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Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China

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Abstract

Criticizing the formalism in China's constitutional studies over the past 30 years and following an empirical-historical perspective to deal with the dilemma of representation and practice, the author argues that both a written constitution and an unwritten constitution are basic features of any constitutional system, and China's constitutional order can only be understood if China's unwritten constitution is taken into account. Selecting four important constitutional issues (the relationship between the Chinese Communist Party and the National People's Congress; the position of state chairman and the trinity system of rule; the relationship between the center and localities; and the constitutional structure of "one country two systems"), the author explores four sources of China's unwritten constitution—the party's constitution, constitutional conventions, constitutional doctrine, and constitutional statutes—and calls for taking into account China's unique political tradition and reality to enrich current constitutional scholarship.

Keywords

unwritten constitution, Chinese constitution, the "rubber stamp," trinity system of rule

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Constitutions are generally divided into two categories: "written constitutions" and "unwritten constitutions." The former, exemplified by the constitution of the United States, are codifications in a single written document and constitute the sole source of constitutional law in a state. In contrast, unwritten constitutions, exemplified by the British tradition, comprise the body of a country's laws such as constitutional statutes, enacted over time, coupled with an emphasis on political precedents. There is no single, formally written or codified document that delineates the powers and limits of government and guarantees the protection of civil rights. In light of this formal distinction, the Chinese constitution is clearly a written and codified one. Ever since the Constitution of the People's Republic of China (PRC) was enacted in 1954, the Chinese constitution has kept its written form, though it was comprehensively revised three times, in 1975, 1978, and 1982. The present constitution is the written constitution as revised in 1982 with some amendments added thereafter.

It is well known that Chinese politics does not function completely according to this written constitution—there is a wide gap separating constitutional representation and constitutional practice. Thus, China has been criticized as an authoritarian regime in which the constitution is something of a fake or is widely abused. However, if the written constitution does not quite capture the Chinese political system, then what are the real constitutional or political rules by which Chinese politics function? The answer requires taking an empirical and historical approach to exploring the "real" constitution, rather than a formalist approach that would confine our view to the written constitution and its discursive representation. Before we begin to explore the real constitution in China, we have to understand what a constitution means to nation-building and state-making in the modern world, and why the formalist perspective is so popular in international political discourse as well as in Chinese constitutional scholarship.

Since the Enlightenment era, law has been regarded as an active instrument of human reason and a reflection of a society's general will in shaping a nation's politics. The constitution is the single legal codified document that lays out the structure of government and protection of civil rights. A written constitution has become so crucial to the formation of a modern state that it could even be said that "if there is no constitution, then there is no modern state." On the one hand, we can evaluate whether a state is a constitutional one according to the form of its constitutional text. For example, adding the Bill of Rights to the U.S. Constitution serves to signify that the American government protects civil rights (Story, 1981). On the other hand, we can evaluate whether a state is a constitutional one by observing the implementation of its constitution. Such is the case with the United States during the Cold War, when it was under severe international criticism for the fact that its racial segregation departed from its

constitutional principle of equal protection (Dudziak, 2002). Many developing countries are often criticized as being "unconstitutional states with a constitution" for failing to enforce the constitutional protection of human rights, which in turn has become a justification for "humanitarian interference."

In this sense, a state's decision on whether to enact a constitution or how to implement it is no longer solely a domestic matter, but a part of international politics. Under the influence of constitutionalism developed in the Western Enlightenment tradition, in their process of nation-building, developing countries have been compelled to enact a written constitution in line with Western standards; otherwise, they will not be recognized by the Western-led international community (most prominently the United Nations) and succeed at their nation-building. Socialist countries even adopted constitutions more radical in their protection of human rights than Western countries to prove the superiority of socialism over capitalism. Hence a number of non-Western countries have felt forced to deviate from their national cultural traditions and duplicate Western "constitutional norms," neglecting the fact that a constitution is but the formal expression of real political organizations that emerge in a particular culture. As a consequence, some of these countries have had to suffer political instability and long-term turbulence resulting from conflicts between their indigenous economic, social, and cultural conditions and Western constitutional institutions. Others have had to face a huge gap between the constitutional text and the reality of the political order, which in turn has led to the dilemma of "a constitution without constitutionalism" (Okoth-Ogendo, 1993; Brown, 2002). Either case is a political catastrophe for non-Western or developing countries.

Against the background of the Cold War, Western counties also constructed an ideological discourse of "democracy" versus "totalitarianism," thereby attributing the gap between political reality and the written constitutional text in non-Western countries to their character as "totalitarian regimes" or "unconstitutional regimes." That in turn provided a justification for the United States not only to promote the American model of the rule of law and a written constitution in the so-called world constitutionalism movement of the post–Cold War era (Ackerman, 1997), but also to overthrow "totalitarian regimes" and establish democratic constitutions by "color revolution" or military invasion, as has happened in Afghanistan and Iraq.

Only when we take the international political dominance of Western countries into account can we truly understand the constitutional history of modern China. Since the founding of new China, the constitution has been under constant revision. Apart from social and political upheavals, what drives that repeated revising has been the intention to accord with international ideological standards, whether set by the Soviet Union or by the Western world. In such

a context, three main schools of Chinese constitutional scholarship developed. The first, based on the idea of "normative constitution," takes the constitutional documents of Western countries as the "universal standard" and uses it to criticize the Chinese constitution as "failing to conform" (Lin, 2001). This "school of constitutional revolution" wants to thoroughly revise the constitution or enact a new constitution so as to adapt to so-called universal standards.[1] The second school, which has been influential since about 2000, is the "constitutional adjudication" viewpoint, which starts from "constitutional norms," demanding that political reality should conform to the constitutional text. Its proponents campaign for the application of the constitution in courts, hoping to bridge the gap between the text of the constitution and political reality through judicial review in the manner of the U.S. courts (Lee, 2005).[2] The third school also starts from "constitution texts," arguing that constitutional scholarship should center on the interpretation of those texts. However, since advocates of this approach fail to take into account the political spirit and reality of China, they cannot avoid applying Western ideas to interpret Chinese constitutional concepts and thus limit the target of their commentaries to the protection of civil rights.[3] This school, "the revisionists," today constitutes the mainstream point of view. These three schools stand for different political positions and assume different methodologies, yet their targets are all confined to the formal characteristics of the Chinese constitution. Therefore, they cannot avoid understanding the constitution in a formalistic and dogmatic way—that is, "talking about constitutionalism according to the text of the constitution." Their main concern is "what the text of the constitution should be" or "what the text is," but not "how the text is practiced in real life" or "what the constitution reveals about the real political order." Due to limitations in their perspectives and methodologies, mainstream constitutional scholars not only fail to understand the political significance of the formalist character of the written constitution but also neglect the living constitution and the unwritten constitution displayed in real political life in China.

In order to reduce the influence of formalism and dogmatism on Chinese constitutional studies and focus on political reality, I follow an empirical-historical perspective in studying constitutional issues, that is, I use historical and sociological methods to deal with the dilemma between representation and practice (Huang, 1996, 2007, 2008). I have adopted this methodology not to question "what the constitution should be" in a metaphysical or ideological sense, but to examine "what the real constitution is in political life," or "what the effective constitution is" by adhering to a value-free stance in historical and empirical research. The major aim of this methodology is not simply to avoid the so-called hegemony of Western-centrism, but to guard against ideological

bias in theorizing about constitutions and to restore the prestige and status of constitutional jurisprudence as a political and social science. Nowadays in Chinese constitutional scholarship, the ability to defend the "autonomy of social science" against political ideologies and political and economic forces has increasingly depended upon whether we can distinguish between an empirical scientific attitude toward constitutions and an ideological one. Many people still contend in an ideological and formalistic way that China has "a constitution without constitutionalism" (Cai, 2005; Zhang, 2008). We need to break out of the formalistic shackles of the written constitution so as to explore China's real-life constitutional spirit, institutions, and conventions.

With this aim in mind, in this article I examine political life in China so as to uncover China's real constitution, the unwritten constitution. In the following section, I review the two concepts of a written constitution and an unwritten constitution in modern politics, contending that these two concepts are not in opposition to each other, but are both basic features of any constitutional system. Even the United States, a paradigmatic case of a country with a written constitution, depends on its unwritten constitution to maintain its constitutional order. In the next section, I focus on the unwritten constitution in Chinese politics. I have no ambition to list every unwritten constitutional institution in China. Instead, I prefer to deal with four important issues in China's national politics: the relation between the Chinese Communist Party (CCP) and the National People's Congress (NPC); the position of state chairman and the trinity system of rule; the relationship between the central government and local government; and the constitutional structure of "one country, two systems." Furthermore, I will explore four sources of China's unwritten constitution: the party's constitution, constitutional conventions, constitutional doctrine, and constitutional statutes. In the conclusion, I will come back to the tradition of Chinese constitutional studies over the past 30 years and argue that, with China now a rising power, Chinese constitutional scholars should formulate constitutional theories that take into account China's unique political tradition and political reality.

