

Jiang Shigong 强世功 on “Written and Unwritten Constitutions” and Their Relevance to Chinese Constitutionalism

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Abstract

Chinese constitutionalism is usually analyzed and found wanting in the West. The deficiencies of Chinese constitutionalism stem in part from its differences from the forms and sensibilities of governmental organization common in the West. But constitutionalism ought not to be reversed engineered to support a particular approach to its operationalization. This article considers the extent to which Chinese constitutionalism is both true to emerging global principles of constitutionalism and how those principles might be applied in a distinctly Chinese way while remaining true to the objectives of transnational constitutionalist principles. The constitutionally significant distinction at the root of the Chinese way of constitutionalism lies in its separation of powers doctrine, one that divides power between political and administrative functions and which does not vest the whole of the power of state in a government. The examination is undertaken through a close engagement with Jiang Shigong’s study of the foundations of Chinese constitutionalism within the context of universalist principles of legitimate constitutional expression.

Keywords

party-state system, single-party constitutional state, the separation of power between the party and the state

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Jiang Shigong (强世功), Professor and Deputy Director, Office of Educational Administration at Peking University, is well known in China for his work *Fazhi yu zhili: Guojia zhuanxingzhong de falü* (Legal Systems and Governance: Law in the Transforming State) (Beijing: Zhongguo Zhengfa daxue chubanshe, 2003) and *Lifazhe de falixue* (Legislator's Jurisprudence) (Beijing: Sanlian shudian, 2007). Jiang's English language publications warrant far more notice in the West. One in particular, published several years ago, on Chinese constitutionalism, deserves careful study, "Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China" (Jiang, 2010). That article nicely describes both the promise and problems of Chinese constitutionalism.

Jiang starts by positing a formal distinction among constitutions. One category consists of constitutions that are "written" in the sense that all premises of a constitutional or supra-legal nature are codified within a single document. The United States Constitution is supposed to be an exemplar of this type. The other category consists of unwritten constitutions like the one in the British tradition in which a number of distinct sources together comprise the constitutional order of the state. Jiang places China in the "written constitution" camp, at least as a formal matter. Ever since the Constitution of the People's Republic of China was enacted in 1954, the Chinese constitution, kept in written form, has experienced three substantial revisions, in 1975, 1978, and 1982. But Professor Jiang recognizes that there is a gap between the functional and formal constitutions and constitutional practice in China. This has served as the fuel that feeds Western criticism of the legitimacy of the Chinese constitutional order. These insights provide the matrix within which Jiang proposes to reconsider Chinese constitutionalism: using a historical and empirical approach, he would seek to find the "real" constitution of China beyond the formalist approach and its discursive representations.

For that purpose, Jiang first interrogates the Western affinity for formalism in constitutionalism, that is, he confronts "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" (Jiang, 2010: 13). To his great credit, Jiang implies that Soviet universalist constitutionalism exhibited a tendency toward the same sort of formalist perspective that was characteristic of its Anglo-European competitors (pp. 15, 35-36). Indeed, one of the great triumphs of modern Chinese constitutionalism is its liberation from the orthodoxy of European Marxist approaches to constitutionalism, as China, like Germany, France, the United States, and other nations with distinctive and contextually appropriate constitutional traditions, also sought to find ways to naturalize universal principles within its national political culture.

With respect to his challenge to formalism as the basis of constitutional analysis (and legitimacy judgment), he starts with the observation that formalism is built into modern constitutionalism as a matter of internal and external necessity. Internally, a written constitution is necessary for legitimacy. It is also necessary to gauge its fidelity to minimum standards or expectations of organizational and substantive rights. I have explored this as well (Backer, 2008a). Jiang argues further that under the influence of this framework of constitutionalism, developing countries have been compelled to enact written constitutions in line with these essentially Anglo-European standards to legitimate their process of nation-building; “otherwise they would not be recognized by the Western-led international community . . . and succeed at their nation-building” (Jiang, 2010: 14). Constitutionalism in this sense has become a matter of international politics (Backer, 2008b). As a consequence, “a number of non-Western countries have felt forced to deviate from their national cultural traditions and duplicate Western ‘constitutional norms’” (Jiang, 2010: 14), producing both formal compliance and instability.

