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The Politics of Constitutional Reform in China: Rule of Law as a Condition or as a Substitute for Democracy?

by Richard Balme and Yang Lihua

In the People's Republic of China (PRC), dynamic policy evolution and related socioeconomic changes strikingly contrast with the absence of any democratic transition similar to those most communist countries have undergone during the last two decades. Nevertheless, policy reforms of the Chinese government entail a number of important administrative and legal developments, among them a series of amendments to the Constitution. This contribution analyses whether and how constitutional reforms are to be interpreted as part of the PRC's modernisation process. It is shown that the constitutional changes so far have not departed from a traditional communist approach but have been used to legitimise fundamental policy changes initiated by the Chinese Communist Party. At the same time, however, this accommodation of the fundamental law triggered a genuine constitutionalisation process that has been subject to severe limitations, while also signalling important changes in political culture and imposing significant tensions on the whole political system. Therefore, recent constitutional developments in China go far beyond the mere window-dressing that is frequently associated with legal practices in communist regimes.

In der Volksrepublik China kontrastiert die dynamische Entwicklung der Staatstätigkeit und ein entsprechender sozioökonomischer Wandel deutlich mit dem Ausbleiben einer demokratischen Transition, wie sie die meisten kommunistischen Staaten während der vergangenen beiden Jahrzehnte erlebt haben. Gleichwohl zieht die Reformpolitik der chinesischen Regierung einige rechtliche und administrative Entwicklungen nach sich, wozu auch eine Reihe von Verfassungsänderungen zählen. Der vorliegende Beitrag untersucht, ob und inwiefern diese Verfassungsreformen als Teil des chinesischen Modernisierungsprozesses zu interpretieren sind. Es wird gezeigt, dass die bisherigen Verfassungsänderungen nicht von dem traditionellen kommunistischen Ansatz abwichen, sondern dazu dienten, die substanziellen Veränderungen der Staatstätigkeit zu legitimieren, die von der Chinesischen Kommunistischen Partei initiiert wurden. Zugleich jedoch hat diese Anpassung des Grundgesetzes einen genuine Konstitutionalisierungsprozess ausgelöst, der zwar deutlich begrenzt blieb, aber bedeutsame Veränderungen in der politischen Kultur widerspiegelt und erhebliche Spannungen im gesamten politischen System bewirkt. Von daher gehen die neueren Verfassungsentwicklungen in China eindeutig über rein symbolische Maßnahmen hinaus, die häufig mit der Rechtspraxis in kommunistischen Regimen assoziiert werden.

I. Introduction

This paper reviews constitutional reforms and their implications for the understanding of political change in post-*Mao* China. Three decades after the introduction of the reform policy, what have been the major transformations of the Constitution of the People's Republic of China (PRC), what are their consequences, and what are the contemporary dynamics of Chinese constitutionalism? The dramatic policy evolution and related economic and social changes in China strikingly contrast with the limits of political reforms, and particularly with the absence of any democratic transition similar to those followed by most communist countries in the last two decades. However, the Chinese government's engagement in its reform policy entails a number of important administrative and legal aspects as well as widely commented upon amendments to the Constitution. Understanding whether and how constitutional reform is indeed part of political modernisation in China is the purpose of this contribution. In particular, we analyse substantive and procedural aspects of the PRC's constitutional reforms to explore their contribution to the development of constitutionalism and the rule of law in China. By constitutionalism we mean the hierarchy of norms placing the Constitution in a position of authority above other types of rules, therefore submitting to the Constitution all government decisions about their compatibility with the fundamental law. We also use the term "constitutionalisation" to designate the growing reference to this idea or to the Constitution itself within the political culture and its effective use in regulating political interactions. By rule of law, we refer to the recognition, definition and effective implementation by the state of fundamental rights for citizens, including the right to formally contest and modify governmental decisions when they violate those rights.

Although the two notions of constitutionalism and rule of law are closely related, they are nevertheless distinct.¹ Indeed, in common law systems the rule of law can be developed to a great extent on a jurisprudential basis, in some cases in the absence of a formal constitution (i.e. the "Westminster" model). In other instances, constitutions declaratively acknowledge a number of fundamental rights without any concrete implications for citizens to formally question the government's policy in the absence of rule-of-law procedures. Constitutional changes have to therefore be assessed on both dimensions. When China is considered, it is tempting to interpret the growing legalisation of public policy, including its con-

1 See in particular *Lane, J.-E.: Constitutions and Political Theory*, Manchester, 1996, and *Holmes, S.: Lineages of the Rule of Law*, in: Maravall, J.M./Przeworski, A. (eds.): *Democracy and the Rule of Law*, Cambridge, 2003, 29–61.

stitutional dimension, as a substitute and possibly an alternative to more substantial political reforms, namely democratisation. We will first attempt to identify the different steps of constitutional change and the ideological evolution they represent for the political regime of the PRC. Secondly, we intend to assess whether these changes can indeed be interpreted as a constitutionalisation of Chinese politics, meaning a greater role of the constitution in the conduct of public policy and a growing submission of governmental policy to constitutional limitations. Thirdly, we will also analyse whether and, if so, when constitutional changes entail some progress in the rule of law by which citizens make use of the constitution to protect their rights against state authorities. Finally, we wish to explore whether these developments are likely to be conflicting, compatible with, or alternative to full democratisation in the PRC.

Our argumentation shows that, on the whole, constitutional changes in the PRC did not depart from a traditional communist approach and also how reforms were used to legitimise and to secure fundamental policy changes initiated by the Chinese Communist Party (CCP). Furthermore, it argues that accommodating policy change in the fundamental law triggered a genuine constitutionalisation process, one subject to severe limitations, but nevertheless signalling important changes in the political culture and imposing significant tensions on the whole political system. We start with a brief historical review of constitutional developments in China until the contemporary period before analysing the different reforms introduced since the adoption of the current constitution in 1982. We then consider in detail the process of constitutional reform and its evolution and the activism deployed by citizens and groups of legal professionals around constitutional issues. The conclusion develops the prospective implications of the trends depicted for the rule of law and democratisation in the PRC.

II. A Brief History of Constitutional Development in China since the *Qing* Dynasty

Constitutional government was properly introduced as a political concept in China in the late 19th century by reformists aiming at transforming imperial institutions to better resist foreign influences and intrusions. The word *xianfa*, which is used in Chinese for “constitution”, existed in ancient China, which was endowed with vivid and burgeoning legal traditions; however the word designated the set of rules and regulations related to government more than a fundamental law in a position of hierarchy with regard to other norms. The same word,

this time referring to the concept of a constitution in the Western sense, was reintroduced by Chinese intellectuals in exile in Japan during the *Meiji* era (1868–1912). Constitutionalism was then considered as the instrument needed to limit or to abolish the arbitrary power of the *Manchu* Dynasty as well as to encourage Chinese elites to promote an effective form of government in a period of trouble. It was also the legal change required for China to alter its status as a self-centred empire to a nation-state engaged in international relations.² Remarkably, from the contemporary perspective we will adopt here, this moment for constitutionalism coincided with the first wave of “globalisation” and with the economic, cultural and colonial expansion of industrial powers on a world-wide scale.

