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Symposium on China and Constitutionalism: Introduction

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For the next several issues the *Journal of Chinese Law* (the "Journal") will publish a series of articles growing out of the "Project on China and Constitutionalism" (the "Project"). The Project was organized during 1992-95 by the Columbia University Center for the Study of Human Rights, the Chinese Legal Studies Center of Columbia Law School, and the East Asian Institute, with funding from the Henry Luce Foundation and the National Endowment for Democracy. A major goal was to produce a series of papers to be discussed at seminars, workshops

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and conferences, a selection of which are to be published in the Symposium which begins with this issue (the "Symposium").

The Project operated under a series of fruitful contradictions. For the organizers it was an intellectual enterprise, to explore issues relating to comparative constitutionalism by looking at the case of China; for many of the participants it was a practical exercise, to take advantage of the freedom and facilities of a foreign university to draft constitutional provisions intended to be put into effect in a future China. Whether scholars or activists, we were all in search of arguments that would make sense to Chinese people in light of their historic experiences and present needs and assumptions.

Participants included both foreigners and Chinese, people from Hong Kong, Taiwan and mainland China, and dissident exiles and people from "within the system." They included adherents of Marxism who had been expelled from the Party, Party members who had lost their faith in Marxism and, of course, Party members who continue to believe in Marxism.

The organizers offered for discussion our own, clearly Western, definition of constitutionalism: the limitation through law of the power of government organs. We were surprised to find that none of the participants took fundamental issue with this definition. The debate, as one participant said, was not over the destination but over the path and the pace. If our experience is any guide, then, there is no market in China for the view, dominant as recently as a decade and a half ago, that a constitution is solely an instrument of policy, a statement of current government intentions or an "expression of the will of the ruling class."¹

Further discussion, however, disclosed that this broad consensus masked a diversity of assumptions. Setting aside the fundamental definition adopted above, the word "constitutionalism" can mean many different things — perhaps more things in Chinese than in English. Translated as *lixian* (lit., setting up a constitution), it implies a movement away from dictatorship and towards a form of legitimacy based on popular will. Translated as *xianfazhuyi* (lit., the ideology of the constitution), it suggests an imported ideology justifying a regime by reference to its founding document. Translated as *xianzheng* (lit., "government by constitution"), it comes closest to the English meaning of a regime of law founded on a basic law

1. R. Randle Edwards, Louis Henkin, and Andrew J. Nathan, *Human Rights in Contemporary China*, 130-131 (1986).

Yet, as readers of the essays in this Symposium will discover, even this idea of government in accordance with a constitutional order means different things in China from what it means in the West. To some Chinese, the fact that China already has a constitution makes it constitutionalist, even though the current constitution fails to impose any real restrictions on the ruling party, either in letter or in spirit.

Most of the Project's participants, however, held that the current system is far from the rule of law. At the same time, their concept of law differed from that prevalent in the West. Law to many of the participants implied a science. In this sense law was seen as a system of rules that provides unambiguous and correct answers to practical dilemmas, not just an accumulated tradition of choices, seeking pragmatic balances among clashing interests in concrete situations. Constitution-writing was, by the same token, seen as a scientific process, which involves comparing various sets of fundamental rules in a universalistic light and picking the ones that are best.

As for the legitimacy of the constitution, where Western writers tend to see an accumulation of myth and civic ritual, Chinese writers tend to see a process of conversion. Although our discussions focused on choices for specific constitutional provisions, the discussion kept coming back to an underlying question: if these provisions were adopted, what could make people obey them, especially those in power? What reconstruction of legitimacy would be needed to make a constitutional order function as a constitutional order?

In neither China, nor the West today, is it possible to think of a constitution which is not legitimated by reference to popular sovereignty. For China, however, the question remains whether popular sovereignty must be expressed through competitive elections or whether it can continue to be claimed by a revolutionary party that purports to represent the people's interests.

Several participants held that it is ultimately the people who must be persuaded of their own sovereignty so that they will demand that the government abide by the law. "We need to teach people to know their rights," said one participant, echoing a theme heard in China since the late 19th century reform movement. In this light, many participants argued that a market economy is the necessary precondition for both democracy and constitutionalism. As an agent of reform, a market economy promotes changes both of culture and of power relations. Specifically, a market economy creates a class of people with economic power who have an incentive to insist on their rights. In this respect, it

encourages an individually based consciousness of freedom as well as legally-grounded norms for freedom of action.

Although participants often argued that certain constitutional arrangements are intrinsically superior, at other times they drew attention to China's "national conditions" and how these might affect either a choice of constitutional arrangements or the feasibility of implementing a constitutional system. As one participant said, "although we are meeting at Columbia University, our starting point must be China."

By "China's conditions," participants usually meant that China is geographically and demographically large, that it is backward (at least in certain areas) and that it carries a long history of authoritarianism. Among other things, participants often argued that China is too big for elections, that it has too few lawyers for an adversarial court system, that its national security situation is too difficult to permit constitutional control of foreign affairs, and that its economic challenges preclude immediate fulfillment of human civil and political rights, much less social and economic rights. Some participants went so far as to argue that China's authoritarian tradition wholly precludes a truly constitutional system. One participant told the story of an old village woman who did not put on the clothes handed out by a relief team because, she said, "The village chief didn't tell me to."

