

Taking Constitution(alism) seriously? Perspectives of constitutional review and political changes in China

Stéphanie Balme, Pasquale Pasquino

► **To cite this version:**

Stéphanie Balme, Pasquale Pasquino. Taking Constitution(alism) seriously? Perspectives of constitutional review and political changes in China. Constitutionalism and Judicial Power in China, Dec 2005, Sciences Po, France. hal-01053072

HAL Id: hal-01053072

<https://hal-sciencespo.archives-ouvertes.fr/hal-01053072>

Submitted on 29 Jul 2014

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

TAKING CONSTITUTION(ALISM) SERIOUSLY? PERSPECTIVES OF CONSTITUTIONAL REVIEW AND POLITICAL CHANGES IN CHINA

Stéphanie Balme and Pasquale Pasquino

(summary of the 1st draft of the paper- originally 45p.)

"Of the plausible scenarios for China's future, the possibility of a new constitutionalism has been taken seriously by only a few Western specialists. Yet the constitutionalist scenario gains credibility from the improbability of the alternatives", argued Andrew Nathan as early as 1995 under a title at that time quite *avant-gardiste*: *China's Constitutionalist Option*.¹ Ten years later, notwithstanding the ups and downs in the political and legal evolutions of China, that "option" seems even more credible. Indeed, constitutionalism rather than democracy looks like the rather consensual and efficient paths for China to go on. The PRC seems thus to have embarked on a path which is both traditional (democracy after the Rule of Law is the rule rather than the exception, and corresponds to the patterns of European history among others) and unusual (that of an evolving constitutionalism without a system of "State of Parties" (the German concept of "*Parteienstaat*") or political pluralism.

To begin with, the paper argues that one must consider the history of constitutional development in China in the long run. We hereby mean, firstly, the fact that constitutional

¹ *Journal of Democracy*, 7.4 (1996) 43-57



legacy dates back to the end of the 19th century but also that it remains hardly “workable” or “usable” in the PRC as it still symbolizes both the dictatorial powers of Yuan Shikai and Jiang Jieshi and nowadays the democratization of Taiwan which was lead possible thanks to the 1946 constitution enacted on the mainland. Secondly, the recent historical transformations of socialist countries must also be considered when analyzing China’s constitutional evolutions. Indeed, China has embarked in legal reforms 10 years before the rest of the socialist countries but remain today far behind them in terms of constitutional justice. Yet, comparatively, most of the Easter European countries had, before the Communism, an experience of constitutional democracy that China never fully experienced: for example, Czechoslovakia had a Constitutional Court after the First World War. At last, contemporary worldwide neo-constitutional movement is growingly based and intertwined with general global concepts such as good governance. Considering the fact that current official discourse in China on Rule of law shares similar references with international discourses, the question is whether the PRC is truly engaged in a 18th century type of constitutionalist movement or whether it is limited to a tool to prevent political and institutional reforms from its original socialist framework.

Leaving the historical perspective, the paper will also argue that two different kinds of constitutionalism exist in today China: an “official” one and one “popular” (*minjian*) or civil-society based. Popular constitutionalism embodies a true “rights movement” (locally labeled “defense of rights” movement- *weiquan yundong*, 维权运动) which progressively, cases after cases, evolves towards a movement for the protection of constitutional rights. Nonetheless, and more interestingly so, both official and non-official constitutionalist movements are intertwined. A clear distinction can not easily be drawn between the two spheres (public and private or, more precisely, non official) as both types of constitutional activism interact each other constantly. For instance, academic or professional based constitutional actions reflect both the Party-State and the civil society domain. Officially also, a constitutionalist movement exists in a sense that, besides the existence of the CCP Charter, the State Constitution becomes an important site of political and social debate and contestations. Thus and secondly, analyzing the most recent constitutional amendments of 1999 and 2004 on the light of constitutional law theory, we will argue that the *State* Constitution of the PRC seems to be growingly taken seriously.

The hypothesis we work on is that China does not seem to be an anomalous paradigm of transition to constitutionalism but rather a classic one. Its model and development

better describe the 18th century view of the relations between constitutional and political changes, according to which constitutionalism is a precondition to democracy and not vice versa. Therefore, we need not to focus on the nowadays standard relation between constitutionalism and democracy, but on the dynamics between constitutionalism and politico-institutional changes if not democratization.