In this context, the *Qing* Dynasty reluctantly considered some changes, first in 1898 with the *Wuxu* Reform and then in 1908 with an imperial edict titled “General Principles of Constitutional Government” (*Qinding Xianfa Dagang*) intended to elaborate a constitution instituting a parliament, the features of which were mainly borrowed from the German Constitution of 1871 and the Japanese *Meiji* Constitution of 1889. Again in 1911 amidst the secession of a number of provinces in central and southern China, a Charter (*Shijiu Xintiao*) followed by an organic law was promulgated, but this failed to save the Emperor from having to abdicate. China then entered a long period of institutional collapse and permanent turmoil marked by rivalries among warlords, Japanese invasion, and civil war between the Guomindang (KMT) and the Communist Party. A number of constitutional projects were launched during this period, in particular at the provincial level with the development of a federalist movement. In 1921, the Hunan province adopted a constitution and was followed by others. Under the influence of Dr. *Sun Yat-Sen*, the founder of the KMT and the icon figure of Chinese republicanism, projects for a national constitution flourished and were adopted in several instances,³ although they failed to meet the political conditions for implementation. The Constitution of the Republic of China (*Zhonghua Minguo Xianfa*) promulgated by the Guomindang government under the leadership of *Chiang Kai-shek* on 1 January 1947 still serves as the basic law of the present Taiwanese government. For a number of reasons that cannot be explained here, the collapse of the im-

2 *Xiao-Planes, X.*: Constitutions and Constitutionalism: Trying to Build a New Political Order (1908–1949), in: Balme, S./Dowdle, M. (eds.): *Constitutionalism and Judicial Power in China*, Basingstoke (forthcoming). A first (French) version of this article has been published in Delmas-Marty, M./Will, P.E. (eds.): *La Chine et la démocratie*, Paris, 2007, 259–295.

3 *Xiao-Planes* (op. cit., 2007, 294) numbers twelve constitutions or organic laws that were promulgated from 1912 to 1948.

perial regime was followed by a long period in which the edification of a constitutional state in China proved to be impossible.⁴

With the end of the civil war and the foundation of the PRC on 1 October 1949, the CCP wanted to model China's institutions under the precepts of Marxism-Leninism. The 1954 Constitution, inspired by the 1936 Constitution of the Soviet Union, guaranteed equality before the law, the separation of powers and private ownership of the means of production. Within a few years, however, this constitution fell into disuse as *Mao's* radical economic plans and sweeping political agendas left no room for legal restrictions on state power. In 1975, following long years of political turmoil and devastation imposed by the Great Leap Forward and before the Cultural Revolution ended, the PRC adopted a second, dictatorial and ineffective, Constitution. Based on this legacy, it abolished most of the legal protections offered in the 1954 document and proclaimed the need to struggle against the capitalist elements of society. Three years later, however, the Eleventh Central Committee of the CCP concluded that official democratic centralism would necessarily require a certain measure of democracy and drafted the 1978 Constitution accordingly. Of course, the meaning of "democracy" remained grounded in the "people's democratic dictatorship" (*renmin minzhu zhuanzheng zhidu*), based on an alliance of the proletariat classes and led by the Communist Party. The 1978 Constitution was also an attempt to counteract the personality cult, the anarchy and the bloodshed of the preceding decade by superimposing a form of socialist democracy on the existing authoritarian model of government.

Departing from its predecessors, the 1982 Constitution may be viewed as an expression of *Deng Xiaoping's* determination to lay a lasting institutional foundation for China's economic modernisation. Progressive in many respects, the current constitutional document de-emphasises class struggle, omits all direct references to the Cultural Revolution, clarifies citizens' "fundamental rights and duties" and stresses the importance of socialist law for the regulation of political behaviour.⁵ Critics of the constitutional developments in today's China mainly address the subordination of the PRC Constitution to the constitution of the CCP.⁶ In particular, from a comparative perspective, the absence of judicial or

4 *Mao, S.L.*: Recent Development of Constitutional Government in China. Paper presented at the International Conference on "The Value Base of Institutions in Times of Political Change", Taipei, July 2000.

5 *Blanchard, H.*: Constitutional Revisionism in the PRC: "Seeking Truth from Facts", in: *Florida Journal of International Law*, 17/2 (2005), 365–403, here 370–383.

6 The role of the CCP is acknowledged in the Preamble of the 1982 Constitution: "Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong's Thought, Deng Xiaoping's Theory and the important thought of 'Three Represents', the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road."

constitutional review imposes severe limits on Chinese characteristics of constitutionalism, suggesting that it amounts merely to party politics with a different name. However, such a position does not allow for considering the possibility of a gradual change, i.e. slowly developing the rule of law as constitutive of the state and progressively providing incentives for the government to comply with it.⁷ The following section, an analysis of the constitutional amendments introduced since 1982, will examine whether or not these amendments, beyond enshrining CCP policy in the state foundations, have contributed to the development of constitutionalism in China.

III. Constitutional Changes and the Reform Policy

Since its enactment in 1982, the Constitution of the PRC has been modified by four different reforms involving a total of 31 articles. The distribution of these articles shows that 14 of them deal with economic issues to progressively acknowledge market economy,⁸ eight address the political organisation of state power,⁹ seven articles involve ideological issues reflecting the policy changes from the CCP,¹⁰ while two refer to social rights and human rights issues (*Table 1*).¹¹

When timing is considered, it is worth noticing the gradual shift from the economy and related ideological aspects to political organisation and fundamental rights. It is more accurate to say that rights are latecomers in the constitutional reform process. In the wording of the Standing Committee of the National

Art.1 further states that “The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People’s Republic of China. Disruption of the socialist system by any organisation or individual is prohibited.”

7 Cai, D. J.: The Development of Constitutionalism in the Transition of Chinese Society, in: Columbia Journal of Asian Law, 19/1 (2005), 1–29.

8 Articles 1, 2, 5, 6, 7, 8, 9, 10, 14, 15, 16, 20, 21 and 22 of constitutional amendments.

9 Articles 11, 25, 26, 27, 28, 29, 30 and 31 of constitutional amendments deal with the division of powers between public authorities, elections, and national symbols.

10 Articles 3, 4, 12, 13, 17, 18 and 19 mainly concern the Preamble, which asserts the leading status of the CCP in the PRC’s political system. These amendments are in line with the evolutions of the CCP’s ideology as reflected by the CCP National Congress, which takes place every five years.

11 Articles 23 and 24 of the constitutional amendments passed in 2004 deal with issues of social and human rights. Art. 23 indicates for the first time that “the state establishes and improves a social security system compatible with the level of economic development” (becomes paragraph 4, Art.14 of the Constitution). Art. 24 declares, also for the first time, that “the state respects and safeguards human rights” (becomes paragraph 3, Art. 33 of the Constitution).

