

For the Ninth World Congress
of Constitutional Law in Oslo

Pour le Nervième Congrès Mondial
de Droit Constitutionnel à Oslo

世界宪法研究(第四辑)

Study on the Worldwide Constitutional Law (Volume IV)

我们为什么需要宪法?

Why Do We Need Constitutional Law?

Pourquoi Avons-nous Besoin du Droit Constitutionnel?

莫纪宏 主编

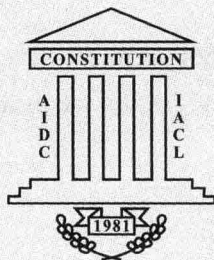
国际宪法学协会 中国分会

China Branch, International Association of Constitutional Law

Direction G é n é rale de la Chine, l'Association Internationale de Droit Constitutionnel



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Preamble

Why Do We Need Constitutional Law?

Mo Jihong

In the contemporary world, constitutional law is a conception which has almost been accepted by all sovereign countries. Either a written constitution or an unwritten constitution, has influenced the people's lives and political activities in a sovereign country. There have been different models of exercising constitutional law based on different legal cultures. We have been familiar with the Federal Constitution of the US, German Basic Law and French Constitution of 1958 in the traditional meaning and the Constitution of the South Africa, British Human Rights Law in the modern sense.

Regarding all kinds of constitutional laws, we can't help probing the reasons for interpreting why we need constitutional law. There are some possibilities for explaining the role of constitutional law in the modern society and international community, for example, in pursuit of protecting human rights and rule of law. Nevertheless, we could verify the presumption of independence of constitutional values. Democracy has more than 2000 years' impact on human political activities, and international protection of human rights seems more effectively than domestic guaranteeing measures. As to constitutional litigation, many constitutional judges have been embarrassed in the dilemma which points at constitutional justice. Facing the above questions, we have to reply the reason why we should believe and observe constitutional law.

There are several angles at which constitution law could be proved to exist and function very objectively.

The first function depends on opposing any privileges. As we see, any law should be enacted by legislature, however, who could guarantee that legislature would not make use of legislative power in pursuit of legislator's privilege? In the logical sense, it needs a positive law to control legislator's privilege, constitutional law could function very well on the scope of institutional design.

The second function refers to the unity of different values of laws. In any countries, there have been a great number of laws and regulations adopted by different legislatures.



In case of legal conflicts, the governor needs an institutional method for resolving legislative contradiction. Constitutional law could be triggered as the rational premise of keeping the unity of different values of laws through interpretation .

The third function relies on the bottom line of settling social problems. In the modern society, the people have all sorts of petitions for their complaints . Given there wasn't any other legal way for remedy, constitutional law would become the final place which could bring a bit of rational wish to the petitioners.

The fourth function relates to international responsibility undertaken by the State Members under international treaties. There is no doubt that the bridge between international law and domestic law should be based on constitutional law.

The fifth function seems to concern human ideals which ensure peaceful order in the human future. Constitutional law could provide a series of rational values and institutional norms for human being to avoid any devastating adventure and impulse in time of public emergency.

The ninth world congress of constitutional law will take place in Oslo from 16 to 20, June 2014. The conference topic is Constitutional Challenges : Global and Local. We have to face many suspects on constitutional traditional functions, but the basic role of constitutional law would not be replaced by another value at present and in the coming future. The constitutionalists in the whole world come to Oslo for discussing constitutional challenges in order to find a proper way to preserve constitutional values. Our Chinese scholars believe constitutional law is human common treasure and all of constitutionalists in the world do the same thing for the more peaceful and sustainable human future. We are full of confidence of constitutional role in leading a rational world.

Préambule

Pourquoi Avons – nous Besoin du Droit Constitutionnel?

Mo Jihong

Dans le monde contemporain, le droit constitutionnel est une conception qui a presque été acceptée par tous les pays souverains. Soit une constitution écrite ou une constitution non écrite, a influencé la vie des personnes et des activités politiques dans un pays souverain. Il y a eu différents modèles de l'exercice du droit constitutionnel sur la base de différentes cultures juridiques. Nous avons été familiarisés avec la Constitution Fédérale des Etats – Unis, la loi fondamentale Allemande et la Constitution Française de 1958 dans le sens traditionnel et la Constitution de l'Afrique du Sud, la Colombie – droit Droits de l'homme au sens moderne.