As other countries of different waves of constitutionalism did previously, China needs to go through a Copernican revolutions in order to define, first, what is law and the sources of law and reconsider the institutional paradigm of parliament sovereignty ; second, to reject the traditional Chinese distrust of judges and, third, the distrust of non official intermediaries located between individuals and the State power. The traditional preference for direct interactions between political power and individuals (society) needs to evolve. For China, constitutionalism is challenging as its philosophy is to prevent excessive centralization of power. Nonetheless, this trend has proven to be reinforced in China constantly besides or thanks to the modernization and opening policies.

Recent constitutional activism: political and historical contexts

China benefits of a rather rich historical constitutional heritage. Indeed, the country has been involved in the worldwide second wave of constitutional movement that has influenced Europe, Americas and non-western systems such as Japan from the end of the 19th century to the beginning of Second World War. At the time of Sun Yatsen's political ideals, intellectual and political movements in China developed accordingly with Japanese constitutional reflections (especially during the 1860-1880's generation) and European (in particular 1910-1930) theories on the Rule of law². H. Kelsen's main work, the *Reine Rechtslehre* (Pure Theory of Law), along with other intellectual movements known as "Vienna circles", were influential in this part of the world. At that time, the current alleged inevitable distinction between the path of reforms according to the European law theory and the constitutional developments in China would have been perceived as a mere abstraction. Sun Yatsen's "*san min zhuyi*" (Three people's principles三民主义), later embodied in the 1946 Constitution, were constitutionally articulated and politically conceived as a Chinese innovation of Montesquieu's "separation of powers". Until the 1940s, Chinese political and legal theory were

² Iyenaga, Toyokichi, 2004, The Constitutional Development of Japan 1863-1881

sometimes even more sophisticated than some of European countries, such as Spain or Portugal for instance which now count as strong constitutional democracies.

If we follow Zhang Xueren et Chen Ningsheng, philosopher and historian of law at Wuhan University³, the last 100 years of Chinese history has been dominated by 3 important yet insufficient evolutions which can easily be summarized by a “language revolution”, as often in the Chinese context, meaning by the replacement of 3 ideograms in key political expressions. They are: (1) the path from the mere discovery of the concept of “Constitution, 宪法“ (from the end of 19th century to the establishment of the Republic in 1912) to the one of “constitutional government, 宪政”; (2) the evolution from the Rule by man (人治) to the Rule by law (法制) and, at last, to the Rule of law (法治) ; (3) the evolution from the notion of vassal, subordinated subjects (臣民) to the notion of “subject-citizen” (国民). Such trends are effective transformations inside the Chinese political system as well as for its nation-state building process. Yet, the early quest for a modern, opened, pluralistic and yet truly Chinese political system remains a battle that is only at its beginning. Therefore, China which has participated officially to the international second wave of constitutionalism in the first third of the 20th century was never part of the third wave which acknowledged, after 1945 and again with the collapse of the communist block in 1989, the worldwide acceptance of democracy.

The characteristics of the Chinese constitutional movement are not mainly determined by so-called specific cultural dimensions but rather by specific historical features. Among them is the circumstance that in China each single element of a system based on rule of law has to be reformed or (re)invented *ad hoc* and at the same time the fact that each constitutional needed “block” to build a rule of law system must be in China reformed or (re)invented *ad hoc* and at a simultaneous pace. For example, in most European countries, including France, the codification of laws has been one of the main political tasks of the 19th century. At that time, legal professionals were trained in law and tradition of law faculties was very vivid. (even if the first chair of constitutional law was only created in France in 1831 by Guizot at the Collège de France for Pellegrino Rossi and did not last longtime). In China, legal agenda must concentrate all type of these different reforms at the same time: from the national unified examination for judges and lawyers (the first one occurred in March 2002) to the writing of a Civil Code

³ Zhang Xueren et Chen Ningsheng (dir.), *Ershi shiji zhi zhongguo xianzheng*, Le Constitutionnalisme de la Chine au XXème siècle, Wuhan daxue chubanshe, Wuhan, 2002, 497p.