The Myth of "Written Constitutions" versus "Unwritten Constitutions"

Debates over Two Constitutional Traditions: The American Constitution and the British Constitution

The classic example of a written constitution is the U.S. Constitution of 1787, which constitutes the foundation of the United States. Indeed, without the constitution, there would be no United States. Thomas Paine said that a constitution

must always be antecedent to any rightful government, that the only true constitution is one that is consciously constructed, and that a nation's government is only the creature of this constitution (McIlwain, 1947: 8–14). In this sense, the modern constitution originated in the United States, and hence the American constitution has become the key to understanding the modern constitution. The U.S. constitution was revolutionary in that it was written and codified, which indicates that government or rulers must be bound by man-made law as the "higher law" (Corwin, 1971). In European history, governments or rulers were to be bound by God's law, natural law, or common law deriving from a long shared history, but now for the first time they were to be bound by positive law enacted by men. The formalistic written character of the modern constitution confers on it the highest position in a state's legal system; it is the "basic norm" (Kelsen, 1949).

The formalistic character of the American constitution exerted a tremendous impact upon other countries. Since then, any new state has had to develop a written constitution to establish its legitimacy to the world. This trend also imposed great pressure upon Great Britain, which boasted a long history of constitutionalism of its own. Because the American type of written constitution became the standard, "England, probably the most constitutional of modern European nations, has also remained the only one whose constitution has never been embodied in a formal document" (McIlwain, 1947: 15). The fact that Paine once pointedly criticized Britain for lacking a constitution can be attributed to his desire to justify the War of Independence, yet even Tocqueville, an admirer of the British regime, was obliged to admit that Britain had no constitution. The British found it difficult to accept this assertion since they prided themselves on their long tradition of constitutionalism and of constitutional freedoms. Hence, like their American peers who are confronted by the "countermajoritarian difficulty" in judicial review (i.e., the judicial branch's power to nullify laws that, having been passed by elected representatives, presumably reflect the will of the majority; see Friedman, 2001), British constitutional jurists have to face the "written constitution difficulty," that is, the question of why Britain does not have a written constitution. In the face of this question, if British jurists choose not to follow Frederic W. Maitland's example and maintain a proud aloofness regarding the U.S. constitution (Maitland, 1908), they have to make a great effort to find modern characteristics in their constitution.

For example, James Bryce proposed the concepts of "rigid constitution" and "flexible constitution" in an attempt to reduce the formalism of the modern constitution and make the flexible British constitution superior to the rigid American constitution (Bryce, 1910). Ivor Jennings went a step further and demonstrated the importance of constitutional conventions, so as to underline

the uniqueness of the British constitution (Jennings, 1943). However, the most noteworthy scholar in this regard is A. V. Dicey who, bearing in mind the modern principles of constitutionalism established by the American constitution, such as the structure of state powers and protection of civil rights, carefully examined the British constitution, which has been developed during a long historical tradition, and transformed it into a modern one. In particular, he introduced the paired concepts of "the laws of the constitution" and "conventions of the constitution." He argued,

> Constitutional law, as the term is used in England, appears to include all rules which directly and indirectly affect the distribution or the exercise of the sovereign powers of the state. . . . Observe the use of the word "rules", not "laws". This employment of terms is intentional. Its object is to call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character. The one set of rules are in the strictest sense "laws", since they are rules which . . . are enforced by the courts. . . . The other set of rules consist of conventions, understandings, habits, or practices. [Dicey, 1961: 23–24]

The importance of this distinction is that it elucidates the whole subject of constitutional law, and the distinction may exist in countries which have a written constitution. In this way, Dicey places the British constitution on an equal footing with the American one; the British constitution can no longer be regarded as inferior because it lacks a written or codified form.

Starting from this tradition, K. C. Wheare completely abolished the distinction between "written constitution" and "unwritten constitution." He argued that "the government is composed of this mixture of legal and non-legal rules and it is possible to speak of this collection of rules as 'the constitution'" (Wheare, 1951: 1). He then goes on to distinguish between constitution in a narrow sense and constitution in a broad sense. While the former consists of legal rules selected from constitutional concepts, the latter includes not only legal rules, but also nonlegal ones.

> We are thinking of the distinction between those rules regulating a government—mostly rules of law—which are written down either in a Constitution or in some act of parliament or other legal document, and those other rules, mainly the customs and convention and usages regulating the government, which have usually not been precisely formulated and put in writing. [Wheare, 1951: 19]

Wheare's distinction provides an opportunity to view the American constitution in a broader sense. In other words, the definition of "a modern constitution" that Wheare proposes does not take the U.S written constitution as a standard, but rather the broad constitution such as the British constitution. Therefore, he reaches the conclusion that "in all countries and not least in Britain both legal and non-legal rules, written and unwritten, are blended together to form the system of government" (Wheare, 1951: 20). Based on this general sense of the meaning of "constitution," Wheare emphasizes repeatedly that it is more accurate to say that Britain has "no written constitution" than that it has an "unwritten constitution."

Wheare's reconstruction of the concepts of "written constitution" and "unwritten constitution" in essence provides justification for "unwritten constitutions." In his view, the "written constitution" is but a part of the "unwritten constitution." In the sea of "nonlegal rules," a written and codified constitution is only an isolated island. This suggests that in considering the modern constitution, the British constitution should be regarded as the norm and the American constitution as an exception. Wheare succeeds in redefining constitution because he insists that "what a Constitution says is one thing, and what actually happens in practice may be quite another" (Wheare, 1951: 5). As we have seen, what Wheare examines is not the "normative constitution" or written constitution such as a constitutional code or constitutional text, but the "effective constitution," institutions in effect in political practice such as constitutional statutes, constitutional conventions, and political ideas shared by the whole government, or what could be reasonably called "the unwritten constitution." If we accept Wheare's definition of constitution, the real constitution must be the unwritten constitution, and the written constitution becomes merely a part of the unwritten constitution, even though an important part. Thus, to truly understand the American constitution, we also need to consider America's unwritten constitution.

The Unwritten Constitution in America's Constitution

A careful look at American constitutional history reveals that constitutional practice in the United States does not merely follow written constitutional provisions. More and more American constitutional jurists have come to realize that beyond the written text itself there is an unwritten constitutional system (Grey, 1975, 1978; Sherry, 1987; Moore, 1989) or invisible constitution (Tribe, 2008) comprising the so-called secret constitution and various constitutional conventions and doctrines.

"The secret constitution." The American Constitution consists of its original body and ten amendments—the Bill of Rights. Yet G. P. Fletcher argues that the thirteenth, fourteenth, and fifteenth amendments, added after the Civil War,

have brought such a new and different constitutional order to the United States that these amendments should be considered as a "second constitution," one based on "organic nationhood, equality of all persons, and popular democracy . . . principles radically opposed" to those of the "first constitution" (the Constitution of 1787), which promulgated "peoplehood as a voluntary association, individual freedom, and republican elitism" (Fletcher, 2001: 2). American constitutional practice after the Civil War is in fact a manifestation of these two constitutions competing for priority in American political life. The prelude to the second constitution was Abraham Lincoln's Gettysburg Address, which invoked the Declaration of Independence. If the first constitution can be seen as a constitution of "liberty," then the second one—made up of the Declaration of Independence, Lincoln's speech, and the additional amendments—is one of "equality." However, the Supreme Court did not begin to implement the second constitution immediately after the Civil War, thus making it a "secret constitution." Not only are the Declaration of Independence and Lincoln's Gettysburg Address, as the prelude to the "second constitution," parts of America's unwritten constitution, so is judicial review as a constitutional convention. It was judicial review that converted the "second constitution" into the "secret constitution," part of America's unwritten constitution.

Judicial review: Constitutional convention and doctrine. Under the doctrine of judicial review, the Supreme Court has the power to nullify congressional or state legislation that contravenes the constitution. However, this power is not explicitly granted by the written constitutional text, but gradually developed in the judicial practice of the Supreme Court. Chief Justice John Marshall claimed the power for the first time in *Marbury v. Madison* (1803), yet his reasoning has been questioned and criticized by the administrative branch and other judges for years. When Chief Justice Roger B. Taney applied it again half a century later in *Dred Scott v. Stanford* (1857), he too had to face extensive criticism. However, after years of judicial practice by the Supreme Court, the constitutional convention of judicial review was not only established, but evolved into "judicial supremacy," a concept that became a pillar of the American constitutional system and has exerted a significant influence on other countries (Bork, 2003). Therefore, it is fair to conclude that the power of judicial review does not come from any written constitutional provision, but from American constitutional practice.

