



Bian, Su (2015) *Contested constitutionalism: constitutionalization in contemporary China*. PhD thesis.

<http://theses.gla.ac.uk/6589/>

Copyright and moral rights for this thesis are retained by the author

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the Author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the Author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

**Contested Constitutionalism:
constitutionalization in contemporary China**

Su Bian, LLB, LLM

Submitted in fulfilment of the requirements
for the degree of PhD

School of Law
College of Social Sciences
University of Glasgow
July, 2015

Abstract

This thesis was written on the constitutional changes of contemporary China, with the 1982 Constitution as the object of researches. This constitution is the currently valid constitution in China, and is expected by constitutional scholars to be put in “juridification”. However, for thirty years since its birth, this task is yet to be realized. What is more, the claim of “judicialization of the constitution” as Chinese legal constitutionalists held especially during the 1990s, is now contested by emergent constitutional schools as *one of many constitutions* in China. They are arguing that China’s constitutional reality should not be colonized by the Western-originated constitutional science –classical constitutionalism.

Having perceived the critical merits of China’s new constitutional schools, this thesis is wary of confirming unconditionally the other end of arguments, namely, applying critical theories to condense into “constitutionalism with Chinese characteristics”. The use of “constitutionalism” to describe the Chinese model, however, should be examined against whether it has indeed resolved the material problems in China’s constitutionalization, or is merely an inflationary application of the terminology. If China’s legal constitutionalism is seen as implanting formalism of Hayekian theory in service of global capitalism, in the second-generation constitutional discourse, have we opted out of this mentality and re-constituted ourselves?

Constitutionalization in contemporary China hence is a complex issue covering the grounds of institutional, political as well as conceptual controversies, more than a practical issue of applicable mechanisms. The conceptual arguments on “what is constitutional” are especially challenging to classical constitutionalism, when combined with “identity politics” and “constitutional pluralism”. Between the material and conceptual level, I am insisting that the ‘democratic deficit’ caused by China’s 1990s economic reforms and the market mentality still needs a redress, before we could render its hybrid outcomes as “constitutionalism with Chinese characteristics”.

Table of Content

Acknowledgments	1
Declaration.....	2
Introduction	3
Part I.The History of Constitutionalization in PRC.....	15
Chapter 1.....	16
China’s 1982 Constitution and Its Judicialization.....	16
1. The promulgation of the 1982 Constitution.....	17
2. Legal constitutionalism in China	24
3. Summary of this chapter.....	31
Chapter 2.Continuity or Discontinuity – Three Orders in China’s Constitutionalization.....	33
1. The socialist base of China’s constitutions – the second order	34
2. Four amendments to the 1982 Constitution – the third order of marketization	42
3. Three social orders: socialism, legalization and marketization.....	45
Part II.Legalization without Constitutionalization.....	49
Chapter 3.Socialist Market Economy – a Configuration of Law, Politics and Economy	50
1. Reforms between 1980s and 1993	51
2. Reforms between 1993 and 2003.....	58
3. Reforms after 2003.....	71
4. Summary of this chapter.....	89
Chapter 4.“Constitutionalism with Chinese Characteristics”: Many Constitutions in China	92
1. Political constitutionalism in China.....	93
2. China’s economic constitutionalism.....	103

3.	Social Constitutionalism and Indigenization of Law in China.....	109
4.	Summary of this chapter.....	117
Part III.Theoretical Re-imaginings on Constitutionalism		121
Chapter 5.Contemporary Constitutional Re-imaginings		122
1.	The Constitutional Paradox – the Kelsen-Schmitt debate	122
2.	Complexities of Constituent Power.....	127
3.	Defending the constitutional paradox with critical constitutional theories?.....	133
4.	Summary of this chapter.....	136
Chapter 6.Constitutionalism-lite		138
1.	Internationalization and Europeanization: the disarming of democracy with constitutional tolerance and incrementalism.....	139
2.	Mattias Kumm: “Constitutionalism” and “Rational Human Rights Paradigm” ...	145
3.	Neil Walker: the “Constitutionalism-lite”: “democratic deficit” relative to “sovereignty surplus”.....	149
4.	Summary of this chapter.....	155
Chapter 7.The Sociological Approach to Constitutionalism and Globalization.....		157
1.	Luhmann’s sociology of constitutionalism: structural coupling of law and politics, law and economy	158
2.	Reconfiguration and the releasing movement of denationalization.....	162
3.	Gunther Teubner’s “societal constitutionalism”: society’s self-regulation.....	165
4.	Summary of the sociological renovation of the constitutional lesson	173
Chapter 8.Deconstructing “Constitutionalism” and Insights from “Peripheral Modernity”		176
1.	Marcelo Neves: “Allopoiesis” of law and “Transconstitutionalism”.....	177
2.	Nico Krisch: radical pluralism with a structure.....	184
3.	Legal Pluralism at the ontological level.....	188
4.	Summary of this chapter.....	192
Chapter 9.Political Constitutionalism in a Critical Perspective.....		194
1.	“The Political” in Foucault’s writings	194

2.	Pluralism or political economy: re-presence of constituent power.....	203
3.	Summary of this chapter.....	209
Chapter 10.Back to China’s Constitutionalization.....		211
1.	The first engagement with constitutional re-imaginings in China: claims of constitutional pluralism.....	212
2.	The problematic of China’s constitutionalization: democratization of rights protection	215
3.	The second engagement with constitutional re-imaginings in China: market mentality	217
Bibliography		223

Acknowledgments

This thesis was written on a project to trace history of constitutional changes in China I initiated in my master degree. But under the supervision of Professor Emiliios Christodoulidis, it has grown into a more fruitful exploration of constitutional theories and their application to the case of China. I could not thank enough for the opportunity to learn from Emiliios. He challenged me to think critically and taught me to keep the intellectual curiosity, always. I am also grateful towards my second supervisor, Dr. Gavin Anderson, who has tolerated my problematic working style and encouraged me when I met with great difficulties in adapting to the new environment. I will miss very much the time I could work with them.

During my stay in Glasgow for more than four years, the School of Law has offered me much help and convenience. I want to thank Professor Lindsay Farmer, Professor Johan Van Der Walt, Professor George Pavlakos and Professor Hans Lindahl for having provided me opportunities to take part in seminars and training courses; and Susan Holmes for being patient with my many queries. The Legal Theory reading group is not only an academic gathering, but also a 'home' for me in Glasgow. My particular gratitude goes to Dr. Pablo Marshall, Nikolas Vagdoutis, Erika Fontanez-Torres, Dr. Marco Goldoni, Dr Gregor Clunie and Dr. Awol Allo, Dr. Steve Collins and Gaogeng Meng, for their friendship.

Financially, this research was funded by the China Scholarship Council--University of Glasgow joint scholarship for three years, and with the help of Uncle Wang Jialu as my guarantor. I am grateful for their generosity to make possible this wonderful adventure.

This thesis could not be finished without support of my parents and my mother's unconditional trust and love. I dedicate the piece to my father and best friend as well, who had no chances to enter into a university, but never stops reading and thinking in his life.

Declaration

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature: _____

Printed Name: _____

Date: _____

Introduction

When I became interested in constitutional law ten years ago, the people's self-determination delivered by the 'constitutional government' was always an appeal. It still is but also a source of confusion. To establish a government of the people, by the people and for the people is all the constitutional politics about; but at the same time, it is where distortions happen to fake the people's will and to fill the "empty place" of the public¹ with private interests. While classical constitutionalism delineates *the* synthesis of constituent power and constitutional form, the first plural of 'we' as constituent power is the most contestable point in constitutional theories, as Hans Lindahl puts it.² Self-determination, between presence and representation, hence becomes the most intriguing part of constitutional theories, ranging from Carl Schmitt's "who decides" to Miguel Maduro's "who decides who decides".³

This thesis deals with China's constitutionalization with an essential complexity that once was reduced, and is now in the theoretical trend of contemporary constitutionalism,⁴ reignited. According to assumptions of positivism and foundational constitutionalism, China's 1982 Constitution is taken as the referencing point of all researches on the contemporary constitutional status of China due to that it is the currently valid constitution. However, this validity is at the same time questioned thanks to the lack of mechanisms to materialize it. As the calling for "judicialization of the constitution" indicates, it is the legality of the constitution itself that is being built in China, which means the thesis of positivism instead of being a presupposition, is a controversy. From this perspective, legal constitutionalism that was dominant in China's 1980s and 1990s, is not a neutral claim but

¹ Claude Lefort (1988) *Democracy and Political Theory*, (Cambridge: Polity in association with Basil Blackwell). 225

² Hans Lindahl (2007), 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press) 14

³ Miguel Poiars Maduro (2003), 'Europe and the Constitution: What if This is As Good as it Gets?' in J.H.H. Weiler & M Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press) 95

⁴ *This term is borrowed from Chris Thornhill (2012a) 'Contemporary constitutionalism and the dialectic of constituent power', Global Constitutionalism 1(3): 369-404*

already laden with predetermined values of “Rule of Law”, especially of an American model.

Positivization of law in contemporary constitutionalism is no longer taken for granted. Reflections on positivism and foundational constitutionalism begin to question the artificial separation of ‘what is constitutional’ from *de facto* social orders, which separation not only distinguishes the political from the social fields, but also singles out a constitutional moment from the ongoing history. Paradoxically, as Claude Lefort comments, this projection of the constitutional moment as exemplified in the French Revolution rather means it is an event that did not happen in history.⁵ The theorization and periodization produces a constitutional narrative that is ahistorical.

In China, this is protested in the second-generation constitutional discourse in the new century that re-explores China’s constitutional history which dates to earlier than 1982. Culture, social network, and constitutional conventions⁶ such as the Party-state structure are all explored as potentialities to contest the positive constitution of 1982 which is uncertain about its own societal effects in contemporary China. The new constitutional schools are arguing that Chinese constitutional story should not be presumed with a legal constitution that fulfils the western and modern formula of ‘constitutional government’, but also encompass the right to define ‘what is constitutional’.

Rather than merely an objective document, historical narratives are closely related to theoretical implications. As Michel Foucault puts it, history is never simply about “tracing a line” but also about “division”, “criteria of periodization” and “series of series”,⁷ just like in China ‘constitutionalism’ could date back to ancient regimes, the socialist China or the modern one configured by law and capitalism. It is what theories are applied in observing and how these observations are taken that project back what is the real history. In this instance, Foucault asks whether a “monumental history” is possible.⁸ This historical narrative, instead of documenting events that happened, also problematizes,

⁵ Lefort (1988) 213

⁶ Shigong Jiang (2010) ‘Written and Unwritten Constitution: A New Approach to the Study of Constitutional Government in China’, *Modern China* 36(1): 12-46. 19 and 42

⁷ Michel Foucault (2002) *The Archaeology of Knowledge*, (London : Routledge).11

⁸ Ibid. 8

Derrida also borrows this word from Sollers, see Jacques Derrida, ‘Interview with Jean-Louis Houdebine and Guy Scarpetta’, in Jacques Derrida (2004) *Positions*, (London: Continuum). 49

“how is one to specify the different concepts that enable us to conceive of discontinuity (threshold, rupture, break, mutation, transformation)? By what criteria is one to isolate the unities with which one is dealing; what is a science? What is an oeuvre? What is a theory? What is a concept? What is a text? How is one to diversify the levels at which one may place oneself, each of which possesses its own divisions and form of analysis? What is the legitimate level of formalization? What is that of interpretation? Of structural analysis? Of attributions of causality?”⁹

In this thesis, I will take this interplay of history and theorization into consideration, re-situate China’s constitutional history in this complexity and engage with emergent constitutional schools in China. Despite great insights they have brought to understanding historical changes and limited views of legal constitutionalism in China, I am worrying it is too early to pronounce a paradigm shift away from the democratic ontology of classical constitutionalism and argue for a Chinese variant. In this thesis, by allowing for their constitutional re-imaginings to unpack, I will also question what constitutes an ‘alternation’ to the first-generation reforms in these imaginings that enable them to claim “the Chinese characteristics”.

1. The complex entanglement of several claims about “Constitutionalism” in China

In the first part, I want to unpack possible diversity and complexities concerning the use of ‘constitutionalism’ in China. Firstly, in Chinese, the expression of ‘constitutionalism’ is ‘Xianfa’, a word that has been used since antiquity. “Originally it simply referred to a set of laws and rules relevant to the government.”¹⁰ Only by means of Meiji Japan (1866-1912), this term is used to translate the western sense of “a fundamental law superior to all”.¹¹ It therefore implies a transplanted conception of ‘supremacy’ that is alien to the word itself. With it, the whole system of ‘constitutional government’ was cherished as superior to China’s traditional form of law in the late Qing dynasty.

Pre-PRC (People’s Republic of China) constitutional history was shaped by a divided nation and internal conflicts. After the failure of establishing a constitutional monarchy in

⁹ Foucault (2002) 6

¹⁰ Xiaohong Xiao-Plaines (2009) ‘Of Constitutions and Constitutionalism: Trying to Build a New Political Order in China, 1908 -1949’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China* (New York: Palgrave Macmillan) 38

¹¹ Ibid. 38

China's last imperial dynasty [in "The Hundred Days' Reform (Bai Ri Wei Xin)" from June 11th to September 21st, 1898], the first draft Constitution ["Tiantan Draft Constitution (Tian Tan Xian Cao)"] was soon aborted by the president of the Republic, Yuan Shikai, who craved the 'life presidency' with omnipotent power. China's constitutional history after that was accompanied with wars and political movements that a stable constitutional order was hard to take root. The destiny of a constitution was dependent upon peaceful intervals, and was subject to powers of cliques and warlords. This subjection of the constitutional fate to war and peace, for Xiao hong Xiao, prepared for a "Nationalist" phase associated with the leader of China's Kuomintang Party (KMT), Sun Yat-sen.

Sun developed his own constitutional thinking of a three-stage transition to a constitutional state, in which he added two stages prior to a constitutional government -- the first stage of "military government" to unify the country and the second stage of "tutelage" to prepare the people to exercise their sovereignty rights over administrations. Hence, though Sun rejected Marxist "class struggles", he adopted Soviet model of "vanguard party" and moulded the party-state structure in China.

The Chinese Communist Party (CCP), a rival party to the KMT was inspired by the soviet model as well. And this party-state structure at the founding stage of PRC has shaped the constitutional argument suggested by Suli Zhu that the CCP's role in political integration should be perceived in comparison with the Russian counterpart, who had a bureaucratic state preceding the Party.¹² It implies a combination of themes of 'nationalism' and 'communism' in China's context, which is closely related to what model China's political constitutionalism could be perceived as (I will explain in Chapter 4).

Secondly, since the establishment of the new state in 1949, there are also four constitutions and an interim constitution once in effect in PRC. And the 1982 Constitution has been amended four times with a collection of thirty-one articles. These constitutions and constitutional amendments went through China's founding phase (1949-1954), the revolutionary phase (from the mid-1950s political movements to the peak of Cultural Revolution) and the reform phase (after 1978 "Reform and Opening" policy), in which the different constitutions have been tasked for different aims. If the "Common Program"¹³ of

¹² Suli Zhu (2009) 'Judicial Politics as State-Building', in Stephanie Balme and Michael W. Dowdle *Building Constitutionalism in China* (New York: Palgrave Macmillan). 35

¹³ The Common Program of The Chinese People's Political Consultative Conference (Zhong Guo Ren Min Zheng Zhi Xie Shang Hui Yi Gong Tong Gang Ling), which came into effect on Sep 29th, 1949. Available at <http://e-chaupak.net/database/chicon/1949/1949bilingual.htm> (accessed on December 6th, 2014)

1949 still served the need to unify the country, end the military control, distribute land to peasants and realize universal franchisement, the 1954 Constitution professed its socialist aim and planned the 1950s collectivization of the means of production in agriculture, industry and commerce to base the socialist infrastructure. Nevertheless, this mission of transforming people and elements of non- and semi-socialism to socialism could hardly make peace with the homogeneous concept of ‘citizenship’ in the constitution. Political movements went through the 1950s and peaked in China’s Cultural Revolution. The latter aimed precisely against bureaucratization of state apparatuses and demanded re-ignition of the revolutionary spirit. In its midst, the 1975 Constitution was promulgated with only thirty articles, half of which stayed as guideline-natured.

With the political trial of the “Gang of Four”, the 1978 Constitution initiated a strengthening of state apparatuses, especially the National People’s Congress (NPC). Till the 1982 Constitution, a direct restoration of the structure of 1954 Constitution was finalized and put the emphasis on “institutionalization”. Since then, the theme of building and stabilizing a constitutional government has dominated the academic arguments, while orthodox socialism turned to be the undercurrent with reference mainly to the preamble of the constitution.

Thirdly, besides the two themes of strengthening functions of state apparatuses and maintaining the leadership role of the Party in constructing socialism, there is a third theme underpinning China’s Reform Period—the 1978 “Reform and Opening” policy. It was put forward in the convention of historical importance -- 3rd Plenary Session of the 11th Central Committee of the Communist Party of China. This policy changes explicitly Mao’s rejection of the “third way” and is receptive to advanced capitalist experiences. From mid-1980s, formulation of contract relations happened in the rural and urban places incipiently and the process got accelerated in the 1990s. With two main categories of socialist ownership preserved, rights to use were separately contractualized in China. The scale and significance of private ownership clearly stretched in the four amendments. It is named as “socialist market economy”.

Since 1990s, the market mechanism began to expansively substitute the old mechanism of social control.¹⁴ And China’s private law regime became highly developed encompassing contract law, property law, bankruptcy law, etc. all of which are essential for a modern

¹⁴ Shaohua Zhan (2011) ‘What Determines Migrant Workers’ Life Chances in Contemporary China? Hukou, Social Exclusion and the Market’, *Modern China* 37(3): 243-285. 252

legal system. It is hard to explain this legalization as merely a transmitting form of the Party policies. Instead, China's legal system should be admitted to having its own logic, which could no longer be compared to a movie industry as Donald Clark mocked.¹⁵ Rather than arguing that China has no law other than policies, it is better to re-formulate the problematic as China's legalization is distinguished from the process of constitutionalization and study instead functions of this legal formulation.

The constitutional order in contemporary China manifests its hybridity. Marketization goes along with legalization but does not shake the party-state structure, against both conventional thoughts of what background market economy functions in, as well as the implications of marketization in transforming the socialist state. How could this effective order be understood? Instead of one-dimensional story telling of incomplete realization of legal constitutionalism, my thesis concerns complexities with regard to China's constitutional future and the fusion of three orders: socialism, legalization and marketization. Which of them best depicts China's constitutional image, and on what basis?

With multiplication of the meanings and orders of 'constitution', it is necessary for me to find a threshold to start my inquiry. In the next part, I will argue why the 1982 Constitution still is taken as a starting point in my thesis even though other constitutional schools intend to suspend this positivist presumption, who I must engage with.

2. A Methodological Delineation

In one of the recently emergent constitutional schools in China—China's political constitutionalism, Shigong Jiang, as its representative, has argued that since the 1982 Constitution never functions as the only normative source in China's society, we should re-consider whether researches on China's constitutionalism should take it as a starting point.¹⁶ In this argument, to take the written constitution as the fundamental law of the whole society is an ideological tool that implants and predetermines a paradigm of how constitutional researches should be carried on.¹⁷ It signifies a radical protest that diversity

¹⁵ Randall Peerenboom (2003) "The X-Files: Past and Present Portrayals of China's Alien 'Legal System'", *Washington University Global Studies Law Review* 2(1): 37-96, 62

¹⁶ Shigong Jiang (2010) 12-46, 13

¹⁷ Shigong Jiang (2010) 12-46, 15-16

not only occurs in legal sources, but also at the level of legal concepts and legal methodology.

In contesting Niklas Luhmann's 'sociology of law', Pierre Bourdieu introduced the thought of the judicial "field"¹⁸, as it sets up an artificial forum as if it could be separated from laypeople's consciousness of "fairness"¹⁹. Finding law only in where law formally operates hence is criticized by Bourdieu as "internal" sociology of law and a self-referential conception²⁰. It embodies a "structured structure"²¹ for sources-finding of law, and hence radiates a "homologation" effect²². This effect becomes the judicial "capital"²³ – a privilege and a tool for exclusion – that keeps the empire of law unchallengeable.

This is a strong critique toward Luhmann's definition of the legal system with "a strict operative approach".²⁴ Legal institutions, observed by Brian Tamanaha in the case of transplanted law in post-colonial states, manifest a deviation from indigenous social orders. They are rather tools manipulated by local elites. Tamanaha thus problematizes whether law could be separated from its social connectedness and transplanted.²⁵ Rules of conduct, instead of norms for decision, work as the constitutional order in these places though not the official 'constitution'. These cases contest strongly the "recognition" of law as per Hart's -- law is modelled according to internal practices of the judiciary and separated from society-derived rules of conduct.²⁶

These fieldwork proofs have questioned a settled discipline of 'sociology of law'. In Jurgen Habermas and Luhmann's writings, this sociology grows out of its transitional background from natural law to modern law. The loss of the metasocial guarantee and "lifeworld" certainties,²⁷ for Habermas, essentializes the building of 'sociology of law' in a "reconstructive" sense. If social rules once were embedded in how society functioned, in the secular society, "communicative action" about "validity" acts as the basis of

¹⁸ Pierre Bourdieu (1986-1987) 'The Force of Law: Toward a Sociology of the Judicial Field', *Hastings L. J.* 38: 805-853, 835

¹⁹ *Ibid.* 835

²⁰ *Ibid.* 816

²¹ *Ibid.* 839

²² *Ibid.* 849

²³ *Ibid.* 821

²⁴ Niklas Luhmann (2004) *Law as a Social System* (Oxford: Oxford University Press)73

²⁵ Brian Z. Tamanaha (2011) 'The Primacy of Society and the Failures of Law and Development', *CORNELL INT'L L.J.* 44: 214

²⁶ Brian Z. Tamanaha (1993) "The Folly of the 'Social Scientific' Concept of Legal Pluralism", *Journal of Law and Society* 20(2): 209

²⁷ Jürgen Habermas (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge, Mass.: MIT Press).²⁶

“integration”. It is hence an inverse relationship between “social integration” and “law”. Habermas applies Max Weber’s “interpretative sociology” which “realizes that this second, more radical tension between facticity and validity inhabits its object domain. ... One needs a reconstructive approach to explain how social integration in general can take shape under the conditions of such an unstable sociation, which operates with permanently endangered counterfactual presuppositions.”²⁸

The concept of law to indicate an autonomous legal system is rather derived from this functional differentiation, which is a modern project. For Luhmann, his “sociology of law” is distancing itself from “social control” or “integration”.²⁹ And “(a)s a result the differentiation of law can be understood only at the level of professions or organizations.”³⁰ The assignment of “legality”, in the context of modern positive law, is a stop-rule for Luhmann that rejects moralization. As Luhmann argues,

“Only the concept of sources of the law defines a point at which the self-description of law stops and further questions are ruled out. The applicability of this concept has been widened so considerably that the *threshold* has been reached at which it could well be said: the legal system itself depends on the *asymmetry*, on the *stop rule*, on the *disjunction of the symmetry* which is intended by the metaphor of the ‘source’, but this intention (or ‘function’) cannot be called the reason or ‘proto-source’ for law ... Hence *the metaphor of sources of law* has, as far as validity is concerned, the function of a formula of contingency – just like the concept transforms a tautology into a sequence of arguments and makes something that is seen as highly artificial and contingent from the outside appear quite natural and necessary from the inside.”³¹

This argument about “legality” shaped Habermas’s critique of Luhmann’s systems theory as “objective” sociology of law as it does not pay attention to “legitimacy”. It, however, mistakes Luhmann’s understanding of another distinction between ‘validity’ and ‘legality’. Luhmann does acknowledge that “what is legal” is dependent on what is legislated, where the ‘legitimacy’ claim matters. And he agrees that “(t)he risk of the coding legal/illegal was accepted but the programming level was used to reintegrate law into society. The

²⁸ Ibid. 21

²⁹ Luhmann (2004) 143

³⁰ Ibid. 143

³¹ Ibid. 445 (emphasis added)

programming level thus functioned as a balancing level for any discrepancies that might arise between law and society.”³² But besides coding and programming, Luhmann has also made a distinction between ‘self-reference’ and ‘coding’, as he argues that, “invalidity” is different from “illegality”. The latter has negative consequences, such as penalties, liability, or rendering void the legal effects of certain acts. But the former only has a “reflexive” value “for clarifying the conditions under which validity operates, but it does not produce possibilities of further connections”.³³ It is the “the metaphor of sources of law” which gives us the language to discuss what is legal or illegal.

For Luhmann, legal pluralism shares the “reflexive” value as equivocation is their essential mission. And legal concepts as the tool of observation, however, could not be multiplied in themselves. Or else, it will not be ‘legal’ pluralism and researches will be “drowning” in “normative pluralism” or “regulatory pluralism”, as Tamanaha himself admits.³⁴ It is the unresolved “legal status of legal concepts” in Luhmann’s word.³⁵

The “equivocation” of meanings itself could not be substituted for “equivalences”. Let me return this argument to China’s constitutional question. When disagreements arise as how China’s constitutional orders should be perceived, they are nonetheless sharing the symbolic language and the validity claim about China’s constitutionalism. If emergent constitutional schools are contesting how and where China’s constitutionalization should go, at least a common ground is preserved that ‘constitutionalism’ for them signifies a fundamental order of the polity ‘China’. Their arguments are focusing on different paradigms and sources. And if legal constitutionalism is wrong in depicting the 1982 Constitution as *the* social order in China, at least it is a point of departure³⁶ that other schools have to refer to in proposing alternatives.

In this thesis, I presume that the 1982 Constitution should be treated as the fundamental law in China, as it is prescribed as *the* valid constitution in China. And all other laws should be legislated according to it. Toward oppositions that China is in effect having a societal order that is complementing or even having more importance than the 1982 Constitution, I put it as a potentiality that has to be confirmed and conditioned on debating

³² Ibid. 193

³³ Ibid. 128

³⁴ Tamanaha, Brian Z., ‘Understanding Legal Pluralism: Past to Present, Local to Global’, (2008) *Sydney Law Review*, 30(3): 375-411, 393-394

³⁵ Niklas Luhmann (1998) *Observations on Modernity*, (Stanford, CA: Stanford University Press). 15

³⁶ This word is borrowed from Neil Walker (2008) ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’, *Int J Constitutional Law* 6(3-4): 384

the functions of the 1982 Constitution. This temporary suspension at the start allows for complexities or even a change of this proposition later in this thesis, where I discuss the effort as well as failure of China's legal constitutionalism in building up constitutional legality in Chapter 2.

3. Structure of the thesis

This thesis is written along two lines, the material history of China's constitutionalization and the theoretical complexities about the process. It intends to connect China's constitutional debates back to historical turns where many issues were left unresolved. Toward China's constitutional future, I am unable to propose a different resolution. This thesis only serves to discern gaps in the thirty-year Reform Period, examine proposals by China's Libertarian scholars and the New Left,³⁷ and pronounce my own diagnosis.

I divide the ten chapters of the thesis into three parts. The first two parts depict a whole picture of China's constitutionalization – the history ranging from the first constitution of PRC in 1954 to the constitutional amendments. Along with it are theoretical arguments about the nature and future of China's constitutionalism. To specify it, Part I contains two chapters. Chapter 1 poses the 1982 Constitution as the platform of investigating China's contemporary constitutional conditions. But the lack of full implementation of it directs the controversy from the level of 'application' to debates about the 'legal nature' of the 1982 Constitution. Consequently, Chapter 2 puts these debates in the historical context of the 1982 Constitution, and discerns three competing social orders. Instead of a fresh beginning, I suggest treating the 1982 Constitution in the process of transformation of China's constitutional orders from the socialist orthodoxy to a modern legal system. This modernization of law is accompanied with marketization and transformation of socialism in a "gradualist" way, which forms strong hybridity of China's constitutional orders.