(法典 expected for 2010) and the formalization of a hierarchy of norms (法律等级) as well as a system of constitutional adjudication (违宪审查制度). Another difference with former communist countries lies in the fact that the American constitutionalist model seems to be the reference for Chinese changes where, in former communist Europe, the legal heritage being essentially the European one, the main debate was basically to choose between the French or the German model. In the case of China, the question doesn't seem to be how the political constitutional engineering affects the transition to democracy and its consolidation but how the current constitutionalist movement can affect a political regime, which refuses at this stage a democratic transition? Can a post-authoritarian system emerge from the conjunction of economic capitalist development and a thin form of rule of law? And whether such a post- or quasi-authoritarian regime emerges, how far can it go?

Constitutionalism, Rule of law and good governance: interacting paradigms

Taken separately constitutionalism, rule of law and democracy are clear concepts, traditionally analyzed by political theory as well as legal philosophy. Yet, having complicated interactions (for instance, constitutional adjudication has long been suspects to democrats and it is hard to justify its necessity in terms of democratic theory) or even contradictory objectives, their meanings tend to be blurred. Besides, there is not but one Rule of law system or one type of democracy. The formation of constitutionalism in Europe and in the US from the 18th Century gave birth to two sisters traditions, sisters which are not twins! The American constitutional tradition has been inspired by the French political theorist Montesquieu, who praised himself English philosophers who had structured his own thought, and even more the English customary constitution.

In the last 25 years, the word "democracy" became mostly in the common (*journalistic*) language of the western societies a synonym of "*good government*", without any other conceptual specification. It seems, nonetheless, more rigorous to use that word to qualify a political system based on "repeated free elections", and as a mechanism to allocate peacefully governmental power among competing elites (essentially a Schumpeter's definition). We now tend to forget that such a mechanism, democracy, presupposes the existence of a plurality of organized political actors (parties) who have some reasons to move from an open violent conflict to a battle fought with "paper stones" (an eloquent expression borrowed to A. Przeworski). Such a condition, the existence of a plurality of

politically organized forces, and as such “democracy” in the Schumpeterian sense doesn’t seem for the time being a possible “option” for China. Therefore, the following question is to inquire what are the reasons, if any, to believe that “constitutionalism” is an option on the table. To better respond to this question, one needs to add something about democracy and elections. The fact that elections are a mechanism to assign political power to competing elites hasn’t been in history the only reason to resort to them. In societies, like for instance France during the Revolution, which did not accept organized political pluralism, elections had an independent double function: 1) to attribute legitimacy to those who govern⁴ (establishing, by the same token, the obligation of the citizens to obey the elected officials as argued by Emmanuel Sieyès during the French Revolution), and 2) to introduce – vis-à-vis the monarchical or dictatorial regime – the practice of a *limited government*, given that those who govern have no “*tenure*”, so that the government is limited *over time*, and those in power need to be reelected if they want to stay in office.⁵ We here suggest that elections and representative government (institutions that we have named later on “democratic” ones) have a strong connection with *constitutionalism* – if we understand by it a “limited government”; more exactly they are an instrument to achieve that goal. If elections and democracy are a *means* and not an *end*, if accordingly we make these democratic institutions function of a superior goal, we suggest by the same token that there are possibly alternative paths or means to achieve the goal of an anti-despotic, or limited government. Constitutionalism, here in the sense of some form of separation of powers, seems to be a major alternative to achieve that goal. An alternative, which actually had been chosen by most of the European continent long before entering the path of a pluralistic “democracy”.⁶

By constitutionalism, one must also mean the existence of a set of norms (normally codified in a written text) that citizens expect political actors will respect in order to govern the country in a non-arbitrary way and that in fact the latter basically respect. Independently from (and next to) free elections, the main instrument that allows constitutionalism (the same here, as we said, that limited, moderate government)⁷ to

⁴ One has to be aware that a revolutionary ideology, for a while, and steep economic growth may be alternative mechanisms for political legitimacy of the government. It is interesting, moreover, to notice that “socialist” and some others authoritarian regimes prefer fake elections to no elections at all!