Take the second part of Article 3 of the American Constitution as an example. According to it, the Court has original jurisdiction only in cases involving disputes among the states and in cases where foreign diplomats are a party. Its appellate jurisdiction is subject to whatever "rules and exceptions" Congress chooses to make. Thus, if Congress does not like decisions made by the Court

in cases involving abortion, freedom of speech, and so on, it can take away the right of the Court to hear these cases on appeal, and even confer it on the state courts. For instance, in 1868, the Reconstruction Congress withdrew the right of the Court to hear the *Ex parte McCardle* case, even as that very case was pending before the Court. Putting up no resistance, the Court pointed out, "We are not at liberty to inquire into the motives of the legislature. We can only examine its powers under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words" (*Ex Parte McCardle*, 74 U.S. 506 [Wall] 1868). Since Congress can control the Court by regulating the scope of its appellate jurisdiction, why, then, has Congress never sought to end judicial activism or to abolish the Court's power of judicial review? William Quirk argues that since the principal aim of most members of Congress is to secure reelection to office, they carefully avoid controversial moral and cultural issues whenever possible. Therefore, with judicial review as a constitutional convention, the second part of Article 3 of the American written constitution has actually been rendered ineffective in political life. Judicial review has become a part of the unwritten constitution of the United States (Quirk, 2008).

If we consider the Supreme Court's decisions when trying to understand the American constitution, we will realize that the Constitution has an "open texture" (Hart, 1961) that needs to be interpreted by the justices. As Chief Justice Marshall commented in *McCulloch v. Maryland*, "We must never forget that this is a constitution we are expounding" (*McCulloch v. Maryland*, 4 Wheat. [17 U.S.] 316, 4 L.Ed. 579, 1819). Hence, in the broadest sense, the political philosophies and constitutional doctrines of the Court justices themselves become the real constitution. For instance, in early times, the Marshall Court and the Taney Court held radically different views on the relationship between federal sovereignty and state sovereignty. Justice Marshall believed that federal sovereignty is superior to state sovereignty, as the federal government is the government of all the people. On the other hand, Justice Taney insisted that federal sovereignty cannot interfere with state sovereignty, because the federal government is only a union of the states. In the long history of the interpretation of the Commerce Clause (which grants Congress the power to regulate commerce with foreign countries, between the states, and with the Indian tribes), to give another example, its legal meaning shifted between liberals and conservatives. Moreover, different constitutional doctrines, such as textualism and originalism, and interpretative methodologies, such as the plain meaning and strict or flexible interpretation, have been used by the justices in their constitutional interpretations according to not only their political

ideology, such as liberalism or conservatism, but also their understanding of the constitution—whether it is a "fixed text" or a "living tree." The justices have even developed "fundamental rights" (e.g., the right to privacy and the Miranda Rules) from the "spirit" of the constitution and labor rights from the "freedom from fear." Those rights are not spelled out in the written constitution. Constitutional interpretation by the justices has perfected the constitutional code; moreover, it has changed its content, thereby reshaping the entire American constitutional regime. With the function of judicial review as a part of the unwritten constitution, the republic, which features separation of three powers, is turning into "Law's Empire" (Dworkin, 1986), as the checks and balances between powers established by the constitution are gradually replaced by judicial supremacy or judicial sovereignty.

Other constitutional conventions. Besides judicial review, there are other constitutional conventions that are part of the American unwritten constitution. For example, the operation of presidential power is regulated mainly by constitutional practice. The Constitution dictates that only Congress has the power to declare war. However, in reality Congress has abdicated that power to the president, as in the Vietnam War and the Iraq War. Perhaps it is wise for members of Congress to blame the war policies of the government on another branch, since they can use their criticism as a political platform during reelection campaigns. In the eyes of Quirk, such a change has developed into "the new, unwritten constitution called the Happy Convention, an informal rearrangement of government powers by which each of the three branches assigns many of its constitutional responsibilities to other branches" (Quirk, 2008: 2). In this unwritten constitution, foreign affairs have been largely shifted to the president, and domestic affairs have been left to unelected justices. Thus, new principles that give priority to the president and the Supreme Court have replaced the principle set forth by the Constitution that the Congress takes priority.

China's Unwritten Constitution: Four Sources

If we break away from formalism and turn our attention from the written constitution to the unwritten constitution, we find very little scholarship on China's unwritten constitution in legal studies or Chinese studies. That is not to say that the actual political institutions and their operation have never been considered, but that they have seldom been studied from a constitutional perspective. In this section, I explore several important aspects of the Chinese political regime and focus on four sources of China's unwritten constitution: the party's constitution, constitutional conventions, constitutional doctrine, and constitutional statutes.

The Mystery of the "Rubber Stamp": The Party's Constitution

The Constitution of the PRC clearly stipulates a system of people's congresses based on the Soviet model, which is itself similar to the British parliamentary system. The NPC and its Standing Committee, as the organs that exercise sovereign power, are to possess a wide range of powers and the highest political authority. But in their actual operation, the NPC and its Standing Committee are often dismissed as mere "rubber stamps" that have not fulfilled their functions as prescribed by the Constitution (Cho, 2002). Such criticism is to a great extent formalistic since it emphasizes the deviation of "facts" from "norms." However, if we look beyond the text of the written constitution and consider political reality, we find that the role of the People's Congress as a "rubber stamp" is determined by China's unwritten constitution. And to understand this unwritten constitution, we have to understand how new China came to be.

In contrast to the American model, in which a state is formed by adopting a written constitution and organizing a government on the basis of it, new China was founded by the revolutionary classes led by the CCP after a protracted revolution. The system of multiparty cooperation under the leadership of the CCP constitutes the real government of new China,[4] and one that existed before the first constitution (1954) was enacted under the influence of the Soviet model. Thus, the fundamental law of China is the leadership of the CCP with multiparty cooperation, and it is that fundamental law which is the foundation of all of China's constitutional institutions. The political function of the written constitution is to affirm and reinforce that fundamental law, which is why the written constitution has such a high status. The constitution has undergone several thorough revisions, but the essential nature of the PRC has not changed, because the fundamental law that constitutes China has not changed. Thus, what constitutes China as a nation-state is not the system of people's congresses established by the written constitution, but the leadership of the CCP within the system of multiparty cooperation that was formed during the revolution, promulgated in the preamble of the written constitution, and affirmed in political practice. Therefore, the leadership of the CCP is the basis and core of the Chinese government; it is "the primary fundamental law" of China, or what has been called China's "absolute constitution" (Chen, 2008). So long as this "fundamental law" remains unchanged, China as an independent political community will continue, no matter how the constitution's text is amended.

The system of multiparty cooperation under the leadership of the CCP constitutes the Chinese government not only because new China was founded by the CCP after a revolution but also because the CCP politically represents the classes of workers and peasants, who make up the majority of the Chinese

population. Cooperating with other democratic parties that politically represent petty capitalists, national capitalists, and other social groups, the CCP thus claims to represent "popular sovereignty" and thereby legitimates its founding of new China. But, since new China was founded on the people's democratic dictatorship, it needed a legal form in order to establish stability. Legal instruments had to be adopted to constitute this nation-state, that is, to embed the system of multiparty cooperation under the leadership of the CCP, the "fundamental law" of the political community, in a legal form by adopting a written constitution. Because the legal basis of a modern nation-state involves individual rights, sovereignty has to derive from the people, the collectivity of individual citizens, and thus the NPC and its Standing Committee, composed of representatives of the people, are naturally identified as "the highest organ of state power" in the written constitution.

Thus, much like the "king's two bodies" in medieval European politics (Kantorowicz, 1957), "people's sovereignty" in China has its own two bodies, the CCP and the NPC. The former embodies the fundamental law that acts as the absolute constitution; the latter embodies the fundamental law codified in the written constitution. Accordingly, there are two types of representatives of the people: the first are the CCP and other democratic parties, whose members are social elites in every field and every class, and who enjoy the support of the masses by virtue of their political ideals, historical mission, and class interests; the second is the NPC, whose members are democratically elected through a legal process. Thus, in the process of constructing political sovereignty, the Chinese constitution adopts a model that is different from the American one in which the written constitution dominates, as well as the British one in which the unwritten constitution takes priority. It suggests a special cooperative relationship between the written constitution and the unwritten constitution, between the system of multiparty cooperation under the CCP's leadership and the people's congress system, between "the people" formed on the basis of political ideology and class interests and "the people" formed on the basis of individual rights, and between the political representatives of the people and the legal representatives of the people. In short, at the heart of China's constitutional regime lies a unique interactive connection between the party and the state.

China's core constitutional question is, therefore, how to properly handle the relationship between the two systems and keep them interacting and cooperating with each other as well as checking and balancing each other. This requires that the political operation of sovereignty and its legal form cooperate with each other, that is, that the CCP exercises the power of substantive political decision making through deliberation in political consultation with the democratic parties, while the NPC and its Standing Committee review and

endorse the decisions, thereby granting them legality as required in the written constitution. In this way, the will of the CCP in consultation with the democratic parties can be nationalized and legitimized, thus converting the general will of the people into the national will under the highest authority of the written constitution. In such a constitutional structure of the party-state regime, the NPC and its Standing Committee must necessarily function as a "rubber stamp." By the letter of the written constitution, the NPC and its Standing Committee can fully exercise their power independently of the CCP, but in actual political practice they cannot develop a political will with regard to national goals and the political mission without the party. Since the great majority of representatives in the NPC and its Standing Committee are party members, they have to follow and approve the party's political decisions. In this sense, the will of the NPC and that of the CCP are unified since they both represent the will of the people. In China's constitutional structure, it is therefore necessary for the NPC to play the role of a "rubber stamp" to legitimize the leadership and ruling position of the CCP. Nevertheless, whenever the NPC and its Standing Committee fulfill their "rubber stamp" function, the constitution is thereby activated to "tame the prince" (Mansfield, 1989)—that is, to cast and confine the power of the CCP in the frame of the constitution and law and to gradually transform the party from a "revolutionary party" to a "ruling party" and then to a "constitutional party." Compared with the 1975 Constitution, which directly allowed the absolute dictatorship of the CCP, under the 1954 Constitution and 1982 Constitution the party's will was bound by the constitutional process. Such a difference can be compared with that between "absolute monarchy" and "constitutional monarchy."

