

# **From Popular Sovereignty to Human Rights: On the Paradigm Transformation of Chinese Constitutional Jurisprudence**

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## **Contents**

- I . From Ideology to Empirical Research: Laying the Scientific Foundation for Constitutional Jurisprudence
- II . From Self-centeredness to Comparative Study: Toward a Global Constitutional Jurisprudence
- III. From Textual Provisions to Implementation Mechanism: Consolidating the Legal Authority of the Constitution
- IV. From Abstract Principles to Concrete Problems: Getting the Constitution Out to Reach Real Life
- V . From Holism to Individualism: Finalizing the Methodological Transformation

## **Abstract**

This article explores five related aspects of the recent transformation in the Chinese constitutional law research. First, constitutional jurisprudence used to be thought as nothing but ideology; now it is becoming a relatively value neutral, positive study. Second, Chinese constitutional jurisprudence used to be self-centered, and mainly served the function of affirming its own constitutional practice and denigrating that others; now it has adopted a more balanced attitude toward foreign constitutional theories and practices. Third, Chinese constitutional jurisprudence used to focus on provisions of the constitutional text; now it has borrow from the experience of the developed constitutional states, and begin to pay close attention to the practical legal effect of constitutional provisions. Fourth, Chinese constitutional

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jurisprudence used to focus on expositions of abstract principles defined in the constitutional text; now it cares more about how the Constitution may help society to resolve specific problems in real life. Finally, Chinese constitutional jurisprudence used to put strong emphasis on such macro concepts as “people”, “states” and “sovereignty”; now its focus has been shifted to individual constitutional rights and principles as reflected in concrete cases. As the Chinese constitutional jurisprudence traveled through the path from popular sovereignty (*renmin zhuquan*) to human rights (*renquan*), the methodology of Chinese constitutional research has completed the fundamental transformation from holism to individualism. The above related changes indicate that China is in the process of constructing its own theoretical framework founded on functionalism and positivism.

The current constitution of China was enacted in 1982,<sup>1</sup> shortly after the economic reform and open-door policy was initiated. Art. 2 of the 1982 Constitution, declares that “All power in the People's Republic of China belongs to the people. The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power.” This provision is generally held as defining the “popular sovereignty” principle of the Chinese constitution, i.e. every state power emanates ultimately from the “people”, who exercise such power through the national and local people's congresses (hereinafter as NPC and LPC, respectively). During the social, economic and legal reforms in the past two decades, the Chinese society has undergone radical transformations. Correspondingly the text of the 1982 Constitution has been revised as many as 31 times. In the most recent amendment in 2004, the concept of “human right” is formally added to the constitutional text. Art. 33

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<sup>1</sup> Since the Common Program (*Gongtong Gangling*) was enacted in 1949, which served as a interim constitution after the Communist Party took over power, China had four constitutions, enacted respectively in 1954, 1975, 1978, and 1982. The prevailing view seems to recognize the 1954 Constitution as the only constitution, the other ones being merely “amendments” to the first constitution. But such view is inadequate because the latter versions underwent dramatic textual changes, making them different “constitutions” rather than amendments. The 1954 Constitution, for example, had over 100 provisions, while the 1975 Constitution, enacted in the aftermath of the Cultural Revolution, had only 30 some provisions. Although the 1982 Constitution currently has 138 provisions, and closely resembles the 1954 Constitution in fundamental aspects, the constitutional continuity – if there was any – was interrupted for nearly three decades. Furthermore, the current constitution already has had 31 amendments. It would cause great confusion if the 1982 Constitution itself were regarded as an “amendment” to the 1954 Constitution.

now explicitly provides: “The state respects and protects human rights.” The explicit recognition of the constitutional status of “human rights” is generally seen as a significant progress in the development of the Chinese constitutional values and ideas.

The enshrinement of the “human rights” concept in the Constitution, however, not only reflects changes in the constitutional text and values, but also signifies important transformation in the modes of thinking in the Chinese constitutional studies. Confucius once said: “review of the past leads to new knowledge.”<sup>2</sup> Reading relevant books and articles published 20 years ago,<sup>3</sup> one cannot fail to be amazed at the scale of transformation in the methodology and paradigms of the Chinese constitutional jurisprudence. In a sense such transformation is more fundamental than the textual changes of the Constitution, however significant in themselves. Although the popular sovereignty concept is still the essential part of the Chinese Constitution, it is the hallmark of the traditional model of the Chinese constitutional jurisprudence – not only that of the 1982 Constitution, but also that of the very first constitutions of the People’s Republic enacted over half a century ago. The preface of the Common Program, enacted in 1949, defined the “people’s democratic dictatorship” (*renmin minzhu zhuanzheng*) as the basic foundation of the state. The first Constitution, formally enacted in 1954, provided that “all powers belong to the people”, and the traditional collectivist paradigm highlighted by these constitutional documents in the notion of popular sovereignty was inherited by the 1982 Constitution without substantial change. On the other hand, the human rights concept, with its invariant focus on the protection of concrete individual rights, signals a decisive shift of focus from the collectives to the individuals in the Chinese constitutional jurisprudence. The apparent continuity in the gradual textual changes, retaining the old notion of popular sovereignty and other values and principles unique to a socialist constitution, cannot conceal the fundamental leap in the methodologies of constitutional law research.