Table 1: Distribution of Constitutional Amendments (Articles by Topic)

Amendment year/ Topic of articles	1988	1993	1999	2004	Total
Economy	2	6	3	3	14
Political Organisation	–	1	–	7	8
Ideology	–	2	3	2	7
Rights	–	–	–	2	2
Total	2	9	6	14	31

Source: Authors' compilation.

People's Congress (NPCSC) in its Explanation to the Drafting Amendment of the PRC Constitution, Article 23, which claims the necessity of establishing a social security system consistent with the level of economic development, is justified by the fundamental interests of the masses and as a tool to maintain the social stability needed to establish a socialist market economy.¹² The Explanation also stipulates that enacting Article 24, which proclaims the state's responsibility to protect human rights, is consistent with the CCP policy defined by its XVth and XVIth Congresses and aims at promoting international communication and cooperation with regard to human rights.¹³

In line with official ideology, Chinese media usually praise constitutional change as the hallmark of the reform policy:

“The core of the four amendments is to establish a market economy, strengthen democracy and the rule of law and protect human rights. As the NPC now plays a more and more important role in promoting political and economic development, it attracts much attention. Meanwhile, the system reform of the people's congresses at various levels has emerged as one of the cornerstones in promoting political civilisation.”¹⁴

Academic comments are also positive, albeit in a somewhat more critical tone:

“Our constitution has been revised at the same pace as China's reform and it has been called a ‘Constitution of reform’ [...] However, it is really time to reconsider the role of the Constitution and its relationship with reform. The Constitution should be not only a document acknowledging every big step in China's grand reform efforts, it should provide guidance to the overall reform programme itself.”¹⁵

12 Wang, P.Y./Quanguo Renda Chang Weihui Bangongting Mishu Erju [Second Secretarial Office of the Standing Committee of the National People's Congress]: *Zhongguo Xianfa Wenxian Tongbian* [The Materials of the PRC Constitution], Beijing, 2004, 141.

13 Ibid.

14 Li, J.G.: All Eyes on NPC, in: *Beijing Review*, 47 (04.03.2004), 2.

15 Xia, Y.: *Zhongguo Xianfa gaige de Jiye Jiben Lilun Wenti – Cong “Gaige Xianfa Dao Xianzheng Xianfa”*

As indicated, the first constitutional reforms considered here reflected the major change in China's political economy. On 12 April 1988, the First Session of the Seventh NPC's meeting amended Article 11, formally endorsing the existence and development of the private sector as a supplement to the public economy. The reform was adopted two years after the first draft of the General Principles of the Civil Law (GPCL), which already contained various provisions on private contract relations. This was the first official recognition of the private sector in communist China. A related amendment granted permission for the transfer of land-use rights.¹⁶

The 1988 amendment was comprised of two articles loosening the prohibition of the private economy. The reform echoed the change in ideology of the CCP during its XIIIth Congress (*Zhongguo Gongchandang Zhongyang Weiyuanhui*) in 1987, proclaiming that China would establish an economy relying primarily on planning, but at the same time allowing market-oriented mechanisms to supplement the former.¹⁷

Based upon this declaration, in early 1988 the State Council (the equivalent to the Chinese government) initiated seven proposals for constitutional amendments. The seven proposed amendments included:

- adding to the Preamble, “China is in the primary stage of socialism” and “perseveres in reform and opening itself to the outside world”;
- adding “the state permits other ways of distributing wealth” after the paragraph of Art. 6 which refers to the principle of “from each according to his ability” to “each according to his work”;
- revising Art. 10, which prohibits the lease of state-owned land;
- adding an article concerning the private economy;
- revising Art. 10, which defines the Chinese economy as primarily centrally planned but now supplemented by mechanisms of the “socialist market economy”;
- stipulating the division of ownership and management for state-owned enterprises (SOEs);
- deleting the notion of Rural Peoples’ Communes (*nongchun renmin gongshe*) in Art. 8 of the Constitution.¹⁸

[The Fundamental Theoretical Issues of China's Constitutional Reform: From “A Reform Constitution” to “A Constitutional Government Constitution”], in: *Zhongguo Shehui Kexue* [The Social Sciences of China], February 2003, 4–17.

16 *Blanchard, H.*, op. cit., 385f.

17 *Wang, P.Y./Quanguo Renda Chang Weihui Bangongting Mishu Erju*, op. cit., 91.

18 See *Tian, J.Y.*: *Shinian Renda Shengya* [Ten Years in NPC], in: *Xinhua Wenzhai*, September 2004.

Under the 1982 Constitution, the Chinese economy excluded any reference to the market, this being considered incompatible with historical socialism. As the major actor implementing reform, the State Council considered the economic regulatory system as outmoded and not suitable for upcoming economic reforms. For the Chinese executive, constitutional changes were necessary to provide the legal basis to conduct relevant reforms. Some of these amendments were decisive in legally unleashing policy changes in China, particularly the option to lease state-owned land, thus introducing the negotiability and marketability of land-use rights, which is so crucial to urban development. It is interesting to note that before the 1988 constitutional amendment, some cities had already engaged in policies leasing state-owned land under the authorisation of the China Land Administration (*Guojia Tudi Guanliju*). In 1987, the China Land Administration had authorised six cities (Shanghai, Tianjin, Shenzhen, Guangzhou, Fuzhou, Xiamen) and the island of Hainan to lease state-owned land, which had been prohibited up to then. Obviously, these administrative policies generated important controversies about their conformity with the Constitution.¹⁹ Significantly from our perspective, the reform policy preceded constitutional change that was implemented in a second stage in order to legalise ongoing governmental practices.

However, the seven proposals from the State Council were too controversial at that time to be fully accepted within the Politburo, and only two of them were eventually endorsed by the Central Committee of the CCP.²⁰ One of these proposals concerns the recognition of the private economy, while the other deals with the permission to transfer the rights to use land.²¹

On 28 February 1988, the Central Committee proposed the constitutional amendment to the Standing Committee of the NPC and recommended that the

19 In particular about compatibility with Art.10, paragraph 4, which states that “no organisation or individual may appropriate, buy, sell or lease, or otherwise engage in the transfer of land by unlawful means”. Cf. *Zhang X.R./Chen, N.*: *Ershi Shiji Zhi Zhongguo Xianzheng* [The 20th Century’s Chinese Constitutionalism], Wuhan, 2002, 401.

20 *Tian, J.Y.*, op. cit.

21 The amendment reads: “Article 1. Article 11 of the Constitution shall include a new paragraph which reads: ‘The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy and exercises guidance, supervision and control over the private sector of the economy.’
Article 2. The fourth paragraph of Article 10 of the Constitution, which provides that ‘no organisation or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means’, shall be amended to ‘no organisation or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law.’”

latter initiate the legislative process to amend the Constitution.²² The first session of the VIIth Meeting of the NPC passed the constitutional amendment²³ in the exact wording proposed by the Central Committee. This amendment was the first constitutional reform after the adoption of the 1982 Constitution. It was crucial in abolishing the unconstitutionality of the market economy and in defining a legal basis for the reform policy.