Moreover, the system of multiparty cooperation under the CCP's leadership is not outside the written constitution, but inside it. This system is outlined in the preamble of the 1982 Constitution, which affirms the CCP's leadership in three aspects. First, the historical role of the party grants it the legitimacy to rule because it was the party's leadership of the Chinese people that

> overthrew the rule of imperialism, feudalism and bureaucratic capitalism, won the great victory of the new-democratic revolution and founded the People's Republic of China. Thereupon the Chinese people took state power into their own hands and became masters of the country. [Preamble of the Constitution of the PRC, 1982]

Second, the great achievements in socialist construction under the leadership of the party reinforce its legitimacy and affirm its mission to lead the Chinese people to build a prosperous, democratic, and civilized socialist country.

Third, it affirms "four fundamental principles," stipulated in the party's constitution as upholding the socialist road, upholding the people's democratic dictatorship, upholding the leadership of the party, and upholding the guidance of Marxism-Leninism and Mao Zedong thought. Thus, the written constitution prescribes the constitutional structure in which the CCP and the NPC cooperate with each other. In other words, the role of the NPC and its Standing Committee as a "rubber stamp" is also recognized by the written constitution.

Because the leadership of the Communist Party with multiparty cooperation is the "primary fundamental law" of China and because the party possesses political sovereignty as the representative of the people, the Chinese constitution should necessarily center on the party. Thus, the nature of the party, the interests it represents, and its political ideals and mission should constitute the core of the constitution. In fact, since the founding of new China, the comprehensive revisions of the written constitution, as well as the addition of amendments, have all been directly connected to the changing political line and policies of the party.

To understand the party, one needs to understand its own constitution. As Deng Xiaoping said, "a nation must have national law. A party must have its own laws and regulations, among which the Party Constitution is fundamental" (Deng, 2001: 147). The Party Constitution (*Zhongguo gongchandang dangzhang*) expressly provides that

> the CCP leads the Chinese people in promoting socialist democracy. It integrates its leadership, the position of the people as master of the country and the rule of law, [and] takes the path of political development under socialism with Chinese characteristics. [Preamble of the Constitution of the CCP, 2007]

In fact, such integration has specified the constitutional structure in which the NPC and the CCP interact and cooperate with each other. This indicates that the people must exercise sovereignty under the party's leadership, that the party's leadership must be in line with the written constitution, and that since the written constitution establishes the people's congress system, the party's political sovereignty (*zhengzhi zhuquan*) must be legally recognized by the NPC before it becomes state sovereignty (*guojia zhuquan*).

Thus, to understand the operation of constitutionalism in China, it is necessary to understand both the constitution of the PRC and the constitution of the CCP. From the perspective of legal formalism, the party constitution is but a normative document that regulates the party; thus it belongs to party law

instead of state law. But, considering its effect and position in China's constitution, it is actually more significant than the written constitution. Just as Deng said, "without the Party laws and regulations, it would be hard to ensure that state laws are enforced" (Deng, 2001: 147). The party's constitution is not only a normative charter, but also an effective constitution. Its contents and political effects make it an integral part of the unwritten Chinese constitution.

The Trinity System of Rule: The Formation of Constitutional Conventions

In the Chinese constitutional structure, the NPC system established by the written constitution and the party's own separate congress system established by the unwritten constitution (the constitution of the CCP) combine to exercise sovereignty. Where is the contact point between the two systems? The answer lies in the unique institution of the head of state or chairman of the People's Republic (*guojia zhuxi*).[5]

The institution of chairman derived from political practice during the Chinese Soviet period when the CCP established an independent regime in 1931 at Ruijin. Mao Zedong assumed the chairmanship of the Central Government Committee and thus started to be addressed as "Chairman Mao." But the "red regime" was destroyed by the Guomindang before Mao began the Long March. After the famous Zunyi meeting in 1935, Mao grasped the real power of the party and the military, and then was elected chairman of the Central Military Commission of the CCP at the end of 1936 and chairman of the Central Committee of the CCP in 1944. Yet as the Shaanxi-Gansu-Ningxia Border Region Government was then, under the terms of the Second United Front during the War of Resistance to Japan, only a regional government under the rule of the national government of the Guomindang, Mao held no official title in the national administrative bureaucracy.

The Common Program (*gongtong gangling*) enacted by the Chinese People's Political Consultative Conference in 1949 was deemed the "Interim Constitution" of new China. The document prescribed the political and economic systems, rights and obligations of citizens, and the fundamental principles in organizing state power, but it did not delineate the state organs and their respective powers. That, as the core of the political regime, was prescribed in the Organic Law of the Central People's Government, which must be considered a constitutional statute. Modeling itself after the 1936 constitution of the Soviet Union, the Organic Law expressly provides that "the Committee of the Central People's Government shall represent the People's Republic of China internationally and lead the state domestically" (Organic Law of

the Central People's Government, Article 4). The committee consisted of a chairman, 6 vice chairmen, and 56 committee members. The Organic Law also provides that the "Chairman of the Central People's Government shall preside at meetings of the Committee of the Central People's Government and lead its work," indicating that the chairman of the Central People's Government, though a member of the committee, is still relatively independent and holds a leading position. Mao, as chairman of the CCP and chairman of the Central Military Commission of the CCP, was elected chairman of the Central People's Government and chairman of the Central Revolutionary Military Commission at the Chinese People's Political Consultative Conference in 1949. He came to hold state power, military power, and party power all at the same time.

This constituted the basic form of the "trinity system," which designated one person to hold these three most important positions in China's modern state. The unification of "party power" and "military power" derived from the principle of "the party commands the gun" established during the revolutionary period and prescribed in the party's constitution. But the trinity system combining these three powers in one person is not legally established in any written constitutional document such as the Common Program, the Organic Law, or the 1954 Constitution or in any part of the unwritten constitution, such as the party's constitution, but developed under the tremendous influence of Mao as a charismatic leader and his tremendous contribution to the founding of the CCP, the army, and new China.

The 1954 Constitution, the first written constitution of new China, greatly changed the power structure that had been established in the Organic Law. Its fundamental difference is that it established the new position of chairman of the PRC, or head of state, whose powers came from three sources. First, procedural and symbolic powers belonging to the new head of a state, such as signing laws and meeting foreign diplomats, came from the now abolished position of the chairman of the Committee of the Central People's Government. Second, power to command the military forces came from the chairmanship of the Central Revolutionary Military Commission. The 1954 Constitution abolished the Central Revolutionary Military Commission that had been established in the Organic Law and transferred its power to the new chairman of the state, who "commands the armed forces of the country, and assumes the Chairman[ship] of the National Defense Commission" (1954 Constitution of the PRC, Article 42). Third, other powers came from the previous position of chairman of the Central People's Government. Instead of leading a Central People's Committee, the state chairman could convene and preside over the Supreme State Conference (*Zuigao guowu huiyi*), which deliberated on the most important state affairs and then distributed its decisions to different branches of the

government for implementation (1954 Constitution of the PRC, Article 43). Thus, the Supreme State Conference was in reality above the NPC and its Standing Committee, not to mention the State Council and other departments.

In comparison with the 1949 Common Program, the most notable development in the 1954 Constitution is its integration of state power with party and military power. Considering that "party power" and "military power" were already integrated in the unwritten constitution, now that the written constitution added state power, the trinity system of rule became firmly established, which in turn helped to harmonize relations between the party and the state. In the first NPC in 1954, Mao was elected state chairman, marking the beginning of the trinity system in political practice. At the same time, Liu Shaoqi, one of the vice-chairmen of the Central Committee of the CCP and a presumed successor of Mao, was elected chairman (*weiyuanzhang*) of the NPC.