Professor Jiang would extend the point—arguing that the Western construction of legitimate constitutionalism also permitted the West to deploy constitutionalism to further its Cold War aims (Jiang, 2010: 14). But most interestingly, he notes that this deployment had a curious effect—to denigrate unwritten constitutions as less legitimate as a consequence of the ideological campaigns to deem as illegitimate constitutional orders whose functional operations did not align with their written form. To some extent, Jiang raises a very interesting point. I suspect that he may be right that one of the great casualties of the Cold War was the rise of a rigid ideology of written constitutionalism and the implication that unless it was within the four corners of a written instrument with a particular form, a constitution could not be deemed wholly legitimate. But his suggestion that this extended to de-legitimate totalitarian constitutions might take the argument too far. The reason for that is that beyond the question of written form, constitutionalism, especially after 1945, became grounded in the protection of a group of substantive rights in individuals. While totalitarianism was to some extent used for political aims, it is also true that many of the regimes described as totalitarian could not, either by their written or unwritten constitutions, have complied with the fundamental notions of substantive constitutionalism. That was certainly the case with respect to the “Big Man” regimes of post-liberation Africa and the cult-of-personality-driven COMINTERN regimes (Booth et al., 2006).

Jiang Shigong, though, makes the valid point that this internationalization of constitutionalism—as a set of principles for legitimate organization of states—has had profound effects on postrevolutionary Chinese constitutionalism (Jiang, 2010: 14). Since 1949, the Chinese constitution has been under

constant revision, which to some extent was motivated by the need to respond to international ideological standards, including those set both by the Soviet Union and the Western world. Jiang also identifies three principal schools of constitutional scholarship that rose to consider these changes and respond to the inherent criticism of Chinese constitutionalism by the variants of Western universalist constitutionalism. These include what he identifies as a school of constitutional revolution, a school based on “constitutional adjudication,” and a “revisionist” school. The first would enact a new constitution that better conforms to universal constitutionalist standards; the second seeks to fuse constitutional form and function through some variation of judicial review; the third also focuses on the use of constitutional interpretation to merge form and function, but the focus here is on civil rights protections. All three schools are criticized for their dogmatic formalism—all three start from the premise that the constitution is restricted to the text of the constitutional document, neglecting, Professor Jiang argues, the living and unwritten constitution of China (p. 15). Moreover, he rejects influential criticisms of Cai Dingjian and Zhang Qianfan that China has a constitution without constitutionalism (p. 16), a point with which I agree (Backer, 2006). But this criticism also forms the start of Jiang’s project—if he means to avoid formalism in constitutional theory and what he describes as Western-centrism and ideological bias, then what is required to harmonize form and practice within a coherent constitutional theory is a search for the real constitution of China, a search that ought to be uninhibited by the fact of a written constitution.

Professor Jiang starts with the construction of foundational premises. At the core of these is the argument that the distinction between written and unwritten constitutions, as refined in the second half of the twentieth century, is a false distinction. He reviews the two concepts of written and unwritten constitutions in modern politics, and argues that they form the two parts of a constitutional whole. No modern constitution can exist without both a formal and an unwritten part (Jiang, 2010: 16-19). Drawing largely on Kenneth C. Wheare’s generative text (Wheare, 1951), Jiang favors notions of flexible constitutions to those of rigid constitutions; he considers it unreasonable to assume that a written constitution can contain the realities of constitutional function. Every state, even those constricted by a written constitution, finds ways of incorporating unwritten premises and structures within their systems. From this he makes his great conceptual leap—a written constitution is but part of a greater unwritten constitution, an isolated island in a great sea of non-legal but constitutional rules.