This article explores five related aspects of the recent transformations in the Chinese constitutional jurisprudence. First, Chinese constitutional law used to be thought as

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<sup>2</sup> *Analects*, 2.11.

<sup>3</sup> For representative works around 1980, see Zhang Youyu et al., *Collection of Essays on Constitutional Law (Xianfa Lunwenji)* and *Collection of Essays on Jurisprudence (Faxue Lilun Lunwenji)*, Beijing: Social Science Literature Press (2003).

nothing but ideology; now it is leaning a relatively value neutral, positive study. Second, Chinese constitutional jurisprudence used to be self-centered, and for most part served the function of affirming China's constitutional theory and practice and denigrating those of other countries; now it has adopted a more balanced attitude toward foreign constitutional theories and practices. Third, the study of Chinese constitutional law used to focus on provisions of the constitutional text; now it is willing to borrow from the experience of the developed constitutional states, and begins to pay close attention to the practical legal effect of constitutional provisions. Fourth, Chinese constitutional jurisprudence used to focus on expositions of abstract principles defined in the constitutional text; now it cares more about how the Constitution may help to resolve specific social problems in real life. Finally, Chinese constitutional jurisprudence used to put strong emphasis on such macro concepts as "people", "nation", "states" and "sovereignty"; now its focus has been shifted to individual constitutional rights and principles as reflected in concrete cases. As the Chinese constitutional jurisprudence traveled through the path from popular sovereignty to human rights, the methodology of Chinese constitutional research has undergone a fundamental transformation from holism to individualism. The above related changes indicate that China is in the process of constructing its own constitutional framework founded on functionalism and positivism.

## **I. From Ideology to Empirical Research: Laying the Scientific Foundation for Constitutional Jurisprudence**

In the most part of the past half a century, the Chinese constitutional jurisprudence is tinted with a strong flavor of political ideology. In other words, scholars simply sided with the official positions in vindicating, affirming, and advocating for the constitution rather than analyzing and evaluating constitutional mechanisms from a neutral perspective. The ideological elements in the scholarly works remained prominent around 1982, when the current constitution was drafted and enacted. There elements were shown rather clearly in the titles of many academic articles, e.g. "The fourth

constitution will be China's best constitution", "The new development of socialist democracy and legal system", "Solid guarantee for strengthening the socialist legal system", "Insistence on the Four Basic Principles is the fundamental assurance for the victory of socialist enterprise", "Must insist on Marxism, Leninism, and Mao Zedong Thought in legislation", etc.<sup>4</sup>

These views are no doubt politically safe, but it is obviously not the business of a constitutional law scholar to express them. As a private citizen he may well have the moral obligation to observe the constitutional norms of his own state, and the constitution as the legal expression of a basic value system necessarily embrace ideological orientations. But self-affirmation can never turn into true jurisprudence; rather, it can merely make constitutional law an "employed instrument" (*yuyong gongju*) of the dominant political power. Such constitutional "jurisprudence" cannot, of course, become scientific in any sense, nor can it substantially solve any problem in reality. To take one example: the "right to strike", provided in the 1975 and 1978 constitutions, was removed in the 1982 Constitution. The explanation provided by a constitutional law scholar was that such right was perhaps necessary for capitalist states, "but in our country, the suspension of productions caused by strikes is a sabotage of interest to the whole people, including the working class.... And the workers in our state-operated enterprise have right to participate in enterprise management, the laborers of the collective economic organizations also have right to elect and impeach the managerial personnel. Why then is it necessary to choose the means of strike in order to cure bureaucratism?"<sup>5</sup> From the perspective today, such an "explanation" is anything but persuasive. It demonstrates that such scholar know little not only about the "capitalist" societies, but also about his own country. It takes only a cursory investigation of the reality to find out that the above rationale supporting deletion of freedom to strike cannot stand. This does not necessarily suggest that such freedom should not be removed from the constitution, but it is certainly not the vacation of constitutional law scholars to provide such superficial vindication for the presence or absence of any constitutional

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<sup>4</sup> See Zhang Youyu et al., *Collection of Essays on Constitutional Law*, *ibid.* It should be pointed out that problems of similar nature are generally present in the jurisprudence works of that era.

<sup>5</sup> *Ibid.*, pp. 12-13.

provision.<sup>6</sup>

Hans H. Gerth and C. Wright Mills, *Essays on Sociology* (1977), pp.109-155.