³⁷ China's New Left is a group of intellectuals that are critical of global capitalism and also some aspects of Chinese economic reforms. In asserting equality, the socialist mentality of Mao Zedong is claimed by them. But they also use postmodern critical theories to arm themselves against the hegemony of the West, which determines their views on economic sovereignty and globalization. They argue for a significant role of state planning and preservation of state capacity along with China's marketization. Unlike the Old Left, they no longer insist on the rigid separation of socialism and capitalism, but argue that China's hybrid economic reforms should be recognized with its innovative value. Re-orientation to social values, however, is not to return to orthodox socialism.

Part II focuses on especially the implications of hybridization. By tracing the establishing process of China's private law system, I correlate the small variations in constitutional terminology with materially great changes in society. Penetrating the phenomena of legalization, this historical-sociological argument also problematizes the function of law in the transformation of socialism, which reveals shortcomings of China's legal constitutionalism. More constitutional schools are emerging and exerting their influences in China's constitutional scene (Chapter 4). By deploying history, politics, sociology, political economy and cultural sources, constitutionalism is argued in an interdisciplinary way in China's second-generation constitutional discourse. Unlike the IRI theory (Imperfect Realization of Ideal)³⁸ that assumes a convergence of China's legal system with the Western and global one, these schools are arguing divergences and Chinese characteristics.

In arguing for alternative legitimacy claims to classical constitutionalism, a meta-constitutional discussion about the meaning of 'constitutionalism' arises. Part III is devoted to the conceptual contestation on 'what is constitutional'. Chapter 5 is a bridging chapter, in which I discern what is challengeable in classical constitutionalism, focusing on the crisis of constituent power. Chapter 6, 7 and 8 separately elaborate three approaches to contemporary constitutionalism in accordance with their different claims. Chapter 6 is devoted to the proposition of "constitutionalism-lite" exemplified in Neil Walker's writings. Starting from the intricate process of European integration and facing the lack of a political community as the referencing point of political legitimacy, Walker instead argues "polity legitimation" in accordance with common interests. As a forward-looking constitutionalism, it differs from Bruce Ackerman's backwardly projected constitutional moment and indicates a new paradigm.

Chapter 7 provides a functionalist critique of this polity legitimation as a simplification of the re-specification of social systems, with the heuristic framework of systems theory. Gunther Teubner makes crucial contributions to adapting systems theory to the constitutional question at the global level. "Re-configuration" and "intermediation" rather than uploading to a global polity is insisted on by the sociological approach. For Teubner, human rights could evolve with time to re-paradoxify into a new coupling of social subsystems in the world society.

³⁸ Quoted in Randall Peerenboom (2003) 61

In Chapter 8, I use Marcelo Neves's contestation of Luhmann's systems theory to point out that Teubner's fragmentation of law proposition lacks and also needs a discussion on the rationality of law. It is named by Neves as "transconstitutionalism". The proposal of "transconstitutionalism" different from "transnational constitutionalism", explores confrontations in legal rationalities. Instead, pluralism and rights to dissent act as the paradigm of "transconstitutionalism" to rectify imbalances.

In Chapter 9, I am applying Foucault's "how" politics to emphasize a critique of these critical insights. The eclipse of the 'political' dimension in contemporary constitutionalism is related by Foucault to 'market mentality' and the scientific claim of political economy. This deeper reason also contests whether pluralism of 'constituencies' is the right resolution for crisis of classical constitutionalism.

In Chapter 10, I return to China's constitutionalization. Contemporary constitutionalism does provide chances to reflect an over-simplified program of legal transplantation and democratization, but this does not mean the 'democratic deficit' in China could be transmitted to a conceptual question of 'democratic variant'. In reviewing material problematic in China's constitutionalism, I will argue that the asymmetry in rights protection still remains and underpins the logic of constitutionalization in China. It demands us to take seriously how market mentality impedes constitutionalization, not merely as an encroachment of the legal field, but by attaching the democratic basis of constitutionalism with the notion of "interests".

Part I.

The History of Constitutionalization in PRC

Chapter 1.

China's 1982 Constitution and Its Judicialization

Introduction

This chapter introduces the focus of my thesis – China's 1982 Constitution. It is the currently valid constitution and the fourth one in the history of PRC. Before it, there are another three constitutions in 1954, 1975 and 1978. They are deemed as four separate constitutions due to the “comprehensive” changes. But after 1982, constitutional amendments are adopted as the chief means of constitutional change. It indicates the attempt to found and solidate the authority of the constitution in a country that does not have a long tradition of the Rule of Law.

This is also understandable if we are reminded that the 1982 Constitution was promulgated after the end of the Cultural Revolution in China. The two constitutions (the 1975 and 1978 Constitutions) born in the revolutionary phase seldom performed the function of legal mediation, but a guideline of mass movements led by the Party. This orients afterwards more than one-decade work of Chinese scholars to transform, if not build up from the base, judicial institutions to materialize legality of the constitution. The calling for judicial autonomy has been fused with the proposition of legal constitutionalism, and the American constitution model occupies the centre stage of Chinese constitutional scholarship.

Concentrated on issues of judicialization of the constitution and constitutional review in China, this chapter argues how and to what extent the ‘legal’ nature of China's constitution is understood. In practices, the court-centred strategy keeps running head to the constitutional principle of “democratic centralism” which exempts the constitution from being applied in the judiciary. This problematizes whether legal constitutionalism is compatible with the constitutional text. But on the other hand, could we leave violation of rights without remedy? Instead of arguing as majority writings do on proposing mechanisms of application, my concern lies in structural obstacles in the rights strategy, which are increasingly acknowledged by human rights lawyers.

In the first section of this chapter, I make clear that legality of China's 1982 Constitution is built up against the background: the end of the Cultural Revolution. In the appeals for constitutional review, the legal nature of China's constitution is intensely debated. Legal constitutionalism in China though is the mainstream scholarship, tells only one side of the story. I will delineate three main schools of it in the second part.

1. The promulgation of the 1982 Constitution

The 1982 Constitution came into effect on December 4th, 1982. As it completed a thorough pending to the 1978 Constitution, it was called a "new" constitution. This wish to be a stable constitution is clear in the long preamble written into it, which recollects all the modern history of China: its struggles and achievements in the past, as well as its mission of "socialist modernization" in the future. This new term indicates that the 1982 Constitution is still a socialist constitution. Compared with the mixed economy in the 1954 Constitution, the 1982 Constitution prescribes two types of public ownership: ownership by the whole people and collective ownership by the working people (Article 6). The latter indicates the co-operative economy in rural and urban areas that has a collective nature. Private economy is not permitted, but individual economy that employs no more than seven people, is defined as a complement to the socialist public economy (Article 11). Foreign enterprises, individuals and other economic organizations are also permitted to invest and participate in co-operation with Chinese enterprises (Article 18).

Concerning the political structure, the Party leadership is preserved, but intentionally understated compared to the emphasis on the institutionalization of state apparatuses. In the two constitutions during China's Cultural Revolution, articles regarding state apparatuses were reduced to a minimal degree (only comprised of Chapter 2, Article 16-25 in the 1975 Constitution; Chapter 2, Article 20-43 in the 1978 Constitution). And it was done in the spirit of revolutionizing and overthrowing the bureaucratic tendency.¹ But after the Cultural Revolution and the Trial of the Gang of Four, "it was clear that the Party-state would have to accept some degree of responsibility for the excesses of the Cultural Revolution".² And for Peng Zhen, who was assigned leadership over the National Congress,

¹ Alain Badiou (2005) 'The Cultural Revolution: The Last Revolution?' *Positions* 13(3): 481-514

² Michael W. Dowdle (2009) "Beyond 'Judicial Power': Courts and Constitutionalism in Modern China", in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan). 209

“(t)he only way to guard against a return to such runaway political extremes ... was to introduce into the entity of ‘the state’ other political structures – constitutional structures – that, because they were institutionally outside the party, could open up the state to a wider diversity of understandings and sensitivities than could be provided by the party alone.”³

Hence the organizational reestablishment is the chief achievement of the 1982 Constitution. And bypassing the 1975 and the 1978 Constitution, it restored the structure of the 1954 Constitution. More than half of the constitution (Article 57-135) concerns empowerment of People’s Congresses at both national and local levels, the Government, the Judiciary and the Procuratorate, and also with a more detailed prescription on division of labour.

With the township being established as the basic-level government, people’s communes’ status was transformed. In the phase of China’s Cultural Revolution, people’s communes and neighbourhood organizations were the basic ‘political’ units in urban and rural areas. Their political functions were stipulated in article 7, 21 and 22 of the 1975 Constitution that “the local revolutionary committees at various levels are the *permanent* organs of the local people’s congresses and at the same time the local people’s governments at various levels (emphasis added).” In 1978 Constitution, these grass-root organizations were preserved (Article 34), but there was no more explicit statement about them as the “permanent organs”. The 1982 Constitution removed their political functions, and they were no longer integrated organizations of both “government administration and economic management” (Article 7, 1975 Constitution). Article 8 stipulated that it was an economic organization; in the meantime, village committees in rural places and neighbourhood committees in urban places were responsible for social affairs. They were self-government of the mass, but not a level of government subject to political election (Article 111).

This manifests the dissolution of social, economic and political functions formerly bound together and has a profound effect on representative and participatory forms of socialism, which I will examine later. Here, what I aim to emphasize is the re-establishment of the local People’s Congresses. While the 1954 Constitution only allowed them to issue decisions and orders, the 1982 Constitution empowers them to promulgate local regulations in accordance with law (Article 100). This for the first time brought about

³ Ibid. 209-210

conflicts of legislative powers between the national and the local levels, and consequently the need for constitutional review.

Many current constitutional arguments made by legal scholars stem from this change, namely, the conflicts between regulations and the need for resolution. From a Luhmannian sociology of law perspective, internalized hierarchy of law is the preparation of constitutionalization.⁴ It shows a potential to be used strategically for a mechanism of constitutional review to be established in China: when rights claims of a lawsuit are prescribed differently by laws and demands for an answer about which law to be applied in the case.

To call it a *strategic* point is because, regarding division of labour and the mechanism of accountability, the 1982 Constitution, as well as the 1954 Constitution, obeys the principle of “democratic centralism”.⁵ It is a principle intended as different from the “separation of powers”.⁶ It means that supremacy of the People’s Congresses is reflected in that they create, supervise and hold responsible other state apparatuses of the same level, and the local government is under the leadership of the central. But it is not through constitutional review to fulfil it, nor there is provision for the review sanctioned. Instead, it is through a mechanism of “Report” and “Record” that local regulations are reviewed and repealed, and a concrete procedure for these practices is not made clear till the promulgation of *Legislation Law of People’s Republic of China* in 2000.⁷ The second section of Article 90 especially attracts attention as it provides that besides state organs⁸ specified in the first section of Article 90, a social group, enterprise, or institutional organization or a citizen may also send a request for review. This citizen empowerment⁹ is especially exciting for

⁴ Luhmann (2004) 409

⁵ In Article 3 of the 1982 Constitution, “Democratic Centralism” is explained as, “(1) The National People’s Congress and the local People’s Congress at different levels are instituted through democratic election; (2) All administrative, judicial and procuratorial organs of the state are created by the People’s Congress to which they are responsible and under whose supervision they operate; (3) the division of function and powers between the central and local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities.

⁶ Glenn D. Tiffert (2009) ‘Epistrophe: Chinese Constitutionalism and the 1950s’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan).68

⁷ Legislation Law of People’s Republic of China (2000), could be found at: <http://www.china.org.cn/english/government/207420.htm>

⁸ They are the State Council, the Central Military Committee, the Supreme People’s Court, the Supreme People’s Procurate, the various special committees of the Standing Committee and the standing committee of the People’s Congresses of various provinces, autonomous regions and municipalities directly under the central government

⁹ Keith J. Hand (2009) ‘Citizens Engage the Constitution: the Sun Zhigang Incident and Constitutional Review Proposals in the People’s Republic of China’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan) 231-232

the “rights-defence movement” advocates.¹⁰ Following its promulgation, in 2003, a series of cases using this article to request constitutional review emerged in China. The most famous is the Sun Zhigang Incident.

In mid-March 2003, Sun Zhigang, a 27-year old man from Hubei province, was stopped by policemen outside an Internet Café on the outskirts of Guangzhou. Although Sun’s stay in Guangzhou was legally granted, he was not carrying his identification card. As a result, he was detained on the suspicion that he was an illegal migrant, held overnight, and transferred to Guangzhou “Custody and Repatriation (C & R)” centre. He died several days later and his body showed signs of abuse and an autopsy found that he died of injuries. With reports by newspapers, public opinion was inflamed and there was demand for authorities to investigate. Thirteen suspects were arrested and eight of them were charged with directly beating Sun. In early June, twelve of them were convicted and given sentences.¹¹

Legal reformers viewed this incident as a chance to challenge the C & R system and to establish a precedent for constitutional review of regulations in China.¹² C & R measures are a form of administrative detention closely connected to the control of migration of peasant workers, and it gave civil affairs and public security bureaus unchecked power to invade civil rights prescribed in the constitution.¹³ To repeal it would mean citing the Constitution to examine the national law and put constitutional review into practice, even though not through the court. However, the result was both successful and compromised. Instead of declaring invalid the C & R system, the State Council replaced it with a new regulation named *Measures on the Administration of Aid to Indigent Vagrants and Beggars*, which required establishment of voluntary aid stations and prohibited forced repatriations.

Cases after this incident have shown less degree of success, especially as tactical dealings were preferred to application of the repeal power.¹⁴ And the more politically oriented cases are, the less will they be tolerated. As advocates find about this strategy, the key flaw

¹⁰ Eva Pils (2009) ‘Rights Activism in China: the Case of Lawyer Gao Zhisheng’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan). 243

¹¹ I derived descriptions from Hand (2009), 222-224.

¹² On May 14th, 2003, Yu Jiang, Teng Biao and Xu Zhiyong, who were doctors in law had submitted their review appeal to NPCSC claiming the C & R was a measure constraining citizens’ civil freedom that was contradicting constitutional protections. After that, on May 23rd, 2003, five legal professors—He Weifang, Sheng Hong, Shen Kui, Xiao Han, He Haibo -- had appealed to the NPCSC for instigating the special investigatory committee prescribed in article 71 of the Constitution.

¹³ See Hand (2009)

¹⁴ See Hand (2009) 237

in this procedure is that it does not prescribe that the Standing Committee of National People's Congress (NPCSC) must respond to the review request, thus there are no forces to push through the review. One famous scholar in China, He Weifang, insists in another direction on a strategic use of Article 71 of the 1982 Constitution, which allows for the establishment of an investigatory committee by the NPCSC for particular issues when necessary. This, for He, could help found a constitutional committee similar to the French Constitutional Council.¹⁵

But all these controversies could be directed to the *legal implications* of China's constitution. Even it is not understood in the American model, the term of "constitutionality" implies at least some legal procedures to sanction accountability, other than NPC's voluntary responses. This is based on a functional understanding of constitutionalism and the study of comparative constitutions. It, nevertheless, conflicts with a rigid and literal reading of China's socialist constitutional structure borrowed from the 1936 USSR Constitution.

Let me firstly distinguish several terms to clarify the extent of how 'legal' China's constitution could be, such as "constitutional review", "application of constitution", "constitutional interpretation", "legal review", "legal interpretation" and "application of laws". As I have written above, there is no special provision for constitutional review sanctioned.¹⁶ Regarding constitutional and legal interpretations, powers are entrusted to NPCSC [Article 67(1)]. But by means of the 1981 "Decision" (Article 2),¹⁷ power of legal interpretation is also entrusted to the judiciary when they are applying law to adjudicate *concrete cases*. To summarize, China's constitution sets itself as an abstract and political document. It is not treated as other regulations and constitutional provisions must be concretized through legislation so as to be applied in the court. This abstract/concrete distinction decides the division of labour and the generation of law in China is best

¹⁵ Weifang He and Yongqin Su (2006) 'Judiciary Reform and Social Transformation' (Si Fa Gai Ge Yu She Hui Bian Qian), (Lecture on July 16th, 2004 in Peking University) available at: <http://www.china-judge.com/ReadNews.asp?NewsID=2033&BigClassID=16&SmallClassID=16&SpecialID=28>, (accessed on December 7th, 2014)

¹⁶ Yu Xingzhong argues, "In 1955, the SPC declared the use of constitutional provisions in criminal adjudication inappropriate (see SPC 1955). In 1986, the SPC again made it clear that the Constitution should not be cited in adjudicating cases (see SPC 1986). As a result, many of the fundamental rights (and duties) specified in the Chinese Constitution remain true only on paper." See Xingzhong, Yu (2009) 'Western Constitutional Ideas and Constitutional Discourse in China: 1978-2005', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan).119

¹⁷ A Decision on Strengthening Legal Interpretation by NPCSC (Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Jia Qiang Fa Lv Jie Shi Gong Zuo De Jue Yi), issued on June 10th, 1981, available at: http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5004401.htm, (accessed on December 6, 2014)

understood as “legislation *in accordance with* the constitution”.¹⁸ Yet the 1981 “Decision” creates another distinction between the abstract and the concrete based on *cases*. Therefore, the two definitions of “the concrete” will have collision if a litigant cites constitutional rights in a concrete case adjudication, whether the courtroom has the right to interpret and decide.

This is especially raised in the *Qi Yuling* case.¹⁹ It was initially a civil law case that the defendant had misused the litigant’s name to enter into a college and worked for ten years after graduation till it was found out. The litigant sued her based on the “right to name” of the Civil Law, and “right to education” of the Constitution. The trial court supported the first while declined to provide remedy for the second, according to that the constitution should be applied only through channelling into laws. The litigant appealed. The applicant court filed an inquiry concerning the issue of application of constitution in this case to the Supreme Court, and the latter issued a reply named “Response regarding whether one who violated the constitutionally protected basic right to education of the citizen should bear civil obligation” and expressed the approval. After the case, the vice president of the Supreme People’s Court, Huang Songyou, published a paper to compare this case to “*Marbury v. Madison*”, and the first case of “Constitutional Adjudication” in China.²⁰

This advance in rights strategy is not agreed by some constitutional scholars, especially because it is affiliated to a private law case while constitution is categorized as public law and regarding state actions.²¹ So this case rather decentres the use of constitution for constraining state powers. This is not a fair argument though, as the issue also concerns whether constitutional rights *should* be concretized in civil laws so that public obligations to provide sufficient rights protection are involved. The scholars’ doubt is rather toward whether Huang’s optimism about a new constitutional mechanism is too early to lift the doctrinal distinction. This conflation between “illegality” and “unconstitutionality” is

¹⁸ In Tong Zhiwei’s arguments, he calls them as “enabling legislation” that constitution could only be applied indirectly.

See Zhiwei, Tong (2009) ‘China’s Constitutional Research and Teaching: A State of the Art’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan).107

¹⁹ Supreme People’s Court (PRC). 2001. Response regarding whether one who violated the constitutionally protected basic right to education of the citizen should bear civil obligation (Guan Yu Yi Qin Fan Xing Ming Quan De Shou Duan Qin Fan Xian Fa Bao Hu De Gong Min Shou Jiao Yu Quan De Ji Ben Quan Li Shi Fou Ying Cheng Dan Min Shi Ze Ren De Pi Fu).

²⁰ Songyou, Huang (2001) ‘Judicialization of the Constitution and its Significance: On One of Today’s Replies of the SPC, (Xian Fa Si Fa Hua Ji Qi Yi Yi—Cong Zui Gao Ren Min Fa Yuan Jin Tian De Yi Ge Pi Fu Tan Qi) *People’s Court Daily (Ren Min fa Yuan Bao)*, August 13th, available at <http://www.gongfa.com/huangsyxianfasifahua.htm> (accessed on December 9th, 2014)

²¹ See Tong (2009)

opposed by Tong Zhiwei, as “at the present time, the biggest threat to the development of constitutionalism in China still stems from ‘public and quasi-public bodies’”.²² If the “unconstitutional” encompass the behaviour of the private, he worries that it will be more difficult for state powers to be constrained by the constitution.²³ In 2008 SPC’s work report, since this “response” was not cited again and in China’s civil law system it does not have effects of precedents, it was removed from the collection of the SPC Report.²⁴

Different from the issue of “Constitutional Review” as in the “*Seed Law*” case,²⁵ Qi’s case is regarding “judicialization of the constitution”, especially influenced by the American constitutional model. Its starting point is a functional “ought” that constitution is law and then should be put into judicialization. But it is at this point where deeper disagreements about the constitutional structure of China are involved. The “democratic centralism” and its sanctioning on the constitution as *abstract* produces a dilemma that it is constitutionally prescribed immunity for the constitution from being applied. The channel of legislation as the only means to concretize the constitution from a political document to laws, however, is ineffective and unresponsive to the needs of rights protection that are on the rise. ‘Rights strategy’, though could not rigidly read as part of the constitutional structure in China shows dissatisfaction toward the concretization-through-legislation mechanism, which is lagged behind remedy of rights.

Liberal-oriented scholars argue in an opposite way to the rigid understanding of the constitutional structure. For them, firstly, constitution is a ‘law’ that must be realized in adjudication. Then courts should have powers to interpret it in cases when litigants claim their constitutional rights. And thirdly, though the constitutional text explicitly entrusts NPC and NPCSC the interpretation power, it is not monopolized by them. But in this argument, the divide between the ‘constitutional’ and the ‘legal’ in the Chinese context is

²² Tong (2009) 107

²³ Tong (2009) 107

²⁴ Yu (2009) 124

²⁵ In May 2003, Li Huijuan, a judge on the Luoyang Intermediary People’s Court in Henan province, in a case concerning the validity of a seed contract, found a local price regulation in conflict with national Seed Law and declared the regulation invalid. Henan People’s Congress considered that her deed constituted a constitutional review, overturned her judgment and requested the Intermediary Court fire her. Though Li did have an option to apply the higher law without declaration of invalidity of the regulation, she explained that she was just trying to strengthen legal reasoning in her judgment in accordance with the requirements of the Supreme Court.

Stephanie Balme (2009) ‘Ordinary Justice and Popular Constitutionalism in China’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan). 180

from the start blurred. Now it is clear that the question concerning whether China should build up judicial constitutionalism is embedded in a deeper argument about what nature China's constitution has.

Here lies the complexity of China's constitutional changes that have not been explored by these majority writings on specific mechanisms of judicial autonomy. The key question is in fact the "telos" of constitutionalization. Is China developing for a "socialist" legality with its own characteristics or is she just in the process of realizing the western constitutional model, as the IRI theory (Imperfect Realization of an Ideal) assumes? The evaluation of constitutional changes also depends on the projection onto China's constitutional future. Here in the following section, I explore the prevalent constitutional scholarship throughout China's 1980s and 1990s, which I call China's legal constitutionalism.

2. Legal constitutionalism in China

As strengthening of judiciary power is a strong theme, there are abundant empirical studies by Chinese or foreign researchers on autonomy of courtrooms²⁶ and obstacles to it, such as the existence of adjudicative committees,²⁷ and the individual case supervision by the People's Congress.²⁸ The adjudicate committees are set up in every People's Court at every level of the judicial system as a consultative committee when the cases at hand are complex. This meeting behind the courtroom and its administrative trait has long been criticized as violating the rule that judges of the trial should only obey the law, and only judges hearing cases could decide. Individual case supervision is exemplified in the *Seed Law* case that the People's Congress at the same level could supervise outcomes of judgments and require retrial of the cases, and even remove the judges. This administrative and legislative interference of the trial process has long been condemned as main obstacles

²⁶ e.g. Benjamin L. Liebman (2007) 'China's Courts: Restricted Reform', (2007) *The China Quarterly* 191: 620-638; Donald C. Clarke (2003b) 'Empirical Research into the Chinese Judicial System', available at SSRN: SSRN: <http://ssrn.com/abstract=412660> or doi: 10.2139/ssrn.412660

²⁷ prescribed in *Organic Law of the People's Courts of the People's Republic of China* (1979) (Article 10)

²⁸ e.g. Randall Peerenboom, 'What Have We Learned about Law and Development? Describing, Predicting and Accessing Legal Reforms in China', (Spring 2006) *Michigan Journal of International Law* 27(3): 823-871

This additional review procedure could be initiated by interested parties who petition the court, procuratorate, or the people's congress to challenge a legally effective decision on their behalf. this innovative practice, though contradicts the principle of 'separation of power', in China's context, should be viewed as a form to balance 'judicial independence' with 'judicial accountability', Peerenboom argues.

to judicial autonomy. Besides that, there are other concerns on implementation and enforcement,²⁹ legal aid and legal profession,³⁰ etc. that touch the importance as well as difficulties of building up a modern legal system in China.

‘Legal constitutionalism’ in China is indicating propositions that intend to take the courtroom as the chief agent for advancing constitutional reforms in China, due to the lack of it in China. The American model and the competence of its judiciary in dealing with highly political issues are admired by Chinese scholars.³¹ In Chinese context, appeal of constitutional adjudication has a conflation with demands of judicial autonomy, as grabbing power of constitutional interpretation is supposed to enable a shift in balance of powers between the party and the judiciary, and between the legislature and the judiciary. But it is to advance a more demanding goal of judicial constitutionalism when the basic requirement of judicial autonomy in China is not guaranteed. The case of “Marbury v. Madison” has a clear imprint in this proposition -- a belief in the miracle that the inferior status of the judiciary could be addressed by judicial activism. There are three schools discernible in putting the judiciary at the centre stage of China’s constitutionalization.

2.1. Three schools of legal constitutionalism

Jiang, of China’s political constitutionalists, summarizes there are three schools insisting on legal constitutionalism in China as his opponents, namely, the schools of “constitutional interpretation”, “normative constitutionalism” and “constitutional adjudication”.³²

However, the differences among them are not dramatic, as I will explain. The first school proposes to deploy a purposeful interpretation in accordance with the constitutional *spirit* when ordinary courts adjudicate cases.³³ Through this, constant constitutional changes

²⁹ e.g. Donald C. Clarke (1996) ‘Power and Politics in the Chinese Court System: the Emergence of Civil Judgments’, *Colum. J. Asian L.* 10(1): 1-92; Donald C. Clarke (1995) ‘The Execution of Civil Judgments in China’, *The China Quarterly* 1995(141): 65-81

³⁰ e.g. Benjamin L. Liebman (2007) ‘Lawyers, Legal Aid, and Legitimacy in China’, in William P. Alford (eds.) *Raising the Bar: the Emerging Legal Profession in East Asia*, (Harvard University Press), pp 311-356

³¹ See He and Su (2006)

³² Jiang has suggested another three names for the three schools: “normative constitution”, “school of constitutional revolution” and “constitution adjudication”. In my category according to these scholars’ own claims, I in fact combine the first and second categories made by Jiang into “normative constitutionalism”, and separate the “interpretation” group from the “adjudication” group.
see Jiang (2010) 12-46, 15

³³ See Dayuan, Han (2005) ‘On Validity of the Constitutional Interpretation (Shi Lun Xian Fa Jie Shi De Xiao Li)’, available at: <http://www.yadian.cc/paper/20038/>, (accessed on December 6th, 2014); Dayuan, Han and Xiang, Zhang (1999), ‘On the Objectivity and Subjectivity of Constitutional Interpretation (Shi Lun Xian Fa Jie Shi De Ke Guan Xing Yu Zhu Guan Xing)’, available at: <http://www.hflib.gov.cn/law/law/falvfagui/xf%20gjf/LWJ/LWJ%201022.htm> (accessed on December 6th, 2014); Dayuan, Han (2004) ‘The Normative Analysis of ‘Protection of Human Rights’ in the Constitutional

could be avoided, as amending still is a resort to politicization which is not good for stabilization of the constitutional authority in China.