It follows, for Professor Jiang, that the British and not the U.S. constitutional form is—or ought to be—the norm. To drive the point home, Jiang outlines his vision of the unwritten constitution of the United States within

which the written constitution operates and is operated on (Jiang, 2010: 19-22). He links together a number of pieces to the U.S. constitutional puzzle to make his case. He draws on the extra-constitutional authority of germinal documents, the century-long struggle to implement the unrealized provisions of the Reconstruction amendments, the American debate about the constitutional character of judicial review, and the functional realities of the political settlements among the branches of the federal government that were built into the structure of the Constitution but remain beyond its reach despite the elaborate jurisprudence of separation of powers. The most interesting aspect of this discussion for Americans should be the way U.S. constitutional discourse looks outside the self-referential hothouse of U.S. constitutional discourse. To a large extent the analysis is refreshing, and refreshingly insightful. But it remains an outsider analysis, precisely because it fails to adhere to the U.S. academic party line, its presumptions and expectations. But that itself is both ironic and perverse, given the pretensions and self-conceptions of academic constitutionalism in the United States, especially among its inner circle (Delgado, 1984; Chang, 2009).

Professor Jiang then attempts a similar but more detailed analysis of the unwritten Chinese constitution, one that envelops its written one. For that purpose he focuses on a study of the actual political institutions and their operation from a constitutional perspective, concentrating on four of its more important sources: the Communist Party constitution, constitutional conventions, constitutional doctrine, and constitutional statutes.

Mystery of the “Rubber Stamp”: The Party’s Constitution

The party’s constitution is described as a mystery of the “rubber stamp.” The Constitution of the People’s Republic of China clearly stipulates the National People’s Congress (NPC) and its Standing Committee possess a wide range of powers and the highest political authority. However, in their actual operation, the role of the NPC and its Standing Committee are often dismissed as a “rubber stamp.” That can only be explained, Jiang says, by taking an overly formalistic view of the Chinese constitutional system focused solely on its written constitution. To understand its unwritten constitution, he argues, one has to understand how the New China came to be.

Professor Jiang argues that the character of a constitution is in part determined by the manner in which the state and its governmental apparatus were created. In the United States, that occurred years after the American Revolution when the leaders of the American states came together to negotiate the formation of a new government, the terms of which were

memorialized in a written constitution. That revolution, and the government formed around its triumph, had deep ideological roots touching on the organization of power and the fundamental relationship between individual liberty, personal and property interests, and the state. In China, the government was created in the aftermath of the triumph of and to institutionalize the victory of a revolution led by the Chinese Communist Party (CCP). That revolution was not merely a contest for power but also embodied substantial ideological elements that included specific understandings of the nature of political power and state administration. The government of the People's Republic of China was a multiparty system led by the CCP (Jiang, 2010: 23-24) and bounded by a very specific political ideology that determined the social, economic, and political character of the state (Backer, 2012a). This core system predated the first written Chinese constitution of 1954, and *survived that constitutional enactment*.

But if that is the case, then the question arises: why the constitution, and why the construction of an administrative apparatus in the form of the NPC system? Professor Jiang's answer is partially satisfying: he suggests that while the CCP's political leadership role represented popular sovereignty, there was still a need to institutionalize that sovereignty, grounded in concepts of the people's democratic dictatorship 人民民主专政, and embed it in a conventional government.¹ That government, in turn, was constructed using conventional forms—in this case a written constitution. As a consequence, popular sovereignty is divided in China between two bodies—the NPC system under the written constitution and the CCP system under an unwritten constitution (Jiang, 2010: 24). This explanation is insightful.

Yet, to my taste, that answer is still overly formalistic. It suggests an equality of power between the administrative apparatus of the government and the political apparatus of the Communist Party. Yet by the logic of Jiang's argument, the opposite might be true: all of the political authority of the state remains vested in the CCP, which is itself obligated to operate under the four cardinal principles 四项基本原则 (Deng, 1979). The 1954 Constitution and its revisions, through the current constitution, have reflected the Communist Party line. A fundamental objective of the party line was to establish an administrative apparatus for the operation of the state and the fulfillment of the obligation of state and party to the people. As a consequence, the Chinese constitution could be understood as establishing an administrative apparatus under the leadership of the CCP and its multiparty coalition (Backer, 2012b).