More fundamentally, a scholar is not obligated to vindicate any opinion from a given standpoint of value judgment. According to the essential distinction of facticity and normality, a value choice cannot embrace any truth value, and thus cannot be characterized in terms of “right” or “wrong”.<sup>7</sup> This dilemma is resolved in positivist legal theory through the notion of democratic legitimacy. In a democratic society, value choices are to be decided by the people or parliamentary deputies representing their preferences, and laws enacted through democratic political processes represent the interests and value choices of the majority population in a society. If a scholar asserts his own value choice in his academic works, then he not only misunderstands his public role as a scholar, but also depletes his work of “academic” values. Thus, although a constitution necessarily embodies a set of value choices, the study of constitution as a branch of legal science should be value neutral, just as social science in general should maintain neutrality despite its human subject of research is invariably value oriented and, in that sense, biased. Otherwise, the so-called social scientific “research” would be reduced to meaningless personal quarrels among individual researchers with opposing subjective values. As the constitution of any state is necessarily oriented toward certain political and ideological values, the study of constitutional law is particularly apt to become politicized, and constitutional jurisprudence as a science cannot begin without rectifying such political orientations.

It is worth pointing out that, in the past half a century, the Chinese constitutional jurisprudence has been heavily disturbed by political movements. As a result it failed to develop stably on a positive scientific track. Ever since the economic reform, the Chinese legal community is preoccupied with eliminating the Leftist remnants of the Cultural Revolution. Thus academic discussions of certain sensitive issues were

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<sup>6</sup> See e.g. Max Weber, Science as a Vocation, in Hans H. Gerth and C. Wright Mills, *Essays on Sociology* (1977), pp. 109-155.

<sup>7</sup> For this problem and the related “Hume’s Law”, see Zhang Qianfan, *Introduction to Study of Constitutional Law: Principles and Applications* (*Xianfaxue Daolun: Yuanli yu Yingyong*), Beijing: Law Press (2004), pp. 38, 46-48.

unavoidably tinged with ideological hyperboles.<sup>8</sup> These efforts were perhaps necessary to cleanse the opposite ideological influences, but it is insufficient for the constitutional study to stay at such a sentimental level after the ideological confusions are cleared. Consistent with the economic and legal reforms, the Chinese constitutional law scholars must transcend political and ideological fetters, and be more attentive to practical social problems. Hu Shih's motto of "talk less ideologies and solve more problems" is particularly relevant to the Chinese constitutional scholars in the new age. Fortunately, the transition of focus from ideology to problem-solving is taking place in recent years. Notably the proportion of ideological content in the works of constitutional law is consistently decreasing.<sup>9</sup> The constitutional law scholars increasingly direct their attentions to solving practical social problems, and attempt to apply knowledge and methods of such positive science as political science, economics and sociology. It is fair to say that Chinese constitutional jurisprudence is making a steady transition from the traditional ideology to a positive science.

## **II. From Self-centeredness to Comparative Study: Toward a Global Constitutional Jurisprudence**

Since the traditional constitutional jurisprudence was regarded as an instrument for political propaganda, its perspective was destined to be self-centered, and its main purpose was to highlight the advantages of China's own constitutional designs. Ordinarily it would not emphasize the comparative research of the constitutional systems of other countries. Even where it happens to involve the institutions of other countries, it normally cannot assess their merits on fair basis. For example, in an article

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<sup>8</sup> See e.g. the dispute about rule of law (*fazhi*) and rule of man (*renzhi*) during the early 1980s, in Editorial Group, *Collection of Papers on the Discussions of the Rule of Law and Rule of Man Problem (Fazhi yu Renzhi Wenti Taolunji)*, Beijing: Social Science Literature Press (2003). But also see the contribution of Professor Yu Guangyuan, a prominent economist: Views on the Discussion of the Rule of Man and Rule of Law Problem (pp. 7-11), where he clearly identifies the limitations in rule of law, e.g. "even rule of law is not necessarily oriented to democracy" (p. 9).

<sup>9</sup> Although systematic research and statistical data are not available, one can feel the unmistakable change of style in the Chinese constitutional law study from a recent collection of papers in Jiang Min'an et al. (ed.), *China's Road to Constitutionalism*, Beijing: Law Press (2005).

entitled “On Freedom of Speech and Press”, although the author introduced the constitutional protection of free speech in the west, he nevertheless concluded as follows:<sup>10</sup>

*Whether it is freedom of political news or freedom to criticize government, subsumed under the surface of “objectivity” and “fairness” are struggles between corporations and between the ruling faction and the opposition factions. It is the freedom of those bosses of news agencies and press companies, not the freedom of every correspondent, much less the freedom of proletariat and vast majority of the laboring people.... If the situation is adverse to the bourgeois rule, the limitation and repression of speech and press will be more severe. From time to time they employ police and secret agents to interfere with progressive opinions.*

While it is perhaps true that the western freedom of speech and press is still subject to controversy in practical application,<sup>11</sup> the author obviously failed to buttress his points and allegations by any concrete evidences taken from reality, but simply denigrate the whole institution from a given ideological commitment. Such inadequate practice is meaningless from the academic perspective, since it does no more than stating the author’s subjective orientation.