In its own turn, the 1993 constitutional reform followed the ideological change promoted by the CCP during its XIVth Congress of 1992. China was then declared to be in the primary stage of socialism; the nation's basic task was to concentrate its effort on socialist modernisation, this in line with the theory of building socialism with Chinese characteristics (*jianshe you zhongguo tese de shehui zhuyi*). The *aggiornamento* also indicated that the basic goal of reform was to establish a socialist market economy, confirming and allowing for further development of the private economy.²⁴ In line with established practices, the CCP Central Committee initiated the constitutional reform process by proposing an amendment of eight articles to the Standing Committee of the NPC. The proposal aimed mostly at further legalising the changing political economy in the Constitution.²⁵

22 Wang, P.Y./Quanguo Renda Chang Weihui Bangongting Mishu Erju, op. cit., 90.

23 Ibid.

24 Pan, W.J.: Lun Xianfa Xiugai, Xianzheng Zhixu Yu Zhongguo Renquan Fazhan Fangxiang [Constitutional Amendment, Constitutionalism and the Development of Human Rights Protection in China], in: 2004 Renquan Ruxian Yu Renquan De Fazhi Baozhang Huiyi Lunwenji [Materials of 2004 Conference of Constitutionalizing and Protecting Human Rights in China], China Academic Journal Electronic Publishing House (www.cnki.net), 2004, 300–311.

25 The final constitutional amendment adopted at the First Session of the Eighth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on 29 March 1993 reads:

“Article 3. The last two sentences of the seventh paragraph of the Preamble to the Constitution read: ‘The basic task of the nation in the years to come is to concentrate its effort on socialist modernisation. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong’s Thought, the Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship and the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system, and work hard and self-reliantly to modernise the country’s industry, agriculture, national defence and science and technology step by step to turn China into a socialist country with a high level of culture and democracy’. This has been revised to read: ‘China is at the primary stage of socialism. The basic task of the nation is to concentrate its effort on socialist modernisation in line with the theory of building socialism with Chinese characteristics. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong’s Thought, the Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship and the socialist road, persevere in reform and opening to the outside world, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system, and work hard and self-reliantly to modernise the country’s industry, agriculture, national defence and science and technology step by step to turn China into a socialist country that is prosperous, powerful, democratic and culturally advanced.’

Before the Central Committee conveys its proposals to the Standing Committee of the NPC, the draft is normally circulated to various authorities, social

Article 4. The following has been added to the end of the tenth paragraph of the Preamble to the Constitution: 'The system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come.'

Article 5. Article 7 of the Constitution reads:

'The state economy is the sector of socialist economy under ownership by the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state economy.'

This has been revised to read: 'The state-owned economy, namely, the socialist economy under ownership by the whole people, is the leading force in the national economy. The state ensures the consolidation and growth of the state-owned economy.'

Article 6. The first paragraph of Article 8 of the Constitution reads:

'Rural people's communes, agricultural producers' cooperatives and other forms of cooperative economy, such as producers', supply and marketing, credit and consumers' cooperatives, belong to the sector of socialist economy under collective ownership by the working people. Working people who are members of rural economic collectives have the right, within the limits prescribed by law, to farm plots of cropland and hilly land allotted for their private use, engage in household sideline production and raise privately owned livestock.'

This has been revised to read, 'In rural areas the responsibility system, the main form of which is household contract that links remuneration to output, and other forms of cooperative economy, such as producers', supply and marketing, credit and consumers' cooperatives, belong to the sector of socialist economy under collective ownership by the working people. Working people who are members of rural economic collectives have the right, within the limits prescribed by law, to farm plots of cropland and hilly land allotted for their private use, engage in household sideline production and raise privately owned livestock.'

Article 7. Article 15 of the Constitution reads:

'The state practices planned economy on the basis of socialist public ownership. It ensures the proportionate and coordinated growth of the national economy through overall balancing by economic planning and the supplementary role of regulation by the market.'

'Disturbance of the socio-economic order or disruption of the state economic plan by any organisation or individual is prohibited.'

This is revised to read, 'The state practices socialist market economy.'

'The state strengthens economic legislation, improves macro-regulation and control, and prohibits in accordance with law any organisation or individual from disturbing the socio-economic order.'

Article 8. Article 16 of the Constitution reads:

'State enterprises have decision-making power with regard to operation and management within the limits prescribed by law, on condition that they submit to unified leadership by the state and fulfil all their obligations under the state plan. State enterprises practise democratic management through congresses of workers and staff and in other ways in accordance with law.'

This is revised to read, 'State-owned enterprises have decision-making power with regard to their operation within the limits prescribed by law. State-owned enterprises practise democratic management through congresses of workers and staff and in other ways in accordance with law.'

Article 9. Article 17 of the Constitution reads:

'Collective economic organisations have decision-making power in conducting independent economic activities, on condition that they accept the guidance of the state plan and abide by the relevant laws. Collective economic organisations practise democratic management in accordance with law. The entire body of their workers elects or removes their managerial personnel and decides on major issues concerning operation and management', is revised to read, 'Collective economic organisations have de-

organisations and experts invited to provide comments. The Central Committee then releases explanations, particularly regarding the recommendations it has rejected, in the “official comments to the proposal with regard to partial revision of the Constitution”, which are attached to the “proposal of the CCP Central Committee to the Standing Committee of the NPC with respect to the partial revision of the Constitution”. In drafting of the 1993 amendment, the Central Committee received a number of significant recommendations, such as to add the “one country, two system” guiding principle for the Hong Kong handover in the preamble of the Constitution, to institute a regulatory power for the Central Military Commission and to establish under Article 70 a special commission of constitutional supervision to insure that the Constitution is fully respected.²⁶ The above recommendations were eventually not accepted by the Central Committee. In its official comment, it argued that no amendment was needed on these three specific issues since they could be interpreted as compatible with the current constitution.²⁷ Remarkably, in doing so, the Central Committee declared it permissible to establish a special commission to supervise the execution of the Constitution, opening up potential space within the current framework to establish an organ for constitutional review.

On 15 March 1999, a new constitutional amendment was implemented, again primarily to reflect and legalise changes introduced by economic reform policies.

cision-making power in conducting independent economic activities, on condition that they abide by the relevant laws. Collective economic organisations practise democratic management and in accordance with law, elect or remove their managerial personnel and decide on major issues concerning operation and management.’

Article 10. The third paragraph of Article 42 of the Constitution reads:

‘Work is a matter of honour for every citizen who is able to work. All working people in state enterprises and in urban and rural economic collectives should approach their work as the masters of the country that they are. The state promotes socialist labour emulation, and commends and rewards model and advanced workers. The state encourages citizens to take part in voluntary labour.’ This has been revised to read, ‘Work is a matter of honour for every citizen who is able to work. All working people in state-owned enterprises and in urban and rural economic collectives should approach their work as the masters of the country that they are. The state promotes socialist labour emulation, and commends and rewards model and advanced workers. The state encourages citizens to take part in voluntary labour.’