In the 1954 Constitution, the state chairman's term of office is expressly limited to five years with a maximum of two terms, but the term of office of chairman of the CCP is not clear in the party constitution. In 1959, when Mao's first term as state chairman ended, he resigned, and Liu was elected as his replacement. At the same time, Mao proposed the distinction between the "first line" and the "second line," and retired to the "second line" to engage in theoretical thinking and writing, while Liu was promoted to the "first line" to preside over the routine work of both the party and the state. However, in light of the unwritten constitution, Mao was chairman of the party and chairman of the Military Commission of the party, and thus held the final power to make political decisions, while according to the written constitution, Liu, as state chairman, assumed supreme power, including commanding the military. Thus, the trinity system was split from one person into two persons. If Mao and Liu could have cooperated closely, the trinity system could have been maintained in practice and a serious crisis in the constitutional system avoided. Unfortunately, due to the special international and domestic political environment in the 1960s, Liu and Mao chose different political lines, giving rise to a constitutional conflict between the state and the party, between the bureaucratic chief and the charismatic leader, and between the written constitution and the unwritten constitution. Mao, resorting directly to people's sovereignty, launched the Cultural Revolution to defeat Liu, and in the process destroyed the written constitution and the trinity system. In the 1970s, the Cultural Revolution was brought under control to some extent. Mao started to consider restoring constitutional institutions and proposed amending the constitution. On the issue of whether to retain the office of state chairman, Mao fought a political battle with Lin Biao, the second presumed successor of Mao. Lin was defeated in the end, and the office of state chairman was completely abolished in the 1975 Constitution. The office was not reestablished until the 1982 Constitution was promulgated.

The 1954 Constitution centralized all important powers in the office of state chairman, whereas the 1982 Constitution distributed those powers among different branches of the government in order to avoid the excessive concentration of power that had made possible a disaster like the Cultural Revolution. In the 1982 Constitution, a new state organ, the Central Military Commission, was set up to exercise the power of command over the armed forces, and the Supreme National Conference was abolished. The position of state chairman was reestablished, with some of the symbolic and procedural powers that a head of state generally exercises. Meanwhile, Deng Xiaoping also revised the party's constitution. First, the office of party chairman was abolished, and the office of general secretary was restored, but the general secretary was not allowed to serve at the same time as the chairman of the party's Central Military Commission. Second, the temporary Central Advisory Commission of the party was established, which prepared for the institutionalization of the retirement of party cadres and enabled increasing the numbers of young cadres in the party and government. Third, party power and state power were separated formally. The general secretary of the party was not the presumptive state chairman. Thus, party power (the general secretary of the party), state power (the state chairman), and military power (either the Central Military Commission of the party or the Central Military Commission of the state) were completely divided. Deng's intention behind this separation-of-powers model was to provide for a successful transfer of political power, thereby avoiding the constitutional tragedy that Mao had caused by his failure to smoothly transfer his power to a successor.

However, when the party's leaders clashed, this arrangement of power only aggravated the conflict, leading to the Tiananmen political tragedy of 1989. Nevertheless, unlike Mao, who had destroyed the constitutional system he himself had help to build, Deng realized the defects in this separation-of-powers model and, so as to promote political stability, spared no effort to restore the trinity system. In 1990, Deng resigned from the chairmanship of the Central Military Commission, turning the post over to Jiang Zemin, general secretary of the party. Thus, party power and military power were reintegrated into one person. Then, in 1993, Jiang was elected state chairman, thereby once again combining party power, state power, and military power in one person. While Mao had established the trinity system of rule mainly by depending on the role of state chairman in the written constitution and the principle of "the party commands the gun" in the unwritten constitution, Deng relied instead on a constitutional convention (*xianfa guanli*), that is, the general secretary of the party should assume the office of state chairman. Compared with the written state constitution and the party constitution, the binding force of constitutional conventions depends more upon consensus among the political elites. In fact, after its establishment by the charismatic

leader Mao and its reestablishment by the more conventional leader Deng, the trinity has been accepted by the high-level political elites in the party, and has become a constitutional convention that fits well into China's constitutional order. Therefore, unless a political revolution occurs or a new charismatic leader appears, this constitutional convention will have no less binding force than the written constitution.

Because of this convention, after Hu Jintao was elected general secretary of the party, he was elected state chairman in 2003 and chairman of the Central Military Commission of the party in 2004, and then later, in line with the procedures prescribed in the written constitution, became chairman of the Central Military Commission of the PRC. Jiang Zemin gave a speech after he resigned from the chairmanship of the Central Military Commission of the party in which he clarified the trinity system in the Chinese constitution:

> the three offices, general secretary of the party, state chairman and chairman of the Central Military Commission, are integrated into a trinity system of rule. Such a leadership regime and a leadership model is not only necessary, but also most appropriate for a party and a country as large as ours. [Jiang Zemin, 2006b: 603]

His words have greatly strengthened the binding force of this constitutional convention.

"Initiatives from Two Sources": Constitutional Doctrine

The central-local relationship is the core of the constitutional system, as it directly concerns national integration. Whether unitary or federal, states will do their utmost to enhance the authority of the central government and reinforce its control over localities. Generally speaking, there are two basic means of control. One is to weaken the autonomy of the local governments functionally, so that they lose their ability to function once they are detached from the center; the other is to strengthen the capability of the central government to control local governments. The Chinese constitutional system has adopted a unitary system in which the functions of local governments are not reduced but kept intact. Local governments at various levels are elected by and held accountable to local people's congresses. Localities are equipped with the whole state machinery, including legislative, administrative, judicial, and military organs. In light of this, local governments, especially at the provincial level, are often deemed "local lords" in official and academic discussions.

So far as the written constitution is concerned, such a view contains some truth because many provinces and autonomous regions cover large areas of land, differ significantly from each other ethnically, economically, and culturally, and have a historical tradition of local separatism. In the constitution the most important way for the center to control the localities is through the Standing Committee of the NPC, which can "annul local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations" (1982 Constitution of the PRC, Article 67[8]).

However, the Standing Committee never uses this power to review local regulations or decisions, and yet in reality China has maintained a unitary system and can even be described as a highly centralized state. The rationale for such a system lies in the party constitution. The CCP is organized in accordance with the principle of democratic centralism. In addition to the party's National Congress, there are similar congresses in localities at different levels. The local party committees elected by the party congresses play a leading role in local political affairs, and carry out their political agenda through the activities of the local people's congresses and governments. Hence, the key to the central-local relationship is not the relation between the NPC and local people's congresses, or between the central government and local governments, but between central party committees and local party committees. The general secretaries of local party committees are the principal leaders in local affairs. For this reason, many secretaries of local party congresses also assume the office of director of local people's congresses, thus fulfilling the integration of party power and state power at the local level.

In such a constitutional structure, conflicts between the central and the local are not solved by constitutional review according to the written constitution, but by the unwritten constitution. The party constitution provides that

> individual party members are subordinate to the party organization, the minority is subordinate to the majority, the lower party organizations are subordinate to the higher party organization, and all the constituent organizations and members of the party are subordinate to the National Congress and the Central Committee of the party. [Constitution of the CCP, 2007, Article 10[1]]

This organizing principle greatly reduces the possibility of local congresses and governments led by local committees of the party coming into conflict

with the NPC and State Council led by the Central Committee of the party. At the same time, the Central Committee of the party adopted some institutional mechanisms to control local governments, among which the most important are the cadre appointment system and the discipline inspection system.

In addition to the principles and institutions established by the party constitution, systematic doctrines of the party play an important role in dealing with the central-local relationship. In 1956, Mao delivered his famous speech "On the Ten Major Relationships" (*Lun shi da guanxi*) in which he put forward his basic thoughts on how the party should deal with the central-local relationship (Su Li, 2004). He attempted to strike a balance between centralized power and local autonomy, so as to promote "initiatives from two sources" (*liangge jijixing*):

> Our attention should now be focused on how to enlarge the powers of the local authorities to some extent, give them greater independence and let them do more, all on the premise that the unified leadership of the central authorities is to be strengthened. This will be advantageous to our task of building a powerful socialist country. Our territory is so vast, our population is so large and the conditions are so complex that it is far better to have the initiative come from both the central and the local authorities than from one source alone. [Mao, 1977: 292]

It is noteworthy that Mao published "On the Ten Major Relationships" in order to explore a "Chinese road" for socialist modernization and to rid China of the influence of the Soviet model and its emphasis on a planned economy under centralized control. The doctrine of "initiatives from two sources" contains a set of constitutional thoughts on dealing with the central-local relationship.

First of all, in handling central-local relations, what is emphasized is not simply reinforcing control of the center to prevent local separatism, but also how to achieve the political goal of socialist modernization. Thus, Mao focused not upon the possible conflicts between the central and the local from a formalist constitutional perspective, but upon the consistency between the central and the local from the perspective of socialist construction. "If we are to promote socialist construction, we must bring the initiative of the local authorities into play. If we are to strengthen the central authorities, we must attend to the interests of the localities" (Mao, 1977: 292–93). This particular focus is mainly due to the fact that the party integrated central and local power and also shouldered the historical mission of leading the whole nation in the construction of an independent, prosperous, and civilized modern country.

Second, the doctrine of "initiatives from two sources" does not put the written constitution aside, but is, in fact, a political interpretation of the written

constitution. On the one hand, from a formalist legal interpretation, Mao argued that what the constitution does not forbid is permitted.