Just as science in general is beyond national borders, constitutional jurisprudence as a branch of legal science should not be limited to a particular state. Since constitutional jurisprudence is not to be treated as a political instrument, it should refrain from blindly confirming self and negating others, but should rather openly explore through free research and without prejudices the common needs of mankind, the general regularities of human conduct, and particular institutional mechanisms that are most suitable to

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<sup>10</sup> Translated from *Collection of Essays on Constitutional Law*, pp. 140-163. Indeed, even today political education is still amazingly effective in formulating the minds of the young generations. In the freshman constitutional law class at Peking University, for example, more than a few students were puzzled at how “bourgeoisie democracy” can work for the interests of the majority.

<sup>11</sup> For the most recent challenge to personal freedom and due process arising from the necessity of national efforts to curb terrorist activities around the world, see Charles I. Lugini, *Rule of Law or Rule By Law: The Detention of Yaser Hamdi*, 30 Am. J. Crim. L. 225.



particular societies and cultures, thereby providing valuable guidance for national constitutional practice. The constitutional text of one's own country is the point of departure for one's constitutional law research, but it is far from its destiny. Just as astronomical study cannot make this globe the center of universe, constitutional jurisprudence should not limit itself to the text of the national constitution. In this sense, in order for China's constitutional jurisprudence to develop into a legal science, the Chinese constitutional scholar must accomplish a "Copernican Revolution", as it were, abandon simplistic value judgments and biases, and study the national and foreign constitutions from an ideologically neutral perspective.

An important function of Chinese constitutional jurisprudence lies in applying constitutional principles to the resolution of numerous practical problems that confront Chinese society today, and the experience and methods of other countries in tackling similar problems are obviously relevant and valuable to China. The Chinese scholars and students can understand the significance of studying western constitutional law at three levels.<sup>12</sup> First, although the so-called "national circumstances" (*guoqing*) may be somewhat different, China can examine and borrow from the western constitutional experience the concrete solutions to similar problems that China share with the western countries. For example, in recent years, there is rising consciousness about moral and legal issues of euthanasia and homosexuality in China, and the American or Dutch experiences in solving these problems can provide models from which China can borrow. Second, even though problems and situations differ to certain extent, the methods and processes of resolving such problems can share common grounds. Thus China can still learn from the methods that the western countries use to resolve different problems. An example is the current legislation on property rights, particularly real estate properties. Although China has a fundamentally different land property system from that of the western countries, the latter's constitutional practice for protecting property rights, e.g. the legislative procedure on taking and the judicial enforcement of "just compensation" (see the Fifth Amendment of the United States Constitution), nevertheless serve as relevant models for China in considering effective methods for protecting property

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<sup>12</sup> See Qianfan Zhang, Preface to the Second Edition, *Western Constitutional Systems* (vol. 1, The Constitution of the United States, 2<sup>nd</sup> Ed.), Beijing: China Politics and Law University Press (2004).

rights of peasants and city dwellers alike in the nationwide process of urbanization and infrastructural renovations.<sup>13</sup> Finally and more profoundly, China can gain from the studies of modes and models of western constitutionalism, such as the fundamental relationships between the state and society, checks and balances of different government departments as well as governments at different levels, and the role of the courts in settling political disputes, etc. To sum up, a study of comparative constitutional law can help to discover, resolve, and reflect on China's own problems.

It is somewhat comforting that, on the dawn of the new millennium, comparative constitutional studies have made far-reaching progress in China. While in the middle of the 1980s, the representative work is Professor Gong Xiangrui's *Comparative Constitutional and Administrative Law*, a comprehensive but rather thin volume on public law in general, the comparative research on constitutional law has made breakthrough both in breath and in depth by the end of 1990s.<sup>14</sup> In fact few works in constitutional law today are content with quoting certain provisions or citing general principles of the national constitution, entirely ignoring foreign experiences in dealing with similar problems.<sup>15</sup> Under the current situation, where constitutional interpretation and implementation mechanism are underdeveloped in China, discussion of relevant foreign constitutional cases is an essential ingredient to any valuable academic contribution. And Chinese constitutional scholars today are well equipped to do so, as many legal classics in constitutional law have been translated into Chinese. It is worth highlighting that the translation of legal classics has been a thriving enterprise ever since 1980s, and it is still prospering today. The constitutional law is no exception. Since the late 1990s several influential works on western (especially American) constitutional law have been introduced to China, and a few popular constitutional law casebooks were

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<sup>13</sup> The lack of effective enforcement mechanism for compensation at a fair market value of the land has led to serious social tragedies and upheavals in recent years. For massive grievance appeals (*shangfang*) and even suicidal attempts induced by lack of adequate compensation for taking, see *Xinmin Weekly*, 2 September 2003.