Article 11. Article 98 of the Constitution reads:

‘The term of office of the people’s congresses of provinces, municipalities directly under the central government and cities divided into districts is five years. The term of office of the people’s congresses of counties, cities not divided into districts, municipal districts, townships, nationality townships, and towns is three years.’

This has been revised to read, ‘The term of office of the people’s congresses of provinces, municipalities directly under the central government, counties, cities and municipal districts is five years. The term of office of the people’s congresses of townships, nationality townships and towns is three years.’”

²⁶ Wang, P.Y./*Quanguo Renda Chang Weihui Bangongting Mishu Erju*, op. cit., p. 90.

²⁷ *Ibid.*

The private sector was further advanced from “a complement” to “a major component” of the socialist market economy. Public ownership of the means of production would remain dominant, but the acknowledgment of “diverse sectors of the economy” and of the “coexistence of a variety of modes of distribution” testified to the growing legitimacy of market mechanisms in the constitutional order.²⁸

However, in subordinating the protection of private property to that of public property, the 1999 amendment fell short of a full recognition of property rights understood as the foundations of the market economy enshrined in liberal Western constitutions. Although the PRC’s institutions were for a long time committed to the eradication of the private sector, they nevertheless had to tolerate the existence of some individual or non-state ownership at the same time. The Common Principles (*gongtong gangling*) adopted in 1949 provided some guidance for accommodating private economic interests. Similarly, the 1982 Constitution guarantees the “right of citizens to own lawfully earned income, savings, houses and other lawful property”. It does not, however, refer to private property as “sacred and inviolable”, nor does it provide for its protection as one of the fundamental rights of citizens.²⁹ As a result, although the market economy is legally recognised as a legitimate instrument of socialist development, it does not rest on fully-fledged property rights. In a context of intensive economic growth and urban development, the implications for enterprises and real estate or land ownership are tremendous. In particular, modernisation in China comes with a very intensive reallocation of land-use within and around cities, frequently imposing the brutal displacement of residents. Naturally, liberal constitutions expli-

28 In particular, Art. 14 of the amendment adds the following paragraph to Art. 6 of the Constitution: “In the primary stage of socialism, the state upholds the basic economic system under which the public ownership is dominant and diverse forms of ownership develop side by side and keeps to the distribution system under which distribution according to work is dominant and diverse modes of distribution coexist.” Art. 16 of the amendment stipulates that Art. 11 of the Constitution, which reads: “The individual economy of urban and rural working people, operating within the limits prescribed by law, is a complement to the socialist public economy. The state protects the lawful rights and interests of the individual economy. The state guides, assists and supervises the individual economy by administrative control. The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public sector of the economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy”, has been revised as follows: “The non-public sectors of the economy such as the individual and private sectors of the economy, operating within the limits prescribed by law, constitute an important component of the socialist market economy. The state protects the lawful rights and interests of the individual and private sectors of the economy, and exercises guidance, supervision and control over the individual and private sectors of the economy.”

29 *Blanchard, H.*, op. cit., 386.

citly or implicitly provide for the possibility of expropriation in the public interest. But the absence of the legal inviolability of private property in the Chinese Constitution and the subordination of private property to public property practically obliterates the possibility of appealing against government abuses if the Constitution is assumed to be a justiciable one.

In such a context, the 2004 amendments attracted considerable attention. At the XVIth Congress held in November 2002, there was further comment on the tension between retaining the public sector as the mainstay of the economy and promoting non-public sectors alongside President *Jiang Zemin's* report to the plenary session indicated that the two policies should not be “set against each other”, but, on the contrary, “unified” in the process of “socialist modernisation”.³⁰ In the same 2002 report, perfecting the legal system to protect “individual private properties” (*siren caichan*) and creating an equally competitive environment for individual and private economic sectors were defined as the state’s priorities. Consequently, the 2004 amendments to Articles 11 and 13 proclaimed that “citizens’ lawful private property is inviolable”, presumably placing the protection of private property on par with that of public property. The state’s pledge to “protect the lawful rights and interests of the non-public sectors of the economy” as well as the “rights of citizens to private property” has been hailed as the beginning of the end of the system of public ownership. Whereas the preceding draft of Article 11 called for the state to “guide, supervise and manage” the private sector, the revised version required it to take a more active role to “encourage and support” the development of the private sector. Finally, the commitment to “make compensation for any expropriation or requisition” of real or private property was also a significant move from mere recognition to a real constitutional protection of private property in China.

In conjunction with the above, the official recognition of private entrepreneurs as constituents of the CCP has attracted the most attention. Aware of the role of entrepreneurs in the development of the Chinese economy and of their growing social leadership, *Jiang Zemin* formally admitted the possibility of entrepreneurs’ becoming members of the CCP in November 2002 by identifying them as “builders of socialism with Chinese characteristics”. Their new status was subsequently codified in the 2004 amendment to paragraph 10 of the Preamble, which seeks to include “the builders of the cause of socialism” in the “patriotic united front”, a reference to the Chinese People’s Political Consultative Congress (CPPCC).³¹

30 *Huang, X.F.*: The Path to Clarity: Development of Property Rights in China, in: *Columbia Journal of Asian Law*, 17 (2004), 202–204.

31 Entrepreneurs’ party membership is by no means unconditional. Many current CCP members are

Last but not least, the 2004 amendment had important implications regarding individual rights. Article 23 added one paragraph to Article 14 of the Constitution, which reads: “The state establishes a social security system compatible with the level of economic development.” Article 24 added one paragraph to Article 33 of the Constitution, stipulating that “the state respects and preserves human rights”. The later followed up Article 13 of the 1999 amendment, modifying Article 5 of the Constitution to provide that “the People’s Republic of China governs the country according to law and makes it a socialist country ruled by law”.

In substantive terms, the 2004 amendment significantly differed from previous reforms with some real progress in the assertion of rights. In sum, however, it does not come as a surprise that the development of constitutional reform in China has been mainly policy-driven, with revisions subsequently providing the institutional framework for implementing policies initiated by the CCP. We will now turn to the analysis of this reform process in more detail.

IV. Constitutionalism from Above: Governing by Law

Although various participants intervene in the formal constitutional reform process, the key role rests with the Central Committee of the CCP. According to Article 64 of the 1982 Constitution,³² only the Standing Committee of the NPC or one-fifth of the members of the NPC can propose a constitutional amendment. However, the wording of Article 64 reflects only one part of the picture. As seen in the previous sections, history shows that it is always the Central Committee of the CCP who initiates the process of constitutional reform and proposes a draft amendment to the Standing Committee of the NPC. Such a constitutional convention³³ places the Central Committee in an exclusive position of agenda setter, both reflecting its pivotal power in Chinese politics and establishing its control of constitutional policy-making.

either *xiaohai*, former government cadres who have “jumped into the sea” of the private sector and therefore possess some degree of political power to begin with, or wealthy managers of large companies who have amassed considerable economic power.