“Normative constitutionalism” criticizes the school of “constitutional interpretation” as “legal fetishism”. This is because China’s social transformations have spread far beyond prescriptions in the written constitution. The term “benign unconstitutionality” implies a dilemma that though beneficial in the long term, these social changes could not be contained within constitutional prescriptions. Hence a strictly interpretative model has to be postponed in application until new norms are promulgated, which is tasked by “normative constitutionalism”. Hence this school is not opposing the interpretative approach but worrying this ‘fetishism’ will be too restrictive when China’s social changes are great and far from being stabilized. What is stressed here by “normative constitutionalism” is that constitutionalization is a process of joint efforts from extra-legal and societal forces in forwarding reforms in private law and in building up China’s civil society.³⁴ What is important does not in unearthing the spirit from the written constitution but in forming constitutional *conventions* across the society. However, this school will be unable to distinguish what social experiments are “normative” from what is not, unless in accordance with the spirit of constitutionalism, such as human rights. In this sense, the two schools are rather in a co-referential relationship.

Ji Weidong and He Weifang are “neo-proceduralists” in China. He is the main advocate of legal professionalism and judicial reform, and argues that the traditional role of Chinese judges was an office charged with comprehensive tasks of a community. In this community, everyone knows each other (a society with no strangers);³⁵ hence there was neither division of labour nor needed. This resembles the *Khadi* Justice of Weber’s account. But when China moves to a modern, differentiated society, this could no longer be sustained. Constitutionalization must put emphasis on autonomy of the legal profession and consolidate a professional community based on specificity of legal reasoning.³⁶ A trial-flow tracer system of cases through the website is put forward by Ji, as this system could enhance transparency and supervision of the process of adjudication and welcome

Text” (Xian Fa Wen Ben Zhong Ren Quan Tiao Kuan De Gui Fan Fen Xi), available at: http://www.chinalawedu.com/news/16900/171/2004/8/ma81553848341118400276368_128117.htm, (accessed on December 6th, 2014)

³⁴ Lin Laifan (2001), *From Constitutional Norms to Normative Constitution* (Cong Xian Fa Gui Fan Dao Gui Fan Xian Fa), (Beijing: Law Press). 284 and 293

³⁵ Weifang He (2005) ‘Chinese Culture and Chinese Legal Science’ (Zhong Guo Wen Hua Yu Zhong Guo Fa Xue), Lecture at Beijing University of Agriculture, available at: <http://www.aisixiang.com/data/7518.html>, (accessed on December 7th, 2014)

³⁶ He and Su (2006)

social comments.³⁷ Ji claims that he is inspired by theories of Niklas Luhmann, Gunther Teubner and Jurgen Habermas, which in common emphasize access to court and communication.³⁸ By submitting to the judicial procedure, a forum for social interaction will be opened. The ideological streak of “socialism” will be de-ideologized into the “social”,³⁹ and transformed to be a “social rechtsstaat”⁴⁰ as he calls it.

Ji is fully aware of the shortcomings of a “procedural” proposition, but he argues once the legal reform is finished, China’s political reform could be put on agenda afterwards. The two ideas of “thick” and “thin” constitutionalism are in fact complementary rather than antagonistic. As he puts it,

“Once judicial reform in China goes deep enough to effect the establishment of judicial constitutional review ... even extraordinary politics can be subject to legal channelling, as the people will be able to reject any kind of extralegal power. Of course, such reforms cannot be fulfilled automatically. Social pressures are indispensable for inducing legal introspection into governmental decision-making.”⁴¹

Ji hence holds the belief of a court-centred social engineering. Strengthening the judiciary is what China needs at present, while a well-stabilized judicial system could then reach out to more radical changes.

Legal constitutionalism of the three schools all make contributions to China’s legal professionalization, which to some degree does construct social expectations and a forum for communication. However, the problem they share in common is what limits of legal discourses lie in the evolutionary process. For example, what constitutional spirit is embodied in interpretation? Could normative constitutionalism produce an accommodation between the full protection of property rights and the socialist principle? How to reconcile the legislative review of NPC and NPCSC sanctioned in the constitution, with the court-based neo-proceduralism? There seems always a moment that the principle of

³⁷ Weidong Ji (2009) ‘To Take the Law as the Public: The diversification of Society and Legal Discourse in Contemporary China’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan) 138

³⁸ Weidong Ji (Dec 2003) ‘Normative Structure of the Constitution’ (Xian Fa De Gui Fan Jie Gou). *21st Century* (Er Shi Yi Shi Ji). Available at: http://www.chinalawedu.com/news/15300/157/2003/12/li8752123734192213002124736_93996.htm, (accessed on December 7th, 2014)

³⁹ Ji (2009) 140

⁴⁰ Ji (2009) 140

⁴¹ Ji (2009) 140

‘democratic centralism’ will have to concede its orthodox understanding to reforms based on rights strategy, or vice versa.

This draws us to the default problem that China’s constitutional prescriptions are channelled through concrete laws. While improving and enriching legislation could compensate for deficits, rights without remedy will appear when there are no or insufficient laws to concretize legal protection of human rights, which calls into question the proper guardian of China’s constitution. This is especially the cases of political rights and some politically sensitive social rights in China.⁴² Gao Zhisheng, who used to be an exemplary lawyer, turned to the ‘Hunger protest’ when he found that infringement of freedom of religion by administrative regulations could not be heard in the court due to the procedural exclusion of “abstract” cases (according to Article 12 of *Administrative Litigation Law*).⁴³ As Fu Hualing puts it, this no-resolution forces “human rights lawyers up the ladder”.⁴⁴

2.2. Peerenboom’s “thin” Rule of Law and articulation of law and development

The court-centred paradigm is also manifested in writings of Randall Peerenboom, who writes comprehensively on Chinese and East Asian legal systems; but in a more theoretical sense about ‘human rights jurisprudence’. In opposition to Clarke, Peerenboom argues that the analogy of China’s present legal system to a movie industry is undermining the three-decade developments in China and is an ideological thinking. Toward deficits of China’s judicial reform compared to the ‘Rule of Law’ ideal, Peerenboom suggests it as an “articulated” variant. Instead of the “lofty” arguments that separate liberal views of individual rights on one side and emphasis on collective interests and social stability in Asia on the other side,⁴⁵ a more proper resolution would be to study particular practices on particular occasions.⁴⁶ This gives the “articulation” thesis of rights by Peerenboom.

⁴² Randall Peerenboom (2009a) Economic Development and the Development of the Legal Profession in China, available at SSRN: <http://ssrn.com/abstract=1342287>

⁴³ Pils (2009) 250

⁴⁴ Fu Hualing and Richard Cullen (2011) ‘Climbing the Weiwan Ladder: A Radicalizing Process for Rights-Protection Lawyers’, *The China Quarterly* 205: 40-59.

⁴⁵ Randall Peerenboom (2004) ‘Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia’, *Duke Journal of Comparative & International Law* 15(1): 75-152.

⁴⁶ Randall Peerenboom (2003a) “Beyond Universalism and Relativism: The Evolving Debates about ‘Values in Asia’”, *Indiana International & Comparative Law Review* 14(1): 1-86. 48

“At the heart of the argument was the claim that the interpretation and implementation of rights does and should depend to some degree on local circumstances, including not just values, but levels of economic development; political institutions and beliefs; legal institutions, doctrines and practices; ethnic diversity; the presence of terrorists and other such factors.”⁴⁷

Therefore, a “thin” rule of law to lay the common ground is adopted as the methodology of Peerenboom in observing China.⁴⁸ But what constitutes the “thin” one is unclear. For Peerenboom, this controversy is rather because it is not “thin” enough but already laden with “thick” values.⁴⁹ In China, four paradigms could be discerned for possible articulations in the future, namely, Liberal Democratic, Statist Socialist, Neo-authoritarian, and Communitarian.⁵⁰ This contingent articulation, for Peerenboom, will not affect a proper definition of the legal system shared universally. In this sense, Peerenboom professes his loyalty to legal constitutionalism that legal institutions could keep their minimum functions while be invested with local values and needs.

Thirdly, with such a configuration of institutions and values in mind, Peerenboom pays special attention to “law and development” proposition. He argues that, “empirical studies have repeatedly demonstrated that wealth is more important factor than regime type even with respect to civil and political rights”.⁵¹ Hence, “tradeoffs” are necessary. For Peerenboom, “authoritarian regimes are better suited to lower levels of development because they can force through tough economic decisions and maintain social stability”,⁵² and “the human rights benefits of democracy may occur only once democracy is consolidated”.⁵³ As a compromised “Washington Consensus”, the East Asian model proves

⁴⁷ Randall Peerenboom, ‘An empirical overview of rights performance in Asia, France and the USA: The dominance of wealth in the interplay of economics, culture, law and governance’, in Randall Peerenboom, Carole Peterson and Albert Chen (eds.) *Human Rights in Asia: A comparative legal study on twelve Asian Jurisdictions, France and the USA* (London and New York: Routledge), 36

⁴⁸ Randall Peerenboom (Spring 2002) ‘Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China’, *Michigan Journal of International Law* 23(3): 471-544.

⁴⁹ Ibid. 481 and 485

⁵⁰ Ibid. 486

⁵¹ Randall Peerenboom (2005) ‘Assessing Human Rights in China: Why the Double Standard?’ *Cornell International Law Journal* 38(1): 71-172. 154

⁵² Randall Peerenboom (2009b) ‘Rule of Law, Democracy and the Sequence Debate: Lessons from China and Vietnam’, available at: <http://ssrn.com/abstract=1447051>. 10

⁵³ Randall Peerenboom (2006b), ‘An empirical overview of rights performance in Asia, France and the USA: the dominance of wealth in the interplay of economics, culture, law and governance’, in Peerenboom, Randall, Petersen, Carle J. and Chen, Albert. H. Y. (eds.), *Human Rights in Asia: A comparative legal study of twelve Asian jurisdictions, France and the USA* (New York: Routledge) 36

to be a better approach.⁵⁴ Peerenboom argues that development of democracy in one country should be evaluated against the income class it belongs to, rather than the Western income class. China as a lower-middle income country has done comparatively well, and a socially stable and economically developed country is more inclined to pursue democracy sooner or later. In this sense, Peerenboom does not agree that China is “trapped in transition”⁵⁵ or shows “more murder in the middle”⁵⁶. It has not fundamentally derailed from the East Asian Model as Japan and Taiwan underwent before.

Instead of directly being involved in the heated debates on whether China has a legal system proper, Peerenboom’s approach has simplified the circumstances of China’s judicial system. And he has given a very vague or symbolic formula of his ‘thin’ Rule of Law.⁵⁷ For Peerenboom, this reduction enables communication across legal systems about human rights. But more than a methodological problem, this *articulation* of values already serves as a “value simpliciter”.⁵⁸ For one thing, it singles out legal institutions as a universal good, overriding other goods in ranking; for another thing, its emptiness is always subject to “tradeoffs” with “development” logic and receptivity of social circumstances. This makes Peerenboom both a defender of China’s legal constitutionalism, while maintaining the affinity with economic constitutionalism in China.

⁵⁴ As Peerenboom puts, “The EAM or developmental state model involves a pragmatic approach to reforms...with governments adopting most of the basic macroeconomic principles of the WC for the domestic economy; ... and modifying the prescribed WC relationship between the domestic and global economy by gradually exposing the domestic economy to international competition while offering some protection to key sectors and some support to infant industries.”

Randall Peerenboom (2009c) ‘Middle Income Blues: The Eastern Asian Model and Implication for Constitutional Development in China’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan).84

⁵⁵ Randall Peerenboom, (2008), ‘Law and Development in China and India: The Advantages and Disadvantages of Front-Loading the Costs of Political Reform’, *La Trobe Law School Legal Studies Research Paper* No. 2008/15. Available at SSRN: <http://ssrn.com/abstract=1283209> or <http://dx.doi.org/10.2139/ssrn.1283209>. 8

⁵⁶ It means that as political space opens, the ruling regime is subject to greater threats to its power so resorts to violence.

See Peerenboom (2008). 13

⁵⁷ Peerenboom argues its traits as “stability”, “securing government in accordance with law”, “predictability” and “fair resolution of disputes”.

See Peerenboom (2002) ‘Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China’, 480

⁵⁸ Emiliios Christodoulidis (2013) ‘On the Politics of Societal Constitutionalism’, *Indiana Journal of Global Legal Studies* 20(2) 632

3. Summary of this chapter

In this chapter, I have selectively chosen one side of the story about China's constitutionalization to tell, which is also the one usually narrated by constitutional scholars. In their writings, after the Cultural Revolution, China has realized the importance of constitutional government and a three-decade march to Rule of Law starts. Glenn Tiffert has acclaimed that,

“Following Mao's death and the fall of the Gang of Four, Deng Xiaoping steered China away from the radical leftism that had shaped its Constitutions of 1975 and 1978, and back to an evolutionary path that recalled the mid-1950s emphasis on socialist legality and modernization ... The resulting 1982 Constitution, which remains in effect today, anchored the post-Mao transformation of China and provided the space for jurists...to restore the legal and legislative machinery of the state; to reconstitute the legal profession and rebuild legal education; and in time, to re-open suppressed debates on marketization, democracy, rule of law, and human rights.”⁵⁹

Though I agree that building up the legality of the 1982 Constitution and strengthening judicial autonomy are needed in China, it does not mean legal constitutionalism and its focus on the miracle of “Marbury v. Madison” is the only paradigm. Rather it is projected by China's scholars who fasten on the American constitutional model and the court-centred paradigm is implanted as an ideal irrespective of the “receiving” constitutional structure and the principle of “democratic centralism”. This leads to a partial interpretation of the 1982 constitution that must exclude the preamble as part of the constitution. It has a simplification effect on controversies about the legal *nature* of China's constitution in the first instance.

It is true of course as Tong comments, legal constitutionalism has contributed to China's legal education in the past decades.⁶⁰ Through them, China's constitution is discussed as a legal subject and put in a track of “rights talk”.⁶¹ From the base of their arguments, they are concerned with what *should* function as a constitution in China, than what *is*. Hence they were rightly criticized as ignorant of socialist orthodoxy and China's own case law.⁶²

⁵⁹ Tiffert (2009) 72

⁶⁰ Tong (2009) 101 and 104

⁶¹ Yu (2009) 117

⁶² Tong (2009) 102

While they are right in distinguishing constitutionalism from pure politics; for their opponents, if the text of the 1982 Constitution does not stipulate a judicial mechanism to materialize the rights articles,⁶³ then scholars of legal constitutionalism are equally fantasizing an ideology external to the constitutional text, even though not the orthodox one.

This argument is no longer about values of human rights or judicial autonomy, but about the *paradigm* projected by legal constitutionalism that China's constitutional future depends solely on institutional building of the judiciary and judicial activism to effectuate the whole process of constitutional reforms. But seen from the other side, it rather means the societal effects of the 1982 Constitution itself and its taking root is uncertain. It is better to put China's constitutionalization in its context of *transformation* rather than imagine the 1982 Constitution establishes *the* legal tradition from a vacuum. It is also necessary to put the legalization phenomena along with the inquiry about the functions of positive law in *ordering* the whole society. In the next chapter I will pursue complexification of three orders entangled in the constitutionalization process in contemporary China: socialism, legalization and marketization. Through this discussion, I intend to explain *why* building up the legality of the Constitution could not be decoupled with social and political conditions. It also detects the flaw in Peerenboom's professed socio-legal research, where the democratic deficit in China's constitutionalization compared with the "development" theme is not addressed. This calls for a sociological study of constitutionalization in China in lieu of a purely normative study on law and application.

⁶³ Duanhong Chen, (2010) 'Logic connection between constituent Power and fundamental laws (Zhi Xian Quan Yu Gen Ben Fa De Luo Ji Guan Lian), (Lecture at Peking University), Available at: <http://www.gongfa.com/html/gongfapinglun/20101204/1537.html> (accessed on December 10th, 2014)

Chapter 2.

Continuity or Discontinuity – Three Orders in China’s Constitutionalization

Introduction

This chapter proceeds with the question that is left in the first chapter. The judicialization of the 1982 Constitution relies on social conditions to support the institutional building and hold other state apparatuses accountable to Rule of Law. It reveals the deficit in legal constitutionalism that the court-centred paradigm could not be decoupled with changes in social environments, especially the transformation from orthodox socialism to a modern legal and political system.

This brings the *continuity and discontinuity* question to the fore of constitutional debates. Should promulgation of the 1982 Constitution radically convert the social and political bases of the embedded order? And how should we perceive the relationship between the 1982 Constitution and its forerunners?

On the other hand, *changes* are acknowledged and even actively pursued. The thirty-one articles in the four amendments encompass vast changes throughout the 1980s to the new century. To merely say that China marched from “socialist revolution”, to “socialist construction” and now “socialist modernization”, is an ambiguous and somewhat unconvincing way to prove continuity of socialism. In this chapter, I take the continuity and discontinuity question as a *hypothesis*, and discern three orders entangled in contemporary China.

In this sense, I suggest that the 1982 Constitution lies at a crucial standpoint. Apart from the first order of institutionalization of state apparatuses and building up the constitutional legality as I explained in the first chapter, the 1982 Constitution professes its continuity with socialism in preserving socialist ownerships and the Party leadership of the political life; while in the meantime, adjustments are made to accommodate modern legal and economic developments. This hybridity is condensed in the revealing terms in the

constitution, namely, “socialist market economy” and “socialist Rule of Law”. In this chapter, I will firstly turn to the second order of socialism and then the third order of marketization. In the last section, I will problematize how the three orders, including legalization in the first chapter, are entangled in contemporary China.

1. The socialist base of China’s constitutions – the second order

As I have stated in the previous chapter, legal constitutionalism is prone to take the 1982 Constitution as a new chapter in China’s history. But the 1982 Constitution still claims to be a socialist constitution, and in emphasizing smooth succession, it also professes the start of “socialist modernization” following socialist “revolution” and “construction”. What is needed is an interpretation of how socialism and its institutional basis evolve so as to answer the question of continuity and discontinuity.

1.1. The founding of the first socialist constitution in China

The first socialist constitution in the history of PRC is the 1954 Constitution. But before it, there is an interim constitution – the “Common Program”¹ – that was adopted on September 29th, 1949, right before the foundation of PRC. It was intended to work as a preparation program till the passage of the first constitution and worked along with the *Organic Law of the Central People’s Government* as the effective constitution from 1949 to 1954. This arrangement is due to the complex social and class relations at the founding phase of PRC. The military control was yet to be ended, and the CCP still relied on “the people’s democratic united front” to integrate the whole country. The “front” was “composed of the Chinese working class, peasantry, petty bourgeoisie, national bourgeoisie and other patriotic democratic elements, based on the alliance of workers and peasants and led by the working class.”(Preamble)

There were two tasks to be fulfilled by the “program”, which were prescribed in articles 3, 26 and 14. Article 3 stipulated the transformation of feudal and semi-feudal land ownership to peasant land ownership.² Hence it was not yet a socialist constitution. Also under

¹ See “Common Program of The Chinese People’s Political Consultative Conference”

² In Mao’s paper of *The Chinese Revolution and the Chinese Communist Party*, Mao clarifies the specific circumstances of the Chinese Revolution. China had a long period of feudalism, in the later period of which, a seed of capitalism had already been planted. If there was no invasion of foreign capitalism, China would have gradually and slowly

Article 26, the economic policy was to take account of “both public and private interests, of benefiting labour and capital, of mutual aid between the city and countryside, and circulation of goods between China and abroad.” It was called a “social economy” with all components playing their respective parts, which would not be changed till collectivization of means of production in the 1950s. Only “(b)y the end of 1960, China had left the ‘new democracy’ stage of development and entered the socialist stage.”³

The other main task sanctioned by Article 14 is the end of military control and the convening of local people’s congresses. It was planned that when military operations and agrarian reform had been thoroughly completed, elections of Local People’s Congresses would be held on the principle of universal franchise. Before that, the Chinese People’s Political Consultative Conference (CPPCC) would act as the “organisational form of the people’s democratic united front” before the “convocation of the All-China People’s Congress” (Article 13). The “Common Program” hence mainly conditioned China’s transition from feudalism and semi-feudalism, which was the task of “New Democracy” or “the People’s Democracy” (preamble). The united front organized by the CPPCC should surrender its function when universal franchise was completed and turn into an agent to “submit proposals on fundamental policies” to the All-China People’s Congress (Article 13). For Chen Duanhong, the “Common Programme” found the nation,⁴ but did not finish the state-building. This argument left an impact on China’s constitutionalization and constitutional debates about its political nature.

In 1952, when considering whether the CPPCC should hold its second session, a choice was made between the maintenance of the status quo and the option to “supersede it by

developed into a capitalist society. Foreign economy accelerated the disintegration of China’s social economy. China’s society hence was transformed into a semi-colonial and semi-feudal society. This *twofold* tasks against feudalism as well as imperialism thus shaped China’s Communist Party and China’s Revolution into a different form. Before the advent of Socialist revolution and democracy, China had to undergo a phase of ‘new democracy’. During that, national capitalists, petty bourgeois and rich peasants are the revolutionary forces in alliance with proletarians; and capitalists in the imperialist countries and domestic landlords are its opponents. This ‘new democracy’ would both clear the ground for capitalism in China and created the foundation for socialism. And this Revolution were both bourgeoisie-democratic and proletarian-socialist.

Mao, Zedong (1939) ‘The Chinese Revolution and the Chinese Communist Party’, available at:

https://www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2_23.htm

³ Jerome Cohen (1978) ‘China’s Changing Constitution’, *The China Quarterly* 76: 794-841

⁴ Chen, Duanhong (2010a) ‘Logic connection between constituent Power and fundamental laws (Zhi Xian Quan Yu Gen Ben Fa De Luo Ji Guan Lian), (Lecture at Peking University), Available at: <http://www.gongfa.com/html/gongfapinglun/20101204/1537.html> (accessed on December 10th, 2014)

electing the National People's Congress described in the Common Program."⁵ While Mao Zedong and Liu Shaoqi considered that the "Common Program" worked well and the promulgation of a constitution should wait until the transition to socialism was finished, they were persuaded by Stalin that the Common Program lacked legitimacy compared to an official constitution. And "the multiparty coalition government established by the Common Program presented a grave security risk to the CCP".⁶ Hence, instead of holding on to the Common Program till the task of transformation to socialism was completed, the official 1954 Constitution came into effect before the transition was finished. This in-progress transition was included in the guideline of the Constitution (Article 4 -10).⁷

Besides the 1949 "Common Program", the 1954 Constitution derived from the 1936 Constitution of the USSR, "which exemplified for the 1954 drafters distinctively 'socialist' constitutional forms and doctrines".⁸ Compared to the "social economy" in the 1949 Common Program, the diverse categories of ownership in the Common Program (Article 26), except for the "state capitalist economy", were also preserved in Article 5 of the 1954 Constitution. Nonetheless, what was different lies in that partial collective ownership was now defined as "semi-socialist" and a *transitional* form by means of which "advance towards collective ownership by the masses of working people" (Article 7 emphasis added) would be organized (Article 8-10).

The primary achievement of the 1954 Constitution, however, is the institutional structure it laid down, which is characterised by Tiffert as "tone-setting".⁹ Chapter 2 of the 1954 Constitution stipulated the organization of state powers according to systemic division of labour between the legislative, executive and judiciary at both the local and the national levels. Additional to the constitution, there were five other regulations to specify the organization.¹⁰ Universal franchise as the mission of the "Common Program" was not realized concerning the separate representation of rural and urban residents. The 1954 Constitution referred to concrete regulations – such as the *Law on Election* -- to prescribe it.

⁵ Tiffert, (2009) 65

⁶ Tiffert, (2009) 66

⁷ Constitution of PRC (1954), Could be found at:
<http://e-chaupak.net/database/chicon/1954/1954bilingual.htm>

⁸ Tiffert (2009) 62

⁹ Tiffert (2009) 60

¹⁰ They are Organic Law of the National People's Congress of the PRC, Organic Law of the People's Court of the PRC, Organic Law of the State Council of the PRC, Organic Law of the People's Procurate of the PRC, Organic Law of the Local People's Congresses and Local People's Committees of the PRC

Tiffert gives the 1954 Constitution high endorsement, as it “heralded a brief surge of legal construction across the PRC unmatched until the reforms of the 1980s.”¹¹

One term is needed to be explained here, the “People’s Democratic Dictatorship” preserved in the preamble. This unusual combination of dictatorship and democracy is derived from Mao’s paper in 1949.¹² For Mao, this combination is to contest monopoly of the narrative of “democracy” by the bourgeoisie which they could use to appropriate who is practising “dictatorship” and “totalitarianism”. But the imperialist purpose that the bourgeois republic serves rather reveals that the so-called “democracy” is in effect “counter-revolutionary dictatorship”. As Mao puts it,

“Revolutionary dictatorship and counter-revolutionary dictatorship are by nature opposites, but the former was learned from the latter. Such learning is very important. If the revolutionary people do not master this method of ruling over the counter-revolutionary classes, they will not be able to maintain their state power, domestic and foreign reaction will overthrow that power and restore its own rule over China, and disaster will befall the revolutionary people.”¹³

So although People’s Democracy promises the extinction of classes, state power and parties, “(t)he leadership of the Communist Party and the state power of the people’s dictatorship are such conditions” for their extinction.¹⁴ The vanishing point is dependent upon an occupation of the state powers. This dual-function of state apparatuses hence made it important to distinguish “the people” from “the enemy”, as state apparatuses would work as an instrument of “violence” for oppression of antagonistic classes, but be tasked with “benevolence” and “propaganda and educational work” among the people. This internal distinction underpins the differentiated use of law which is incompatible with the notion of equality before the law. It is why scholars of legal constitutionalism try to marginalize the preamble as part of China’s constitution, and emphasize rights provisions in the content.

It is not that the 1954 Constitution did not protect rights. The whole Chapter Three was dedicated to political rights, civil rights and social benefits (Article 85-96). And after its promulgation, several of PRC’s most famous law journals were founded, a discourse on

¹¹ Tiffert (2009) 70

¹² see: Zedong, Mao, *On the People’s Democratic Dictatorship* (1949), available at: http://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm

¹³ Ibid.

¹⁴ Ibid.

“socialist legality” was initiated, combining Soviet jurisprudence and “translated notions of rule of law and constitutionalism that had entered China during the early republican period.”¹⁵ It rather concerns a positive rights conception that suggests a different relationship between rights and democracy, instead of negative liberty.¹⁶

In the “Hundred Flowers Campaign” of 1956 and 1957, during which the party encouraged citizens and especially intellectuals to openly air their opinions, some of the participants in the drafting of the 1954 Constitution publicly invoked constitutional principles to “take the CCP to task for regulating multiparty democracy, human rights, and rule of law.”¹⁷ Tiffert lamented that “(t)he Party responded with the Anti-Rightist Movement of 1957, which struck the legal and intellectual communities especially hard”.¹⁸ A series of political movements followed throughout the 1950s in China, and peaked in the Cultural Revolution starting from 1966.

The transitional task and its distinction between socialist and non-socialist elements constantly kept in tension with the constitutional framework. The continuing arguments between the political “people” and the legal “citizenship”,¹⁹ shows effort of scholars to rationalize the political definition of “who are the people” within the constitutional framework of “democratic dictatorship”.