En ce qui concerne toutes sortes de lois constitutionnelles, nous ne pouvons pas aider à sonder les raisons pour interpréter pourquoi nous avons besoin du droit constitutionnel. Il y a quelques possibilités pour expliquer le rôle du droit constitutionnel dans la société moderne et la communauté internationale, par exemple, à la poursuite de la protection des droits de l'homme et de la primauté du droit. Néanmoins, nous avons pu vérifier la présomption d'indépendance des valeurs constitutionnelles. La démocratie a de l'impact de plus de 2000 ans sur les activités politiques et la protection internationale des droits de l'homme semble plus efficace que des mesures garantantes nationales. Comme pour le contentieux constitutionnel, de nombreux juges constitutionnels ont été gênés dans le dilemme qui pointe à la justice constitutionnelle. Face à ces questions, nous devons répondre la raison pour laquelle nous devons croire et respecter le droit constitutionnel.

Il y a plusieurs angles de la loi Constitutionnelle qui pourrait être prouvé d'exister et de fonctionner de façon très objective.

La première fonction dépend de s'opposer à tous les privilèges. Comme on le voit, une loi devrait être promulguée par législature, cependant, qui pourrait garantir que le législateur ne serait pas faire usage du pouvoir législatif dans la poursuite du privilège de législateur? Dans le sens logique, il a besoin d'un droit positif pour contrôler le privilège



de législateur, le droit constitutionnel pourrait très bien fonctionner sur le tope de la conception institutionnelle.

La seconde fonction se réfère à l'unité de valeurs différentes de lois. Dans tous les pays, il y a eu un grand nombre de lois et règlements adoptés par les différentes législatures. En cas de conflits juridiques, le gouverneur a besoin d'une méthode institutionnelle pour résoudre la contradiction législative. Droit constitutionnel pourrait être déclenché que le principe rationnel de maintenir l'unité de valeurs différentes de lois par l'interprétation.

La troisième fonction s'appuie sur la ligne inférieure de régler les problèmes sociaux. Dans la société moderne, les gens ont toutes sortes de pétitions pour leurs plaintes. Étant donné qu'il n'y avait pas un autre moyen légal pour réparation, le droit constitutionnel deviendrait le lieu final qui pourrait apporter un peu de volonté rationnelle aux pétitionnaires.

La quatrième fonction concerne la responsabilité internationale engagée par les membres des états en vertu des traités internationaux. Il ne fait aucun doute que le pont entre le droit international et le droit interne doit être fondée sur le droit constitutionnel.

La cinquième fonction semble concerner les idéaux humains qui garantissent ordre pacifique à l'avenir humain. Droit constitutionnel pourrait fournir une série de valeurs rationnelles et des normes institutionnelles pour l'être humain afin d'éviter toute aventure dévastatrice et impulsion en cas de danger public.

Le neuvième congrès mondial de droit constitutionnel aura lieu à Oslo du 16 au 20, Juin 2014. Le thème de la conférence est contestations constitutionnelles: Globales et Locales. Nous devons faire face à de nombreux suspects sur les fonctions traditionnelles constitutionnelles, mais le rôle fondamental du droit constitutionnel ne serait pas remplacé par une autre valeur à l'heure actuelle et dans le futur à venir. Les constitutionnalistes du monde entier viennent à Oslo pour discuter des défis constitutionnels afin de trouver une façon de préserver les valeurs constitutionnelles. Nos chercheurs Chinois croient droit constitutionnel est le trésor commun humain et tous les constitutionnalistes du monde font la même chose pour l'avenir de l'humanité plus pacifique et plus durable. Nous sommes pleins de confiance de rôle constitutionnel dans la tête d'un monde rationnel.

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Part I



Economic, Social and Cultural Rights

Right to Food and Safety of Food in China

Mo Jihong *

[**Abstract**] The problem surrounding safety of food has been becoming a hot social issue both in theory and in practice in China. Although the NPC adopted a special law for safety of food and Chinese governments at all levels have made a lot of measures in improving quality and safety of food, it can't be denied even by Chinese vice premier minister that safety of food in China hasn't been guaranteed as well as anticipated both by the government and the public. This thesis will focus on probing into the reasons causing the problems in the process of protecting quality and safety of food and point out a correct and effective way for the government to promote the effectiveness and efficiency of food management and supervision by transmitting the traditional thoughts of intensifying management into the modern ideas of protecting right to food based on the unified criterion both at international level and at domestic level.