32 Art. 64, paragraph 1 stipulates that “Amendments to the Constitution are to be proposed by the Standing Committee of the National People’s Congress or by more than one-fifth of the deputies to the National People’s Congress and adopted by a vote of more than two-thirds of all the deputies to the Congress”.

33 Yin, X.H./Fang, B.G.: Lun Woguo Xianxing ‘Zhengcexing Xiu Xianfa Moshi de Juxianxing [The Limitations of the Current “Policy-oriented” Model of Constitutional Reform], in: Law Info China, 1999 (<http://law1.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=art&Gid=335566947>).

Constitutional reform in the PRC is also closely related, and indeed subordinated, to changes in the Charter of the CCP.³⁴ The 1982 Constitution was adopted by the NPC after the XIIth Congress of the CCP had amended its own “constitution” in the same year. Each of the 1988, 1993, 1999 and 2004 constitutional amendments also followed changes in the constitution of the CCP, which took place in sequence in 1987, 1992, 1997 and 2002. The substance of constitutional reform therefore primarily reflects the shifts in ideology of the CCP. For instance, when the resolution of the XIVth CCP’s Congress in 1992 declared that China’s modernisation would be guided by the theory “to construct socialism with Chinese characteristics” (*jianshe you zhongguo tese de shehui zhuyi*), the 1993 constitutional amendment modified the Preamble accordingly. In 1997, the XVth CCP’s Congress added “Deng Xiaoping’s theory” as one of the Party’s ideological tenets and declared as its objective adherence to a principle of “rule by law” to develop socialism in China. Similarly, the 1999 amendment transposed this ideological change in the Constitution.

The *de facto* monopoly of constitutional initiatives with the Central Committee is not, however, exclusive of any consultation process. Amendment proposals are drafted by a commission appointed by the Politburo of the CCP, a body that seeks advice and comments from four different types of organisations:

- each central ministerial department and commission, including the People’s Liberation Army (PLA);
- provincial authorities, including People’s Congresses and the CCP’s authorities;
- “the eight small democratic parties”³⁵ and other social organisations; and, finally,
- experts and scholars relevant to the issues involved in the constitutional reform.

On the basis of recommendations collected from these authorities and interests groups, the Commission drafts an initial proposal submitted for review to the Politburo and to the Central Committee.³⁶ If both approve the draft in principle, it is then submitted to the above governmental and non-governmental organisations for further comments. The commission for constitutional amendment then

³⁴ Ibid.

³⁵ The CCP is indeed not the only lawful political party in China. There are eight other “democratic parties” with legal status in the PRC. These parties supported the CCP during the civil war of 1946–1949.

³⁶ According to Art. 22 of the constitution of the CCP, the Central Committee and the Politburo are the central authority of the CCP. Normally, the Central Committee is convened only during the annual meeting. The Politburo is the standing organ elected by the Central Committee and exercises the power of the Central Committee when the annual meeting of the latter is over.

revises the proposal before re-submitting it to the Central Committee and to the Politburo. The latter in turn reviews the proposal before it enters the legislative process, i.e. when the Politburo submits it to the Standing Committee of the NPC on behalf of the Central Committee.

Normally, the Standing Committee of the NPC strictly follows the wording suggested by the Politburo when the proposal is submitted to the NPC annual meeting in March, the only authority empowered to pass constitutional amendments. However, it is worth noticing that, during the discussion of the proposal for the 1993 constitutional amendment by the Standing Committee of the NPC, some modifications of the CCP's initial version were formulated. The Standing Committee recommended adding one sentence to paragraph 10 of the Preamble, reading "the system of multiparty cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come".³⁷ The recommendation was conveyed to the Politburo, which revised its proposal after internal discussion. This was the first time the Politburo reconsidered its own proposal of constitutional reform at the initiative of the Chinese legislature.³⁸ This move was very remarkable. On the one hand, it can be regarded as a kind of parliamentarisation of Chinese constitutionalism, since it was the first time that the NPC took an active role in initiating constitutional change. On the other hand, the wording of the revision, highly praising both the leadership role of the CCP and the process by which the Politburo still had to approve the modification, was quite eloquent about the strict submission of constitutional developments in China to the initiative and control of the CCP.

V. Constitutionalism from Below: Civil and Legal Activism for the Rule of Law

As we can see from the above, the constitutionalisation of Chinese politics, despite some dramatic changes in ideology reflected in constitutional amendments, has been a gradual and limited process. The picture somewhat changes, however, when constitutionalism is not considered from above, i.e. at the top of the state apparatus, but from below, i.e. the way citizens or legal activists essentially make use of existing procedures.

37 The recommendation eventually became Art. 4 of the constitutional amendment.

38 *Du, Q. Q.*: *Woguo 1993 Nian Xiuxian Guocheng zhong Cunzai de Nuogan Chengxu Xiaci* [Several Procedural Defects in the Process of 1993 Constitutional Amendment of China], in: *Zhongguo Xianfa Shili Yanjiu I* [Research on Constitutional Developments in China I], Beijing, 2005, 205.

In the absence of formal provisions for judicial and constitutional review, desperate citizens helped by active lawyers have invoked a legal procedure recently established under Article 90 (2) of China's 2001 Law on Legislation (*Lifa La*). This provision grants Chinese citizens the right to propose that the Standing Committee of the NPC review administrative regulations, the rulings of the Supreme People's Court (SPC) and local laws that they deem legally incompatible with the Constitution.³⁹

In a decision of 13 August 2001 (the *Qi Yulin* case), the Chinese Supreme Court, asked to arbitrate a private litigation (usurpation of access to university), considered that the violation of a constitutional right (access to education) could open the way to compensation in the absence of specific legislation. The decision and its justification attracted numerous comments since this was the first time that a court indeed referred to the Constitution in making a decision regarding citizens' rights.⁴⁰ Chinese legal commentaries exaggeratedly (and wrongly) referred to the famous *Marbury v. Madison* decision of 1803 by which jurisprudence rather than formal changes of the fundamental law opened the way to judicial review in the US. In the same vein, in 2003 Judge *Li Huijuan* from Henan province refused to implement a local regulation in a civil law case on the ground of its incompatibility with Article 64 of the same Law on Legislation. Initially suspended, the judge finally regained her position after a wide mobilisation of the media, lawyers and legal academics. Again, the affair attracted important controversies about the constitutional status of the law referred to and about the procedure. Finally and more tragically, in 2003 the death of the student *Sun Zhigang* following violence during his detention by the police motivated a group of lawyers to invoke Article 90 of the Law on Legislation to address the Standing Committee of the NPC.⁴¹ They intended to contest the constitutional basis of a form of administrative detention called the "custody and repatriation" regulation under which *Sun Zhigang* had been put under arrest, and they called for the establishment of its constitutional review. Before any decision from the NPC had been taken, the State Council withdrew the corresponding regulations.⁴² Finally, the

39 Balme, S.: The Judicialisation of Politics and the Politicisation of the Judiciary in China (1978–2005), in: *Global Jurist Frontiers*, 5/1, (2005) (available at: <http://www.bepress.com/gj/frontiers/vol5/iss1/art1>).