⁵ Which, needless to say, presupposes real and free elections.

⁶ The English case is slightly different, but also in England the early forms of “constitutionalism”, in the Middle Age, predate the establishment of a regular two parties system [see Deborah Boucoyannis]

⁷ So the word designate at the same time the means (separation of powers) and the aim (limited government)!

exist and survive goes, since the 18th century and the article 16 of the Declaration of Rights, under the name of “separation of powers”. An elected, accountable Parliament was able to balance an hereditary king (or an elected president in the American republican version of the story) and, vice versa, the king (or the President), because of his prestige (see Benjamin Constant on “*pouvoir neutre*”) and a veto power, was able to avoid the exorbitant power resulting from a government by a single assembly (*gouvernement d’assemblée*). This elegant structure, which in different forms is the masterpiece of the American as well as of the first French constitution (1791), looses much, not to say all, of its grip in contemporary parliamentary regimes (or in the States under “united government”), which are moreover *Parteistaaten* (political systems dominated by organized parties). The reason is pretty intuitive: since the executive lacks independence, because of the principle of political responsibility vis-à-vis the Parliament, the same political party or the same political majority are in control of the two major branches of the government: the legislative and the executive. This is indeed one of the main reasons why contemporary constitutionalism – the one established in Europe in successive waves after the Second World War – is based essentially on the crucial role of an independent judiciary and on judicial organs in charge of constitutional control of statute laws and (sometimes) of the acts of the administration.

The complex structure of the new constitutional-democratic regimes produced a “new constitutionalism” characterized by the generalization of mechanisms of constitutional adjudication, presidentialization of executive power (American influence), rationalized parliamentary institutions and supranational courts (European influence). Nowadays, a fundamental shift in democratic practice is that democracy is no longer limited to competitive repeated elections, since constitutional adjudication has gained a normative legitimacy even in France, a country of a longstanding tradition of distrust of judges.

We now assume that elections alone cannot be considered as a sufficient guarantee for constitutional-democracy; providing a mechanism of constitutional adjudication is now a requirement even for countries where it was anathema or even taboo⁸. Indeed, 95% of the countries of the 3rd wave of democratization and constitution making⁹, especially former communist countries have adopted between 1991 and 1996 a judicial review or constitutional adjudication mechanism, and for the majority the centralized system of a

⁸ *Democracy and the rule of law* by Adam Przeworski, J M Maravall and Pasquino, 2003

⁹ Tom Ginsburg, 2005.

special court according to the European, Kelsenian, Continental model. In these cases, constitutional adjudication was basically the product of democratization.

The definitions of some theorists (Henkin and others 1992) according to which constitutionalism is equivalent to democracy has been echoed by the literature on political and democratic transition after the third and fourth wave democratization countries¹⁰. Nonetheless, there is actually no definite sequence between democratization and constitutionalism, scholars have long ignored the interactions between constitutionalism and the paradigm of the democratization, i.e. the transition to democracy. Some particularities of the Chinese constitutionalist movements indicate a possibility of rule of law preceding democratization with a particular constitutionalist model. As such China better describes the 18th century view of the relations between constitutional and political changes, by which we mean that constitutionalism might be a precondition for democracy rather than vice versa.

Popular and Official constitutionalism in China: similar dynamics?

On the aftermath of constitutional amendments adopted in March 2004 by China's 10th National People's Congress, various forums, Internet chats welcomed remarks from ordinary citizens on the event. The very official Xinhua Forum printed popular advocacy in favor of constitutionalism showing the high level of consciousness of educated urban (basically) as well as the official support of such claims. Numerous messages would indicate for instance that "the authority of the Constitution can only be maintained in a constitutional system" or "only when the provisions of the Constitution are object of judicial litigation can its provisions have any substance" etc¹¹. A constitutionalist movement exists in a sense that, notwithstanding the existence of the CCP Charter, the State Constitution becomes an important locus of political and social contestations.