1.2. The Peak of Cultural Revolution and the turn to the “Reform” period

The 1975 Constitution²⁰ is called a revolutionary constitution as it was promulgated in the midst of the Cultural Revolution (1966-1976). In its preamble, the 1975 Constitution claims “the victory of the new-democratic revolution and the beginning of the new historical period of socialist revolution”.²¹

¹⁵ Tiffert (2009) 71

¹⁶ Thomas E. Kellogg (February 2008), ‘Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China’, Indiana University Research Center for Chinese Politics & Business, *Working Paper #1*. Available at: http://www.indiana.edu/~rccpb/Working_Paper/RCCPB_WP1_Kellogg_Feb_08.pdf

¹⁷ Tiffert (2009) 71

¹⁸ Tiffert (2009) 72

¹⁹ Tiffert (2009) 69

²⁰ Constitution of PRC (1975), Could be found at: <http://www.e-chaupak.net/database/chicon/1975/1975e.htm>

²¹ Concerning the difference between the two revolutions, I have already explained at *Supra* n.2

Resistance to bureaucratization in accordance with the spirit of China's Cultural Revolution is expressed in the 1975 Constitution.²² It is a short constitution with only thirty articles, half of which are guidelines (Article 1-15). Also after three co-operative movements in agriculture, handicraft, and commerce in 1950s, public ownership was written into the constitution. Article 5 not only confirmed the two types of ownerships as "socialist ownership by the whole people and socialist collective ownership by the working people", but also their organizational forms as "neighbourhood organizations in cities and towns or production teams in rural people's communes". People's communes and neighbourhood organizations are the basic "political" units in the urban and the rural areas. Their political functions were prescribed in article 7, 21 and 22, as "the *permanent* organs of the local people's congresses and at the same time the local people's governments at various levels (emphasis added)."

The people's communes had brought structural changes to the constitution which was noticed by Mao in 1958, and he asked,

"Has the [establishment of the rural] people's communes violated the constitution? The issue of integrating politics and the commune, for example, was not passed by the People's Congress, nor is it in the constitution. Many parts of the constitution are obsolete..."²³

But at the other hand, these substantive changes could be said to realize the transitional mission prescribed in the constitution. With regard to rights protection, the most noticeable feature of the 1975 Constitution is how radically cut they were while people's enjoyment of "Four Grand Freedoms" was proclaimed. Article 13 stated, "(s)peaking out freely, airing views fully, holding great debates and writing big-character posters are new forms of carrying on the socialist revolution created by the masses of the people." Article 28 allowed "freedom to strike" which is neither included in the 1954 nor in the 1982 Constitution. These rights explicitly reflected the mass-line democracy. Cohen argues that the right to strike is a political weapon "for mobilizing the masses to intimidate the bureaucracy", rather than as an economic weapon in the employment conditions of the workers. These political freedoms are "tools of the Party which, at least in theory, can

²² In Cohen's paper, he argues that there were two groups in China's political context at that time. The radicals, or "the Shanghai group" argued China should not sacrifice revolutionary values to economic development and insisted on the ideological purity. "The Peking group" placed rapid industrialization before ideological orthodoxy, and they favoured "bureaucratic rationality and central planning."

Quoted in Cohen (1978)

²³ Mao (1939)

never be separated from the masses.”²⁴ It is no wonder that the stipulation on organization of state apparatuses was limited, and the mass line is also extended to “procuratorial work and in trying cases” (Article 25).

Due to the “political” nature of the 1975 Constitution, it is seldom mentioned in the constitutional textbooks. Where it is, is in a negative sense.²⁵ It is true, the continuous revolutionary process could hardly be said to be mediated with the constitutional text. For revolutionists, democracy is rights. Compared to mediation through law, they demanded immediate subjectification. In this sense, the 1975 Constitution could be hardly said to be a synthesis between constitutional law and constituent power.

Around 1976, China’s Cultural Revolution came to its end. It was concluded with the political Trial of Gang of Four²⁶ on November 20th, 1980, who were handed the chief responsibility in the Culture Revolution. At the significant trial of “Madam Mao”-- Jiang Qing, “Jiang was not charged with conspiring against the state. Instead, the charges focused on her personal, spiteful persecution of the people who, for whatever reason, she felt threatened by.”²⁷ But Jiang defended herself against it by asserting that, “she operated precisely as an agent of the party-state”, and “did not do anything that she was not authorized to do.”²⁸ She argued that “it is she, not the alleged victims, who is persecuted. All those writers and party backs deserved what they got in the Cultural Revolution. They were bourgeois criminals”.²⁹

Apparently, Jiang utilized precisely the argument of “who is the enemy”. Her trial is a “constitutional poiesis” for China to recognize that the party-state had to accept some responsibility for the excess of Cultural Revolution, Micheal Dowdle argues. And as a redress, the articles of the 1978 Constitution were doubled to sixty, and powers of the NPC and the State Council were stipulated in detail (Article 20-32). The Standing Committee of the NPC was for the first time empowered to “interpret the Constitution and laws and to

²⁴ Cohen (1978)

²⁵ e.g. Tong’s criticism against Vyshinsky’s definition of law as the tool of the ruling class, see: Tong (2009) 100

²⁶ The Four are Jiang Qing, Zhang Chunqiao, Wang Hongwen, Yao Wenyuan

²⁷ Dowdle (2009) 207

²⁸ Dowdle (2009) 207

²⁹ Dowdle (2009) 207

enact decrees” [Article 25(3)]. Cohen defines it as “a halfway house” between the 1975 document on the left and the 1954 document on the right.³⁰

The other celebrated theme is the “Third Plenary Session of the 11th Central Committee of the Communist Party of China” from December 18 to 22, 1978. From this convention, Deng Xiaoping as the second generation of leadership of the CCP was confirmed. “Reform and Opening” replaces Mao’s explicit rejection of the third way and opts for the possibility of borrowing Capitalist advanced techniques and experiences to construct socialism in China. With it, is the advent of China’s Reform Period. The intensely ideological arguments were suspended and given over to more gradual reforms and practical improvements. It should be admitted that social order that was disrupted by China’s Cultural Revolution got its restoration, but also more than “restoration”, as I will discuss whether there should be a third order discerned in this Reform Period.

1.3. Summary on the second order – socialism and socialist transformation

This part explores the second order of China’s constitutionalization—socialism. The first socialist constitution was founded in 1954 with an unfinished process of state building and universal franchise, tasked in the 1949 “Common Program”. The Party-state structure was kept for the leadership of CCP in transition to socialism. But it was after the 1950s collectivization that the socialist ownership structure was completed, and admitted into the 1975 Constitution. The semi-socialist nature of collective economy has never been successfully transformed till now, which causes an internal separation between the rural and the urban residents since 1950s and a large pool of peasant labour after China initiated her “Reform and Opening” policy.

From the 1954 Constitution, the Party-led transformations to socialism became dominant, and its distinction of the people/the enemy kept in tension with the homogeneous concept of citizenship. So is the case of state apparatuses against the supra-state Party. During China’s Cultural Revolution, this was intensified and led to replacing government apparatuses with concrete mass organizations – the people’s communes -- that played economic, social as well as political functions.

³⁰ Cohen (1978)

The 1982 Constitution and its restoration of political representation by People's Congresses, dissociates and removes the political function from people's communes and transforms them into economic co-operatives. Social functions, such as health care and education, are institutionalized separately and with the proceeding of economic reforms, are transformed into supply enterprises (as I will explain more in Chapter 3). Socialism from the 1982 Constitution is devoid of the form of direct participation and the inseparable functional ensemble of political, social and economic lives.

This disaggregation of people's communes is fulfilled by means of law, which organizationally separated the infrastructure of socialism from representative forms of socialism. It could be said that the process of legalization is separated from democratization, in the sense of de-essentialization of socialist 'democracy', while the liberal democracy did not advance with the process of legalization. Taking this into consideration, I argue that a distinction between legalization and constitutionalization allows a better understanding of China's constitutional discussions that I will pursue in the next chapter.

2. Four amendments to the 1982 Constitution – the third order of marketization

In this part, I focus on the four amendments to China's 1982 Constitution and examine the claim of a modern legal system in the building. The "modernity" theme is put alongside with the "institutionalization" theme in Tiffert's comment³¹ as if they are co-referential. But in this part, I want to separate them to see their differences and connections, and problematize how modernization of law is linked to marketization in China.

2.1. History of four amendments to the Constitution

The 1982 Constitution has undergone four amendments up to now in 1988, 1993, 1999 and 2004. Of the thirty-one articles in total, fourteen have direct correlation with changes to China's economic system. To emphasize that does not mean other articles are not important. Revisions to Article 28 in the 1999 amendments replaced the political term of "counter-revolutionary activities" with "other criminal activities that endanger state security", which influenced the definition of political crimes. And the two articles

³¹ Tiffert (2009) 59 and 72

regarding “state emergency” in the fourth amendment could be attributed to the incident of 2003 SARS (Article 67 and 80 in 2004 Amendment) that has put the government’s duty to publicize information into question. The “transparency” requirement promoted reforms to administrative laws, which are taken as semi-constitutional in China.³² But compared to economic contents, they do not occupy the centre stage of China’s constitutional changes that shapes China’s Reform Period.

The two articles of the 1988 amendment dealt with the lease of land, as the reform process started from the rural areas. The Household Responsibility System put forward in 1978 was a peasants-initiated experiment in China’s Anhui Province when they were facing starvation. Household farming required a departure from rigidly-controlled collective land system in the constitution and an allowance for land transfer. Besides that, the distinction between collective economy and individual economy was also challenged by practices of the Township and Village Enterprises (TVEs) in 1980s. TVEs played a very important role in China’s economic reforms, but exceeded the number of people that individual economy was allowed to employ. It constituted the ‘private economy’ forbidden in the constitution. The 1988 Amendment took a big step to confirm the legal status of the private economy as a “complement to the socialist public economy” as well as the individual economy.

The 1993 amendment legally put an end to people’s communes and the large-pot (*Daguofan*) system in rural areas, and returned peasants to household farming. The double-tenure land institution³³ between collective economic organizations and households was fixed by the amendment (Article 6 in 1993 Amendment). Reforms in urban areas promoted their own contractualization and corporatization of state enterprises from 1985. By separating state agency from enterprises, the “state enterprise” was re-named as “state-owned enterprise” (Article 5 and 8 in 1993 Amendment). As a consequence, cross-ownership transactions and exchanges were formally possible which brought about rationalization of commercial laws across state, collective, private, foreign and individual economy.³⁴ So is the superficial convergence with international practices accompanied with the formulation of legal personality. The series legislation of private law

³² He Xin (2009) ‘Administrative Law as a Mechanism for Political Control in Contemporary China’, in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan) 209

³³ A land system is adopted in China’s Reform Period, dividing between collective ownership of land and individual use of land through contracts. More details see chapter 3.

³⁴ The Article 428 of the *Contract Law of PRC* (1999) stipulates that since it came into effect on October 1st, 1999, the *Economic Contract Law of PRC*, the *Foreign-related Economic Contract Law of PRC* and the *Technology Contract Law of PRC* would be repealed.

makes sense of the combined terms “socialist market economy” (Article 7 in 1993 Amendment) and the “socialist Rule of Law” (Article 2 in 1999 Amendment), which I will explain in detail in my next chapter.

The 1999 Amendment extended degrees of protection for non-public ownership further, from admitting its complementary status to incorporating it as “major components to socialist market economy” (Article 5). And new distributive approaches were enacted that “with the distribution according to work remaining dominant and coexistence of a variety of modes of distribution” (Article 3). Albeit dramatic changes to the socialist doctrine, both are assigned with “Chinese characteristics” in the *priliminary* phase of socialism (Article 1 of the 1999 amendment). This periodization of socialism allows for experimentation with capitalist advanced experiences in socialist China, and produces the “hybridity” in China’s legal and economic systems.

The retreat of the socialist orthodoxy is more telling in the 2004 amendment, which provides explicit protection of private property (Article 6) and admission of private businessmen in the Communist Party (as part of “all builders of socialism” in the amendment to the preamble). In the meanwhile, China’s New Left also regards the 2004 Amendment as a turning point for China’s constitutional process, from the purely economic orientation in 1990s, to a “harmonious society” (2004), as the constitutional amendment makes a commitment to human rights protection (Article 8) and establishment of social security system (Article 7).

Relatively speaking, these constitutional changes to applied terminology are not dramatic. A shift from “state enterprise” to “state-owned enterprise” will not reveal its significance if not matched with the bigger social context. And “Socialist market economy” could not be well understood if we do not see the full picture of its gradual tinkering with the “third way” and revisions to Mao’s explicit rejection. But it is in the next chapter that I will link them with China’s social and economic transformations, and the establishment of the private law system. Here, I am confined to pointing out the general trends in China’s constitutional amendments: potentialities that socialism could be combined with market instruments, and give property rights privileged protection among constitutional rights. This, however, could not be made sense as a mere ‘restoration’ to the 1954 constitutional legality. Rather, I will argue, it is a combination of three orders: socialist basis, legalization and marketization. These three constitute the present ‘hybridity’ of China’s constitutionalism.

2.2. Summary of the third order

In this part, I bring to the fore the economic characteristics of China's four constitutional amendments. The "restoration" thesis of Tiffert, however, could not answer why in China's thirty-year reforms, property rights explode in comparison with social rights and political rights; namely, why institutionalization is selective and asymmetrical. It also could not account for why China's legalization did not bring democratization as a presumed outcome. Rather, legalization enables the opposite of its aim that the CCP's leadership is not curbed by law, but instead it acts as instigator of law-making.

While a liberal democracy is not rooted, socialist 'democracy' is vacated. If socialist organization relies on its collective infrastructure to concretize participation, the latter is under primary liquidation in the Reform Period. Instead, China's society is left with a centralist Party leadership intact while any representative form of "the social" is individualized and privatized, if not abolished. In this sense, socialism in China is left with a concentrated political power in the meantime disarming social resistance.

It is hence important to review three instead of two social orders competing on the scene of China's constitutionalization -- to consider not only a conflict between socialist party-state structure and constitutional government, but also the *paradigm* adopted. If retreat from the total state means primarily marketization, what effects this will leave on China's constitutionalization. To briefly summarize, my thesis, instead of inquiring into China's constitutionalization as transformed from its socialist integrity to a modern Rule of Law—a coupling of two relatively autonomous systems of law and politics, is to argue reasons for the *decoupling*. In this argument, marketization adopted as the chief strategy of "Reform and Opening" should be noted about its effects.

3. Three social orders: socialism, legalization and marketization

In this chapter, the 1982 Constitution is re-situated in its historical background. By doing so, I intend to emphasize why a historical-sociological study of China's constitutionalization is needed, more than pure focus on legislation and judicial mechanisms. It is the shifts of different social orders that are neglected in legal constitutionalism, which starts and continues with law and legalization.

One of the competing social orders is the tradition of Socialist constitution, which was essentialized by a concrete participatory form – the people’s communes. More than a simple act of entitlement of rights,³⁵ this movement of *generalization* is related to complex affairs of creating legal personality and redistribution of wealth, which are dramatically undermined in claims of legal constitutionalism. In arguing the formulation of legal personality, E.B. Pashukanis has stated acutely how the “objective” process of production, exchange and division of labour makes the “subject”, but in the meantime causes legal relations of the latter to have “no greater significance” than the former. It is because,

“value ceases to be casual appraisal, loses the quality of a phenomenon of the individual psyche, and acquires objective economic significance. In the same way, there are real conditions necessary for man to be transformed from a zoological individual into an abstract, impersonal legal subject, into the legal person.”³⁶

In this “socialist orthodox in retreat”,³⁷ a shift in jurisprudence occurs from state’s positive guarantee of rights to the position where negative rights are assumed to be enjoyed by individuals so long as there is no interference.³⁸ With this change of rights conception, social and political basis of it should also be greatly transformed to support such rights to be practised and materialized. But this ‘support’ in China rather adopts the form of ‘retreat’; and precisely in this retreat, market gets the *excessive* significance for constitutionalism and constitutionalization.

In examining *Speenhamland* Law in the nineteenth century, Karl Polanyi observes that,

“Under Speenhamland society was rent by two opposing influences, the one emanating from paternalism and protecting labo(u)r from the dangers of the market system; the other organizing the elements of production, including land, under a market system, and thus divesting the common people of their former status, compelling them to gain a living by offering their labor for sale, while at the same time depriving their labo(u)r of its market value. A new class of

³⁵ E .B. Pashukanis (1978), *Law and Marxism*. (London: Villiers Publications Ltd.) 113

³⁶ *Ibid.* 115

³⁷ Kellogg (2008) 6

³⁸ Kellogg (2008) 8

employers was being created, but no corresponding class of employees could constitute itself.”³⁹

To “constitute” is the key word here. In common with Pushukanis’s account, the subject of “employee” is rather subject to a process of objectification. Generalization of legal personality from concrete social status, even in the labour law form of “protection”, has to be pursued through deprivation and commodification. This might be why Marx made the account that workers *are generated by* the capitalist class.⁴⁰ There is not a real moment for their constitution.

Polanyi has acutely pointed out “the institutional separation of society into an economic and political sphere.”⁴¹ This separation of social, political and economic systems has characterised the social history in the nineteenth century as “a double movement”. As Polanyi puts it, “the extension of the market organization in respect to genuine commodities was accompanied by its restriction in respect to fictitious ones.”⁴² Labour, land and money are politically constructed as “goods” to be marketized. This separation is exactly a self-regulating market demands, and it leads to an inverse movement to adjust society to economic logic. This is inevitable,

“For once the economic system is organized in separate institutions, based on specific motives and conferring a special status, society must be shaped in such a manner as to allow that system to function according to its own laws. This is the meaning of the familiar assertion that a market economy can function only in a market society.”⁴³

With this institutional renunciation of solidarity and compassion, positivism finds its location in legal science and utilitarianism finds its position in political economy. More importantly, institutionalization of law from the social embeddedness also leads in the end to a demise of *human law* by the most *natural* and scientific law of “hunger”.⁴⁴

³⁹ Karl Polanyi (1957), *The Great Transformation*, (Boston: Beacon Press, 1957).80

⁴⁰ Cited in Emiliios Christodoulidis and Ruth Dukes (2007) ‘On the Unity of European Labour Law’, in Sacha Prechal and Bert van Roermund (eds.) *The Coherence of EU Law: The Search for Unity in Divergent Concepts*. (Oxford : Oxford University Press) 404

⁴¹ Polanyi (1957) 71

⁴² Polanyi (1957)76

⁴³ Polanyi (1957)57

⁴⁴ Polanyi (1957)117

This depiction also could be applied to China's great transformations, and it is indeed used by China's New Left.⁴⁵ From China's 1982 Constitution, legal institutions are increasingly important for the organization of social life. The concrete participatory form of socialism was dissolved. The combination of law and marketization has produced the privilege of private law field in the whole of China's constitutionalization process. The third order of marketization is easily confused with the individualization process (of the political and legal importance) in China's transformative context. Though they seem to be a similar process, I differ from Polanyi's theory as in China the political sphere did not get its autonomy spontaneously in the process, and the economic over-development rather impeded its emergence. I also disagree with China's New Left in utilizing Polanyi's theory to predict a social reaction being triggered by the economic one. My disagreement lies in that there is not an automatic separation between the economic sphere and the political sphere with the process of marketization, nor are the political and the constitutional spheres derived *after* this divide happened. The political is *re-appropriated* in the process instead of being *generated*. While Polanyi has made brilliant accounts on the marketization effects, he undermined the scope and importance of the 'political' compared to the 'social'.

In the next chapter, my disagreement will be made clearer. I will review historically how the socialist common good is appropriated by a market system gradually. In this process, law and market are in a co-originating and co-referential relationship. But instead of arguing the separation of the economic and political fields, I claim how legalization and democratization are flawed with a start from the economic mechanism of appropriation. While endorsing Polanyi's writings on the transformations from feudalism to capitalism and nation-state, my thesis insists that democratization does not spontaneously appear as a result of an economic separation and marketization, which structurally could not *establish* a political system, as implied in the case of China.

⁴⁵ Mainly in Wang Shaoguang's argument and his interpretation of democracy, as I will argue in Chapter 3.

Part II.

Legalization without Constitutionalization

Chapter 3.

Socialist Market Economy – a Configuration of Law, Politics and Economy

Introduction

After unpacking the three social orders entangled in China, this chapter attempts to interpret the ‘hybridization’ of the three social orders condensed in the term “socialist market economy”. I am using a historical process to describe how this ‘combination’ was made possible, and what was lost from the pre-reform phase. It is a process with changes simultaneously happening in the social subsystems of law, politics and economy, and forms a configuration now professing “Chinese characteristics”.

It is worth observing what role is played by legalization. Especially in the field of private law, modernization of the Chinese legal system is broad-ranging. But right because of that, a separation between the terms of ‘legalization’ and ‘constitutionalization’ is important, as legalization has engineered enormous shifts in the economic system and social organizations, without spillover into democratization. It is hence worthwhile to examine the market-freedom-first paradigm, and its effects on China’s constitutionalization.

I divide the three decades into three phases according to their chief features and turning points in policies (Part 1-3). Policies issued by the State Council and the CCP are influential in China’s context, without which promulgation of laws could not be understood. My main emphasis lies in examining how legalization channels the Party policies and formulates legal concepts. The derived modern legal system, such as a proper divide between public and private law, will be put into question about its understatement of the constitutional significance in this very fragmentation (Part 4).

1. Reforms between 1980s and 1993

1.1. Two ownerships and separation of the rural and urban Areas

As I have stated in my previous chapters, in the 1982 Constitution, “socialist public ownership” was established with two subcategories, which were handled by separate social organizations: working units in the urban areas and people’s communes in the countryside.

The two separate types of public ownership, namely, ownership by the whole people” and “collective ownership by the working people” (Article 6), were represented by state enterprises in the cities and collective economic organizations in rural areas, and they were assigned exclusive resources (Article 9 and 10). State enterprises were submitted to “unified leadership by the state and fulfil all their obligations under the state plan” (Article 16), therefore they had an “agency-in-charge”. Accordingly, they were also allocated resources from the State to take on obligations of health and education services (Article 19 and 21). Schools, kindergartens and hospitals were mainly held by different working units. Mimi Zou has well depicted Chinese socialist employment relation system as “three old irons”: “the ‘iron rice bowl’ of lifetime employment and ‘cradle-to-grave’ social welfare provided by the state (*tie fanwan*), the ‘iron wage’ of centrally administrated and fixed wages (*tie gongzi*), and the ‘iron chair’ of state-controlled appointments and promotion of managers (*tie jiaoyi*)”.¹

In contrast, collective economic organizations in the rural areas accepted the guidance of state plans while had the right to elect and remove their managers and to decide on major issues (Article 17). Also their medical services and education programmes had only a “co-operative” nature taken by the collective organizations (Article 19 and 21), which principle was also applied to the urban collective economy.

This means, if China’s urban social organizations were work units of State enterprises, the rural society depended on the land system collectively owned. Confiscation of the rich landowners and redistribution of land to peasants privately was achieved in the *Land Reform Law* of 1950, but after that socialist transformation of land system to collective

¹ Mimi Zou (2009 IIRA), ‘Chinese Labour Law at a Critical Point in History’, available at: http://www.ilera-directory.org/15thworldcongress/files/papers/Track_4/Wed_W2_ZOU.pdf

ownership started in the 1950s and by 1957, with the completion of collectivization in agriculture, “private ownership of rural land had been largely abolished, with peasants being required to transfer their land to peasants’ cooperatives. Thus, the system of collective ownership of rural land was established. The system was elaborated by the Regulation on Rural People’s Communes in 1962, which introduced the principle of ‘three-level ownership with the production team as the basis’.”²

The divide in rights, welfare and obligations, as well as the privilege of the urban working class had to be sustained by a special system of social control. The 1958 *Regulation on Household Registration of People’s Republic of China* provided that the population should be broadly registered as urban or rural. As this registration was related to grain rations, employment-based housing and health care services, people who attempted to work outside their residence had to apply for six passes at that time. This tight control aimed to guarantee the supply mainly for workers in the state enterprises.³ Such discrimination in registered status has been kept up to now even though migration was allowed unofficially soon after the economic reform.⁴ It is criticized as “Chinese Apartheid” in the foreign media.⁵

² The three levels were the people’s communes, the production brigades and the production teams respectively.

More details in Albert H. Y. Chen (2011) ‘The Law of Property and the Evolving System of Property Rights in China’, in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*, (London: Routledge) 100

³ Luo Ruiqing, ‘Explanations concerning the *Regulation on Household Registration of People’s Republic of China (Draft)*’ (Guan Yu Zhong Hua Ren Min Gong He Guo Hu Kou Deng Ji Tiao Li Cao An De Shuo Ming), Ming), available at: http://www.law-lib.com/law/law_view.asp?id=1338 (accessed on December 9th, 2014) 2014)

⁴ After the 2003 “Sun Zhigang Incidence”, some provinces (like Guangdong, Beijing and Shanghai) experimented with changes to this system; and in 2015 the abolition of the ‘temporary residence card’ with a “residence card” in 17 provinces captured the attention to reforms to household registration system. But the Land issue was admitted as unsolved or vaguely tackled. See: Local Programs of Reforms to Household Registration Were Publicized in 17 Provinces, (Shi Qi Sheng Chu Di Fang Ban Hu Gai Fang An), available at <http://legal.people.com.cn/n/2015/0610/c188502-27131265.html>, (accessed on June 11th, 2015).

In reforms to *Law on Election of PRC*, “peasant” is treated as a category of constituency rather than an occupation. Eight peasants shared one voting right in equivalence to one urban resident in 1953. This ratio was 4:1 (at the county level), 5:1 (at the provincial level) and 8:1 (at the national level) in 1979. It was unified as 4:1 across all levels in 1995, and only in 2010 amendment, it is 1:1, since it was reported that the urban population was amount to 46.6% of the whole population.

“New Amendment to the Law on Election”, (Xu Ju Fa Xin Xiu), (2010) *Finance and Economy* (Cai Jing), vol. 6, available at:

1.2. Household Responsibility System in rural areas

The industrialization policy and burdensome extraction from the agriculture worsened the situation in rural areas, and it was from the countryside that China's reform process started. In 1978, in a small village named "Xiaogang" in Anhui Province, an innovative experiment with Chinese Land system was initiated secretly and illegally, which later developed into the "Rural Household Contract Responsibility System" (*Chengbao*) in China.

The new practice made it possible for peasants to sign a formal contract with their collective economic organizations and hence to work on the plots assigned to them. It meant that they could return to the "household farming" from people's communes, and enjoy a personal *use* of land without changing the collective *ownership* structure. Therefore, the "large pot" system which organized communal type of labour, was first smashed in China's rural areas. Besides that surplus labour forces were released, incentives for efficiency were also raised. As Albert Chen commented,

"Under this system, the relevant authority in the rural areas enter into contracts with peasant households pursuant to which the households enjoy the right to possess, control, use and derive economic benefits from (collectively owned) land covered by the contract subject to payment of consideration ... The system may be understood as partial privatization of agricultural production which had been collectivized since the mid-1950s".⁶

To avoid the issue of redistribution, this transaction of rights to use is separated from privatization of ownership. To unbundle rights ensemble of the people's communes implies a risk of asymmetry if co-operations other than the economic co-operative fell out

<http://magazine.caijing.com.cn/templates/inc/chargecontent2.jsp?id=110396269&time=2010-03-15&cl=106&page=1>, (accessed on December 9th, 2014)

⁵ Macleod, Calum. "China reviews 'apartheid' for 900m peasants", (June 10, 2001) *The Independent* (last accessed on December 16th, 2010), the resource has already been removed online.