<sup>14</sup> See e.g. Li Buyun (ed.), *Comparative Studies of Constitutional Law*, Beijing: Law Press (1998); Shen Zongling, *Comparative Constitutional Law: A Comparative Study of Constitutions of Eight States*, Peking University Press (2002).

<sup>15</sup> For a representative collection of articles, see *China's Road to Constitutionalism*, Beijing: Law Press (2005).

also translated.<sup>16</sup> Like their counterparts in other areas of law, these translations are quite uneven in quality, but they did provide the Chinese readers with an indispensable knowledge base for approaching western constitutional law.

### **III. From Textual Provisions to Implementation Mechanism: Consolidating the Legal Authority of the Constitution**

As the constitution was taken for a long time as an ideological proclamation rather than legal instrument for practical problem-solving, the traditional Chinese constitutional jurisprudence generally contented itself with enumeration of constitutional provisions and their theoretical expositions, and refrained from exploring the application of constitutional theories and provisions in socio-political life. As a result the Chinese constitutional scholars in the past did not attend sufficiently to the judicial mechanism of implementing the Constitution. And this was by and large the situation by the time of drafting the 1982 Constitution. Among the 55 academic articles that appeared in the *Collection of Essays on Constitutional Law*, only one article took judicial review as special topic.<sup>17</sup> And those works that did discuss the constitutional supervision generally took for granted the rationality and efficacy of the current constitutional model, in which the Standing Committee of the National People's Congress (NPCSC) is in charge of interpreting the constitutional and laws, and their main theme was to vindicate such a prescribed model of "constitutional supervision". The experience of implementing the current constitution for over two decades indicates, however, that the existing implementation mechanism defined in the 1982 Constitution

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<sup>16</sup> See e.g. the *Series of Translations in Constitutionalism* (Xianzheng Yicong) edited by Professors Liang Zhiping and He Weifang and published by Sanlian Press, and *Translation Series of Public Law Classics* (Gongfa Mingzhu Yicong) edited by Professor Luo Haocai and published by Commercial Press. The completely translated American constitutional law casebook is Paul Brest et al. (ed.), *Processes of Constitutional Decisionmaking: Cases and Materials* (4<sup>th</sup> Ed.), Qianfan Zhang et al. (trans.), Beijing: China Politics and Law University Press (2002). The last edition of Professor Conrad Hesse's classic *Outline of the Basic Law* has been translated into Chinese from the original German version, and will be published in early 2007.

<sup>17</sup> See *Collection of Essays on Constitutional Law*, pp. 245-263. There was one other article that mentioned models of judicial review, see *ibid.*, pp. 516-528.

is obviously inadequate. Although doubts of unconstitutionality over concrete or abstractive government acts abound, the NPCSC has never substantially exercise the interpretive power conferred by the constitution to vindicate its dignity. Without an adequate implementation mechanism, the effect of the constitutional text will necessarily remain on the paper, resulting in enormous gaps between the constitutional theory and social practice.<sup>18</sup> As a result, although the preface and Article 5 of the current constitution explicitly declare that it is the highest law of the state, the constitution is basically not enforced and lacks legal effect in reality.

Although the issue of constitutional implementation was raised at early as 1954, when the first constitution was drafted, and once again during the drafting process of the 1982 Constitution, this crucial issue did not receive enough attention until recent years. From the late 1990s, Chinese constitutional scholars began to systematically study the mechanism of constitutional implementation.<sup>19</sup> Since then models of judicial review in the western countries consistently arouse academic interest. *Marbury v. Madison*<sup>20</sup> was hardly known as of the 1980s, but it has now become the classical story in the Chinese legal community. The mechanism of constitutional implementation is a popular theme in every annual conference of the Chinese Constitutional Law Association, and it can be said that as long as such issue is not adequately resolved, it will continue to attract the attention of not only constitutional scholars, but also society in general. So far the theoretical arguments for the necessity of some form of constitutional review has been largely completed, and the focus of research is gradually shifted to the practical methods of establishing an effective yet practicable implementation mechanism within the existing constitutional framework.<sup>21</sup> It is not exaggerating to say that the Chinese

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<sup>18</sup> For example, the State Council rescinded its regulation on internment and deportation in 2003. Although the legal community petitioned the NPC more than once and demanded constitutional review of the regulation, NPC and its Standing Committee's lack of response showed again the inadequacy of the current constitutional supervision mechanism.