As Juan Linz showed in a pioneer book in 1978, *The Breakdown of Democratic Regimes*, political life is not simply divided between the ones who are in favor of changes and democracy and the others who are in favor of conservatism and dictatorship. It is a more subtle process, a combination of official and "non official" spheres. Indeed, one can observe in China since the mid 1990's the vitality of a truly

¹⁰ Linz and Stepan, 1996.

¹¹ 新华论坛, www.forum.xinhuanet.com

constitutionalist movement embodied by different representatives and strata of the “non official spheres“ society as well as by official channels.

As more new laws and regulations are being promulgated in China by governments at all levels, the amount of conflict and inconsistencies between local and national legislation have also increased considerably. Briefly, the main characteristics of this unofficial constitutionalism are as follow:

- 1- less and less isolated cases and, on the contrary, more sophisticated claim against State institutional irrationality or brutality as well as increasing collective litigations
- 2- a growingly active public opinion, lobbying on related constitutional matters. Young legal professionals, media (radio, journals and TV shows specialized on law and broadcast trials) and ordinary citizens are the most involved (see for instance the TV' series “ 走向共和” among others); even if the surveys tend to show that awareness and knowledge of the Constitution are virtually nil, both among citizens¹² (any comparative analysis, however, would show similar results, even in democratic regimes, with the probable exception of the United States) and among the legal professions or government officials. More precisely, if general knowledge about the law is increasing, the Constitution is still perceived as "a purely political document" and constitutional law remains marginal, almost irrelevant law. It is neither the noble material nor an essential resource of the know-how of leadership elites, as is the case in the West.
- 3- Both the legal activists, ordinary citizens who go to courts, and active judges' incentives are growingly sophisticated
- 4- to some extent it is possible to detect various forms of “legal dissent”, by legal professionals (lawyers such as Xu Zhiyong, Li Subin or Li Fangping for examples¹³), law students, activists in local people's congresses and judges, i.e. those who are in a position to address the core contradictions of the political system. The expression “judicialisation” (*sifa hua*) became recently a rather common word. It refers to the political uses of the law, the legal uses of the institutional reforms and the self-justification by the law of the authoritarian practices of the government but also the increasing influence of legal institutions in constitutional practice, as in the expression "judicialisation of the Constitution (*xianfa de sifahua*). The expression “judicial power-grabbing” (司法抢滩)¹⁴ is

¹² *Zhongguo gongmin xianfa yizhi jiaocha baogao*, publication dans *Zhengfa luntan*, juin 2002. The main findings are also available on <http://www.calaw.cn/include/shownews.asp>, 18p, as carried out by Han Dayuan and Wang Dezhi.

¹³

¹⁴ See Balme, 2005, Judicialisation of politics and politisation of the judiciary in China.

nascent. Thus, constitutionalism appears clearly for what it stands: not purely an academic subject but a key political and social issue.

5- Medias are all entirely under official/party control but tend to express provocative opinion although amidst high constraints and pressures. Good law reports can be found in “21世纪经济报道”, China Youth Daily《中国青年报》, The New Beijing Daily《新京报》, Internet chats. Yet, media coverage of legal cases can be, as elsewhere in the world, controversial.

6- It is a true “rights movement” as its Chinese name indicated (rights protection movement), which evolve growingly towards a constitutional rights movement as the pervasive Chinese expression indicates it: “以宪法维权...”. Today, the most invoked articles are the right to equity and equal protection (as stipulated in article 33, paragraphe2 of the 1982 Constitution: “all citizens of the PRC are equal before the law”) and the protection of property rights. Moreover since the SARS crisis in the Spring of 2003, the demand of citizens that their fundamental right to information be respected is increasing.

7- Administrative litigation plays the substitute role of the de facto inexistence of constitutional adjudication. Although a popular consensus exists and there is an elite based social demand for the instauration of a mechanism to protect constitutional rights vis-à-vis unconstitutional laws. As a result, more administrative adjudication litigation (行政诉讼案) are being brought by citizens seeking to reverse government actions based on local regulations that conflict with national laws. However, under China’s Administrative Adjudication Law《行政诉讼法》(1990) pursuant to which these suits were filed, judicial review is limited to “concrete administrative action” (具体行政行为) and does not reach “abstract administrative action” (抽象行政行为).