Philip Huang argues that, this segregation has created China's "informal economy" with such a huge resource of cheap labour forces with their social security absent. "In 1978, there were only an insignificant 15,000 employees outside the formal sector; by 2006, that figure had exploded to 168 million, out of a total labour force of 283 million, to make up 59.4 percent of the total".

see: Philip C.C. Huang (2009) 'China's Neglected Informal Economy: Reality and Theory', *Modern China* 35(4): 405-438, 406

⁶ Albert Chen (2011) 83

disproportionately. For instance, without corresponding social co-operatives, China's rural security mechanism was not established at the same speed with economic co-operatives.

For Wang Shaoguang, a main representative of China's New Left, the decline of the collective economy was the reason for the end of once-booming co-operative medical services.⁷ I agree with him that it was an important factor, but there was no reason why co-operatives had to be so limited. Rather, there was another contributing factor that, from 1983, people's communes were widely abolished and townships were re-established as the basic level to exercise the government power.⁸ Village committees were left responsible mainly for organizing land and production co-operations, while other social services were transferred to the township level. The all-in-one functions of peoples' communes hence were divided into elected governments, official safety net for social functions, and economic co-operatives. However, the construct of an official safety net was an inferior concern, as Wang admits that, the Communist Party at that time adopted a "cut non-productive expenditures"⁹ policy.

This was reflected in the 1993 Constitutional amendment that the "people's communes" were removed and replaced by the economic co-operatives between producers, supply and marketing, credit and consumers (the Article 6 in 1993 Amendment); in the meanwhile, both the lease of land and private sector of economy were permitted by the 1988 Constitutional Amendment (Article 1 and 2).

From 1985, peasants were allowed to provide services in urban areas though without shifting permanently their registered status. Most of them flew to the coastal regions in Eastern China, and became the first generation of China's migrant workers. China had formed three coastal regions open to foreign investments by 1985, including five Special Economic Zones (SEZs) from 1980, fourteen Coastal Open Cities in 1984 and three Coastal Open Areas in 1985. Foreign investments were encouraged in these regions by giving them reduction of business income tax (from 30% to 15% in SEZs, and to 24% in Coastal Open Areas), entitling SEZs relatively independent legislating power, decreasing mandatory state plans for local governments, and other supra-national treatments for

⁷ Shaoguang Wang (2009) 'Adapting by Learning: the Evolution of China's Rural Health Care Financing', *Modern China* 35(4): 370-404

⁸ Zhong Fa [1983]35 (October 12th, 1983) A Notice by CCP & State Council Concerning the Separation of Government from Communes, and Establishing the Township Government (Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Shi Xing Zheng She Fen Kai Jian Li Xiang Zheng Fu De Tong Zhi), available at <http://cpc.people.com.cn/GB/64184/64186/66701/4495412.html>, (accessed on December 9th, 2014)

⁹ Shaoguang Wang (2009) 382

foreign companies.¹⁰ With the opportunity of “Industrial Upgrading” of the “Asian Four Little Dragons”, China began to develop its own labour-intensive industry and formed the export-oriented policy. The FDI increased slightly in 1980, but by 1993, it became the largest recipient in the developing countries, next to the United States.¹¹

1.3. The Factory Director Responsibility System and the dispatch labour

The urban reform started around 1986 when state enterprises adopted the “Factory Director Responsibility System”. In lieu of direct leadership of CCP, a factory director was selected to manage the factory, though his election and removal was still decided by the “agency-in-charge”. But the director was entrusted with great powers to implement the labour contract system and probation period, to dismiss workers and forbid insider employment, namely, children of the workers in the factory could no longer take positions from which their parents retired. At the beginning, most workers were transferred to fixed-term individual and collective labour contracts successfully, except for peasant workers who were excluded as “temporary workers”.¹²

¹⁰ A Notice by CCP & State Council Approving and Transferring “Summary of the Convention among Some Coastal Cities” (Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Pi Zhuang “Yan Hai Bu Fen Cheng Shi Zuo Tan Hui Ti Yao” De Tong Zhi, issued on May 4th, 1984. Available at: <http://cpc.people.com.cn/GB/64184/64186/66678/4493873.html>, (accessed on December 9th, 2014)

Guofa [1986] No.95 (February 18th, 1985) A Notice by CCP and State Council Approving and Transferring “Summary of the Conference on Issues of Yanzi River Delta, Pearl River Delta and Xiamen-Zhangzhou-Quanzhou Delta in Southern Fujian” (Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Pi Zhuang “Chang Jiang Zhu Jiang San Jiao Zhou He Min Nan Xia Zhang Quan San Jiao Di Qu Zuo Tan Hui Ji Yao” De Tong Zhi), available at: <http://cpc.people.com.cn/GB/64184/64186/66679/4493932.html>, (accessed on December 9th, 2014)

State Council (October 11th 1986) Provisions on the Encouragement of Foreign Investment (by the State Council), available at <http://www.asianlii.org/cn/legis/cen/laws/potscoteofi727/>

¹¹ Mingming Pan, Three Essays on FDI in China. Available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1023&context=businessdiss>, (accessed on December 9th 2014)

¹² A Notice by CCP & State Council concerning the Promulgation of Three Regulations on State Enterprises (Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Ban Fa Quan Min Suo You Zhi Gong Ye Qi Ye San Ge Tiao Li De Tong Zhi), issued on September 15th, 1986, available at: <http://cpc.people.com.cn/GB/64184/64186/66680/4493981.html>, (accessed on December 9th, 2014)

The Labour Contract system and the Director Responsibility system signified a distancing of the relationship between workers and state enterprises. These tactical changes made employment no longer a membership right to state assets. And since 1994 *Labour Law*, “labour contracts in China have overwhelmingly tended to be fixed-term contracts with the length of contract becoming shorter and shorter”,¹³ “usually between half a year and three years”.¹⁴ As Zou puts it, “(t)his fundamental abandonment of the ‘iron rice bowl’ has seen the rise and rise of temporary, contingent employment such as dispatch labour”.¹⁵

The reforms to wage and price system followed as the Responsibility system allowed factories to retain benefits and changed the “state-monopolized revenue and expenditure”.¹⁶ When in the work unit system, “(w)ages were set according to a nationally standardized wage grid system, which was detached from any considerations of individual or *danwei* (work units) performance. The state administrated wage system sought to minimize disparities within and across enterprises through a low wage policy and very small wage differences between grades of employees.”¹⁷ This rigidity had to be changed as competitions were encouraged across industries and enterprises, and disparities inevitably arose. Also, as the labour contract introduced risks of layoff, social services were required to be provided in a form of wage to replace material forms tune in concrete demands. From 1980s, work units began to distribute welfare benefits through wages, which for one thing caused inequality across industries and factories; for another thing, it transferred categorization of welfare services from supply to consumption.

Interim Provision on Employment Issues of State Enterprises (Guo Ying Qi Ye Zhao Yong Gong Ren Zan Xing Gui Ding)>, issued on July 12th, 1986, available on <http://cpc.people.com.cn/GB/64184/64186/66680/4493988.html>, (accessed on December 9th, 2014)

Interim Provision on Employment-in-Suspension Insurance of the State Enterprises’ Workers (Guo Ying Qi Ye Zhi Gong Dai Ye Bao Xian Zan Xing Gui Ding), issued on July 12th, 1986, available at <http://cpc.people.com.cn/GB/64184/64186/66680/4493986.html>, (accessed on December 9th, 2014)

Interim Provision on Experimentation of the Labour Contract System by State Enterprises (Guo Ying Qi Ye Shi Xing Lao Dong He Tong Zan Xing Gui Ding), available at <http://cpc.people.com.cn/GB/64184/64186/66680/4493989.html>, issued on July 12th, 1986, (accessed on December 9th, 2014)

¹³ Mary. E. Gallagher and Baohua Dong (2011) ‘Legislating Harmony: Labour Law Reform in Contemporary China’, in Kuruvilla Sarosh, Lee Ching Kwan and Gallagher, Mary. E. (eds). *From Iron-Rice Bowl to Informalization: Markets, State and Workers in a Changing China*. (Ithaca, New York: Cornell University Press) 40

¹⁴ Zou (2009)

¹⁵ Zou (2009)

¹⁶ (February 27th, 1988) Provision on Contract Responsibility System of State Enterprises (Quan Min Suo You Zhi Qi Ye Cheng Bao Jing Ying Ze Ren Zhi Zan Xing Tiao Li), available at <http://cpc.people.com.cn/GB/64184/64186/66681/4494043.html>, (accessed on December 9th, 2014)

¹⁷ Zou (2009)

At that time, China was still managing a Dual-track price system, namely, a system containing a fixed price and a market price for the same kind of products. Only the excess to state plans could be sold at a market price. Manipulation of exchanges by government officials between the two prices triggered dissatisfaction among the people, and resulted in the panic buying in 1988, followed by the 1989 political movement in the name of anti-corruption and democracy.

From 1988 and especially after 1989, the “Reform and Opening” policy was suspended. “Centralization” was re-emphasized in the three-year overhaul while responding to an economic blockade by foreign countries. Mandatory plans increased, and products were sold at fixed prices again; the role of the central bank was strengthened while private banks or societal collection of funds were forbidden; licensing for export was tightly controlled and migrant workers were sent back to their rural hometowns. Political conservatives criticized the reform policy as importing capitalism along with its ideology of democracy. A debate on the Socialist Road or the Capitalist Road that China took was heating up.

1.4.A brief summary of the reforms before 1993

In sum, reforms before 1993 took tactical but important steps both in rural and urban areas. Through the abolition of people’s communes, land and productive co-operations replaced the membership right of communes in rural places; while later in urban areas, labour contract system took place of the life-long employment and welfare services based on it. It changed the mode and organizations of social integration in pre-Reform China, by entitling rights for individuals to be flexible, to contract and consume. It would not cause too much trouble when most workers were successfully transferred into the contract system, but a risk could be foreseen when these short-term benefits were no longer available.

This mode of formal contractualization avoided the redistribution issue in socialist transition. This, on the other hand, means this contractualization was not made by equal parties, and exchanges were indeed a pure formulation. This contract hence constituted legal personality rather than reflected it, and the key absence from this type of contract is “freedom” of contract which is definitional to this mechanism.¹⁸ This induced the

¹⁸ Alain Supiot has made a distinction between contractualism and contractualization in his book. The key difference between the two is that the latter professes the ideology of contract as emancipatory in opposition to “the heavy machinery of States and the imperfections of the law” as “rigid, unilateral and enslaving”. (p83) In China’s context, it

paradoxical result of legalizing it. As Zou has commented on China's labour law reform that, "(i)f the primary object of labour law is to 'counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship', then Chinese workers must rely on laws that are based on the status of a legal individual who is party to a contract".¹⁹ The emergent private law system and legal relations could barely be contained within the socialist constitutional text and socialist social contract. It was best captured by the term "benign unconstitutionality" that legal scholars often used.

2. Reforms between 1993 and 2003

In 1992, Deng Xiaoping gave his Southern Tour Speech when touring around Shenzhen, Wuchang, Zhuhai and Shanghai, which put an end to criticisms against him and re-started the reform agenda. It was argued that such an impact was not produced overnight but because China already had a "market-preserving federalism".²⁰ This "political durability", especially manifest in the SEZs of Guangdong province, kept political conservatives, who were rejecting the "third path", from enforcing a reversal.²¹

Deng concluded the former failure and the 1989 political movement as a deficit in catching up with people's increasing demands for consumption.²² This reduced the more heated ideological debate and democratic implications, and also set the next step as productivity-centred. The crisis in 1989 hence reinforces the reform logic in economy. Instead of declaring to pursue the Capitalist path, China situates itself at the preliminary stage of Socialism (Article 1 in 1993 Amendment). Building Socialism in a poor country is a unique situation that could neither be learned from textbook nor from experiences of other countries, which shapes the Chinese characteristics. Also some deviations from a normal marketization process have to be noted as the powerful lesson of the 1989

shows that the formal contract without substantive freedom to contract is rather enslavement itself. For Supiot, contractualization throws off the basis of contractualism while uses its techniques to generalize and imagine a power relation to be free of power. Alain Supiot (2007) *Homo juridicus : on the anthropological function of the law* (London: Verso, 2007)

¹⁹ Zou (2009)

²⁰ Gabriella Montinola, Yingyi Qian and Barry. R. Weingast, 'Federalism Chinese Style: the Political Basis for Economic Success', *World Politics* 48(1): 50-81, 53

²¹ Ibid. 52

²² See A Decision by the General Office of CCP on Managing and Controlling, and Deepening Reforms (Summary) (Zhong Gong Zhong Yang Guan Yu Jin Yi Bu Zhi Li Zheng Dun He Shen Hua Gai Ge De Jue Ding), issued on November 9th, 1989, available at <http://cpc.people.com.cn/GB/64184/64186/66683/4494107.html>, (accessed on December 6th, 2014)

movement teaches that State capacity should not be undermined while marketization proceeds.

2.1.Reforms to state owned enterprises (SOEs)

China's SOEs continued with and stretched their reform as in the 1980s, but adopted a selective strategy. The *State Enterprise Law* of 1988 stressed the "operational spheres of autonomy of SOEs" and set up SOEs as a legal person separated from the government system. The *Company Law* came into effect on July 1st, 1994 and many companies were set up in a mode of "corporatization". Iain MacNeil commented that, "corporatization had the effect of formalizing the separation of state from SOEs, as the state became a shareholder rather than the direct owner of productive assets".²³ Yet Article 4 provides that "The state assets of a company belong to the state" which could not be made sense for Iain MacNeil that "assets that belong to a company, as a separate legal person, to be owned by another entity at the same time".²⁴ No matter whether this formulation could renovate property theories anew, it did not appear to have caused many practical difficulties in transferring direct ownership into a form of shareholding.

Another difference concerning China's corporate governance lies in the marketability of shares. "Chinese stock exchanges fall far short of Western 'outsider'-control models as they allow for only a small proportion of shares to be traded on the exchange."²⁵ Among different categories, foreign investors "cannot own A shares, which represent the majority of the marketable shares of listed companies".²⁶ This situation did not change until China entered WTO and the 2002 "Reform of Non-tradable Shares". MacNeil argues that the limits on marketability would compromise the efficiency claim; and the state as the controlling shareholder would limit emergence of institutional investors and possibility of takeovers. Hence he concludes that corporate governance in China still operates in a manner fundamentally different from the West, which is summarized as "formal convergence" accompanied with "functional diversity", with "some room for adaptation at

²³ Iain MacNeil (2002) 'Adaptation and Convergence in Corporate Governance: the Case of Chinese Listed Companies', *Journal of Corporate Studies* 2(2):289-344, 310

²⁴ Ibid. 299

²⁵ Roman Tomasic (2011), 'Looking at corporate governance in China's large companies-Is the glass half full or half empty?' in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*. (London: Routledge) 196

²⁶ MacNeil (2002) 312. However, they could participate in the market through purchases of B shares, --5% of the capital of listed companies in aggregate. They also could buy foreign shares of Chinese companies listed in Hong Kong (H shares), NYSE (N shares) and London (L shares) with the approval by China Securities Regulatory Commission (CSRC).

the lowest level (company law), less in the intermediate level (securities law and regulation), and almost none at the top level (listing rules)".²⁷

This coincides with Clarke's characterization of China's corporate governance as "corporatization, not privatization".²⁸ Corporate governance was a crucial mechanism in China's state enterprises reform and in the whole economic reform as well. As Jiangyu Wang puts it,

"The major contradiction is that they (enterprises) are short of funds because the state is facing fiscal constraints and difficulties [and hence cannot inject more capital], and the banks lending cannot be so large to meet all the needs. For this reason, raising funds through issuing shares to the public could not only absorb the huge amount of unused money in the civil society, but also could convert consumption money into capital for production and construction..."²⁹

In this sense, the channelling is "advancing mainly the interest of the state as a shareholder – *the biggest private interest in China*. As a result of this policy, the overwhelming majority of the listed companies in China are state owned." (my emphasis)³⁰ It counts as "a broader industry policy" and induces the "relative insignificance" of the minority shareholder "in the overall structure of ownership".³¹ By this means, "the state intends through State holding companies to maintain a controlling share ownership in the 'pillar industries' and 'key enterprises in the basic industries'".³²

The SOEs reform was also accompanied with three regulations concerning bankruptcy. The 1986 *Enterprise Bankruptcy Law* and 1994 "Notice"³³ regulated the SOEs bankruptcy, while non-public enterprises' bankruptcy was regulated by the 1990 *Civil Procedure Law* (Chapter 19). The "Notice" gave preferential treatments to fourteen pilot cities for them to "optimize the capital structure". In fact, only small and medium-sized state enterprises

²⁷ MacNeil (2002). 340

²⁸ Donald C. Clarke, 'Corporatisation, not Privatisation', (2003) *China Economic Quarterly* 7(3): 27-30

²⁹ Jiangyu Wang (2011) 'The Political Logic of Securities Regulation in China', in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*. (London: Routledge 2011) 234

³⁰ Ibid. 242

³¹ Tomasic (2011)185

³² Tomasic (2011)185

³³ A Notice by State Council Concerning Several Issues of Implementing Bankruptcy Practices of State-Owned Enterprises in several Cities (Guo Wu Yuan Guan Yu Zai Ruo Gan Cheng Shi Shi Xing Guo You You Qi Ye Po Chan You Guan Wen Ti De Tong Zhi), available on <http://cpc.people.com.cn/GB/64184/64186/66686/4494327.html>, issued on October 25th, 1994, (accessed on December 9th, 2014)

were encouraged to “contract, lease, or be sold to collective organizations or individuals”.³⁴ If an enterprise was deemed improper to go bankrupt, the local government would subsidize it according to the “Notice”. These enterprises are mainly of China’s “strategically important industries”, which play the “leading role” in the state economy. In 1999, this strategy was officially named as “grasp the large and release the small”.³⁵

It is argued that, contrary to the transition orthodoxy, “the presence of a strong State which is able to give priority to the overall national interest is likely to be a more effective means of making this transition from communism to a market-based society.”³⁶ And Roman Tomasic finds that,

“Instead [of end of history], we have seen the persistence and indeed the strengthening of the nation-State in transition economies; this is especially evident in China itself. The recent global financial crisis seems to have seen the re-emergence of the State in many countries with governments becoming owners of large proportions of shares in major banks; this process of State expansions has also been evident in China. This must affect the way we look at corporate governance.”³⁷

This comment implies that the 1990s reforms to SOEs corporate governance and the economic structure formed accordingly decide responses China would make in global financial crisis, which I will explain later in this chapter. With a separation between operation and ownership, “state economy” was changed into “state-owned economy” in the Article 3 of the 1993 Amendment, and “state enterprises” into “state-owned enterprises” in Articles 6 and 8. But this also created confusion in understanding the “state economy” that was formerly specifying the economic organization of urban areas, relative to the “collective economy”. In the 1999 Constitutional Amendment, Article 1 re-defined the ownership structure and the distribution system. Article 3 of the 1999 Amendment also

³⁴ A Decision on Several Issues by CCP concerning Establishment of the Socialist Market Economy (Zhong Gong Zhong Yang Guan Yu Jian Li She Hui Zhu Yi Shi Chang Jing Ji Ti Zhi Ruo Gan Wen Ti De Jue Ding), issued on November 14th, 1993, available at <http://cpc.people.com.cn/GB/64184/64186/66685/4494216.html>, <http://cpc.people.com.cn/GB/64184/64186/66685/4494216.html>, (accessed on December 9th, 2014)

³⁵ Several Important Decisions by CCP on Reform and Development of State Enterprises (Zhong Gong Zhong Yang Guan Yu Guo You Qi Ye Gai Ge He Fa Zhan Ruo Gan Zhong Da Wen Ti De Jue Ding) issued on September 22nd, 1999, available at: <http://cpc.people.com.cn/GB/64162/71380/71382/71386/4837883.html>, (accessed on December 9th, 2014)

³⁶ Tomasic (2011)187

³⁷ Tomasic (2011)192

permits “other non-public economies” developing along with individual and private economy.

2.2.Reforms to the price system

The dual-track price system faded when mandatory state plans were replaced by state-ordered contracts.³⁸ Enterprises were required to adapt themselves to the “demand-oriented system of the market”.³⁹ Through this practice, the two prices could converge gradually and formally. However, the dual-track element is still preserved in China’s *Law on Price* effective since May 1st, 1998. Article 18 of it prescribes that the government reserves power to give a guiding price or set the price when necessary, which is practised in monopoly industries of the State, like the oil industry. There remains a controversial concern for state monopoly in China’s 2007 Antimonopoly Law, which entitles a next higher level of administrative authority to rectify abused administrative monopoly of the lower level.⁴⁰

2.3.Reforms to the taxation system

The Tax reform in 1994 is taken by some Chinese scholars⁴¹ as the most important reform in China after 1993. Before that, China was practising a fiscal contracting scheme between two adjacent levels of governments. “The basic idea is that a lower-level regional government contracts with the upper-level regional government on the total amount of tax and profit revenue to be remitted for the next several years; the lower-level government keeps the rest”.⁴² This mode of “soft-budget constraints” gave more incentives for local governments to protect local enterprises. But from 1994, a tax-sharing reform was

³⁸ A Notice by State Council Approving and Transferring “Key Points Concerning the 1991 Reform to the Economic System by the Reform Committee of State Economic System (Guo Wu Yuan Pi Zhuan Guo Jia Ti Gai Wei “Guan Yu 1991 Nian Jing Ji Ti Zhi Gai Ge Yao Dian De Tong Zhi), issued on May 20th, 1991, available at: <http://cpc.people.com.cn/GB/64184/64186/66684/4494173.html>, (accessed on December 9th, 2014)

³⁹ Li Peng, On the Current Economic Situation and on Further Activating Large and Medium Sized SOEs (Guan Yu Dang Qian Jing Ji Xing Shi He Jin Yi Bu Gao Huo Guo Ying Da Zhong Xing Qi Ye De Wen Ti), issued on September 23rd, 1991, available at: <http://cpc.people.com.cn/GB/64184/64186/66684/4494165.html>, (accessed on December 9th, 2014)

⁴⁰ Salil K. Mehra and Meng Tanbei (2008) ‘Against Antitrust Functionalism: Reconsidering China’s Antimonopoly Law’, *Virginia Journal of International Law* 49(2): 379-430

⁴¹ see Shaoguang, Wang (1997) *The Bottom-line of Division of Power (Fen Quan De Di Xian)*, (Beijing: China Planning Press)

⁴² An Chen (2008) ‘The 1994 Tax Reform and Its Impact on China’s Rural Fiscal Structure’, *Modern China* 34(3): 303-343

implemented.⁴³ It embodied four major changes: firstly, two separate systems were set up to collect taxes, namely, national tax system and local tax system; secondly, taxes were divided into three types: National, Local and Joint; thirdly, the national government relies on the “transfer payment” to compensate for local governments and hence selectively implements its policies: taxes on banking, insurance, telecommunication and railway industries, etc. belong exclusively to the national tax system; fourthly, the power to decide on the divide between national tax and local tax is monopolized by the State Council.

According to An Chen’s research, of the total 18 types, the Consumption Tax and the Valued Added Tax (VAT) were biggest, and the former was exclusively earmarked for the centre, while the latter was shared between the central government (75%) and the local governments (25%). All other types were categorised as local tax, of which the biggest was the Business Tax levied against tertiary industries. Hence, Taxation Reform shifted the focus of local governments from “industrialization” to “urbanization (of land)” and gave rise to a contemporary phenomenon of “land financing” in China.⁴⁴ The tax reform also increased local NTR (non-tax revenue) in an explosive way, which burdened peasants and TVEs in late 1990s.

The continuing trend in centralization was also prominent in 1996⁴⁵ and 2002.⁴⁶ What is concerned and controversial here is the locality-centre relationship constituted and changed by the taxation reform compared to the pre-1993 economic reform, and preservation of state capacity in the central government. This economic model contributes to economic constitutionalism I will turn to in the next chapter.

⁴³ Decision by State Council concerning the Implementation of Tax-sharing System (Guo Wu Yuan Guan Yu Shi Xing Fen Shui Zhi Cai Zheng Guan Li Ti Zhi De Jue Ding), issued on December 15th, 1993, available at: <http://cpc.people.com.cn/GB/64184/64186/66685/4494212.html>, (accessed on December 9th, 2014)

⁴⁴ Zhou Feizhou (2006) ‘Ten Years after Tax-sharing System: Institutions and Impacts’, (Fen Shui Zhi Shi Nian: Zhi Du Ji Ying Xiang), *China’s Social Sciences*, Vol.6 available at: http://www.chinareform.org.cn/Economy/tax/Practice/201012/t20101206_53871.htm accessed on December 9th, 2014

⁴⁵ Reform to the Stamp Tax changed the share between the national and the local from 50:50 to 80:20

⁴⁶ The Income Tax for both enterprises and individuals were transferred from local tax category to the joint tax. See: Guo Fa [2001] no.37 A Notice by State Council concerning Sharing Reform of Income Tax (Guo Wu Yuan Guan Yu Yin Fa Suo De Shui Shou Ru Fen Xiang Gai Ge Fang An De Tong Zhi), issued on December 31st, 2001, available at: http://www.mof.gov.cn/zhengwuxinxi/caizhengwengao/caizhengbuwengao2002/caizhengbuwengao20024/200805/t20080519_21080.html, (accessed on December 9th, 2014)

2.4.Reforms to the banking system

Yuwa Wei has argued, China's banking reforms underwent three stages, and the first phase of banking reforms started in the mid-1980s.⁴⁷ Before the 'Reform and Opening' policy, People's Bank of China (PBC) was the 'mono-bank' in the city with rural credit co-operatives as its extension. From 1983, the PBC was organized as the central bank of China while four "specialized" banks (Agricultural Bank of China, Industrial and Commercial Bank of China, Bank of China and China Construction Bank) were established in 1984 under the leadership of PBC. "The main object of the reforms during this period was to restructure China's highly centralized and unified banking system into a diversified banking system in order to satisfy the demand of the expanding economic activities. The most significant outcome of the reforms during this phase was the introduction of the two-tier banking system, which has since established the framework of China's banking sector."⁴⁸

But in 1994, three "policy banks" (China Development Bank, Agricultural Development Bank of China, the Export-Import Bank of China) were set up to take over policy functions from the four specialized banks and transformed them into national commercial banks. So that commercialization could go along with policy functions of the banking system. From 1992 to 1996, joint-venture banks were founded and in 1995 rural credit co-operatives were developed into Urban Co-operative banks and were turned into City Commercial Banks in 1997. Between 1992 and 1997, SOEs reform had left with a large amount of non-performing loans (NPLs), hence in 1999 the Ministry of Finance set up four asset management companies (AMC) to purchase 1.4 trillion Yuan NPLs, so that SOEs and state-owned Commercial Banks could be restructured and listed in the market.⁴⁹ China Banking Regulatory Commission (CBRC) was founded in 2003 after the establishment of CSRC in 1992 and China Insurance Regulatory Commission (CIRC) in 1998. From 1994 to 2003, "(t)he banking reform at this stage aimed to introduce the concept and mechanisms of risk management. This was an important step towards corporatization of state commercial banks".⁵⁰

⁴⁷ Yuwa Wei (2011), 'China's Banking Reforms at the Time of Global Economic Recession', in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*, (London: Routledge). 213

⁴⁸ Wei (2011) 213

⁴⁹ Dong Dengxin (2010) 'Thirty-year Transition of China's Enterprise Financing' (Zhong Guo Qi Ye Rong Zi Ti Xi San Shi Nian De Bian Qian), (2010) *International Financing*, vol.12 available at: http://blog.caijing.com.cn/expert_article-151355-14869.shtml, accessed on December 9th, 2014

⁵⁰ Wei (2011) 214

Nicholas Howson argues that China's restructuring of commercial banks adopted the same model of SOEs corporate governance, namely, corporatization rather than fully privatization. They can hardly get rid of China's Nomenclatura and are too big to fail.⁵¹ The case study of China's "Sovereign Wealth Fund (SWF)"⁵² by Katharina Pistor, shows that China's banking reform took a "learning-by-monitoring" track. This track has some features as involving minority stakes with two or more SWFs, lockup periods, or optional board seats for investors, etc. It increases "the propensity of foreign investors to transfer knowledge and expertise in order to enhance returns on their investment",⁵³ yet still remains a strategy of "engagement without transference control".⁵⁴ For Pistor, this constitutes a unique model of political economy: "autonomy maximization"⁵⁵ and is not simply available for any country to adopt.