40 *Kui, S.*: The Beginning of the Era of the Rule of the Constitution? Reinterpreting China's First Constitutional Case, in: *Pacific Rim Law and Policy Journal*, 12/1 (2003), 199–231, here 200–215.

41 *Hand, K.*: Citizens Engage the Constitution: the Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China, in: Balme, S./Dowdle, M. (eds.): *Constitutionalism and Judicial Power in China*, Basingstoke (forthcoming).

42 *Delmas-Marty, M.*: La construction d'un Etat de droit en Chine dans le contexte de la mondialisation, in: *Delmas-Marty, M./Will, P. E.* (eds.): *La Chine et la démocratie*, Paris, 2007, 551–575.

same NPCSC has been put in the position of interpreting the PRC Constitution by political developments in the Hong Kong Special Administrative Region (HKSAR), particularly when amendments to the HKSAR basic law are considered.⁴³ Ironically enough, the conservative approach of the PRC's authorities to democratisation in Hong Kong and its common law system contributes to a moderate constitutionalisation of politics on the mainland. These different developments are obviously far too limited to be interpreted as a full swing toward constitutional or judicial review. At least they show some juridification of the Constitution, in some instances used by the jurisprudence, and the existence of a vivid debate among legal activists and academics about judicial review either by a specific organ of the NPC or through the creation of an independent court.⁴⁴ In that respect they represent some significant developments in the Chinese political and legal culture.

Does this impact on the ordinary life of Chinese citizens through the justiciability of the Constitution? It is hardly disputable that Chinese authorities frequently repress legal activists and make use of arbitrary detention. However, this does not mean that legal recourse is either inexistent or ineffective. Quite the opposite, it can be argued that it is today the dominant form of social mobilisation in China and the major channel for constitutional change in the absence of significant political reform. In the course of these struggles, citizens make use of constitutional arguments to contest public policy and to request a legal basis for government action. In doing so, they not only shape public policy, but also claim and actively promote the constitutional foundations of the state. Recent constitutional complaints reviewed by *Keith Hand* that involved tax and compensation issues as well as challenges to the Property-Rights Law illustrate this dynamic.⁴⁵

As indicated above, the NPCSC, not the judiciary, has the power to invalidate regulations that contradict the Constitution and national law.⁴⁶ The Legislation Law provided the first concrete legal mechanism through which citizens could advance constitutional claims. Citizens have made active use of this mechanism, submitting more than 50 requests since 2000 for NPCSC review on a wide range of issues.

43 *Ghai, Y.*: The Legal Foundations of Hong Kong's Autonomy: Building on Sand, in: *The Asia Pacific Journal of Public Administration*, 29/1 (2007), 3-28.

44 *Balme, S.*, op. cit.

45 *Hand, K.*, op. cit.

46 Subsequent provisions extended the right to include proposals challenging Supreme People's Court judicial interpretations.

In July 2006, an annual road fee for car owners attracted public scrutiny after the Chinese media reported that a car owner who failed to pay the fee had been charged 780,000 yuan in back penalties. Soon afterward, lawyers uncovered an apparent conflict between administrative regulations that authorise the fee and two national laws (the Highway Law and the Legislation Law), and they sent a claim to the NPC Standing Committee challenging the legality of the administrative regulations authorising the road fee. After the Ministry of Transportation declared it would continue to collect the fees in 2007, another lawyer submitted a broader proposal to the NPCSC. The Chinese media reported actively on the issue, something that put significant pressure on the Ministry. As public controversy over the road fee mounted, the government responded. In late November 2006, Xinhua News Agency published an interview with NPCSC and State Council legal officials, confirming they had received several citizen's proposals and reviewed them in accordance with legal procedures. They then offered a legal justification for continuing to levy the fee. Although the interview did not constitute a formal legal ruling on the citizen proposals, it was nonetheless the first time that the NPCSC had publicly answered and addressed the legal arguments in a citizen's proposal submitted under the Legislation Law.

Another case in 2006 was related to the death of three students in a traffic accident in Chongqing. Pursuant to a 2003 legal interpretation by the Supreme People's Court (SPC), many local courts determine compensation partly on the basis of whether such accident victims hold an urban or rural residence registration. Relying on this standard, the responsible party provided the families of two Chongqing students more than twice the compensation it agreed to provide the family of a third student, who held a rural residence registration. Domestic media reported widely on the case, resulting in public controversy over the unjust compensation disparity and related calls for amending the SPC interpretation.

In the wake of these proposals, both local and national authorities announced legal reforms related to the compensation standard. In 2006, local governments in five provinces and cities adopted reforms to bring compensation for certain migrants into line with that for urban residents. The SPC also began accepting public suggestions about revising its interpretation. In March 2007, NPC delegates introduced motions calling on the Supreme People's Court to equalise the standard. Shortly afterward, SPC Chief Justice *Xiao Yang* announced that the interpretation would be revised after the NPC session. This controversy provides a second recent example of a citizen's proposal that influenced government policy and reinforced constitutional norms.

A third case was the constitutional challenge to the passage of the Property-Rights Law. Originally scheduled for March 2006, the passage of the law was

delayed after Peking University law professor *Gong Xiantian* issued an open letter arguing that the bill contravened Article 12 of the Constitution, which declares that state property is inviolable. The appeal generated extensive controversy after its diffusion via the internet. As the NPCSC prepared to deliberate on a revised draft in late 2006, the Chinese government launched an extensive campaign to defend the proposal and its constitutionality. In December of the same year, when the NPCSC approved the Property-Rights Law for consideration by the full NPC, it engaged in an active communication campaign, including a public statement by its chairman, a press conference by senior officials and publication of scholarly defenses of the law's constitutionality by state-run media. Again, although the issue substantially differed in this case, the government had to publicly take action to justify its policy on constitutional grounds.

These events are only small steps toward an active use of the Constitution by citizens and its full effectiveness in guiding policy-making. But their significance in the PRC's context should not be underestimated. Prior to the fall of 2006, the NPCSC had not issued a direct public response to any citizen's proposals filed under Article 90 (2) of the Legislation Law. The fact that China's government publicly reacts to its citizens' legal and constitutional arguments rather than merely ignoring or suppressing them is notable in itself. But these responses also introduce precedents and gradually expand a space for constitutional activism among citizens. Not only do these responses legitimise the idea that legislative acts must comply with national law and the Constitution; they also acknowledge the right of citizens to call legal provisions into question on constitutional grounds and they build public expectations for government responsiveness to future appeals. Anticipating a flood of similar petitions relating to other grievances, the Legal Work Committee of the Standing Committee has established a special office to give preliminary scrutiny to such claims.⁴⁷ A series of complaints has reportedly been filed with the Standing Committee against various State Council regulations, particularly by collective groups of Hepatitis B carriers claiming that civil service regulations unlawfully discriminated against them, by female civil servants petitioning to invalidate the requirement that women retire five years earlier than men and by thousands more challenging regulations authorising the demolition of their housing. These complaints have not yet resulted in a constitutional decision by the Standing Committee, but they help to spur administrative reforms and give popular support to Chinese constitutionalism.