> According to our Constitution, the legislative powers are all vested in the central authorities. But, provided that the policies of the central authorities are not violated, the local authorities may work out rules, regulations, and measures in the light of their specific conditions and the needs of their work, and this is in no way prohibited by the Constitution. [Mao, 1977: 294]

On the other hand, regarding the political mission of socialist modernization, he emphasized that

> we want both unity and particularity. To build a powerful socialist country it is imperative to have a strong and unified central leadership and unified planning and discipline throughout the country; disruption of this indispensable unity is impermissible. At the same time, it is essential to bring the initiative of the local authorities into full play and let each locality enjoy the particularity suited to its local conditions. [Mao, 1977: 294]

In this light, the central-local relationship in the constitution is understood mainly as an economic one. In a planned economic system, it becomes the relation between "centralized planning" and "application in particular situations." For this, Mao emphasized that there could be a division of power between the center and the localities in the different economic departments such as industry, agriculture, and commerce:

> The central departments fall into two categories. Those in the first category exercise leadership right down to the enterprises, but their administrative offices and enterprises in the localities are also subject to supervision by the local authorities. Those in the second have the task of laying down guiding principles and mapping out work plans, while the local authorities assume the responsibility for putting them into operation. [Mao, 1977: 293]

Third, confronting the inevitable differences between the central and local governments, Mao put forward the democratic principle of "consulting to settle the matter" (*shanliang banshi*). In this respect, it is necessary to distinguish between the party's principle of democratic centralism and the government's principle of bureaucracy. The former is based on the party's

political philosophy of "following the mass line" (*qunzhong luxian*), and emphasizes that the party's decisions must comply with the interests and demands of the people. To gain the people's support, the Central Committee of the party or the other upper-level party organizations should frequently seek opinions from local party committees, thereby encouraging the initiative of local party committees and the masses. However, the constitutional relation between the central government (including the State Council and different departments) and local governments follows the bureaucratic principle, that is, lower-level governments must strictly implement the orders from higher-level governments. Perceiving that imitation of the centralized bureaucratic system of the Soviet Union had caused serious problems for China during its socialist construction, Mao criticized the planned economic system for allowing central departments to send orders directly to localities.

> At present scores of hands are reaching out to the localities, making things difficult for them. . . . Since the ministries don't think it proper to issue orders to the Party committees and people's councils at the provincial level, they establish direct contact with the relevant departments and bureaus in the provinces and municipalities and give them orders every day. These orders are all supposed to come from the central authorities, even though neither the Central Committee of the Party nor the State Council knows anything about them, and they put a great strain on the local authorities. There is such a flood of statistical forms that they become a scourge. This state of affairs must be changed. [Mao, 1977: 293]

At the same time, Mao urged the government system to overcome its bureaucratic thinking and learn from the party system by introducing the principle of democratic centralism—that is, democratically "consulting to settle the matter"—into its handling of the central-local relationship established by the written constitution.

> We should encourage the style of work in which the local authorities are consulted on the matters to be taken up. It is the practice of the Central Committee of the Party to consult the local authorities; it never hastily issues orders without prior consultation. We hope that the ministries and departments under the central authorities will pay due attention to this and will first confer with the localities on all matters concerning them and issue no order without full consultation. [Mao, 1977: 293]

Thus, the principle of "consulting to settle the matter" is presented as a way of extending the principle of democratic centralism of the unwritten

constitution into the bureaucratic system of the written constitution, and by integrating these two constitutions, ensuring that "initiatives from two sources" can be better implemented. Clearly, tensions in the socialist modernization between the written constitution and the unwritten constitution, the party's democratic system and the government's bureaucratic system, and the mass line and the expert line played a key role in the exploration of a "Chinese road" (Gan Yang, 2007).

Fourth, once the principle of "consulting to settle the matter" in the unwritten constitution was carried into the implementation of the written constitution, it was no longer just a specific policy on managing central-local relations, but a general constitutional principle about the relations between higher-level and lower-level governments and different departments of the same level. Mao emphasized that

> The central authorities should take care to give scope to the initiative of the provinces and municipalities, and the latter in their turn should do the same for the prefectures, counties, districts and townships; in neither case should the lower levels be put in a strait-jacket. . . . The provinces and municipalities, prefectures, counties, districts and townships should all enjoy their own proper independence and rights and should fight for them. [Mao, 1977: 294]

Regarding the "relations between localities of the same level," they can also be dealt with in accordance with the principle of "consulting to settle the matter."

The doctrine of "initiatives from two sources" derives from Mao's reflections on the real problems caused by the failure of the 1954 Constitution to address sufficiently the question of the power of localities. The 1982 Constitution endows the localities with the power of legislation, something absent in the 1954 Constitution. However, Deng Xiaoping inherited the doctrine of "initiatives from two sources" in handling central-local relations and adopted it into the written Constitution of 1982 (Article 3[4]). On the one hand, Deng began to launch the economic reform according to the idea of "granting power to lower levels and allowing them to keep a larger profit" (*fangquan rangli*), which greatly stimulated initiatives from localities and competition among them. On the other hand, he supported the reform of the taxation and financial systems to enhance the initiatives of the central government. As the former state chairman Jiang Zemin (2006a: 471) said,

> Our party has always paid much attention to dealing with the relationship between the center and locality. To thoroughly stimulate initiatives from two sources is an important principle in the political and economic

> life of our country, which directly deals with the unification of the nation-state, the solidarity of nationalities, and the concerted development of the whole economy of the country.

The doctrine of "initiatives from two sources" has been practiced, developed, and refined by several generations of leaders, and helps to solve the problem of central-local relations. Thus, it has been a successful choice in constructing the modern Chinese constitutional system (Su Li, 2004). However, the doctrine of "initiatives from two sources" is part of an unwritten constitution not only because it was personally created or practiced by Mao, Deng, and Jiang, but because these statesmen took the doctrine as a constitutional principle and developed it. This doctrine and their interpretations have thus become an integral part of the constitution, just as the U.S. Supreme Court's interpretations have become an organic part of the American constitution. Thus, doctrines and commentaries of both party and state leaders and reports and decisions by the party's Central Committee on constitutional problems should be regarded as part of China's unwritten constitution.

The Hong Kong Basic Law: Constitutional Statutes

After China resumed the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region (HKSAR) was established in accordance with 1982 Constitution, and the Basic Law of HKSAR was enacted to ensure the implementation of "one country, two systems" (*yiguo liangzhi*), the basic policy of the PRC regarding Hong Kong. Since the drafting of the Basic Law, people have been puzzled by the question of whether the 1982 Constitution applies to Hong Kong.

Theoretically, since the constitution is the fundamental law of China and since Hong Kong is a part of China, the 1982 Constitution should be operative there. Yet in fact, under the principle of "one country, two systems," the socialist system provided by the constitution cannot apply to capitalist Hong Kong. For example, the people's congress system, based upon democratic centralism, is not in effect in Hong Kong. While there are Hong Kong representatives in the NPC, they do not perform the function of Congress deputies in Hong Kong. The HKSAR government is not organized according to principles of the people's congress system, but according to principles established by the Basic Law, that is, separation of powers and an executive-led system (*xingzheng zhudao*). The PRC constitution prescribes that the Supreme People's Court is the highest judicial organ, exercising the power of final adjudication, yet cases in Hong Kong need not be appealed to the Supreme Court, and Hong Kong

has its own court of final appeal. Thus, from the perspective of legal formalism, one has to distinguish in the constitution between what belongs to "one country," which would apply also to Hong Kong, and what belongs to the "socialist system," which would not apply to Hong Kong. However, since "one country" is the prerequisite for "two systems," and this "one country" is obviously a socialist one, how can we formally separate "country" and "socialism" in China's constitution? For example, the system of multiparty cooperation under the leadership of the party is fundamental to the "one country" in the constitutional system, but also fundamental to the "socialist system" embraced by the country. Is then the status of the CCP as the ruling party, as recognized by the constitution, valid in Hong Kong?

In order to understand and solve these constitutional difficulties, we must break away from legal formalism, and understand the special nature of the Basic Law and its contribution to the Chinese constitutional system, as well as the revolutionary change embodied in the principle of "one country, two systems." As a judge in the HKSAR court of appeals said,

> The Basic Law is a unique document. It reflects a treaty made between two nations. It deals with the relationship between the Sovereign and an autonomous region which practices a different system. It stipulates the organizations and functions of the different branches of government. It sets out the rights and obligations of the citizens. Hence, it has at least three dimensions: international, domestic and constitutional. It must also be borne in mind that it was not drafted by common law lawyers. [*HKASR v. Ma Wai-Kwan* [CAQL1/1997]]

The uniqueness of the Basic Law is shaped by the special political reality of the return of Hong Kong. From the legal formalist perspective, new China has never recognized the three unequal international treaties between China and Great Britain dating from the Qing dynasty, and has insisted on its sovereignty over Hong Kong. The constitution, as a legal document constructing national sovereignty, should of course apply to Hong Kong. Yet, in fact, the central government only claimed to legally "own" the sovereignty of Hong Kong, but never actually "exercised" it; thus the Chinese constitution was inapplicable in Hong Kong before its return. China's resumption of the exercise of sovereignty over Hong Kong was made under the principle of "one country, two systems," resulting in the Basic Law. In this sense, it can be said that the Basic Law is the prerequisite for the recognition of the validity of the Chinese constitution in Hong Kong. Thus, although the Basic Law is ostensibly a law enacted by the NPC, it in fact serves as a potential social contract between the mainland

and Hong Kong, by which Hong Kong inhabitants receive a high degree of autonomy and at the same time recognize China's exercise of sovereignty.