Yasheng Huang argues in another direction that China's financial system is underdeveloped and still, good legal and financial institutions are essential for enterprises to thrive. But China as he examines, is lucky to have Hong Kong as a substitute mechanism. Foreign companies therefore could organize all their operations as subsidiaries of its Hong Kong firm and are subject to laws and regulations pertaining to FDI instead of those far more restrictive laws pertaining to domestic private businesses. These practices and the institutional environment make up for financially constrained private firms in China.⁵⁶

In addition to this underdeveloped financial system, China's fixed exchange rate, pegging to the dollar at "an unreasonably low rate" from 1995 to 2005, is long considered as a form of industrial policy. "Unlike the Koreans and the Japanese, the Chinese are not subsidizing

⁵¹ Nicholas C. Howson (2009) 'China's Restructured Commercial Banks: Nomenclatura Accountability Serving Corporate Governance Reform?' in M. Avery, M. Zhu and J. Cai, (eds.) *CHINA'S EMERGING FINANCIAL MARKETS: CHALLENGES AND GLOBAL IMPACT*, (Singapore: John Wiley and Sons, Asia), available at SSRN: <http://ssrn.com/abstract=1351853>

⁵² "A sovereign wealth fund is a state-owned investment fund or entity that is commonly established from balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, government transfer payments, fiscal surpluses, and/or receipts resulting from resource exports". Definition see: www.swfinstitute.org

⁵³ Katharina Pistor (2009), 'Banking Reform in the Chinese Mirror' *Columbia Law and Economics Working Paper* No. 354. Available at SSRN: <http://ssrn.com/abstract=1446930> or <http://dx.doi.org/10.2139/ssrn.1446930>

⁵⁴ Ibid.

⁵⁵ It mainly means maximizing the domestic autonomy of the ruling elite in the sovereign sponsor. Hatton Kyle J. and Pistor, Katharina (March 15, 2001) 'Maximization Autonomy in the Shadow of Great Power: The Political Economy of Sovereign Wealth Funds'. *Columbia Law and Economics Working Paper* No. 395. Available at SSRN: <http://ssrn.com/abstract=1787565> *Columbia Journal of Transnational Law*

⁵⁶ Yasheng Huang (July 2005) 'Institutional Environment and Private Sector Development in China', ASIA PROGRAM SPECIAL REPORT, 26-32. Available at: http://www.wilsoncenter.org/sites/default/files/AsiaReport_129.pdf

one particular sector”, Francis Fukuyama argues, “(t)hey are basically giving their whole coastal manufacturing region a big advantage over the rest of the world.”⁵⁷ In this sense, “China has been in effect de-industrializing much of the rest of the world.”⁵⁸

The combination of these elements would make sense of China’s model of economic sovereignty and the limited openness to global financial risks. This controlled openness without undermining state capacity, technical learning, institutional experiments and co-existence of market mechanism and socialism are the crucial definition of the Chinese characteristics by Chinese economic constitutionalists, whose arguments I will engage with in the next chapter.

2.5. The land reform

Along with bankruptcy of SOEs, land as a factor of production began to be put into the market as well (1988 Constitutional Amendment). While the land is state-owned and collective-owned, right to use land could be transferred and granted, namely, a dual land tenure system. “The Land Administration Law enacted in 1986 reiterated constitutional principles of public ownership of land, and clarified the jurisdictional arrangements for land administration. Revisions in 1988 to the constitution and the Land Administration Law of PRC permitted broader land use rights to be conveyed to private entities”.⁵⁹ The right to land use is split into two types: non-profit use and profit-oriented use, and they are regulated as Grant (*Churang*), or Transference (*Zhuanrang*) with payment of consideration separately.

To deal with “jurisdictional conflicts” in the system of land use rights caused by separate implementing rules enacted by local governments since 1990s, and “to tighten state control over perceived abuse”, “(l)and registration rules were enacted shortly thereafter”.⁶⁰ An administrative registration procedure unifies the two types, as they both have to be registered and regulated by the county or above-county-level governments. The former requires no payment of consideration while also cannot be transferred, leased or mortgaged,

⁵⁷ China, Wall Street and the Global Financial Crisis: Francis Fukuyama talks with Henry Paulson, (March 30th, 2010). Available at: <http://www.csmonitor.com/Commentary/Global-Viewpoint/2010/0330/China-Wall-Street-and-the-financial-crisis-Francis-Fukuyama-talks-with-Henry-Paulson>, (accessed on December 9th, 2014)

⁵⁸ Ibid.

⁵⁹ Pitman. B. Potter (2011), ‘Public Regulation of Private Relations – Changing Conditions of Property Regulation in China’, in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*. (London: Routledge) 54

⁶⁰ Potter (2011) 54

with the exception that it could be transferred with the above-ground buildings and also after compensating payment of consideration. In accordance with different purposes, maximum terms are varied, and the longest period of 70 years is applied to the urban residential use.⁶¹

As the Land Administration Department manages overall planning of land use, and has power to convert non-agricultural use of land under collective ownership,⁶² the State monopolizes the first-tier land market both in urban and rural areas in effect and could transact use rights in the second-tier land market. This elicited expropriation of peasants' land and land lease to foreign or private real estate developers in a massive scale.⁶³

The 'land financing' and the booming real estate market caused rapid decrease of the cultivated land. To appease dissatisfaction of peasants, in 1997, peasants' contracting rights were re-assured and extended to thirty years,⁶⁴ which was also admitted into Article 4 of the 1999 Amendment. But compared to high profits of commodification, this legal guarantee is rather a weak resolution and could be exchanged with money.

2.6.Reform to social security system

This series of reforms could not be all successful without loss, but who bore it and how was it communicated? To answer this question, it is worth examining the transformation of welfare services in China from membership to legal rights.

Social security issue in the pre-Reform China was part of China's economic institutions and was maintained by work units and in the material form of distribution according to demands. But after introduction of bankruptcy risks, it was no longer possible for SOEs to handle this function. Firstly, these services had to be specified and paid in a form of

⁶¹ *The Interim Regulations of the PRC concerning the Assignment and Transfer of the Right to Use of State-owned Land in Urban Areas* (1990)

⁶² *Regulations on the Implementation of the Land Administration of the PRC* (1998)

⁶³ This allowance could be referred to *Interim Measures for the Administration of Foreign-invested Development and Management of Tracts of Land*, effective on May 19th, 1990, and ceased to be effective on March 7th, 2008.

⁶⁴ A Notice by the General Office of CCP and State Council on the Stability and Development of Contracting Relations of the Rural Land (Zhong Gong Zhong Yang Ban Gong Ting Guo Wu Yuan Guan Yu Jin Yi Bu Wan Shan Nong Cun Tu Di Cheng Bao Guan Xi De Tong Zhi), available at <http://cpc.people.com.cn/GB/64184/64186/66687/4494335.html>, issued on August 27th, 1997 (accessed on December 9th, 2014)

wage,⁶⁵ and national social insurance system was established, which includes: “retirement and pension benefits; worker compensation for job-related injuries and diseases; medical care and disability benefits for injuries or diseases that are not employment related; unemployment benefits; pregnancy and maternity benefits; and death benefits for survivors”.⁶⁶ Secondly, coverage of these insurances were extended and “socialized”. The 1999 *Provision on Unemployment Insurance* changed the meaning of “unemployment” in the 1986 Provision from “waiting for employment” (*Dai Ye*) to “losing a job” (*Shi Ye*). And along with that, the coverage extended from state-owned enterprises to enterprises under different ownerships: private, collective or foreign. Unemployment, Pension and Medication insurances adopt a combination of social pooling and individual savings.

Though the 1986 *Bankruptcy Law* and the 1994 “*Notice*” both gave priority to social security funds, from 1997 the “Shanghai Experience” was promoted nationwide,⁶⁷ which established a re-employment centre to take laid-off workers from SOEs. Workers would stay in this centre for three years supported by a “laid-off workers fund”, then receive a two-year unemployment insurance, before they receive a minimum social relief.⁶⁸ This institutionalization of re-employment centres would make the primacy of workers’ claims registered as a separate theme out of the whole bankruptcy process. And it was reported that the NPLs for settlement of laid-off workers were limited to 10 billion Yuan in total in 1997 during this critical restructuring period of state-owned banks.⁶⁹

This process of “socialization from the state” was quite problematic. The distinction of state/society and an independent “social sphere” were created in this process. Workers were deprived of their working-class status so as to purchase social welfare, and in such a

⁶⁵ ‘The Ten-year Layout for National Economy and Social Development and 8th Five-Year Plan’ (2006), available at: http://www.gov.cn/english/2006-04/05/content_245691.htm

⁶⁶ James Zimmerman, *Labor Law: Trends and Practices in China*, The Foundation of Law, Justice and Society in collaboration with The Center of Socio-Legal Studies, University of Oxford (6), available at: <http://www.fljs.org/sites/www.fljs.org/files/publications/Zimmerman.pdf>

⁶⁷ Guo Fa [1997] No. 10, A Supplementary Notice by State Council concerning the Implementation of the SOEs Merger, Bankruptcy and Worker’s Re-employment Project in Several Cities (Guo Wu Yuan Guan Yu Zai Ruo Gan Cheng Shi Shi Xing Guo You Qi Ye Jian Bing Po Chan He Zhi Gong Zai Jiu Ye You Guan Wen Ti De Bu Chong Tong Zhi)>, issued on March 2nd, 1997, available at <http://cpc.people.com.cn/GB/64184/64186/66687/4494359.html>, (accessed on December 9th, 2014)

⁶⁸ Guo Fa [1997] No. 29, A Notice on Establishing Nationwide Security System of Minimum Living in Urban Places (Guo Wu Yuan Guan Yu Zai Quan Guo Jian Li Cheng Shi Ju Min Zui Di Sheng Huo Bao Zhang Zhi Du De Tong Zhi), issued on September 2nd, 1997, available at: <http://cpc.people.com.cn/GB/64184/64186/66687/4494334.html>, (accessed on December 9th, 2014)

This minimum standard varied according to different regions and did not include migrant workers. The social security in rural places still depended on family support.

⁶⁹ Zhu Rongji, Actively Promote Enterprise Reforms and Implement Re-employment Project (Da Li Tui Jin Qi Ye Gai Ge, Ji Ji Shi Shi Zai Jiu Ye Gong Cheng), issued on January 8th, 1997. available at: <http://cpc.people.com.cn/GB/64184/64186/66687/4494373.html>, (accessed on December 9th, 2014)

sense they were “socialized”. Enterprise autonomy, social security demands and market to supply were produced at the same time,⁷⁰ but this formalization concealed substantive loss, not to mention effects of inflation or corruption. In 2000, Premier Zhu acknowledged publicly that there was a huge hole in the social pooling of the Pension Insurance, which had added up to 37.6 billion Yuan in 1999.⁷¹

The Housing reform reflected both the land reform and social security reform. “Before 1988, employees in urban areas all lived in houses or apartments allocated by their enterprises or institutions. They did not have ownership of the houses or apartments and only paid a symbolic rent.”⁷² The housing reform was initiated in 1988, and “(t)he legal regime for the acquisition of the ‘right to use’ state-owned land by real estate developers was established by the State Council when it enacted in 1990 the Provisional Regulations on the Grant (*churang*) and the Transfer (*zhuanrang*) of the Right to Use State-Owned land in Cities and Towns (PRCT)”.⁷³ Besides that, “the *Law on the Administration of Urban Real Estate* enacted in 1994 and amended in 2007, and the *Law on Real Rights* enacted in 2007 follow that system.”⁷⁴

As Guanghua Yu writes, while in the initial period,

“(T)he immediate objective of the housing reform was to raise the rent, the long-term objective was to realize the goal of allocating houses or apartments through the market. In 1994, the State Council issued the Decision on Deepening the Reform of Urban Housing System. The gist of the Decision was to incorporate the housing benefits into the salary of employees so that the high-income families could buy commercial houses (*shangpinfang*) while the middle- and low-income families could purchase subsidized suitable economy houses (*jingji shiyongfang*) or lease low-rent apartments (*lian-zufang*)”.⁷⁵

An experience of “House Accumulation Fund” (*zhufang gongjijin*) borrowed from Singapore was introduced by the “Decision” to the housing reform. This fund was

⁷⁰ Perry Anderson (January-February 2010) ‘Two Revolutions’ *New Left Review* 61

⁷¹ Zhu Rongji, Speed Up Establishing Social Security System, and Ensure Lasting Political Stability.” (Jia Kuai Wan Shan She Hui Bao Zhang Ti Xi, Qie Shi Bao Zheng Guo Jia Chang Zhi Jiu An), issued on May 26th, 2000, available at: <http://cpc.people.com.cn/GB/64184/64186/66689/4494504.html>, (accessed on December 9th, 2014)

⁷² Guanghua Yu (2011), ‘The Role of Mortgages – A Case for Formal Law’, in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*. (London: Routledge) 120

⁷³ Albert Chen (2011) 84

⁷⁴ Guanghua Yu (2011)120

⁷⁵ Guanghua Yu (2011) 120

contributed by local finance, enterprises and the individual worker respectively 5% of his wage, and would be stored in banks until his retirement. According to different levels of wage, three types of houses would also be sold to workers at differently reduced prices and with varied marketability.⁷⁶ Therefore, it is a system of co-existence of policy housing and commercial housing. “This Decision sent out a very clear signal to the urban residents that buying and selling houses on the market was the future direction. ... Among other things, the Notice also instructed commercial banks to expand the scope of home-purchasing loans and the local governments to improve the system of registration of mortgage loans.”⁷⁷

Different from the long-term policy housing in Singapore, China’s public housing project decreased from 1998, so as not to “interrupt the market order”.⁷⁸ Hereafter, real estate transaction becomes a high-profit industry in China. The benefits from the housing reform are easily lost when houses and land use rights are put into market re-appreciation.

2.7.A brief summary

In sum, China’s economic and social transition was mediated through a series of reforms, which was named by Fan Gang and Wing Thyee Woo as PPP (Parallel Partial Progression) approach.⁷⁹ It means that the combination of reforms was too comprehensive to resist, if compared to a sequencing type (354). It was impossible to complete transition quickly in any one area, but quickly when started almost everywhere. To some extent, we could define China’s reform process as a radical one though adopted a strategy of “gradualism”.

There are two points to be noticed. The first is the legalization to constitute rather than merely reflect the distinction between State and society, namely, the “socialization” process in China. The implication of gaining *freedom* in this process was highly dependent upon economic transactions. China’s contractualization was rather an enforced process and its delivery of individual freedom was a failure in this sense. Secondly, there is a two-tier market structure established in China’s economic system, which is crucial for us to interpret the meaning of “Socialist market economy” (Article 5 of 1993 Amendment). We

⁷⁶ A Decision by State Council on Promoting Urban Housing Reform (Guo Wu Yuan Guan Yu Shen Hua Cheng Zhen Zhu Fang Gai Ge De Jue Ding), issued on July 18th, 1994, available at <http://cpc.people.com.cn/GB/64184/64186/66685/4494187.html>, (accessed on December 9th, 2014)

⁷⁷ Guanghua Yu (2011) 121

⁷⁸ Chen Xuebin, A Review of the mid 90s Housing Reform, http://www.cssn.cn/ts/ts_jpsz/201312/t20131224_923133.shtml, accessed on December 9th, 2014

⁷⁹ Fan Gang and Wing Thyee Woo (2009) ‘The Parallel Partial Progression Approach to Institutional Transformation in Transition Economies: Optimize Economic Coherence, Not Policy Sequence’ *Modern China* 35(4): 352-369

could observe this structure in reforms to SOEs in China's strategic industries; corporatization and non-marketability of shares in financial markets; state monopoly of the first-tier land market and the divide between land ownership and right to use; tax sharing system and transfer payments, etc. Through these practices, China produces a model that could be called "state capitalism": market reforms are controlled and liquidating small and medium-sized enterprises is encouraged in the meantime with strengthening strategically important industries. Joseph Stiglitz compliments the Chinese path as putting emphasis on competition and dynamics, while privatization is taken as secondary.⁸⁰ But apparently in this comment, whether it is a real competition is less concerned by Stiglitz. However, this state re-centralization and selective privatization could not be reconciled without costs, which were gradually manifested in the decline of social security and the rise of mass incidents.

3. Reforms after 2003

3.1. The rise of "Mass Incidents" and the proposal of "Harmonious Society"

The 1990s reforms are crucial for China's economic miracle, but also dramatically root out security of the working class lives in China. Urban workers began to protest for their loss of jobs and related absence of welfare or corruption in the implementation. In the North-east China, where China's heavy industries were formerly concentrated, an entire family could be laid off at the same time due to the closure of state enterprises and changes in industry policies. The boom of real estate industry makes the one time benefits of the housing reform lost to market re-appreciation, and the gap between compensation and affordability of new residence is revealing. This gives rise to the phenomenon of "enforced demolition" and demands for stronger protection of property rights by the relatively wealthy class who owns property first in the reform process. Other social services, albeit medication or education, which was appropriated through a formal transference from "status to contract", begin to feel the pressure of the market and the substantive loss. According to the report of Government Expenditures cited by Dirk Schmidt and Sebastian Heilmann, China's population's most pressing concern before the 2007 financial crisis was

⁸⁰ Joseph E. Stiglitz (2002), *Globalization And Its Discontents*. (London: Penguin Books Ltd.) 182

still public goods and affordable houses. But the government expenditures for health and education only comprised 18 percent of all expenditures, much less than peer countries.⁸¹

Rural areas are in a worse condition and get even less support from the State than urban areas. Working on household agriculture could no longer earn enough to catch up with the rise of education and medication fees. What is more, their land, which is their whole basis for living and security, is under the pressure of urban real estate industry and expropriated on a massive scale. Young peasants leave their homeland and migrate to coastal cities due to poverty on the rise. They only constitute “semi-proletarians”⁸² with a plot of land allotted in their hometown, while they are living in the city in a poorer situation: lack of social security, lagged behind in education and training, and discriminated in legal protection.

Mass incidents, a term used to describe mainly that injustice caused by enforced demolition, lay-off from work, and confiscation of land without sufficient compensation, etc. could not find proper resolutions through law and judicial means, resort instead to mass gatherings, media reports or other extra-legal means to exert pressure. They find in fact extra-legal methods sometimes more efficient, which Dowdle puts as an “informed disenchantment”.⁸³ According to the research of Chinese Police Academy, mass incidents rose from 8,300 in 1993 to 90,000 in 2006 and went violent.⁸⁴ In proposing “Harmonious Society” and “Scientific Development”, the government declares its new attention to social problems alternative to the 1990s fully economic orientation. I will take up discussions of these terms later (3.5.), where I explain the paradoxical effects of labour law fragmentation in China, and whether “harmony” is available.

3.2. China’s accession to the WTO

Another significant event in the development of China was its accession to the WTO on December 11th 2001 after a long process. As Karen Halverson argues, “China’s status as a

⁸¹ Dirk Schmidt and Sebastian Heilmann (January 2010) ‘Dealing with Economic Crisis in 2008-2009: The Chinese Government’s Crisis Management in Comparative Perspective’, *China Analysis* 77, available at: www.Chinapolitik.de

⁸² Pun Ngai and Lu Huilin (2010) ‘Unfinished Proletarianization: Self, Anger and Class Action among the Second Generation of Peasant-Workers in Present-Day China’, *Modern China* 36: 493-519

⁸³ Dowdle (2009) 214

⁸⁴ see: Barbara Demic, Protests in China over local grievances surge, and get a hearing, October 08, 2011, Los Angeles Times, available at: <http://articles.latimes.com/2011/oct/08/world/la-fg-china-protests-20111009> (accessed at December 9th 2014)

developing country and economic power posed a dilemma.”⁸⁵ China expressed her commitment clearly in this accession. Constitutional amendments were enacted to protect property rights and private owners (Article 3-6 of the 2004 Amendment), and the *Law on Property*, after being prepared for decades, was finally promulgated in 2007. The state council also published in 2004 “*Several Opinions by State Council Concerning Promotion of the Reform and Opening, and the Stable Development of the Capital Market*”⁸⁶ to promote developments in capital market, which emphasized an important measure on “reform of non-tradable shares” as I have mentioned. In 2005, “*Several Opinions by State Council On Encouraging, Supporting and Guiding Individual, Private and Other Non-Public Economy*”⁸⁷ was issued, which for the first time allowed non-public capital access to some monopoly industries [Article 1(2)]. It reflects significant concessions China has made in order to get access to WTO, such as, Transparency, Agreement on Subsidies and Countervailing Measures (SCM Agreement), Nonmarket Economy Treatment in anti-dumping cases and Discriminatory Safeguard Rule.

However, case studies show that many of these concessions are compromised to some extent in China. On December 31st 2001, shortly after China’s accession, the seven-year transition period provided to transitional economy ended without extension available for China. Hence, in the case of China’s subsidy, a “SOE-based specificity test” is applied as a criterion, namely that, if “disproportionately” a large number of state-owned enterprises receive such subsidy, China will be subject to countervailing actions.

Julia Ya Qin argues that it is naïve to believe potential litigations at the WTO or countervailing actions of China’s trading partners will decide policies China adopts to privatize its state sector; and situations involved in a pre-privatisation subsidy in China are far more complex and of a larger scale, such as “policy loans, automatic rollover of unpaid principal and interest, foreign loans and below-market low interest loans”,⁸⁸ which are provided to SOEs through state-owned banks. Additionally, part of the SOEs subsidies

⁸⁵ Karen Halverson (2004) ‘China’s WTO Accession: Economic, Legal and Political Implications’, *B.C. Int’l & Comp. L. Rev.* 27(2): 319-370

⁸⁶ Several Opinions by State Council Concerning Promotion of the Reform and Openning, and the Stable Development of the Capital Market (Guo Wu Yuan Guan Yu Tui Jin Zi Ben Shi Chang Gai Ge Kai Fang He Wen Ding Fa Zhan De Ruo Gan Yi Jian), issued on January 31st, 2004, available at: <http://cpc.people.com.cn/GB/64184/64186/66691/4494617.html>, (accessed on December 9th, 2014)

⁸⁷ Guofa [2005] 3, Several Opinions by State Council On Encouraging, Supporting and Guiding Individual, Private and Other Non-Public Economy (Guo Wu Yuan Guan Yu Gu Li Zhi Chi He Yin Dao Ge Ti Si Ying Deng Fei Gong You Zhi Jing Ji Fa Zhan De Ruo Gan Yi Jian), issued on February 19th, 2005, available at: http://www.gov.cn/zwggk/2005-08/12/content_21691.htm, (accessed on December 9th, 2014)

⁸⁸ Julia Ya Qin (2004) ‘WTO Regulation of Subsidies to SOEs – A Critical Appraisal of the China Accession Protocol’, *Journal of International Economic Law* 7(4): 863-919

during the reform era has effects of correcting market distortions rather than creating new ones.

China's SOEs reform and its compliance with the criteria of the WTO are also controversial. Take the telecommunication service industry for example, the establishment of Foreign-Invested Telecommunication Enterprises (FITE) has a shareholding requirement of 51% state equity interest, so that, "(i)n fact, it grants China discretion in determining whether to allow a given foreign supplier to establish an FITE because the state owns potential Chinese partners."⁸⁹ Independence from government hence would have ambiguous meaning. 51% state equity requirement also means ownership by another member is impossible and few are likely to be controlled. Therefore, national treatment is not to be applied. Tania Voon concludes that "China tends to treat its GATS (General Agreement on Trade in Services) commitments as imposing maximum rather than minimum requirements."⁹⁰

A case study on China's banking sector also shows a "Same Bed, Different Dreams"⁹¹tendency, Daniel Crosby argues. Controversy arises concerning that China allows qualified foreign financial institutions "to establish" wholly owned subsidiaries, branches and joint venture Banks. Does it mean the establishment of a commercial presence through the "acquisition" of existing Chinese banks, or only through the "constitution" of new banks? This concerns especially Chinese commercial banks and city banks as they are not controlled by the central government.

Howson, nevertheless, holds a positive view toward China's liberalization of the securities industry. He observes a wonderfully open-ended stipulation of foreign ownership that "a requirement that one shareholder in the firm holds at least 25% of the equity", in the newly promulgated *Securities Investment Fund Law* in 2004.⁹² Howson predicts that after domestic development and corporatization, China's "Going Out Strategy" will finally force China to be shaped by a completely different legal, contractual and regulatory context and rules.⁹³ But Clarke disagrees and argues that reforms simply imposed from outside are

⁸⁹ Tania Voon and Andrew Mitchell (2010) 'Open for Business? China's Telecommunications Service Market and the WTO', *Journal of International Economic Law* 13(2): 321-378, 358

⁹⁰ Ibid. 340

⁹¹ Daniel C. Crosby (2008) "Banking on China's WTO Commitments: 'Same Bed, Different Dreams' in China's Financial Sector", *Journal of International Economic Law* 11(1): 75-105

⁹² Nicholas C. Howson (2007) 'China and WTO Liberalization of the Securities Industry: Le Choc des mondes or L' Empire immobile?' *Asian Policy* 3: 151-181

⁹³ Nicholas C. Howson (2006), 'China's Acquisition Abroad -- Global Ambitions, Domestic Effects', *Law Quadrangle Notes* 48(3): 73-84

unlikely to go beyond surface compliance.⁹⁴ The requirement in TRIPS and GATS are limited only to specific sectors rather than a systematic reform.

These case studies are meant to understand the complex and compromised effects related to China's 1990s reform and the economic structure it left. As the study of Wspaning Andersen's fourfold typology of welfare regimes shows, the Eastern Asian model could be counted as quite different in the market-government configuration.⁹⁵ This also problematizes whether and how marketization will influence China's constitutional reforms from the private law system. I will elaborate more later.