[**Key Words**] Safety of Food; Right to Food; Management of Food;
Supervision of Food; Quality of Food; Legal Statutes of Food

I. Right to Food and Its Significance in Completing Human Rights

The conception of right to food has been getting more and more popular in China in the recent years. ^[1] However, there haven't been enough articles regarding right to food to define its conception and function, even in the academic field of human rights study

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[1] The author heard the conception of right to food firstly at Norwegian Institute of Human Rights in 1998 when acting as a visiting scholar. During that visit, professor Asbjørn Aude, the former director of Norwegian Institute of Human Rights, organized a group for researching and discussing the draft of International Covenant on Right to Food. The author took part in several seminars concerning discussing the conception and function of right to food.



and constitutional law study. Although Covenant A^{〔1〕} was ratified in 2001 by the Standing Committee of the National People's Congress, Chinese governments at all levels have been puzzled with many famous cases in relation to food safety, for examples, milk powder with melamine, tonyred duck etc. The different methods of administering and monitoring food safety can't prevent all kinds of toxiferous foods from flowing into the bowl and the stomach of the people, therefore, many young parents would like to buy milk powder for their children from foreign countries (mainly Holland) rather than from well-known domestic products. Behind these strange and odd phenomena, lack of consciousness of right to food is a very important factor to interpret why food safety has been ignored in the society all the time. The old saying "Bu Gan Bu Jing Chi Le Mei Bing" (unclean food isn't harmful to the health) has occupied the mind of most of Chinese people. Thus, in the perspective of protecting right to food, the issues concerning food sanitation and food safety are able to be followed with interest.

The right to food, and its variations, is a human right protecting the right of people to feed themselves in dignity, implying that sufficient food is available, that people have the means to access it, and that it adequately meets the individual's dietary needs. The right to food protects the right of all human beings to be free from hunger, food insecurity and malnutrition.^{〔2〕} The right to food does not imply that governments have an obligation to hand out free food to everyone who wants it, or a right to be fed. However, if people are deprived of access to food for reasons beyond their control, for example, because they are in detention, in times of war or after natural disasters, the right requires the government to provide food directly.^{〔3〕}

The right to food is derived from the International Covenant on Economic, Social and Cultural Rights^{〔4〕} which has 160 state parties as of May 2012.^{〔5〕} States that sign the covenant agree to take steps to the maximum of their available resources to achieve progressively the full realization of the right to adequate food, both nationally and internationally.^{〔6〕} In a total of 106 countries the right to food is applicable either via constitutional arrangements of various forms or via direct applicability in law of various

〔1〕 That is International Covenant on Social, Economic and Cultural Rights in contrast to Covenant B (International Covenant on Civil and Political Rights).

〔2〕 Ziegler 2012: "What is the right to food?"

〔3〕 Special Rapporteur on the Right to Food 2012a: "Right to Food".

〔4〕 Special Rapporteur on the Right to Food 2012a: "Right to Food".

〔5〕 United Nations Treaty Collection 2012a.

〔6〕 International Covenant on Economic, Social and Cultural Rights 1966: article 2 (1), 11 (1) and 23.; Ziegler 2012: "What is the right to food?"

international treaties in which the right to food is protected. ^[1]

At the 1996 World Food Summit, governments reaffirmed the right to food and committed themselves to half the number of hungry and malnourished from 840 to 420 million by 2015. However, the number has increased over the past years, reaching an infamous record in 2009 of more than 1 billion undernourished people worldwide. ^[2] Furthermore, the number who suffers from hidden hunger – micronutrient deficiencies that may cause stunted bodily and intellectual growth in children – amounts has been over 2 billion people worldwide. ^[3]

Now that the importance of right to food is regarded in the international society, what is the meaning of right to food and what is the function of right to food? As to such questions, there are many academic and institutional reasons for verifying right to food is an important human rights and it plays a very important role to accomplishing right to an adequate standard of living.

As to the importance, in domestic field, there are a lot of academic explanations for supporting the reasonability of the conception of right to food. Mr. Ning Li – Biao points out the following evidences in his essay, the right to food is a right recognized by international bills of human rights, but today some people object to it with the reasons such as violating freedom, leading to revolution, breeding dependence on welfare and relying on the availability of the resource. The above reasons are problematic. The right to food is a right not only because it can help fulfill the basic goods for a man to be human, but also because a justice society must remedy to food scarcity caused by the structural poverty. Meanwhile, logic of cooperation in a community makes the country and the society protect the right to adequate food. ^[4]

There exist a great number of international documents which assert the legitimacy of right to food, including the right to food recognized in the 1948 Universal Declaration of Human Rights (Article 25) as part of the right to an adequate standard of living, and enshrined in the 1966 International Covenant on Economic, Social and Cultural Rights (Article 11), ^[5] the 2009 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights making the right to food justiciable at the international level, ^[6] and in 2012, the Food Assistance Convention adopted, making

[1] Knuth 2011: 32.

[2] Ziegler 2012: "What is the right to food?".

[3] Ahluwalia 2004: 12.

[4] Legitimacy of the Right to Food, NING Li – biao (Law school, Guizhou University, Guiyang, Guizhou, 550025), "Law and the Social Development", Volume 3, 2011.

[5] Special Rapporteur on the Right to Food 2012a: "Right to Food".

[6] Special Rapporteur on the Right to Food 2010a: 4.