In brief, the 2 following changes are the most important:

- the appropriation by a specialized elite of judicial reforms and institutional changes
- the progressive disconnection of the legal (and as such the “autonomization”) reform from the others reforms, especially the economically oriented ones. Concretely, most of current reforms observed in China are the same as the ones observed in Eastern Europe from the 1980’s to the 1990s : a process of constitutionalisation of the rights movement, judicial reforms, heated debates on the preservation of supposedly socialist characteristics, rebirth of constitutional law and professionalization of legal experts.

Official constitutionalism: "rigidity" of an unilateral constitution

Constitutional rigidity is written in the PRC Constitution (art. 64) [Article 5 spells out moreover the principle of *superiority*: "No law or administrative or local regulation may contravene the Constitution"]. It is true that this same rigidity is or maybe nullified by the fact that the CCP controls both the legislative majority and the supermajority needed to modify the constitution; but progressively this norm is being imposed on the CCP. In a "unilateral constitution"¹⁵ like the Chinese one, constitutional amendments are not *de facto* more difficult to enact than ordinary statutes. But they are passed as amendment in order to send a signal to the population, to the party bureaucracy and to the international community, to indicate that an important modification took place in the Party ideology and will take place in the society. This signaling mechanism seems innocent and notably without any legal and political consequences for the regime. Yet, the amendments, on one side, make visible a new equilibrium inside the CCP concerning very important questions both of ideology and policy-making. And - even more important - they confirm *de facto* the *de jure* distinction between constitutional norms and ordinary (statute) laws; putting the first stones towards the recognition of the importance of hierarchy of norms which is the starting point of the modern constitutionalism, We need to add that the Constitution integrates *ex post* the legal transformations rather than giving *ex ante* impulsion to new laws or to the protection of rights. Even if the coherence of the system is nowadays largely a wishful thinking, it seems nonetheless inevitable that a consciousness of the hierarchy of the norms is emerging in China. One should not forget that it took two century in France to move from the idea of hierarchy of norms to the practice of constitutional control.

The CCP passed 4 sets of important constitutional amendments to the 1982 constitution. Up to 2004, constitutional amendments were concerned almost exclusively with the change of orthodoxy in economic matters: the diversification of property rights (1988), the establishment of a "socialist market economy" (1993), the acceptance "within the limits defined by the law and on the basis of strong State control, of the individual and semi-private economy" (Article 11, 1999) and the recognition of private property rights (March 2004). By stressing the value and concept of human rights, the amendment adds a new definition to the provisions concerning citizens' rights in the current Constitution.

¹⁵ We borrow this expression from Andrea Pozas Loyo.

Although the concept of “citizens’ fundamental rights,” as described in the Constitution, is more definite in legal terms than that of human rights, regarding the subject and content, it has less influence in political terms. By adding the description that “the state respects and protects human rights” in the chapter of the Constitution concerning “the Fundamental Rights and Duties of Citizens”, the amendment combines the two concepts in an organic way, upgrading the essential meaning and value of the concept of citizens’ rights.

The inclusion of human rights in the Constitution ushered in a new era of using the Constitution to safeguard human rights and opened up a wide window for the all-round development of human rights in China. Most of Chinese legal scholars object that such amendments are essentially of *political* nature and that the constitution is or ought to be a *legal* document. What the distinction does or should mean in that context? If by political decision one means minor questions connected with policymaking, no one can think that introducing “property rights” in the Chinese constitution, as it happened in 2004, is a *minor* decision. More in general and concerning the question legal-political, C. Schmitt’s theory argues that a “constitution” (see his *Verfassungslehre*, 1928) has necessarily two sides: it is at same time a *legal structure* and a *political decision*. The fact that many liberal-democratic constitutions do not present themselves also as political decisions is not a reason to think that they are not such. Many written constitution includes clear choices and not just technical provisions about the organization of the government [examples from the French and the Italian present Constitution are republic, a-confessional state, etc.]. It seems moreover strange that NPC, meaning the CCP, willing to disregard the constitution no matter what, did pass in 2000 a *Lifa Fa* (a Law on Legislation), which “provide[s] a means by which individuals can suggest the Standing Committee of the National People’s Congress (NPCSC) to check constitutionality and legality of some ordinary laws”.