<sup>19</sup> For representative works, see Zhou Yongkun: On the Direct Effect of Constitutional Basic Rights, *China Legal Science (Zhongguo Faxue)* 1997 (1); Lin Laifan, *From Constitutional Norms to Normative Constitution (Cong Xianfa Guifan Dao Guifan Xianfa)*, Beijing: Law Press (2001).

<sup>20</sup> *Marbury v. Madison*, 5 U.S. 137.

<sup>21</sup> See e.g. Zhang Qianfan, Taking Constitution Seriously: On the Necessity and Feasibility of Establishing a Constitutional Review Mechanism, *Peking University Law Journal (Zhongwai Faxue)*, 2003 (5), pp. 560-580; Establishment of a Review System for Legal Norms: A Theory of Constitutional Revision, *Strategy and Management (Zhanlve yu Guanli)*, 2004 (2), pp. 61-69.

constitutional scholars now share the common vocation to explore and design a practicable constitutional implementation mechanism, by which the constitution can acquire practical legal effect for limiting government power and protecting individual rights.<sup>22</sup>

#### **IV. From Abstract Principles to Concrete Problems: Getting the Constitution Out to Reach Real Life**

Like other legal norms, a constitution is enacted to solve practical social problems. At the bottom a constitution is not the law of scholars, but the law of the people – it is the basic law made by the people to protect their fundamental rights. As such constitutional jurisprudence should be built upon concrete cases that arise in the process of resolving conflicts of vital social interests, rather than abstract principles that scholars fabricate around the constitutional texts. This is not to say that principles are insignificant, and the accumulation of numerous cases will necessarily result in a set of common principles for treating similar problems, but it does suggest that constitutional jurisprudence would lose touch with social reality if it simply begins and ends at the level of abstract principles. It is true, as the Chinese often paraphrases Marx’s critique of “mechanical materialism”, that one is to transcend the myopia of “seeing the trees while missing the forest”, but at the same time one should not be content with a vague, overarching “forest” while losing sight of individual composite “trees”; such a “forest”, absent concrete elements, can be nothing but a phantom in the mind of scholarly imagination. In constitutional jurisprudence it is even more dangerous to ignore “trees” in a “forest”. While missing the “forest” merely run the risk of lacking theoretical depth, loss of the “trees” would deplete a constitution of any meaning by plucking it out of the social soil on which it grows, as it were. However, precisely because a constitution contains more abstract principles than ordinary laws, constitutional jurisprudence is particularly apt to be trapped in the situation of “seeing a forest without trees”.

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<sup>22</sup> For certain objections to judicial review from jurisprudence oriented scholars, see Jiang Shigong, Dilemmas in the Judicialization of the Constitution, *Chinese Social Science*, 2003 (2). These views are not, however, representative of the Chinese constitutional law community.

In the *Collection of Essays in Constitutional Law* published in the early 1980s, almost all articles committed precisely such an error since they all dealt with grand constitutional principles. This is made apparent by some of the titles, e.g. “The basic spirit of constitutional amendment”, “On the organizational and action principles of Chinese state institutions”, “The constitution and spiritual civilization”, “Scientific summation of the framing experience of a socialist constitution”, “On democratic centralism”, “The unification and dignity of legal system”, etc. Not a single article contained individual case analysis. Only a few topics touched on specific subjects, e.g. “On the legislative power of the Standing Committee of the National People’s Congress”,<sup>23</sup> but they were limited to the expositions of theoretical principles. Of course, constitutional discussions could be pointed and relevant if they are targeted to relatively concrete subjects. For example the disputes about “everyone is equal before law” during the early 1980s produced some articles with substance.<sup>24</sup> But even these discussions are limited to theoretical principles without case studies.

As a branch of legal science, however, constitutional study must be founded on real events and concrete cases rather than hollow slogans. Cases give life to constitutional law and constitute the material building blocks of the Chinese constitutional system, without which the constitution would remain empty wishes and true constitutional jurisprudence would never take off, much less to establish a valuable theoretical system. To be sure the total absence of constitutional cases is not the fault of Chinese constitutional scholars; as the current mechanism of constitutional implementation is far from perfect, the constitutional provisions cannot be taken as legal basis for judicial judgments. As a result the development of Chinese constitutional law is severely restricted by lack of genuine ground material. So far its only material consists in a few “events” of constitutional relevance, and there has not been a single constitutional “case”, properly speaking, with the only possible exception of the Qi Yuling case (2001). The lack of constitutional practice constitutes the major impediments to the development of Chinese constitutional jurisprudence. For this reason, at the current stage, the Chinese

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<sup>23</sup> See *Collection of Essays on Constitutional Law*, pp. 500-505.

<sup>24</sup> See, e.g., Pan Nianzhi and Qi Naikuan, On the Problem of “All Are Equal Before the Law”, *Social Science*, 1980 (1). For references to this dispute, see Library of CASS Law Institute (ed.), *On All Are Equal Before the Law*, Beijing: Social Science Literature Press (2003).

constitutional law needs not more theory, but more practice, i.e., living examples that emerge in a process through which the constitutional system is applied to solving practical problems.