In the drafting of the Basic Law, the two most controversial issues were the relationship between the central authorities and HKSAR and the political system of HKSAR. Regarding the first, some drafting members from Hong Kong argued that HKSAR should retain all powers which are not expressly stipulated in the Basic Law. In contrast, drafters from Beijing argued it was the Chinese central authorities rather than HKSAR that should have those "reserved" or "residual" powers. This controversy is based upon a fundamental issue in China's constitution: what is the real meaning of "one country"? Is it a unitary system or a federal system? Is it a nation-state, or perhaps an empire? Most academic articles and official reports say that "one country" means a unitary system in a nation-state, but in fact the central government grants the HKSAR more power and autonomy than a federal system grants a state. In this way, as a legal document constituting the special relationship between the central government and this new "border region," the Basic Law followed the traditional wisdom of governing border regions in China's long history, such as the governing of Tibet since the Qing dynasty, itself very similar to the principle of "indirect rule" in the British empire (Jiang Shigong, 2008b).

For the economic prosperity and social stability of Hong Kong, China's government hoped to keep most of the British legacy, such as the market economy, the executive-led political system, and the common law tradition. Yet the executive-led political system was challenged by Hong Kong liberal democrats in the drafting of the Basic Law, who proposed a "legislature-led" (*lifa zhudao*) system, in which the chief executive would be accountable to the legislature. The Chinese central government strongly resisted the "legislature-led" model and voted it down in the subcommittee of the drafting committee after Deng Xiaoping spoke to the whole drafting body and gave clear guidance. The reason why the central government refused the "legislature-led" model is that it would fundamentally change the relationship between the central government and Hong Kong and impede China's resumption of the exercise of sovereignty over Hong Kong.

Of course, the principle of "one country, two systems" is itself a particular historical construction designed for a particular purpose. It authorizes Hong Kong to practice a high degree of autonomy, including not only in economic, social, and cultural affairs, but also in diplomacy, issuing currency, collecting customs duties, legislation, the administration of justice, border administration, and so on. In other words, considering the formal relationship of the center and Hong Kong established by the Basic Law, in reality the center has relatively weak control over Hong Kong—except in military and diplomatic matters, the

appointment of the chief executive and principal officials, and legal interpretation, Hong Kong is virtually a "quasi-state political entity." If the "legislature-led" model had been adopted, the chief executive's compliance with central authority would have been compromised, if not completely nullified. Thus, it was necessary that Hong Kong adopt an "executive-led" model, in which the chief executive and other principal officials appointed by the central government are accountable to central authority. In this way, as Deng Xiaoping said, "Hong Kong people ruling Hong Kong" means "patriots (*aiguozhe*) ruling Hong Kong." "After all," as Kit Poon has written, "Beijing did not concede to 'Hong Kong people ruling Hong Kong' to the extent that China would lack any mechanism of control, neither did it accept 'high degree of autonomy' to the extent of *de facto* independence" (Poon, 2008: 38).

Just as the primary fundamental law in China's constitution is the leadership of the party, the primary fundamental law in the Basic Law is the rule of patriots in Hong Kong. The Basic Law is formally a national law enacted by the NPC, but it is a special national law, which functions as a constitutional law to construct the relationship between the center and Hong Kong and to ensure China's resumption of the exercise of sovereignty over Hong Kong by the "executive-led" model and the rule of patriots. The Basic Law concerns not only the application of China's written constitution in Hong Kong, but also the implementation of its unwritten constitution. The leadership of the party is effected in Hong Kong by means of "patriots ruling Hong Kong." In this sense, the Basic Law is not only a "mini-constitution" for Hong Kong, but a "mini-constitution" for China in its construction of a new model for party rule of Hong Kong. The Basic Law can thus be seen as a constitutional statute (*xianfaxing falü*) and part of China's unwritten constitution. With constitutional statutes such as the Basic Law, alongside the written constitution, China is no longer a solely socialist country, but a mixed country with the socialist system as the main body and the capitalist system as a supplement, and China is also no longer a unitary state, but contains a part that possesses "a high degree of autonomy." Today's China is no longer the China solely reflected in the 1982 Constitution; it can only be understood if the constitution and Basic Law are both taken into consideration (Jiang Shigong, 2008c). Such constitutional statutes as the Basic Law of Hong Kong and the Basic Law of Macau have become important sources of the unwritten constitution in China.

Conclusion

As we have seen, to understand China's constitution it is necessary to understand not just the written constitution but also the unwritten constitution that has arisen from various sources. For each source of the unwritten constitution,

there exists a great many constitutional documents and rich political practices, such as the party's documents, conventions, doctrines of the party and state leaders, and constitutional statutes. Investigating all these greatly broadens the field of constitutional jurisprudence and enriches the content of constitutional studies.

The development of constitutional jurisprudence in China in the past three decades can be divided into two phases. The first was basically an ideological stage during which general Marxist concepts were used to discuss the basic concepts of constitutions and to understand China's own constitution. In the second phase, since the wave of "constitutional adjudication" that began in 2001, people have tried to understand China's constitution from a judicial perspective. Influenced by this wave, they have started to Americanize their understanding of China's constitution and to criticize it according to the principles and rules of the American constitution. Thus, research on the American constitution has become the mainstream in the field of constitutional studies. Compared with the first phase, the second greatly enhanced constitutional studies in China. Not only have many scholarly texts about the U. S. constitution been translated into Chinese, but Chinese scholars themselves have contributed to this body of scholarship. However, just like the first phase, the second one has a strong ideological bent, only now American ideology has replaced Marxist ideology. If we want to discard ideology in constitutional studies, we have to adopt nonideological, empirical-historical methods, and focus on studying the practical problems in China's constitution and discovering the existing constitutional principles and rules in the unwritten constitution. At the same time, we should maintain a critical attitude toward constitutional problems, but that attitude should be rooted not in ideology but in the desire to solve real problems.

For example, the trinity system of rule, as we have seen, is maintained by constitutional convention. But according to convention, the election of the Political Bureau, the Standing Committee of the Political Bureau, and the general secretary of the party precedes the election of the NPC, which means that, according to the written constitution, the former general secretary of the party, as a general party member, might still be state chairman and the chairman of the Central Military Commission. Normally, this short-term separation of the three positions would not be a problem. But if extreme conditions such as war or a coup were to take place at that time, there might be two power centers contending for the right to declare war and to claim command of the military, leading to a constitutional crisis. To avoid this, rules about the transfer of power in such a trinity structure should be established both in practice and in written form. As another example, the leadership of the party is the fundamental law in China's constitution, and the party constitution also contains an

unwritten constitution; therefore, the modification of the party constitution should not be an internal party matter, but a matter of the whole Chinese people and should be agreed upon by the people. Since the CCP as the ruling party should be under the supervision of the constitution, a constitutional statute about the rule of party should be developed, which would make the CCP a constitutional party. Compared with these important constitutional questions about the nation's foundation and structure of its political system, the emphasis in current constitutional study on the protection of citizens' rights does not address the real issues of political life in China. As the American Federalists argued, before the ratification of the Constitution of the United States, the constitutional document on building state power is the Bill of Rights itself (Hamilton et al., 1982: No. 84).

The study of the unwritten constitution requires constitutional scholars to step down from the clouds of metaphysics and ideology and go deeply into China's political reality, history, and cultural traditions. Only then can we discover the real laws and constitutions of China. The constitution of any country is not merely expressed as constitutional texts, but is a living political experience. It is the practical experience in the development of Chinese constitutionalism that calls us to consider China's constitution from the perspective of the unwritten constitution. The problems faced in the development of Chinese constitutionalism can only be understood by considering the interactions between the written and the unwritten constitution, and between the state and the party. Due to these interactions, China's political system is different from the American system of separation of powers, and also from the Britain's parliamentary cabinet system; it is a party-state system combining the system of multiparty cooperation and the people's congress system, a combination embodied in the trinity system of rule. This unique political structure is the basis for China's modern development, from the Communist revolution to the reforms of the 1980s and thereafter. The future direction for the development of Chinese constitutionalism is neither to write a new constitution nor to institute constitutional adjudication, but to take our unwritten constitution seriously as a constitution, especially to systematize the interaction of the written and unwritten constitutions and to make clear and systematic constitutional conventions. China should develop its own unique constitutional model of interaction between the written and unwritten constitutions, and not follow the pattern of an American written constitution or a British unwritten constitution.