47 *Cohen, J.*: Law in Political Transitions: Lessons from East Asia and the Road Ahead for China, in: *New York University Journal of International Law and Politics*, 37/3 (2005), 423–439, here 431–436.

VI. Conclusion

Having reviewed constitutional developments in the PRC since the beginning of the reform era, how can we characterise the position of Chinese constitutionalism today? Probably the first element to consider is the long-term perspective and the tumultuous Chinese history we introduced at the beginning of this contribution. The PRC has now accumulated a 25-year period of constitutional government, an unprecedented fact on the Chinese mainland. This can definitely be attributed to the reform policy launched by *Deng Xiaoping* and prolonged by the successive Chinese leaders as the institutional and political foundations of the CCP's policy. It resulted in the establishment of a wholly new political regime, one based on a new constitution for the Chinese state, and in dramatic changes in the political culture that are hallmarked by the role of the constitution in domestic politics. This process can be seen as a second foundation of the PRC by the CCP after the Cultural Revolution, one in which the state once again emanates from the Party. The rooting of constitutional government in Chinese politics is definitely a significant change in the long term.

Having said that, the major issues are whether the reform policy is in any way conducive to further political change for the PRC and, more precisely, if constitutional reform and constitutional jurisprudence display any signs of political liberalisation. From this point of view, a number of observations can be derived from the above developments. Firstly, while the doctrine of the CCP underwent radical changes regarding economic policy and the status of the market economy in China, amendments on political issues have been far more limited, if not absent. It is true that dramatic advances have been made with the recognition of the rule of law, human rights and property rights in the Constitution, advances that represent significant political changes. But the acknowledgement of rights hardly suffices to serve as a guarantee if the Constitution is not justiciable, and reforms initiated by the Chinese leadership on this issue have been limited to the provisions in the 2001 Law on Legislation we reviewed above.

Secondly, when the process of constitutional amendment is considered, it is remarkable that, up to now, constitutional reform exclusively follows, proclaims and adapts to policy changes initiated by the CCP. Broadly speaking and when key public policies are considered, constitutional change is basically a step in the policy implementation conducted by the CCP and it illustrates the overall submission of the state to the Party. Even when the NPCSC took the unusual step of initiating a change in the amendment suggested by the Central Committee of the CCP, it was to further assert the leadership role of the Party. Beyond that, it can be argued that the Constitution largely exerts a lock-in effect on the CCP sup-

remacy in Chinese politics and therefore fails to truly liberalise the Chinese regime.

Thirdly, it follows that all instances of progress in the rule of law, if they now can find a legal basis in the Constitution, are more likely to be substantial in the areas of judicial reform, legal procedures, law codification, the training of the judiciary and conditions for legal professions than in the Constitution as such.⁴⁸ This by no means equates to a sudden advent of the rule of law as an unprecedented state of affairs in China but, quite on the contrary, to a long-term modernisation process by which rights are progressively acknowledged and increasingly respected, if not fully guaranteed. Identifying these developments does not imply that the situation of rights in China is satisfying; rather, it helps to locate the actual sources of substantial changes.

Finally, if the institutional constitutionalisation of Chinese politics has thus far remained strictly contained by the CCP leadership, it has also opened a limited but significant space for constitutional activism by citizens and legal professionals, indeed probably the most remarkable political trend of recent years in the PRC. These events demonstrate the growing importance of constitutional issues in politics and public opinion, and deserve attention as manifesting a significant evolution of Chinese political culture. Of course, their political implications should not be overestimated. It would be premature to interpret the evolutions described here as the emergence of an institutionalised and independent legal process for constitutional review. China remains far from establishing such a mechanism. Under the current Constitution, judges are not independent of political authorities, and citizens do not have a legal right to compel a review of their constitutional claims. Their capacity to influence the government's decisions is also dependent on their capacity to attract media coverage to generate public-opinion pressure; here again, although the flow of information on the internet is more difficult to control, citizens are confronted with the lack of institutionalised pluralism of Chinese society. Many obstacles remain in the way of China's constitutional development, and constitutional activism as we describe it here is therefore probably more significant in terms of political culture and social mobilisation than in terms of institutional change. It is nevertheless illustrative of a process through which citizens make use of the Constitution to pressure the government and in which the constitutionality of public policy is not left to the exclusive discretion of leadership but also triggers public interactions between citizen and the state.

48 *Peerenboom, R.*: *China's Long March toward Rule of Law*, Cambridge, 2002; *id.*: *China Modernizes. Threat to the West or Model for the Rest?*, Oxford, 2007; *Lin, C.X.*: *A Quiet Revolution: An Overview of China's Judicial Reform*, in: *Asian-Pacific Law and Policy Journal*, 4/2 (2003), 255–319.

Whether these developments will indeed nourish further political reforms remains an open question. From a Western and liberal perspective, the rule of law is understood not only as the protection of citizens' rights *by* the state but also *against* potential abuses by the government. It is therefore quite apparent that beyond the recognition of these rights in the Constitution, their effective implementation requires at least some degree of separation of powers, in particular independence of the judiciary, as well as the freedom for citizens to publicly express their grievances and to access legal procedures.⁴⁹ It is doubtful from this perspective that the rule of law can be fully established without freedom of expression and association and competitive elections. As was the case in Taiwan and again in South Korea, robust constitutional enforcement is more likely to follow and consolidate, rather than force, political reform at the top.⁵⁰ But China may also follow a different constitutional trajectory referring to "Asian values", and it is obviously trying to do so in adhering to the principle of rule of law while avoiding substantial political reform. In that case, the Chinese concept of rule of law would involve traditional citizen-state interaction, rooted in a Confucian tradition, in which Chinese elites advance moral claims to guide state behaviour rather than the more adversarial process in which constitutional disputes are resolved in liberal constitutional regimes.

The ideological continuity of Chinese leadership with "the people's democratic dictatorship" and democratic centralism do not allow for an accomplished political transition if we understand this to be a full recognition of pluralism including freedom of expression and association, competitive elections and a related inversion of relations between the state and the CCP's respective constitutions. However, this does not preclude some elements of liberalisation *within*, rather than *by*, the regime. The growing references to the Constitution in Chinese politics, initially under the concept of "rule by law", progressively establish some effective elements of "rule of law" by which citizens indeed make use of the Constitution to contest and to limit the government's authority and public policy. Seen from this perspective, the recent constitutional developments in China go far beyond the mere window-dressing that is frequently associated with legal practices in communist regimes.

49 Killion, M.U.: China's Amended Constitution: Quest for Liberty and Independent Judicial Review, in: Washington University Global Studies Law Review, 4/1 (2005), 43–80.

50 Cohen, J., op. cit.