elaborate doctrinal abstractions may be regarded as a reflection of this culture, and may well be seen as one of the main feature of Swiss legal thinking.

The Sino - Swiss International Symposium on Constitutional Law that took place in October 1998 is the first of its kind. It has been very successful and it encouraged legal experts of both countries to engage in a lively exchange of opinions on sensitive problems of legal reform. Although the Chinese and Swiss legal institutions were at the centre of the major parts of the presentations made at the symposium, its interest went beyond that. This symposium has also to be seen as part of the wider and extensive dialogue developing between China and the West since the beginning of the reform policy in China.

I would like to thank here all those who contributed to the success of the symposium, and above all Professor Wang Jiafu, Professor Liu Hainian, Professor Li Lin, and the other members and staff of the Institute of Law of the Chinese Academy of Social Sciences involved in the organization. On the Swiss side, this symposium could not have taken place without the enthusiastic support of Professor Thomas Fleiner, Director of the Institute of Federalism in Fribourg, and of Professor Lidija Basta, responsible for the International Research Center of the Institute of Federalism. I shall also mention here with gratitude the support both moral and material provided by the

Political Division IV and of the Swiss Agency for Development and Cooperation of the Swiss Foreign Ministry.

Dominique Dreyer
Ambassador of Switzerland