Since the beginning of modern times, China has been continuously learning from the West. Nowadays Western civilization has become an integral part of Chinese civilization. However, as a civilization that has had a 5,000-year history and has produced a third of the world's population, Chinese civilization

has always been concerned with *tianxia* (i.e., the world). If we hope to make a real contribution to tianxia, to human civilization, we cannot simply replicate the West, but should try our utmost to contribute to the international community and explore the possibility of a new modern civilization. If the Chinese constitutional system can do nothing but copy the Anglo-American model, then that would not only be a great loss for China, but for human civilization. Today, the rise of China has become a significant event in human history. Exploration of the phenomenon will undoubtedly challenge many theoretical assumptions established since the rise of the modern West and compel significant intellectual innovation. We should take the rise of China seriously, and we should take the constitutional system that has sustained China's success seriously. In this respect, Western scholarship has started to search for the "Chinese model" or "Chinese road," regarding it as a challenge to Western civilization (Ramo, 2004; Leonard, 2008). Regrettably, innovation in China's own scholarship lags behind the practical creativity of our people and the decisions of our statesmen. More than ten years ago, the economist Justin Yifu Lin claimed that the Chinese economic reform would become a gold mine for economic theorists, and the jurist Zhu Suli followed by declaring that China was a gold mine for Chinese legal scholars (Su Li, 1996). At that time, theirs were lone voices. Yet now, during the rise of China, if our constitutional scholars still turn a blind eye to the political reality of China and dismiss the unwritten constitution, they are abandoning their responsibility as Chinese intellectuals.

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Notes

1. Since the 1980s, political liberals have argued that China should adopt a new constitution based on the American constitutional model, with such things as

separation of powers, checks and balances, a multiparty system, and competitive elections. This led to the political tragedy in Tiananmen Square in 1989.
2. There is a large body of scholarship on this topic. For a summary, see Jiang Shigong (2003) and Wang (2003).
3. There is too much literature on human rights in China to list here.
4. Generally, those criticizing one-party dictatorship or the dictatorship of the CCP ignore the system of multiparty cooperation by which the CCP consults with the democratic parties to reach a political consensus on its policies and decisions.
5. "State chairman" is translated in the English version of Constitution of PRC as "president," but I prefer to use "state chairman." For a thorough discussion of the institution of state chairman, see Jiang Shigong (2008a).

References

ACKERMAN, BRUCE (1997) "The rise of world constitutionalism." Virginia Law Rev. 83: 771–97.

BORK, ROBERT H. (2003) Coercing Virtue: The Worldwide Rule of Judges. Washington, DC: Amer. Enterprise Institute Press.

BROWN, NATHAN J. (2002) Constitutions in a Nonconstitutional World. Albany: State Univ. of New York Press.

BRYCE, JAMES (1910) The American Commonwealth. New York: Macmillan.

CAI, DINGJIAN (2005) "The development of constitutionalism in the transition of Chinese society." Columbia J. of Asian Law 19: 1–29.

CHEN DUANHONG (2008) "Lun xianfa zuowei guojia de genbenfa yu gaojifa" (On China's constitution as the higher law and fundamental law of China). Zhongwai faxue 20, 4: 485–511.

CHO, YOUNG NAM (2002) "From 'rubber stamps' to 'iron stamps': the emergence of Chinese local people's congresses as supervisory powerhouses." China Q. 171: 724–40.

CORWIN, EDWARD S. (1971) The "Higher Law" Background of American Constitutional Law. Ithaca, NY: Cornell Univ. Press.

DENG XIAOPING (2001) Deng Xiaoping wenxuan (Selected works of Deng Xiaoping), vol. 2. Beijing: Renmin chubanshe.

DICEY, A. V. (1961) Introduction to the Study of the Law of the Constitution. London: Macmillan.

DUDZIAK, MARY L. (2002) Cold War Civil Rights: Race and the Image of American Democracy. Princeton, NJ: Princeton Univ. Press.

DWORKIN, RONALD (1986) Law's Empire. Cambridge, MA: Harvard Univ. Press.

FLETCHER, GEORGE P. (2001) Our Secret Constitution: How Lincoln Redefined American Democracy. Oxford: Oxford Univ. Press.

FRIEDMAN, BARRY (2001) "The counter-majoritarian problem and the pathology of constitutional scholarship." Northwest Univ. Law Rev. 95: 933–54

GAN YANG (2007) "Zhongguo de daolu: sanshinian yu liushinian" (China's road: thirty years and sixty years). Dushu 6: 3–13.
GREY, THOMAS C. (1975) "Do we have an unwritten constitution?" Stanford Law Rev. 27, 3: 703–18.
——— (1978) "Origins of the unwritten constitution: fundamental law in American revolutionary thought." Stanford Law Rev. 30, 5: 843–93.
HAMILTON, ALEXANDER, JAMES MADISON, and JOHN JAY (1982) The Federalist Papers. New York: Bantam Books.
HART, H. L. A. (1961) The Concept of Law. Oxford: Clarendon Press.
HUANG, PHILIP C. C. (1996) Civil Justice in China: Representation and Practice in the Qing. Stanford, CA: Stanford Univ. Press.
——— (2007) "Whither Chinese law?" Modern China 33, 2 (Apr.): 163–94.
——— (2008) "Zhongguo falü de shijian lishi yanjiu" (A study of the history of practice in Chinese law). Kaifang shidai 4: 105–24.
JENNINGS, IVOR (1943) Law and the Constitution. London: Univ. of London Press.
JIANG SHIGONG (2003) "Xianfa sifahua de beilun" (Paradoxes of constitutional adjudication). Zhongguo shehui kexue 2: 18–28.
——— (2008a) "Guojia zhuxi: sanweiyiti yu daiji gengti" (The state chairman: the trinity system of rule and generational succession of power). Kaifang shidai 1: 30–32.
——— (2008b) Zhongguo Xianggang (China's Hong Kong). Hong Kong: Oxford Univ. Press.
——— (2008c) "Jibenfa zhi mi" (Mystery of the Basic Law). Dushu 9: 40–47.
JIANG ZEMIN (2006a) Jiang Zemin wenxuan (Selected writings of Jiang Zemin), vol. 1. Beijing: Renmin chubanshe.
——— (2006b) Jiang Zemin wenxuan (Selected writings of Jiang Zemin), vol. 3. Beijing: Renmin chubanshe.
KANTOROWICZ, ERNST HARTWIG (1957) The King's Two Bodies: A Study in Mediaeval Political Theology. Princeton, NJ: Princeton Univ. Press.
KELSEN, HANS (1949) General Theory of Law and State. Cambridge, MA: Harvard Univ. Press.
LEE, TAHIRIH V. (2005) "Exporting judicial review from the United States to China." Columbia J. of Asian Law 19: 152–84.
LEONARD, MARK (2008) What Does China Think? London: Fourth Estate.
LIN LAIFAN (2001) Cong guifan xianfa dao xianfa guifan (From constitutional norms to a normative constitution). Beijing: Falü chubanshe.
MAITLAND, FREDERIC W. (1908) The Constitutional History of England. Cambridge, UK: Cambridge Univ. Press.
MANSFIELD, HARVEY CLAFLIN (1989) Taming the Prince: The Ambivalence of Modern Executive Power. New York: Free Press.

MAO TSE-TUNG (1977) Selected Works of Mao Tse-tung, vol. 5. Beijing: Foreign Languages Press.

McILWAIN, CHARLES HOWARD (1947) Constitutionalism: Ancient and Modern. Ithaca, NY: Cornell Univ. Press.

MOORE, MICHAEL (1989) "Do we have an unwritten constitution?" Southern California Law Rev. 63: 107–39.

OKOTH-OGENDO, H.W.O. (1993) "Constitutions without constitutionalism: reflections on an African political paradox." Pp. 63–82 in Douglas Greenberg et al. (eds.), Constitutionalism and Democracy: Transitions in the Contemporary World. New York: Oxford Univ. Press.

POON, KIT (2008) The Political Future of Hong Kong: Democracy within Communist China. London: Routledge.

QUIRK, WILLIAM J. (2008) Courts and Congress: America's Unwritten Constitution. New Brunswick, NJ: Transaction Publishers.

RAMO, JOSHUA COOPER (2004) The Beijing Consensus. London: Foreign Policy Centre.

SHERRY, SUZANNA (1987) "The founders' unwritten constitution." Univ. of Chicago Law Rev. 54, 4: 1127–77.

STORY, HERBERT J. (1981) What the Anti-federalists Were For. Chicago: Univ. of Chicago Press.

SU LI (1996) Fazhi jiqi bentu ziyuan (The legal system and its native resources). Beijing: Zhongguo zhengfa daxue chubanshe.

——— (2004) "Zhongyang yu difang guanxi: chongdu shi da guanxi" (The relationship between the center and the locality: rereading 'On the ten major relationships'), in Daolu tongxiang chengshi: zhuanxing Zhongguo de fazhi (Roads to the city: the legal system in transformed China). Beijing: Falü chubanshe.

TRIBE, LAURENCE H. (2008) The Invisible Constitution. London: Oxford Univ. Press.

WANG LEI (2003) "Xianfa shishi de xin tansuo" (New explorations into the implementation of constitutions). Zhongguo shehui kexue 2: 29–35.

WHEARE, K. C. (1951) Modern Constitutions. London: Oxford Univ. Press.

ZHANG QIANFAN (2008) "Zouxiang shijie de Zhongguo xianzheng" (Chinese constitutionalism on the way to the world). Beifang faxue 11: 5–19.

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