It is worth pointing out that a minority number of scholars and students have made valuable contributions in this regards, however seriously are they handicapped by the existing system.<sup>25</sup> Bringing events encountered in ordinary life to litigation, they attempt to turn the constitutional events into constitutional cases in China. Of course, this process is only in its beginning, and has already met formidable resistance in practice.<sup>26</sup> Despite the negative factors, however, we still seem to have reason for some optimism and believe that more scholars, students, and ordinary citizens will participate in constitutional litigations. In a broader scope and from a brighter perspective, Chinese citizen's consciousness for applying the constitution in ordinary life has been consistently rising. In the Sun Zhigang's incident that aroused national reaction in 2003, for example, several legal scholars petitioned the NPCSC and requested it to rescind the State Council's Regulation on Interment and Detention Management. In the renovation and urbanization projects that involve land confiscation nationwide, not a few citizens referred to the Constitution to defend their personal and property rights.<sup>27</sup> With an effective constitutional review mechanism, these constitutional events can easily turn into constitutional cases of major significance.

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<sup>25</sup> For a representative work, see Zhou Wei, *A Study on the Judicial Remedies of Constitutional Basic Rights (Xianfa Jiben Quanli Sifa Jiuji Yanjiu)*, Beijing: China People's Public Security University Press (2003).

<sup>26</sup> Even after the Qi Yuling case in 2001, the Chinese courts still decline to try constitutional litigations, e.g. Jiang Tao v. Chengdu Branch of the China People's Bank, sometimes called the First Constitutional Equality Case, or avoid using constitutional provisions as the legal basis for judgments, e.g. Zhang Xianzhu v. Personnel Office of Wuhu City, Anhui Province, which involves the equality issue of whether the physical examination standard for public servants may legally exclude the non-infectious hepatitis-B virus carriers.

<sup>27</sup> See, e.g., Duan Hongqing, Awaiting Supreme Court's Judicial Interpretation for Demolition, *Finance (Caijing)*, 5 June 2004, p. 104.

## **V. From Holism to Individualism: Finalizing the Methodological Transformation**

Let's now return the title of this paper: the historical progress from the notion of popular sovereignty to that of human rights. I should note at the outset that I do not necessarily oppose the notion of "sovereignty", however misleadingly it has been applied in China's past. It is true that, in the process of regional integration concomitant with the decline of nation-states, the notion is now losing its grip in growing parts of the world, but I acknowledge that may still serve useful purpose in international law. And the principle of popular sovereignty, a rather strong expression for democracy that needs much improvement and strengthening in China today, is still one of the basic principles of the current constitution. The problems lies not so much in the notion itself than the methodology and conception it used to underly. Both "people" and "sovereignty" stand for an indivisible macro whole, and as such represents a holistic way of thinking. On the other hand, although "human rights" is also a generic concept, it derives meaning from and applies to each individual person, and thus represents an individualistic way of thinking. The transitions from the macro "people" to micro "individual", and from the abstract "sovereignty" to the concrete "rights", underlines a fundamental methodological change in the constitutional amendment of 2004.

Methodological individualism and holism are diagonally opposed methodologies for social scientific interpretations. Methodological holism emphasizes the inherent relationships of things and insists on the indivisibility of the whole – whether cosmos, society, or human body – that cannot be decomposed and reduced into its parts (e.g. individuals of a society or organs in human body) without losing essence; a living organism would be destroyed by severing the interconnections between parts, just as a society would be dissolved by reducing it to isolated individuals. Although holistic thinking has its reasonable side, it may lead to dangerous social consequences if pushed to an extreme.<sup>28</sup> On the other hand, while individualism acknowledges the causal

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<sup>28</sup> An example is racial discrimination based on self-claimed supremacy of certain race, which resulted in the American slavery system before the Civil War and widespread persecutions of Jews during the Nazi reign. Racism still has followers today only because it appeals to and incites the feeling of superiority of certain



connections between things, it insists that the whole is composed of individual parts connected together, and can be meaningfully studied only after it is divided into parts; broad claims about the “whole” is meaningless in theory and dangerous in practice, since it may be used to support those views that cannot stand before more careful analysis. Thus, the cosmos can be studied only by analyzing its components; a human body can be studied only by examining the brain organization, metabolism system; and a society or state can be studied only by focusing on individuals that compose these entities, and etc. Just as a “person” will be recovered by putting together related organs in certain ways, a “society” in particular configuration will be regenerated by organizing individuals through certain economic, political, moral, and legal order. Society and state are nothing but individuals in certain social, legal and political relationships; one cannot meaningfully speak of state, society, or people once individuals are ignored.