Under either approach, Professor Jiang suggests the core problem of Chinese constitutionalism: "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." He proposes one basis: "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” (Jiang, 2010: 24-25). Again, the division suggests one grounded in the distinct character of each body, one political and the other administrative. Because the NPC system is administrative in character and managed by the political leadership of the CCP, it may be open to a broader participation by the people directly; the CCP as the incarnation of political power must necessarily limit participation to its cadres (Backer, 2012a). Moreover, he believes that this may also bring the multiparty cooperation system under the party’s leadership within the scope of the written constitution. Thus, the NPC’s rubber stamp role assumes a distinct character—the role is meant to legitimate the leadership role of the CCP within the administrative apparatus of the state. For Jiang Shigong, this suggests a dynamic process, one that would eventually transform the CCP from a revolutionary to a constitutional party and thus bring the unwritten constitution of the CCP within the principles of the written constitution (Jiang, 2010: 25). I am less convinced that this dynamic element is necessary, or that it might be the optimal way to complete the transformation of the CCP from revolutionary to constitutional party.

I am, moreover, not sure if such a dynamic element is necessarily inevitable within the Chinese constitutional framework. It is possible that the current division and power hierarchy are stable, and for the moment necessary and a reflection of the political development of the state, one in which democratic dictatorship suggests the continued role of the CCP in its leadership role. But it is possible to argue, instead, that the dynamic element observed by Jiang Shigong is occurring not within the state apparatus, but instead within the party apparatus. It might be possible, for example, to consider this dynamic element as a consequence of the premise of *san’ge daibiao* 三个代表 and its move to reduce class enemies and expand the pool of people who could become cadres and thus assume some measure of political engagement (Backer, 2006). Jiang points in this direction as well, noting the CCP constitution’s provision for political integration and administrative deference.

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*). (Jiang, 2010: 26)

I might posit a variation—that the CCP’s political sovereignty must be legally embedded within the administrative apparatus of the state through the constitution before it can become operational within the state.

The Trinity System of Rule: Formation of Constitutional Convention

If the NPC and CCP share sovereignty, Professor Jiang suggests that they interact through the unique institution of the head of state or chairman of the People’s Republic (*guojia zhuxi*) (Jiang, 2010: 27). Since the 1990s, the president of China has also been the general secretary of the Communist Party. The president is sometimes, but not always, elected as the head of the Central Military Commission, which controls the People’s Liberation Army. This arrangement has the authority of convention but is not memorialized in the constitution. Mao Zedong set up a chairmanship through a series of institutional reforms and arrangements. Chairman Mao “came to hold state power, military power, and party power all at the same time,” which constitutes the basic form of the trinity system. This trinity system “is not legally established in any written constitutional document . . . 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” (p. 28).

According to Professor Jiang, “the 1982 Constitution distributed those [three] 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” (p. 30). However, in 1990 Deng Xiaoping still transferred the chairmanship of the Central Military Commission to Jiang Zemin, general secretary of the party. “Then in 1993, Jiang was elected state chairman, thereby once again combining party power, state power, and military power in one person” (p. 30). Professor Jiang claims that “compared with the written state constitution and the party constitution, the binding force of constitutional conventions depends more upon consensus among the political elites” (p. 30). He makes a good point here—the formal separation of power may be effectively fused through conventions for the election of the same person to distinct positions. Yet, he also points out a tension inherent in the division of administrative and political power within China: that at this stage in the development of China, it is necessary to develop the formal division of authority among the political and administrative apparatus, but it is still functionally necessary to ensure that, to preserve stability at least at the highest levels, formally distinct offices are held by the same people. But that also requires great discipline within the CCP to ensure that the necessity of

stability does not produce cults of personality that detract from the democratic centralism at the core of the CCP's operations.