Others participants in the Project rejoined that powerholders in China talk about "national conditions" as an excuse to resist constitutionalism. In this view, national backwardness should not be an obstacle to rule of law. If some are too backward to understand the law, then — borrowing a leaf from Deng Xiaoping's book of step-by-step economic reform — "let some become constitutionalist first" by allowing the rule of law to be exercised in those spheres where it would be viable. Candidates proposed for early reform included the operations of the national legislature, the functioning of the courts and the country's system of constitutional interpretation and review.

Assuming the possibility of reform, participants often discussed the problem of transition. Two dominant views emerged over the course of the Project. One was that China could move to constitutional rule by building on attributes of the present system, especially the already existing constitution and laws which are in effect in China. The other view was that the present system is so fundamentally anti-constitutionalist (despite the existence of a constitution on paper) that only a fundamentally new system could be constitutional. As one participant put it, we face a choice between "implementing the

constitution we have and gradually amending it versus rewriting the constitution before trying to put it into practice.”

In effect, therefore, the discussion of transition involved an evaluation of how far the present system is from being a constitutional system. Several participants held that the present system is immanently constitutional. From this perspective, an essentially lawless, one-party dictatorship has decided, for its own reasons, to subject itself to rule of law. The way from dictatorship to constitutionalism, therefore, is to help the government to continue to establish legal rules to circumscribe its activities. Constitutionalists, under this view, should encourage the government to adopt, improve and obey laws. In this way, a constitutional order would emerge through evolution.

The advantage to this approach, according to its proponents, is that it is incremental, avoiding linguistic confrontation while achieving substantive change. A participant gave the example of the reform of the communes in the early 1980s. Pursuant to that program of reform, communal land was divided under the vaguely socialist sounding slogan of “system of joint production under individual responsibility” (*lianchan zeren baogan zhi*). The effect of the reform, however, was to move China’s system of land usage steadily closer to de facto privatization.

According to this view, the current constitution offers plenty of room for change by taking its language at face value. It speaks not of communist party control of government but of communist leadership. It speaks of class dictatorship, yet this becomes mere rhetoric once it is announced that there are no longer any antagonistic classes. It speaks of adhering to the socialist road, yet also validates the market economy, suggesting that the socialist road is consistent with the market.

The contrasting argument was that the letter of today’s law merely disguises the reality of single-party dictatorship. Against this reality, law is a thin reed. Judicial review, for example, cannot work when the Party is above the state and the constitution. The National People’s Congress (the “NPC”) cannot become a true legislature as long as a single ruling party controls the selection of NPC members and every detail of the NPC’s operation. In sum, according to this argument, the very “system” (*tizhi*) is anti-constitutionalist in view of the larger party-state structure within which the present constitutional structure is embedded.

However, even those who felt that the system would have to undergo fundamental change also believed that this change would have to come through gradual reform. Advocates of fundamental change reasoned that arguments for completely replacing anti-constitutional

elements within China's present system apply with differing force to different aspects of that system. It was proposed, for example, that the need for fundamental change is most sharp with regards to reforming the means of constitutional review and interpretation within China and with regards to improving the implementation of constitutional rights. At the same time, it was allowed that practices like cabinet government, de facto federalism and a greater role for the legislature could evolve from the present system without too much change in the surrounding party-state system. In any case, according to the proponents of fundamental change, to say that the constitutionalist era will not fully arrive until the system of one-party dictatorship ends is not necessarily to call for revolutionary change or violence.

Did the Project have any utility, since China lacks a strong constitutionalist political culture and tradition? A view of some participants was that the future of China will be made in China by practicing politicians and that theoretical discussions held overseas could have little effect. Others were convinced that ideas count. Ideas can provoke change by giving convincing reasons, and good arguments can have an influence on reasonable minds. This was how Marxism came to China. Whether or not the ideas discussed in the Project are accepted by future leaders, many participants felt these ideas would inform future debates in China and would have an influence on future thought.

Not everyone believes that a constitutionalist future is likely for China. But few would disagree that it offers the best among possible alternatives. Yet constitutionalism is not a simple choice: it entails a host of difficult decisions. We hope the essays presented in this series will be useful to those considering such options as well as to observers who watch the process of choice unfold.

The essays published in this first issue of the Symposium deal with two topics: (1) strains of thought from within China's history which might act as a resource in approaching the question of constitutionalism in China and (2) the crucial role of the military with regards to China's development of a constitutional system. Future essays will address constitutional review and interpretation, the role of the legislature, human rights, federalism, China's twentieth century experience of constitutionalism, and other topics related to the central theme. We hope that readers of the Journal will find it informative to know what topics relating to constitutional reform are being discussed within China, and beyond its borders, as China continues in its historic pursuit of strengthening and reform.