In the past, however, such holistic concepts as “people” (*renmin*), “state” (*guojia*), “nation” (*minzu*), “society” (*shehui*), and “collectivity” (*jiti*) were not only taken for granted as real entities in China, but also accepted as the interest of highest order, before which any rights or interests of private individuals are completely overwhelmed. Since the Constitution itself is replete with these holistic notions, the holistic thinking was prevalent in the Chinese constitutional jurisprudence. In an article entitled “The theory and practice of people’s democratic dictatorship”, for instance, the author cited a standard definition: “The agency of the people’s democratic dictatorship is, of course, the people. At the time when the new China was founded, the people include the working class, the peasant class, the city petit bourgeois, and the national bourgeois.”<sup>29</sup> This definition reduces the notion of “people” into several “classes”, yet “class” itself is still a holistic concept, the nature of which is fundamentally different from that of concrete individuals. Today it is trivial for Chinese to ridicule the “class element theory”

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racism; once such a “race” is decomposed into individuals, racism as a “theory” is utterly meaningless and indefensible before countervailing facts.

<sup>29</sup> Translated from *Collection of Essays on Constitutional Law*, pp. 48-66. I will not dwell into the notion of “people” here, which was a political vocabulary at least in the 1954 Constitution, demarcating the boundary between “enemies and friends” (*diwo*). The evolution from such political concept with class limitations to a generally applicable legalistic concept of “human rights” is an enormous progress in itself. See Lin Feng, *Constitutional Law in China*, Hong Kong: Sweet and Maxwell Asia (2000), pp. 12-14.

(*wei chengfen lun*) prevailing during the Cultural Revolution,<sup>30</sup> and the pervasive “class struggles” during the mass movement brought calamities of unprecedented scale to the entire nation. Whether in theory and in practice, holistic thinking proved to be disastrous for China. It is precisely for this reason that the 2004 constitutional amendments enlarged the coverage of the so-called “unified front” (*tongyi zhanxian*) to embrace the “constructors of the social enterprise”, presumably including private entrepreneurs who were removed from the friendly category of “people” during the successive political movements. This is a fair (though belated) recognition of their vital contributions to the economic reform, but if the Chinese mode of thinking stops at the holistic level, the insistence on “popular sovereignty” would result in continued blindness to the constitutional protection of concrete individual rights.

In this regard the constitutional amendment in 2004 marked a fundamental transition. Although “human rights” is also a generalized notion, its basis lies in concrete individuals and not abstract collectivities. As a further illustration of the human rights principle, the amendment also provides that “lawful private property should not be violated”, and the state should “provide compensation” for expropriation of private property or land. Today the Chinese focus has been shifted from the indefinable “people” to tangible individuals, and from the inoperable “sovereignty” to enforceable legal rights, the violation of which are provided with specific remedies.

The purpose of this paper is not to “elevate the present and belittle the past” (*houjin bogu*). The 1982 Constitution was enacted at the early stage of economic reform. In the recent two decades, both social realities and conceptions have undergone rapid and enormous changes. It is only normal and expected that the theory, methods, and focal points of the Chinese constitutional jurisprudence would change correspondingly. And I do not mean that the above five-fold transformations are close to completion; to the contrary, such transformations are still taking place, and some aspects just began to

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<sup>30</sup> A simple counter example suffices to illustrate the infirmity of the class element theory: as individuals, any members of the workers, peasants, or other classes in the category of “people” may commit crimes, and thus should not be exonerated from criminal punishment by the constitutional protections; for the same reason, all those excluded from the classes of “people” are not necessarily “enemies” in the eye of law, and thus should not be deprived of constitutional protection without reason.

change and have already encountered powerful resistance from the conservative blocs that cling to the traditional ideology. Yet the keynote of the paper *is* somewhat optimistic, because I do believe that the undergoing changes meant progress for the Chinese constitutional jurisprudence taking shape as a branch of legal science. If Chinese constitutional scholars will be more conscious of their vocation and apply individualistic methodology in their research, if the constitutional jurisprudence can derive more experience and insights from comparative studies – not only of those advanced states, but also of those developing state in the process of democratic constitutional consolidation, design and establish more effective constitutional mechanisms, by which practical problems can be resolved through institutionalized channels, thereby providing rich cases and materials for constitutional jurisprudence and solid basis for more elevated theories and principles, then the Chinese constitutional jurisprudence will establish its own theoretical system on the pragmatic-positive foundation just like its counterparts in other areas of law – “pragmatic”, because the Constitution and its jurisprudence is no longer hollow theory, but effective instrument for resolving practical social conflicts; “positive”, because it is no longer based on imaginations of theorists, but established on the solid ground where the general constitutional principles and concrete national practices are molded together and such social scientific disciplines as politics, economics, sociology, and behavioral psychology can be jointly employed to guide predictions of human and institutional behaviors. With such an edifice of constitutional science in mind, I look at the future of Chinese constitutional jurisprudence with cautious optimism.

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