Professor Jiang then considers two additional expressions of the unwritten constitution around the written constitution of China. Each is important but will be considered in more summary form here. One deals with the sensitive issue of the scientific development of the Thought of Mao Zedong. The other touches on the transnational element of Chinese constitutionalism, something that merits much greater development.

“Initiatives from Two Sources”: Constitutional Doctrine

Democratic centralism plays an important role in the organization of the state as well (Jiang, 2010: 35-36). While the administrative apparatus appears to be organized in a way that permits localities some measure of autonomy, “in reality China has maintained a unitary system and can even be described as a highly centralized state” (p. 32). “The rationale for such a system lies in the party constitution,” and is to this extent both extra-constitutional and part of the fundamentals of the unwritten constitution (or rather the political constitution of the CCP). “The CCP is organized in accordance with the principle of democratic centralism” (p. 32). That system is carried over to the functional relationship between the central government and the localities. In addition there is an effective fusion of roles as local party leaders assume positions of local administrative power (p. 32). Yet there also exist centrifugal forces in the central-local relationship. Among the more important is the doctrine of “initiatives from two sources,” proposed by Mao Zedong, an example that “contains a set of constitutional thoughts on dealing with the central-local relationship” (p. 33). The initiatives from two sources posit the possibility of initiatives from both center and locality, though the actual mechanics remain ambiguous. Professor Jiang suggests that this doctrine is both an example of unwritten constitutional modification but also a political interpretation of the unwritten constitution (pp. 33-34).

He offers four constitutional perspectives. First, central-local relations are bound up in political work, that is, CCP work, in realizing socialist modernization. But that requires strengthening the center through attention to the localities (p. 33). In its political work, the CCP must be expected to play a central and mediating role. Second, the initiatives from two sources suggest an interpretation of the written constitution rather than an ignoring of that document. From Mao Zedong, Professor Jiang advances the constitutional doctrine that what is not forbidden is permitted. There is irony here; other

Marxist-Leninist states have taken the opposite interpretative tack—that which is not specified is forbidden (Backer, 2011). The result is flexibility in the division of authority between center and locality that must be adjusted to meet the needs of both—something that is also identified as political work. Third, Professor Jiang contends that differences between center and locality are subject to the democratic principle of consultation (*shangliang banshi*). He draws on the distinction between democratic centralism in the development of the political line and bureaucratic engagement, which is meant to serve as the province of the state apparatus.

The organization of the state under the constitution follows the bureaucratic principle. That principle has a great danger of distancing the government from the masses, a fear that for Chinese scholars was realized disastrously in the construction of the Soviet *nomenklatura*. The necessary antidote lies in the political work of the CCP, which is bound to follow the mass line (*qunzhong luxian*) if it is to retain its leadership role. The principle of consulting to settle the matter is presented as the way to extend the extra-constitutional principle of democratic centralism to the state apparatus and its bureaucracy (Jiang, 2010: 35-36). Fourth, thus extended, the principle of consulting to settle the matter becomes a constitutional principle that defines the relations between higher and lower levels of government. This principle, absent from the 1954 Constitution, found its way into the fabric of the 1982 Constitution, yet it remains for the most part practiced and not incorporated into the text.

Hong Kong Basic Law: Constitutional Statute

The “Hong Kong Special Administrative Region (HKSAR) was established in accordance with the 1982 Constitution, and the Basic Law of HKSAR was enacted to ensure the implementation of ‘one country, two systems’” (Jiang, 2010: 37). Professor Jiang suggests that whether the 1982 Constitution should apply to Hong Kong is a puzzling question (p. 37). The HKSAR government is organized by separation of powers and an executive-led system, which is not accordance with the China’s written constitution. Professor Jiang argues that “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’” (p. 38). In this sense, Jiang concludes that HKSAR Basic Law is the precommitment for the recognition of the validity of Chinese constitution in Hong Kong. That is, “it in fact serves as a potential social contract between the mainland and Hong Kong, by which Hong Kong residents

receive a high degree of autonomy and at the same time recognize China's exercise of sovereignty" (pp. 38-39). The Basic Law can be seen as a constitutional statute and part of China's unwritten constitution, following a Chinese pattern of British-style indirect rule, traditionally used for border regions like Tibet (pp. 37-40).