3.3. The 2007 global financial crisis and the staging of China's New Left

Based on complexities in China's accession to WTO, the impact of "Global financial crisis" on China also has to be re-evaluated. According to the research by Schmidt and Heilmann China had a comparative minimum exposure to the most risky financial products. Before the financial crisis, China's financial system was primarily bank-based. Bank lending was the dominant source (85%) for external funding while bonds (10%) and stocks (4%) only played a minor role. China's financial system has often been characterized as underdeveloped and "repressed", with most of investment coming from saving not borrowing.⁹⁶ The effects of the financial crisis on China concerned indeed real economy. In the first half of year 2009, exports sank 21.8% and imports 25.4%. And in the spring of 2009, China's Ministry of Agriculture reported that 20 million recently laid-off migrant workers returned to the countryside.⁹⁷

Confronting this, China's State Council announced its 4-trillion-Yuan Stimulation Plan and changed its monetary policy from "moderately tight" to "moderately loose".⁹⁸ This is meant to activate consumption, especially consumption by rural residents and low-income class in urban areas, according to the report of Premier Wen.⁹⁹ From 2008 to 2009, the

⁹⁴ Donald C. Clarke (2003) 'China's Legal System and the WTO: Prospects for Compliance', *Washington University Global Studies Law Review* 2: 97-118

⁹⁵ Bob Jessop, *The Future of the Capitalist State*. (Cambridge: Polity 2002) 61-68

⁹⁶ Schmidt and Heilmann (2010)

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Wen Jiabao, Several Important Issues Concerning Deeply Promoting the Idea of "Scientific Development" (Guan Yu Shen Hua Guan Che Luo Shi Ke Xue Fa Zhan Guan De Ruo Gan Zhong Da Wen Ti), issued on November 5th, 2008, available at: http://www.gov.cn/lhdh/2008-11/03/content_1138667.htm, (accessed on December 6th, 2014)

State Council issued four decrees¹⁰⁰ to tackle the rural pension insurance, which was formerly handled in the unit of households; to upgrade the level of rural and urban consumptions; and to address unemployment. Reforms to the health and medication system are also included. Jane Duckett argues that it was actually initiated in 2005 related to the “colour revolutions” in Eastern Europe and criticism of marketization and neo-liberalism,¹⁰¹ but Barry Naughton deems it could not be understood without the stimulus package.¹⁰²

With regard to contents of the stimulation programme, Schmidt and Heilmann praise China’s using the “window of opportunity” to put forward reforms in health care and solve unemployment, so as to preserve overall social stability. But this plan lacks support for small- and medium-sized enterprises and is lagged markedly behind in terms of “green technology” promotion.¹⁰³ With massive investment in the infrastructure, China’s SOEs will benefit most from the plan, which even provokes a trend named as “the state sector steps forward while the private sector retreats”.¹⁰⁴ In 2009, the merger of small mining enterprises in Shanxi Province, which measure reduced the total of 2200 to 100 in name of regulating “bloody GDP”, was selected by legal scholars one of the top ten constitutional incidents.¹⁰⁵ It expressed their worry about a return to state regulations, not only in

¹⁰⁰ Guo Fa [2008] No. 30 Guidelines by State Council Concerning Promoting the Reform and Openness, and the Economic and Social Development to a Higher Level in Yanzi Delta (Guo Wu Yuan Guan Yu Jin Yi Bu Tui Jin Chang Jiang San Jiao Zhou Di Qu Gai Ge Kai Fang He Jing Ji She Hui Fa Zhan De Zhi Dao Yi Jian), issued on October 16th, 2008, available at: <http://www.china.com.cn/ch-xinwen/content/news081016-2.htm>, (accessed on December 6th, 2014)

Guo Ban Fa [2008] No. 134 An Opinion by the General Office of State Council on Activating Circulation and Increasing Consumption (Guo Wu Yuan Ban Gong Ting Guan Yu Gao Huo Liu Tong Kuo Da Xiao Fei De Yi Jian), issued on December 30th, 2008, available at http://www.gov.cn/zw/gk/2008-12/31/content_1192763.htm, (accessed on December 6th, 2014)

Guo Fa [2009] No. 32 Guidelines by State Council Concerning Experiment of Pension Insurance of a New Type in the Rural Areas (Guo Wu Yuan Guan Yu Kai Zhan Xin Xing Nong Cun She Hui Yang Lao Bao Xian Shi Dian De Zhi Dao Yi Jian), issued on September 1st, 2009, available on http://www.gov.cn/zw/gk/2009-09/04/content_1409216.htm, (accessed on December 6th, 2014)

¹⁰¹ Jane Duckett (2010) ‘Economic Crisis and China’s 2009 Health Reform Plan: Rebuilding Social Protections for Stability and Growth?’ *China Analysis* 80, available at: www.chinapolitik.de

¹⁰² Barry Naughton (2009), ‘Understanding the Chinese Stimulus Package’, *China Leadership Monitor* 28: 1-12

¹⁰³ Schmidt and Heilmann (2010)

¹⁰⁴ Ibid.

¹⁰⁵ Restructuring of Shanxi Mining Industry Adopts “the State Sector Steps Forward while the Private Sector Retreats”, Mining Entrepreneurs Are About to Resign From the Stage (Shan Xi Mei Kuang Chong Zu Shang

economy, but also in politics. The “developmental state” named by Philip Huang requires “a service-oriented state, with perhaps also some measures of active involvement in development”, and the state works “in conjunction with private sectors to ensure the provision of public services and social welfare.”¹⁰⁶

China’s model became popular for its advantages in resisting economic risks in the context of globalization. It is especially appreciated by China’s New Left. Heilmann defines it as an “unusual combination of extensive policy experimentation with long-term policy prioritization – in a short formula: foresighted tinkering – that has been practised under the shadow of hierarchical authority structure”.¹⁰⁷ Similarly, Wang characterises it as “one-size-does-not-fit-all pragmatism” and the “learning/adaptive capacity” of China’s political systems.¹⁰⁸ For Zhou Xueguang, China’s model is characterized as “collusion between local governments acts as a corrective and countervailing force to the centralization of decision-making authority in China.”¹⁰⁹ Hence he holds a similar view on the local/central relationship with Barry Weingast’s “market-preserving federalism”.¹¹⁰

Sun Liping, calls forth a “theory of transition” for former Socialist countries, different from the “theory of modernity” in developed countries and the “theory of development” in Africa and Latin America, as it is very difficult for post-Communist countries to thoroughly change their pre-existing mechanisms for distributing political powers and resources. Instead, he proposes neo-institutionalism, which stresses that practices have a generating mechanism and the theoretical focus should be given to how people strategize and act in practices.¹¹¹

It is hard to predict whether the stimulation plan will really benefit China in the long run. If China was de-industrialized, how would it sustain high costs of the social welfare project? Or could it become consumption-driven without initiating financial reforms? This is how Fukuyama predicts with confidence that an economic downturn may bring challenges to

Yan Guo Jin Min Tui, Mei Laoban Jiang Tui Chu Li Shi Wu Tai), available <http://finance.ifeng.com/news/20090828/1166577.shtml> (accessed on December 9th, 2014)

¹⁰⁶ Philip C.C. Huang (2009) 430

¹⁰⁷ Sebastian Heilmann (August 2010) ‘Economic Governance: Authoritarian Upgrading and Innovative Potential’, *China Analysis* 82. Available at: www.chinapolitik.de

¹⁰⁸ Wang Shaoguang (2009) 398

¹⁰⁹ Xueguang Zhou (2010) ‘The Institutional Logic of Collusion among Local Government in China’, *Modern China* 36(1): 47-78

¹¹⁰ Barry R. Weingast (1995), ‘The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development’, *The Journal of Law, Economics & Organization*, 11(1):1-31

¹¹¹ Liping Sun (2008) Societal Transition: New Issues in the Field of the Sociology of Development, *Modern China* 34(1): 88-113

the fragile legitimacy of China's politics.¹¹² In contrast, China's New Left detect from the global financial crisis a chance to develop China's own model of "economic constitutionalism" and "political constitutionalism". The first *State Plan of Action for Human Rights (2009-2010)* was promulgated on April 13th, 2009, which puts economic, social and cultural rights (including rights to employment, social security and health, etc.) prior to political rights in the structure.¹¹³ And the Twelfth Five-year Plan was published in 2011 which announced completion of the "Socialist Legal System".¹¹⁴ It promises never to practise separation of power, Bicameralism, Federalism, Multi-party System and Privatization, but a substantial definition of "what is" is lacking.

This reflects the influence of China's New Left in theoretical examination of the Chinese model, who provide new perspectives extending from political economy to political and constitutional theories. There is an apparent advantage in China's restricted submission to the global market that could count as an "institutional innovation".¹¹⁵ The 1990s reforms and the combination of Socialism and the market mechanism do not undermine China's state capacity to meet with financial crisis. This study on China's governance model will be influential to China's constitutional re-imaginings, to some extent an inverse trend to legal constitutionalism in the 1980s, which is my concern in the next chapter.

3.4. The promulgation of Law on Property in China

Both the outcomes of the 1990s reforms and the globalization imperative call for the promulgation of a property law in China, so as to resolve internal conflicts of the property issues. The difficulty, for Pitman Potter, is to deal with the orthodoxy of public ownership while to recognize private property relations. "The 2004 constitutional developments in turn paved the way for completion of a draft law, work on which had begun in the early 1990s."¹¹⁶ The *Law on property*, however, does not revolutionize the existing law and property relations. Its "main significance and contribution lies in providing a conceptual

¹¹² Fukuyama, Francis (January 17th, 2011), 'US democracy Has Little to Teach China', available at: <http://www.ft.com/cms/s/0/cb6af6e8-2272-11e0-b6a2-00144feab49a.html#axzz3PFfIoNdd>, (accessed on December 9th, 2014)

¹¹³ State Plan of Action for Human Rights (Guo Jia Ren Quan Xing Dong Ji Hua) (2009-2010), available at: <http://www.chinaneews.com/gn/news/2009/04-13/1642873.shtml>, issued in April 2009, (accessed on December 6th, 2014)

¹¹⁴ Layout for National Economy and Social Development of The 12th Five-Year Plan (Guo Min Jing Ji He She Hui Fa Zhan Di Shi Er Ge Wu Nian Ji Hua Gang Yao), available at: http://www.gov.cn/2011lh/content_1825838.htm, (accessed on December 6th, 2014)

¹¹⁵ Roberto Mangabeira Unger and Zhiyuan Cui (November-December 1994) 'China in the Russian Mirror', *New Left Review* 1/208

¹¹⁶ Potter (2011) 54

framework for the purpose of organizing, consolidating and systematizing the existing law relating to property rights in movable and immovable property.”¹¹⁷

To deal with the orthodoxy, the *Law on Property* is said to make its innovations. As Chen argues, in the draft process,

“One view was that the threefold classification was applicable only to systems of ownership (*suoyou zhi*) and need not be provided for in the LP, which should make provisions for ownership of property rather than systems of ownership which concern the ‘economic base’ of society (according to Marxist theory) and which belong to the province of constitutional law rather than civil law.”¹¹⁸

But could they be separated? This suspension in discussing the more politically and constitutionally sensitive question and reducing it to a specification question of civil law, is based on unbundling conceptions of ownership and right to use as in the 1980s and 1990s reforms. This divide deviates from both the continental civil law system and the Communist legal system, and at the same time constitutes a combination of both, as Chen puts it,

“In non-communist civil law jurisdictions where private ownership of property is the dominant form of ownership, property ownership rather than *yongyi wuquan* (*Nutzungsrechte*) is the central concept in property practice. The peculiarity of ‘socialism with Chinese characteristics’ or the ‘Socialist market economy’ in China is such that ownership in land cannot be privately held and cannot enter the market, but *yongyi wuquan* can”.¹¹⁹

This distinguishes China’s property relations from other jurisdictions. Take the collectively owned land for example. The LP seeks to protect the rights of members of the collective by requiring release of the information on *chengbao* plans or the use and distribution of land compensation. Apart from “the rights of participation in decision-making and of taking court actions”, members of the collective also “enjoy the rights to share in the income or benefits derived from the use (e.g. leasing of *chengbao* operation) of the collectively owned land...”¹²⁰ In this sense, “(i)t may thus be argued that ownership is in official

¹¹⁷ Albert Chen (2011) 102

¹¹⁸ Albert Chen (2011) 91

¹¹⁹ Albert Chen (2011) 92

¹²⁰ Albert Chen (2011) 102

theory a form of socialist public ownership, there are elements of private property in it insofar as members of the collective as private individuals may enjoy certain private rights (including income) and assert certain private claims relating to the use of collectively owned property”.¹²¹ This private *element* embodied in public ownership, and the right to use in the LP “is largely a response to indigenous circumstances and needs. It also testifies to the unique combination of socialist and private property rights that is a product of the era of ‘reform and opening’ in China that began 30 years ago.”¹²²

The Draft has undergone seven hearings before coming into effect. And in 2005, during the nationwide discussion of the draft, Gong Xiantian, a professor of Jurisprudence at the Beijing University published a letter on the internet, named “An Unconstitutional Draft of Law on Property in Violation of the Principle of Socialism: A Public Letter Written for the Abolition of Article 12 of the Constitution and Article 73 of 1986 ‘The General Principle of Civil Law’”.¹²³ In this letter, Gong made explicit the incompatibility of the Socialist structure of 1982 Constitution and the property relations that have evolved in China, especially privileges gained by a minority of the population in liquidating state assets. In contrast, the working class, who have already been left with no property to own, only gained a formal entitlement. This Law on Property legislation hence was to enact substantive inequality into a form of law. Gong thus called forth a straightforward discussion on the fundamental principle, the direction of socialism, and the relationship between public property and private property. Potter observes as well,

“To the extent that enjoying the benefits of property rights protection requires compliance with formal regulatory models, this privileges people already adept at communicating and acting in the formal regulatory world, while excludes and marginalizes those who are not so adept. In the short term, this has the potential to aggravate rather than relieve socio-economic tensions, while in the longer term may undermine traditional patterns of socio-economic and political relations.”¹²⁴

¹²¹ Albert Chen (2011) 102

¹²² Albert Chen (2011) 93

¹²³ An Unconstitutional Draft of Law on Property in Violation of the Principle of Socialism: A Public Letter Written for the Abolition of Article 12 of the Constitution and Article 73 of 1986 ‘The General Principle of Civil Law’” (Yi Bu Wei Bei Xian Fa he Bei Li She Hui Zhu Yi Ji Ben Yuan Ze De Wu Quan Fa Cao An – Wei Xian Fa Di Shi Er Tiao He 86 Nian Min Fa Tong Ze Di 73 Tiao De Fei Chu Xie De Gong Kai Xin) available at <http://www.chinaelections.org/NewsInfo.asp?NewsID=45986> (last accessed on October 10th, 2010). It has already been removed from this site, now is available at <http://news.qq.com/a/20061221/002288.htm> (accessed on December 9th, 2014)

¹²⁴ Potter (2011) 66

This letter provoked many criticisms from the Civil Law professorship. They insisted that all properties transferring in the marketplace deserve recognition of the same status and equal protection. This is the “spirit” of property law as a subcategory of civil law, and if the Law on Property was suspended, it would further block the promulgation of a Civil Code in China. At a civil law conference at the end of 2005, scholars on property law decided to appeal for re-start of the legislating process. But the passage of Law on Property was postponed in December 2005 and March 2006, and finally got through in 2007 after seven hearings.¹²⁵ A well-known civil law professor Jiang Ping commented on Gong’s protest that, “he no longer opposed Law on Property only, actually he questioned the whole ‘Reform and Opening’”. Toward this, Gong replied, “I oppose both”.¹²⁶

3.5. The fragmentation of labour law and the promulgation of Labour Contract Law

What is distinct about China’s labour law is that this law was born out of a transformation of the socialist structure of ownership and membership, and developed along with the economic transformation. In a sense, it is a byproduct of the private law regime China established after the 1978 Reform and Opening. This gives Chinese labour law a perplexity since as law, it depends on its relative autonomy from political discretions; while this law does not guarantee the same level of protection as workers enjoyed before the Reform; rather it is a degradation from workers’ mastery of state assets. This calls for a deeper inquiry into the phenomenon of legalization. Labour law in China embodies internal tension between its form (as appropriation of legal personality) and substance (of labour protection). This binary effect of legalization of labour relation and fragmentation of labour law in contemporary China hence reminds us of what problem was lost from sight in this legalization and whether the compensation program (I will explain in Chapter 4) is enough.

In the pre-reform era, labour relation was embedded in the general social structure and was rigid and not commodified. “Young workers would be assigned to a *danwei* by the local administration department, which would also form the basis of their social and individual

¹²⁵ A Public Letter by a Professor of Peking University on Unconstitutionality of Law on Property (Draft) that Reignites the debates Between Socialist Path and Capitalist Path(Bei Da Jiao shou Gong Kai Xin Cheng Wu Quan Fa Wei Xian, Zai Tiao Xing Zi Xing She Zhi Zheng), available at: <http://news.sohu.com/20060223/n241979849.shtml>, (accessed on December 9th, 2014)

¹²⁶Gong Xian Tian (Gong Xian Tian Zhe Ge Ren), available at <http://finance.sina.com.cn/g/20070318/06243416735.shtml> (accessed on December 9th, 2014)

life”.¹²⁷ Also, with a “dual system” of Party and management control as the basis of enterprise leadership, the trade union functioned as the “transmission belt” between the Party-state and workers, and was “responsible for educating workers and dealing with their grievances”.¹²⁸ All unions belonged to “the sole state-sanctioned union body”, the All-China Federation of Trade Unions (ACFTU).

The rigidity of labour relation began to change with the adoption of two contract systems in rural communes and state enterprises. Contract responsibility system released labour forces from people’s communes and “peasant workers” began to move to Chinese newly established SEZs. They comprise groups of workers concentrated in the exploitative factories of the “sunbelt”.¹²⁹ The other group was from the declining “rustbelt” – the urban working class that once enjoyed lifetime job securities in the state enterprises as “masters of the factory”.¹³⁰ With the removal of the “cradle-to-grave” social welfare of the *danwei* system, social services had to be transmitted to wages and in 1990s, the *national* social insurance system was established. The wage reform in China enabled the generalization of labour relation apart from its enterprise basis, and made labour law conceivable than separate labour regulations regarding different ownerships as in the 1980s¹³¹ – the start of Reform.

This gave birth to the 1994 *Labour Law*, which “formally” established the system of labour contract as the primary means for regulating employment relations. But as other reform processes were also in progress, the 1994 Labour law had a “disorderly internal structure”¹³² and it “left out much of the details—for example, the law largely focuses on *termination of* employment yet does not address contract formation in any detail”.¹³³ As Mary Gallagher and Baohua Dong comment,

“The problems presented by the labour contract system are indicative of the difficulty legislating employment laws that have two different, even opposing, functions. The 1994 Labour Law was designed to both end the entitlements of socialism and ensure increased protection and rights under the market economy.

¹²⁷ Zou (2009)

¹²⁸ Zou (2009).

¹²⁹ Cynthia Estlund and Seth Gurgel, (2012) A New Deal for China’s Workers? Labor Law Reform in the Wake of Rising Labor Unrest. *New York University Public Law and Legal Theory Working Papers* Paper 297 <http://lsr.nellco.org/nyu-plltwp/297>

¹³⁰ Ibid.

¹³¹ Supra at n. 11

¹³² Zou (2009)

¹³³ Zou (2009)

Combined with the realities of a large labour surplus, these legal developments were more effective in ending socialist employment than protecting workers in the new market economy”.¹³⁴

Zou also points out the mismatch of China’s labour relation with the presumption about the labour law that, “(t)he Labour Law 1994, in its presumption that employers and individual workers are equal in a contractual relationship (for example, art.17 stipulates that ‘Conclusion and alteration of labour contracts shall follow the principle of equality, voluntariness, and agreement through consultation’), is still based on a pre-reform workplace mentality of Chinese enterprises that espoused common interests between management, workers and the Party”.¹³⁵ But there are more contrasts throughout the reform process between the Chinese labour law and the Western counterpart, which I try to unfold here based on discussions of several scholars.

The first issue is the corporatist paradigm in legalizing labour relation. Whether 1994 Labour Law could found a “state corporatist” paradigm depends on the relationship between the Party and the Trade Union. With the Party in law withdrawing its direct guidance in state enterprises, do trade unions represent workers instead? It is very controversial in the nature and structure of ACFTU. Many labour law scholars have raised questions concerning whether the unified representation of ACFTU has been outdated and ignorant of the notion of “*contradictions*”. As Cybthia Estlund and Seth Gurgel comment,

“Still, the notion of explicitly recognizing conflicting interests among workers or between workers and managers—either through a redefinition of the ‘employees’ who are covered by collective bargaining at all or by something like separate ‘bargaining units’ within the enterprise—has gained little traction even among forward-looking Chinese policymakers and scholars in the labour field”.¹³⁶

The monopoly of representation of ACFTU preserves the socialist presumption of trade unions that they are “on behalf of ‘the worker state’, not shareholders”.¹³⁷ After such great transformations in China’s industry, labour and social structure, the official mission and limited constituency of ACFTU are kept untouched. If during China’s planned economy phase, the working unit as the employer shared common interests with individual worker,

¹³⁴ Gallagher and Dong (2011)40

¹³⁵ Zou (2009)

¹³⁶ Estlund and Gurgel (2012)

¹³⁷ Ibid.

so the ACFTU could function as the “transmission belt” or consultation, the increasing conflicts between employers and employees are not sufficiently recognized in this outdated institutional basis. This limits the function of collective bargaining of trade unions in China, as “conflicts” inherent in the employment relation are not recognized as normal; rather “*stability*” is what ACFTU’s official mission. It prevents emergence of employer’s union and stresses “collective *negotiations*” in lieu of “collective bargaining”.

It also prevents the enterprise-based trade unions from having real power. “The ACFTU’s official monopoly status represents a frontal rejection of the principle of ‘freedom of association’, a core international labour right and a central organizing principle of the International Labour Organization”.¹³⁸ This “explicit prohibition of any trade union organization other than the one designated by the one-party-state” makes it suspicious that ACFTU could represent genuinely the workers’ demands instead of balancing with other governance requirements, such as attracting investments. Cooperative paradigm is not an accurate description of China’s labour legislations since the representation of workers by ACFTU is far from effective.

The second issue lies in the absence of a ‘right to strike’. Though there is a great deal of attention regarding strikes and collective bargaining, “what is still largely missing is any direct link between collective bargaining and strikes”.¹³⁹ But “what will impel employers to agree to, or even consider, a union’s collective bargaining demands?”¹⁴⁰ In the West, “it is not legal compulsion but economic pressure, primarily based on the capacity to interrupt production, that historically has been the linchpin of workers’ bargaining power through the history of organized labo(u)r. Without a right to strike, what clout does the union have behind its economic demands?”¹⁴¹ That is to say, legalization is the basis for trade union to function in collective bargaining, but without this bargaining performance of interruption, the representation would be void. To make it clear, this concerns whether entitlements of right to strike will conflict with China’s other means of social control.

Right to strike and bargaining depends on other political and institutional guarantees to allow for this disruption of the enterprise order, which are a *precondition* of the Labour Law, rather than what are prescribed only *in* and *by* the Labour law. Legalization of “right to strike” in China hence has paradoxical effects. For Chang Kai, a leading labour scholar

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

in China, legal recognition of strikes is “the inevitable result of market economy and something society would have to learn to accept”.¹⁴² While, for some other scholars, “they worry that a ‘right to strike’ in China would inevitably come with sharp-edged limitations that would define most actual strikes and strike activity as illegal, and would do more to embolden their repression than legitimate them”.¹⁴³ In fact, “(W)orkers in China have gotten much of what they have gotten precisely by making trouble on the streets, and that the current legal ambiguity surrounding the strike has perhaps allowed them to do with less police and regulatory intervention than they are likely to get with a legally defined and circumscribed ‘right to strike’”.¹⁴⁴ The labour-law defined “strike” in this sense is conditioned by a public law guarantee on the *circumscription* of “*what is a strike*” that allowed for immunity from police intervention. But scholars are worried that this immunity is lacking in China’s legal system.

The third issue concerns fragmentation of labour relation from other social transformations. Legalization of labour itself could not deal with codification of labour forces in labour law itself but merely *recognition* of labour. Labour forces in China’s “sunbelt” and “rustbelt” were formed differently and treated differently. The majority of the “sunbelt” labour is composed of migrant workers who are registered as members of rural collective community and consequently inaccessible to social welfare in the urban residence. They are vulnerable to discrimination, low wage, poor working conditions and delay in getting paid. Implementation of labour law facilitates them in getting a better working condition and fair treatment. However, this legalization of labour relation does not concern their social status in the whole. It only corresponds to their commodification as “labour” but is ignorant of the commodification logic and incentives. It does not address to the discriminating framework that programs commodification. Labour law legislation could really protect migrant workers so long as they sell themselves into employment relation and become recognized as labour forces, but the deep-rooted question of rural/urban divide is unanswered. Consequently, “informal labour” as a prime feature of China’s labour condition, Huang asserts, has no register in academic discourses about labour conditions. Huang hence disagrees on this projection of labour conditions in China argued in a model and definition of industrialization.¹⁴⁵ For migrant workers in China, they do not have a right *not* to sell themselves while being protected as labourer. They are certainly more

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Philip Huang (2009) 405-438, 413

willing to get involved in the network of social securities in urban places, but it also implies as urban residents they should lose their land-related rights in rural collectives. However, there is no reassurance of decent work for them in the cities, since they already are lagged in education and trainings.

“Rustbelt” workers are not in the same situation with their rural peers. They are labour forces degraded from their mastery of state assets. They made a labour contract with the state but contracted for nothing in return. Administrating labour law will not influence them as much as welcomed by peasant workers in the “sunbelt”, as it is the distribution problem involved in their becoming employees. It is far complex than implementing what labour law prescribed. Rather it concerns that they were and continue to be a *member* of state enterprises of socialist ownership but are left with only low wage payments. Their share in public property was simply lost to unequal appropriation by certain industries and certain workers. This question is beyond the control of labour law, as employment relation is derived not prior to the separation. In this case, strengthening state enterprises compared to private or foreign enterprises will benefit this group of workers while recognizing labour flexibility is precisely what migrant labour forces desire.

This dilemma was caused by China’s duality of public ownership existent before the reform and was not solved but complicated by the process of commodification and generalization. It not only created confrontation between labour and capital, but also contradictory demands internal to the division. It is hence questionable whether mere flexibility is capable of handling different demands altogether. The two groups of labourers will compete with each other, one for flexibility and taking chances to be an urban citizen, the other for stability and retaining the privilege in appropriating state assets. Legalization of labour relation could strengthen the current outcomes, but is incapable of solving all problems when definition of labour-related issues is related to the whole social structure.