In China, the lack of respect for the Constitution is explained by the lack of a clear conception of the position of the Constitution in the hierarchy of the normative system, despite the apparently unambiguous terms used to designate it: it is indeed defined as the “fundamental law” (*genben dafa*) or as the “mother” of all the laws (*mufa*) with equal frequency. There are endless examples of the liberties taken with the text of the Constitution. For example, Article 28 of the Penal Law of 1997 (revised) replaces the term “counter-revolutionary activities” with the expression “penal activities which threaten the security of the State”: this modification, however, was only integrated into

the Constitution when it was revised in 1999, two years later. Up to now, however, no revision of the constitution has institutionalized these new rules, even though they are in direct opposition to the "fundamental law" of the PRC.

Interestingly, most of the Asian countries – with few exceptions, and most notable among them India – have the reputation of being countries where the *constitution* doesn't matter. Countries with constitutions but without "constitutionalism" (T. Groppi). This document – a written constitution – which is nowadays one of the basic requirement to become a recognized member of the international community seems to be nothing more than a "parchment barrier" for political powers struggling with their transition to the promise land of democracy! China is a case in point because it seems to represent both the epitome of a political power without limits, and a country where the constitution can't be more than a mockery. It is this apparent evidence, suggesting arguments in favor of the slightly unconventional hypothesis that the CCP takes, since almost 20 years the constitution growingly seriously.

Concluding remarks

In former Eastern block, in Mongolia, in Taiwan, Leninist parties played a dominant role in constitutional design of incremental reforms. Therefore while Stalinist legacies may play a path dependence role, it cannot prevent on the long run inner institutional reforms in China. Remains the fact that the Western development of the Rule of Law was marked by two forms of control of power, two irreversible and decisive victories which are: the verification of the legality of administrative action (and thus of the government) and the constitutional review. Now, both of these questions lie at the heart of contemporary evolutions in both the political and legal systems in China. As Philippe Schmitter put it "what counts is when and how these collective decisions about meta-rules are made, debated, ratified and implemented more than what is in them", as the process of choosing the institution is more important than the institution itself.

The last century even more than the century of democracy has been the century of the universalisation of "rigid" constitutions. China is again a case in point since they have a rigid constitution but no democracy. The expression "rigid" constitution according to James Bryce and Hans Kelsen, refers to the legal quality of those norms that can't be modified by the majority of the legislative power, but need a larger agreement, let say the involvement of the opposition in order to be amended. Rigid constitutions are in a sense

the ultimate defeat of the English-British model of Parliamentary sovereignty and victory of the model invented (or consecrated) in the US by the Philadelphia Convention in 1787.

The Rule of Law was forged over the course of the history of the countries of Europe. It is a body of "representations both of the State and of the Law", as Jacques Chevallier summarizes it. The theory of the Rule of Law is taking root in China in a soil which is very different not only from its founding historical context, but also from the political choices made since the end of the Cold War by the former regimes of the Communist bloc. In China today, as was to some extent the case in Europe in the past, and possibly particularly in France, the Rule of Law is a modern means of regulation, a tool in the service of the objective of rationalization of the State, here conceived by the single party in power. Thus, under the Ancien Regime, the philosophers of the Enlightenment sought, in the face of the theoreticians of Absolutism, to think through the political order rationally, from which there emerged the idea of the Social Contract. However the ideology which gave meaning to the Rule of Law stems from *distrust* of the State, whose power one always seeks to constrain and to supervise in order to protect the individual. Moreover, constitutional development has been based on a clear definition of the concept of law as defined as early as 1789 in the Declaration of the Rights of Man and the citizen approved by the National Assembly at that time: "Law is the expression of the general will. Every citizen has a right to participate personally or through his representative in its foundation (...) All citizens, being equal in the eyes of the law are equally eligible to all dignities and to all public positions and occupations, according to them and without distinction except that of their virtues and talents". Defining what is law means defining and deciding who has the power to draft, enact and vote laws. Such a power implies to delimit popular sovereignty, meaning also to take parliamentary sovereignty seriously.