Professor Jiang concludes that "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" (p. 40). He refers to two phases to describe the development of constitutional jurisprudence in China in the past three decades. The first was "an ideological stage during which general Marxist concepts were used to discuss the basic concepts of constitutions and to understand China's own constitution" (p. 41). The second was marked by efforts to understand China's constitution from a judicial perspective, reflecting the influence of Western constitutionalism, especially the American tradition. Jiang criticizes both phases as ideologically grounded—the first by the blinders of Marxist ideology, the second by the blinders of American ideology (p. 41; Backer, 2010). Professor Jiang would adopt a critical but non-ideological approach, grounded in the desire to solve real problems. It follows that he thinks the Chinese constitutional system cannot simply replicate those of the West, but should try to contribute to the international discourse of constitutionalism from its own reality. For Jiang, China must develop its own unique model structured on the interaction between its written and unwritten constitution, between the political and administrative apparatus that together constitute China.

I agree with Professor Jiang that the written constitution of China is not the whole of the Chinese constitution. Jiang correctly understands the constitutional role of the CCP and the constitutional status of key practices of the Chinese state that in the aggregate provide a more complete picture of the Chinese constitution. I also agree that the totality of the Chinese constitution is both rational and coherent. But I am less certain I would refer to these constitutional elements as part of an unwritten constitution. I understand why Jiang takes that position—it is a necessary consequence of his view that the normal state of legitimate constitutionalism must account for both formal constructions and functional practices with constitutional effects, and that it must follow that an unwritten constitution must envelop the formal written instrument that Western theory has increasingly and incorrectly taken to constitute the totality of the constitutional element of a state. But I might be tempted to look at this phenomenon differently. To call the elements that Professor Jiang identifies part of an unwritten constitution tends to privilege the written element of constitutionalism to an extent that might be inappropriate in state like China. Thus, it might be more useful, for example, to consider

that the foundational constitutional element of China is the CCP. The institution of the CCP—whose members are the holders of political authority subject to a strict mandate to follow the mass line within the framework of Marxist-Leninist thought as refined in China through the present time—then necessarily is obligated to structure a government for the people, which has been accomplished through the promulgation of a written constitution. That constitution necessarily must be understood as an important element of the party line, binding on the party and the people through the leadership role of the CCP in Chinese political life. It is through the manifestation of this party line in a constitution that the state apparatus is created and its substantive elements developed.

The fundamental constitutional law of the state, then—the supreme law and constitutional premises through which all national life must be understood and with which it must conform—is identified in the constitution but is not the constitution itself. The people may exercise state power through the NPC system (Xianfa, 1982: art. 2), but the people’s democratic dictatorship (Xianfa, 1982: art. 1) is exercised through the CCP by whose power the constitution itself was established under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and the important thought of the “Three Represents” (Xianfa, 1982: Preamble). Professor Jiang is correct to suggest that the Chinese constitution is not available in one document; what is available that way is the document establishing the apparatus of administrative power in the state. But political authority and the preservation of the ideological basis of state organization must necessarily lie outside the contours of the framework within which the government itself is created. It must, because that power is superior to, and a constituting element of, the government itself. Understood in that way, Professor Jiang’s analysis is an important and welcome step forward in Chinese constitutional analysis.

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Note

1. Mao Zedong, "On the People's Democratic Dictatorship, In Commemoration of the Twenty-eighth Anniversary of the Communist Party of China," June 30, 1949, *Selected Works of Mao Zedong* IV. Available at www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm. ("Who are the people? At the present stage in China, they are the working class, the peasantry, the urban petty bourgeoisie and the national bourgeoisie. . . . Democracy is practiced within the ranks of the people, who enjoy the rights of freedom of speech, assembly, association and so on. The right to vote belongs only to the people, not to the reactionaries. The combination of these two aspects, democracy for the people and dictatorship over the reactionaries, is the people's democratic dictatorship.")

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