China’s accession to WTO accelerates the pace of economic reform and makes the segmented labour market highly problematic. Also social disquiet rises rapidly showing that re-distribution of benefits of growth is much required by a “harmonious society”. For Zou, it is in this context that the national government adopted three major pieces of regulations in 2007: the *Labour Contract Law*, *Employment Promotion Law* and the *Labour Mediation and Arbitration Law*. The most important of them is the *Labour Contract Law*, whose provisions try to “strengthen employment contracts, impose broad obligations on employers to prevent the underpayment of wages, increase the rights of

unions and workers representatives at the enterprise, provide for the transmission of employee entitlements when a firm restructures, and regulate the use of dispatch labour”.¹⁴⁶ The *Labour Contract Law* has addressed some gaps in the 1994 labour Law such as detailed regulation of the formation of labour contracts and the regulation of dispatch labour according to experiments first starting in Shanghai in 1994. It sets “two years as the minimum employment period with a labour dispatching agency, and introduces a system of licensing and registration of such agencies”.¹⁴⁷

However, comments were varied towards the legislation of *Labour Contract Law*, and several parties were involved in the process of its two readings. Collective labour contract was emphasized in these laws, but it was also seen as a measure of industry policy. According to Liisi Karinidi’s research, in the consultation of comments from foreign enterprises, the EUCCC (the European Union Chamber of Commerce in China) and the USCBC (the US-China Business Council) both pointed out the negative impact for foreign investment by limiting the employee’s flexibility. Other organizations such as the Shanghai Association of Human Resources management in Multinational Companies and some Taiwanese and Hong Kong businesses with investments in mainland China even threatened to withdraw investments once this kind of law was going to be implemented.¹⁴⁸

The promotion of trade union status becomes quite controversial in the process of legislating *Labour Contract Law*, when the first reading required a strong role played by trade unions in approving collective contracts. The EU and US Union all published their comments and their worry in fact lay in the correlation of trade union organization with the Party. It easily becomes a policy instrument to impose economic nationalism on private and foreign enterprises. In Zimmerman’s account,¹⁴⁹ while trade unions in state enterprises are absent or ineffective, trade unions in the multinational companies almost set an example for establishing enterprise trade unions in China, than assumed oppositely. After the Labour Contract Law, it is Wal-mart firstly set up the trade union in enterprises. In this case, trade unions required to be set up in foreign enterprises would cause discrimination in policy implementing, for which reason they were making effort to remove these

¹⁴⁶ Zou (2009)

¹⁴⁷ Zou (2009)

¹⁴⁸ Liisi karindi (November 2008) ‘The Making of China’s New Labour Contract Law’, *China Analysis* 06, www.chinapolitik.de

¹⁴⁹ James Zimmerman, Labor Law: Trends and Practices in China, available at: www.fljs.org/sites/www.fljs.org/files/publications/Zimmerman.pdf

requirements from the second reading. In the end, representation of labour in the trade union was less concerned than legalization of labour protection.¹⁵⁰

The difficulty of establishing modern employment relations in China unpacks the complexities in the ‘socialist modernization’ in the constitution. It is never an easy combination, but an entangled interplay of law, politics and economy. In this entanglement, even the function of law will be changed. As Cynthia and Seth have put the controversy,

“The paradoxical toleration of management domination of the ACFTU’s enterprise union chapters is emblematic of the paradoxical nature of Communist China’s embrace of capitalist-led development”. While “the relatively egalitarian character of the pre-1978 Chinese economy may render comprehensible the notion that the participants of an enterprise were all in it together and required no separate representation. The question, though, is how that notion has managed to survive in the decades since the advent of the ‘labour contract system’ and the commodification of labour, the introduction and growth of private profit-making enterprises, and the spectacular economic inequalities that have followed.”¹⁵¹

3.6. A brief summary

Reforms after 2003 begin to reflect a stabilized structure as a result of the 1990s reforms outcome. For one thing, the two-tiered frame prevents China from full-scale privatization and in the 2007 financial crisis China gained the advantage of having been lagged behind. For another thing, fragments occur not only between the property owners and labour forces, but also internal to labour forces, which makes the proposition of “harmonization” less possible. If we simplify the social transformation as only entitling rights and making law, as Potter’s account of “a legitimacy claim about the tension between property rights and rights to development”,¹⁵² the constitutional issues concerned will be reduced. This balancing and reconfiguration among *categories* of ‘rights’ does not answer whether the ‘rights’ claim is in effect void and law is separated from its functions to protect. Constitutionalization is not a unitary metaphor of fragmented responses, I argue; it is a defragmentation and exposure of the gaps. It rather necessitates a distinction between “legalization” and “constitutionalization” in China’s context.

¹⁵⁰ Ibid.

¹⁵¹ Estlund and Gurgel (2012)

¹⁵² Potter (2011) 61

Toward “hybridity” of China’s private law system, different focus will generate different theorization about China’s institutional achievements in the past three decades. While Chinese libertarians tend to see the formalization of legal system as a great step to the ideal of “Rule of Law”, the New Left compliments the Chinese model against the “Washington Consensus” -- a Western-imposed legal science and state/market divide. But how could there be so radical and opposing views on the Reform process? This *excess* from economic field to constitutional theories will be touched in the next chapter.

4. Summary of this chapter

In this chapter, I reviewed the process of China’s economic reform and the establishment of China’s private law system. Through it, I highlighted how law serves the formulation of legal personality from the socialist institutions and facilitates the economic reform. Correspondingly, the economy-centred reform also gives private law priorities in the whole process of legal reform in China.

The reform history shows the initiation, acceleration and discontinuity during the process, in which I put more emphasis on the 1990s reforms. It is an intensified period of the 1980s reforms and comprehensively shaped the economic structure of contemporary China. The third phase of the reform from 2003 has a characteristic of generalizing the already-in-shape property relations and labour relations into legal form and civil code, and communicating them with the world society in a formally shared language of ‘law’. But the compromised effects of globalization in China reveal that there is substantive divergence beneath superficial convergence, which also blurs the prospect of China’s future reforms.

This entanglement of law, politics and economy is condensed in its outcomes: the “socialist market economy” and the “socialist rule of law”. However, there is no sufficient explanation for how this combination is possible. By unpacking the historical process, I intend to point out how legal formulation has contributed to the economic reform while for another thing, how this building of “Rule of Law” is biased with a market orientation.

As I have repeated in this chapter, it is important to understand the movement “from status to contract” in China. The “Socialist public ownership” relies on working units and people’s communes to be substantial. People benefited from state assets and collective organizations by means of concrete membership, which also determined a strict control on

migration. This makes the adoption of two contract responsibility systems in urban and rural areas significant for the reform process. By gaining this personality, movements across regions, industries and enterprises become possible. This might be the reason for applying “contract theory” in conceiving constitutionalism, and the individual liberty that libertarians seek from it.

But we should notice there were no equal parties before the contract, and there was no alternative of not contracting. This contract without freedom means an imposition of the *effects* of the contract instead of the *will* of making contracts. It hence betrays the freedom of contract as its spirit, and problematizes the *autonomy* thesis of legal subjects that libertarians wish to get from this contract process. And if flexibility of movements is indeed a gain from this process, as these scholars take defence, then at least it assumes that flexibility and market freedom are privileged over other human rights such as workers’ securities.

Hence apart from the phenomenon of legalization, the function of legalization and entitling of rights are questioned. What is the implication when we give primary consideration to contract and market freedom as the very definition of human rights and gist of legalization? Legal constitutionalism could not explain the selective protection of human rights by law during China’s transition, and degradation of the working class by law when they only exchange their life-long membership for a formal right to be employed.

China’s New Left acknowledges well that many reforms were initiated by the Party and government policies, which were the “soft norms” in China. These experiments were illegal if rigid understanding of the Socialist ownership was applied. Hence unlike normative assumptions, the New Left contributes to the facticity of the reform process. It is the governance model that played a more important role in the reform process and continues to do so in converting future reforms from “state capitalism” to “socialist market economy”.¹⁵³ They are right in detecting instrumental use of law in China’s Reform Period and instead proposing a social use of “law”. But in the meantime, this “use” rather implies that “law” for them is rather lacking functional specificity of law. They are in effect sharing with libertarians in reading law technical; though the former insists on instrumentalism while the latter formalism.

¹⁵³ Philip C.C. Huang (2012a), ‘Profit-Making State Firms and China’s Development Experience: State Capitalism or Socialist Market Economy?’ *Modern China* 38(6): 591-629

Kerry Rittich's comments on the post-Washington Consensus programme to re-orient to "the social" could be borrowed here to ask the New Left, "in what ways and to what extent do second generation reforms represent" a rupture or continuation, an overlap or conflict.¹⁵⁴ Without returning to the "constitutive" function of China's private law reform, fragmentation of law will always follow the fragmented rationality to solve problems of a constitutional nature. And the "harmonization" thesis is not different from this co-option. The deficit caused by the first-round deprivation of socialist welfare now turns to be the second-round dependence on state capacity to compensate, which justifies the importance of economic growth and economic sovereignty. The pie has to be created bigger in order to give equity a share.

But in this chapter, I confine myself to making sense of the institutional changes and the structure of "socialist market economy", before justifying this governance model immediately as "constitutionalism with Chinese characteristics". Yet it is important to reveal the instrumental use of law in the reform process, and consequently the insufficient problematization of legal fragments.

¹⁵⁴ Kerry Rittich (2004) 'The Failure of Law and Development: Second Generation Reforms and the Incorporation of the Social', *MICH. J. INT'L L.* 26: 199-243

Chapter 4.

“Constitutionalism with Chinese Characteristics”: Many Constitutions in China

Introduction

After three-decade reforms, a relatively modern legal system is developing in China. But criticisms toward the lack of judicial autonomy continue to shadow China’s legal reform. This puts the phenomenon of legalization under examination. While Stanley Lubman doubts whether China has a legal *system* due to inconsistency of concepts, Donald Clarke problematizes whether China has a *legal* system functioning equivalently to the Western institutions. Rather, Thomas Stephens suggests, it might be more precisely described as a disciplinarian system.¹ Randall Peerenboom contends that these arguments ignored China’s great effort in rationalizing its legal institutions and increasing involvement in the international society. Instead, keeping a “thin” rule of law as the common ground for discourses is more productive than sacrificing piecemeal improvements totally. His views are shared by most Chinese scholars who work on the legal “reforms”. A “thick” rule of law will immediately invite socio-political and cultural-traditional debates, as the propositions of indigenization of law and Left Confucianism in China show.

But in fact, except for scholars who insist on legal constitutionalism, there has been a marked shift away from treating China’s case as a “corruption” of the Rule of Law ideal, to a position of questioning the universal “truth” of what is transplanted from the West. Legal formalism with a special affinity to the American model, which was a theme throughout the 1980s to 1990s, is now under attack, both as an ideological imposition and as empirically imprecise. Critiques vary from fieldwork practices; to even a cultural war on modernity. This chapter hence is dedicated to exploring the other level of the story of China’s constitutionalization: constitutional re-imaginings.

In China, it means that by arguing “constitutionalism with Chinese characteristics”, we could turn a deficit of the ideal type to a reflection on China’s own constitutional orders.

¹ Quoted in Randall Peerenboom (2003c) 61

The hybrid process of institutional changes hence no longer implies a certain “telos”, but instead opens multiple potentials. So different from the “constitution”, this chapter is devoted to “constitutionalism”, or more precisely speaking, to the “legitimacy claims” underlying it, as Kaarlo Tuori puts it.² It is meant to argue that, besides the institutional and material changes as I examined, there is also a battlefield on what counts as “constitutional” at the conceptual level.

This chapter delineates three new conceptions as political constitutionalism, economic constitutionalism and social constitutionalism in accordance with their main claims and their intended departure from classical constitutionalism applied in China. At the end of this chapter, I argue that these re-imaginings could be linked to shifts of constitutional theories in a bigger map.

1. Political constitutionalism in China

China’s political constitutionalism is a recent body of scholarship that recognizes the limits of legal constitutionalism. As Stephanie Balme and Micheal Dowdle correlate the move to political jurisprudence with “the Chinese leadership’s infamous resistance to democratization that the real motor for China’s present-day constitutionalization seems to lie. Chinese resistance to democratization appears to have encouraged authorities to advance ‘rule of law’ (and associated law reform) as political legitimacy substitutes for democratization.”³ The lesson from Anglo-American constitutionalism increasingly turns to be presented as “an alternative to democracy, rather than an articulation of democracy.”

4

It also stems from an attempt to put constitutionalism in an interdisciplinary perspective. As Chen Duanhong, a professor of constitutional law in Peking University, argues, “studying constitutionalism in a country that has a master-text but lacks mechanisms of constitutional review, and in a country where the text could only reflect limited political facts, constitutionalism with such a quality (namely, legal constitutionalism) is not only unable to be founded, nor is it useful even if there is possibilities.”⁵ Instead, political

² Kaarlo Tuori (2010) ‘The Many Constitutions of Europe’, in Kaarlo Tuori and Suvi Sankari (eds.) *The Many Constitutions of Europe* (Farnham: Ashgate Publishing Limited) 13

³ Stephanie Balme and Michael W. Dowdle, Introduction: Exploring for Constitutionalism in 21st Century China, in Stephanie Balme and Michael W. Dowdle (2009) 5

⁴ Ibid. 5

⁵ Duanhong, Chen (2010a)

constitutionalists propose to extend the constitutional inquiry into real political existence. The normative question, for them, is not law in the books, but what functions as the effective order in China.

1.1. Constituent power and fundamental laws in China

Chen indeed brings an important concept back to constitutional discussions in China. Though being a familiar concept in classical constitutionalism, constituent power is a stranger for most Chinese legal reformers, who try to establish a purely legal discipline. It could be said that Chen starts from a Western theoretical tradition before moving back to China's context step by step.

Chen's arguments on constituent power has undergone three stages, namely, Jean-Jacques Rousseau, Emmanuel Sieyes, and China's Party-state, separately reflected in three papers collected in his book *Constituent power and the Fundamental Law*. Chen firstly uses Rousseau for his resolution of the representation question in modern democracy, which is best put in the title of the paper: "the people must be present".⁶ To solve the dilemma of popular sovereignty, the resort to "constituent power" other than "constitutional law" is needed, so that the people are not only governed by government but also set it up and decide its continuity. This doctrine of constant revolutions is Rousseau's great contribution. Different from legislative power, constituent power 'decides' the political existence of the whole community, which is a sovereign decision.⁷ Chen hence introduces an important concept to interpret what legal constitutionalism could not, namely, what makes law *law*?

After bringing the duality of law and politics back into sight around constitutionalism, Chen makes his second move to the specific question of "constitution-founding moment", about which he argues that Sieyes completes Rousseau with the intermediate of "extraordinary representatives". While constituent power is conceivable in theory, constitution making is a represented act by representatives, than pure presence of the people. Chen hence turns to emphasize a division between extraordinary representatives and ordinary representatives, and accordingly develops four epochs from the three in

⁶ Duanhong, Chen (2010b) 'The people must be present' (Ren Min Bi Dei Chu Chang), in *Constituent Power and Fundamental Law* (Zhi Xian Quan Yu Gen Ben Fa), (Beijing: China Legal publishing House). 46-110

⁷ Ibid. 65

Sieyes's delineation of the constitution-making process.⁸ By dissolving the dichotomy of constituent power and constituted government, presence and representation, and the exceptional and the normal, Chen adds a *chronological* element of “extraordinary representation” and *connects* the two sides. And now Chen converts his argument to one that suggests that “the people are neither present nor absent”.⁹

From this step, Chen could fully concentrate on the “extraordinary representatives” in China's history, which is the third stage. Notably, as the “extraordinary representatives” are closely related to the constitution-founding moment, there is a strong *historical* dimension to Chen's theory. He asks then what is the first constitution in China? Instead of that of the 1954, Chen argues that the 1949 Common Program was what lay the foundation for the political community and the nation state of China.¹⁰ But if we were to concentrate on the rare moment of exerting constituent power in history, how could Chen explain China's constant even discontinuous constitutional changes that followed?

Facing the question of continuous attribution, Chen finally argues that the continuity lies in a reflection of what indeed *functions* as a constitution in China. Equivalent to limitation of state power and protection of rights as in the Capitalist constitution, Socialist China has five fundamental laws: the leadership of the CCP, Socialism, democratic centralism, Socialist construction and fundamental rights.¹¹ By coupling these five laws and *defining*

⁸ Duanhong, Chen (2010b) ‘The people are neither present nor absent: theories on the people's constituent power in Sieyes's *What Is the Third Estate?*’ (Ren Min Ji Bu Chu Chang Ye Bu Que Xi—Xi Ye Si <Di San Deng Ji Shi Shen Me> Zhong De Min Zu Zhi Xian Quan Li Lun), in *Constituent Power and Fundamental Law* (Zhi Xian Quan Yu Gen Ben Fa), (Beijing: China Legal publishing House). 123

Sieyes in his book *What Is the Third Estate?*, has distinguished three epochs of the formation of a political society. The first epoch “is characterized by the activity of *individual wills*” and describes how they seek to unite as a nation. The second epoch “is characterized by the action of a *common will*”. Without this *unity* of will, the community “would not be able to make itself a willing and acting whole”. In the third epoch, only a “*representative common will*” than a “*real common will*” acts, which is the epoch of representative government. See Emmanuel Joseph Sieyes, *Political Writings* (Indianapolis/Cambridge: Hackett Publishing Company) 134-135

Chen, however, emphasizes the second epoch and the extraordinary representatives, so that he insists that the theoretical map should be categorized as four epochs.

⁹ Ibid. 111-182

¹⁰ Duanhong, Chen (2010b), ‘The people's constituent power in the third form of Republic—the Common Program (Di San Zhong Xing Shi De Gong He Guo De Ren Min Zhi Xian Quan – Gong Tong Gang Ling), in *Constituent Power and Fundamental Law* (Zhi Xian Quan Yu Gen Ben Fa), (Beijing: China Legal publishing House). 183-254

¹¹ Duanhong, Chen (2012b) ‘On constitution as the State's fundamental Law and higher Law’ (Lun Xian Fa Zuo Wei Guo Jia De Gen Ben Fa Yu Gao Ji Fa), in *Constituent Power and Fundamental Law* (Zhi Xian Quan Yu Gen Ben Fa), (Beijing: China Legal publishing House). 282-294

anew “the constitution”, however, the problematization of discontinuity almost could find nowhere to register. Chen in fact internalizes the discontinuity as the series of constant revolutions he borrows from Rousseau, and CCP in this sense as constituent power co-exists with the constituted power of the NPC.¹² When legal constitutionalists face the difficulty to explain “benign unconstitutionality”, Chen treats it precisely in terms of the characteristics of the reform-era China: the self-transformation of the socialist party-state.

It is interesting to observe how Chen starts from classical constitutionalism and reverses it to a constitution with Chinese characteristics. By inserting extraordinary representatives between constituent power and constituted government, Chen’s key argument is that the people are neither present nor lost in parliamentary representation. And in different countries, these representatives could be played by different actors, such as the Party in China. By surrendering the constitutional paradox to an argument about sequence, historical facts of who formed the nation and community surrender classical constitutionalism to plural equivalences, such as a Party-state constitution.

1.2. Jiang Shigong’s “unwritten constitution” in China

Jiang derives his theory from careful studies of Carl Schmitt and Michel Foucault,¹³ as they both provide critical insights on formalism of law. Jiang diagnoses the mainstream scholarly discourse in China is preoccupied with legal formalism “in order to adapt to international standard”, which he criticizes as in fact an “end-of-history-esque” ideology.¹⁴ What’s more, to examine whether legal constitutionalism is an applicable solution in China, we also have to examine the Western ideal in its own context. Jiang argues that Chinese legal constitutionalists rather misunderstand complexities of the Western tradition, accept the American model unconditionally and contrast its written form with the British unwritten constitution. In such a case, amending the written constitution and effectuating judicial implementation of the text becomes the monopolistic theme for Chinese scholars.

¹² Duanhong, Chen (2010b), The intelligible benchmark of Constitutionalism: a conversation on constituent power between a political and a constitutional scholar (Xian Fa Xue De Zhi Shi Jie Bei – Yi Ge Zheng Zhi Xue Zhe He Yi Ge Xian Fa Xue Zhe Guan Yu Zhi Xian Quan De Dui Hua), in *Constituent Power and Fundamental Law* (Zhi Xian Quan Yu Gen Ben Fa), (Beijing: China Legal publishing House). 21

¹³ Larry Cata Backer (2014) ‘Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong’s Constitutionalism’, *Modern China* 40(2): 168-195, 174

¹⁴ Shigong Jiang (2014b) ‘How to Explore the Chinese Path to Constitutionalism? A Response to Larry Cata Backer’, *Modern China* 40(2): 196-213, 209

But it is an illusion that Jiang will deconstruct. The American model is rather an exceptional case while the British one is the norm. Jiang uses K. C. Wheare's reconstruction of the concepts to mean that "written constitution" is but a part of "unwritten constitution". Jiang devotes great effort to studying the functioning logic of American legal system and its evolution to conclude that it is the constitutional convention that matters more than the dictation of the constitutional text. By converting the paradigm to "unwritten constitution", Jiang aims to replace the normative base of constitutionalism and overrule the legal tradition of positivism, which Larry Cata Backer characterises as an adoption of Foucault's critical point of law as a disciplinary instrument.¹⁵ And he intends to negate the positivist rationality of law in service of equivalent proposals that China's experience could provide.

So after deconstructing of the western ideal type, Jiang turns to systematically explore China's constitutional resources as they are expressed in real practices. He states his intention and methodology as being, "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";¹⁶ and "to restore the prestige and status of constitutional jurisprudence as a political and social science."¹⁷ Jiang calls it "effective constitution (19)" or "substantive law" approach. Four constitutional norms, if not laws, are explored as: the Party's Constitution playing the substantive role and the NPC as "Rubber Stamp"; the Trinity system¹⁸ unified by the chairman of the PRC; the local-central doctrine of "initiatives from two sources"; the Hong Kong Basic Law as constitutional statutes. For Jiang, the Party constitution is essentially one part of China's political existence in the form of a constitutional convention.

¹⁵ Backer (2014) 174

¹⁶ Shigong Jiang(2010) 15

¹⁷ Shigong Jiang (2010)16

¹⁸ Shigong Jiang (2010). It means the chairman of the PRC combines state power, power of the Party and military power in one person, and hence acts as the contact point between the party system and the government system while also does not deviate from the principle of "the party commands the gun" (30). Jiang argues this "trinity" system was re-established by Deng Xiaoping after the deconstruction of it in China's Cultural Revolution. The principle of "initiatives from two sources" is derived from Mao's paper On the Ten Major Relationships" to deal with the local and central relationship. Jiang argues that Deng has inherited this principle from the 1954 Constitution and adapted it into the 1982 Constitution and the "economic reform" in China. On the one hand, it granted power to lower levels "to keep a larger profit", while "supported the taxation and financial systems to enhance the initiatives of the central government". (36)

But then, what is the relationship between this constitutional convention and the written constitution of 1982? This leads to his fourth point that China's 1982 Constitution, different from its precedents, signifies an achievement of institutionalization, and this institutionalization confirms rather than undermines the constitutional status of CCP, which could be compared to a "constitutional monarchy".¹⁹ For Jiang, the future constitutional reforms lie in the inception of the Party Constitution as integral to constitutional norms, but apparently, the institutionalization of the Party *under* the constitution does not mean more than *reference* to it.²⁰

Unlike Backer, Jiang insists that China's party-state system is neither the Western nor the Soviet Union versions. The two are both part of a Judeo-Christian tradition²¹ that does not follow the organic development of China's society. This is why China, especially after 1982, pursues a quite different track from Russia.²² "Chinese culture and theology tend to embrace a more cyclical temporality",²³ and this is the reason why "Communist ideology ultimately failed to integrate into the Chinese ethos, and cannot be used as a spiritual pillar supporting the Chinese people."²⁴ With this Jiang is denouncing the incorporation of China's case into the orthodox Marxist paradigm. Rather, the "Two Bodies of the King" might best capture Jiang's proposal for the Party-state.

Jiang's writing does succeed in extending the horizon of constitutional discussions in China to real practices. In China's reform period, party policies dramatically transformed the society ahead of law. Instead of using the paradoxical term "benign unconstitutionality", Jiang insists on putting the Party constitution as one source alongside, and with reference to, by the written Constitution. This constitutionalization of party discipline, however, does not mean there is any mechanism to hold the Party accountable.

¹⁹ Shigong Jiang (2010)25

²⁰ Jiang suggests a "process of internalization" could be observed, especially after the Cultural Revolution and in the 1982 Constitution.

see Shigong Jiang (2014a) 'Chinese-Style Constitutionalism: On Backer's Chinese Party-State Constitutionalism' *Modern China* 40(2): 133-167, 144

²¹ Shigong Jiang (2014a) 135

²² Jiang calls this a "Sinicization" of Marxism, or else, we could not explain why the communist ideology was abandoned so quickly and completely in the aftermath of the Cultural Revolution. Jiang also poses communism as the counterpart of liberalism, both of which are based on a narrative of "the end of history". in Shigong Jiang (2014b) 207

²³ Shigong Jiang (2014b) 208

²⁴ Shigong Jiang (2014b) 208

1.3. Larry Cata Backer's political/administrative distinction for China's Party-state

In Backer's writings, a genealogical and typological mapping of *constitutionalism* is placed first. "Since 1945 three values variants have emerged within constitutionalism. The oldest is nationalist constitutionalism," and American and French constitutions are exemplary. Since 1945 transnational constitutionalism has emerged as a powerful force, which is "grounded in a constitutional value system derived from the common constitutional traditions of the community of states evidenced either in shared practices and values, customary international law norms or memorialized international rules in the form of treaties and conventions." Since the 1970s, "(t)heocratic constitutionalism is grounded in the embrace of the rule of law principle of state construction, but implemented on the basis of and through the rule systems of a single religion".²⁵

From the start, Backer treats classical constitutionalism as one variant based on the Western tradition and under certain historical conditions. This spares Backer from arguing negation of classical constitutionalism, as Jiang and Chen had to do; and his mission is rather to *choose* a coherent model to apply to China's practices. As he argues, classical constitutionalism "is best understood as a system of classification for the purpose of judging the legitimacy of state governance systems as conceived and as applied, grounded in the fundamental postulate of law governance."²⁶ It is a self-referential narrative;²⁷ and its status as "the privileged template for legitimate constitutional expression" has "burdened the scientific development of Chinese constitutionalism".²⁸ Being grounded in its Marxist-Leninist framework, China's Party-State constitutionalism has more similarity with the theocratic constitutionalism of Iran. And it should be examined how and whether it is workable.

Backer understands the division of labour between the Party and the state in the familiar sense of the political/administrative distinction, famously developed in Alexis de Tocqueville's theory. The political role is assigned to the Party, as China's "integration" is made possible through the Party. This especially concerns the understanding of the

²⁵ Larry Cata Backer (2009) 'The Party as Polity, The Communist Party, and the Chinese Constitutional State: A theory of State-Party Constitutionalism', *Penn State Legal Studies Research Paper* No. 05-2009. Available at: <http://ssrn.com/abstract=1325792>, 106-107

²⁶ Ibid. 106

²⁷ Backer(2014) 169

²⁸ Backer(2014) 171

function of the “vanguard party”. Backer contends that Party membership is functionally equivalent to political citizenship in the West. “The holders of political citizenship – Party members – then serve *within* the party as the forces for social cohesion...and outside the Party in a fiduciary capacity to all people in the political community who are holders of social and economic rights, but who lack political rights.”²⁹ The CCP hence could not be interpreted as a western party competing in elections and representing interest groups, but an all-people party – a party that is responsible for state integration. Backer argues that, it is clearly manifested in the new-era guideline of “Three Represents”³⁰ that transgresses class sectors.

Hence “the political” means for Backer not antagonism and party competition, but “party as polity”. The state, on the other hand, is responsible for administration and management of government, and citizens outside the Party are participating through economic and social rights. Backer describes it as “a division of the character of citizenship between economic and social citizenship, claimed by all persons, and political citizenship, which can be exercised through the Party”.³¹ The CCP’s obligations to the people concern “knowledge” rather than “engagement”.³² Backer hence leaves a chasm regarding the understanding of “the political”, between the over-political sense of integration and under-political enjoying of social benefits.

In interpreting the party-state, Backer differs from Jiang, as he understands China as remaining in the track of socialism, and the Party’s function in civic education is the justification of its leadership and supra-state status. The constitutional mechanism hence should be embodied within the Party, instead of the opposite. But this for Jiang, means “unconstitutionality” of the party could never arise. No matter whether this disagreement is only about the use of terms, their critical difference lies in Backer’s emphasis on the hegemonic function of the Party over the state and the constitution compared with Jiang’s emphasis on voluntary self-discipline of the Party under the constitution.

²⁹ Backer (2009) 109

³⁰ Backer argues, “The movement from a conception of Party within rather than outside the state, without the embrace of the individualist turn of the Soviet model, suggests that the CCP has chosen a different and plausible path inherent in Marxist-Leninist theory at its inception more than a century ago. Anti-constitutionalism was the status quo in 1979; by 2008 the theoretical framework of something different—a single party constitutionalist state—could be discerned.”

Backer (2009) 126

³¹ Backer (2009) 110

³² Backer (2014) 184

1.4. Corrupted people and the constitutional moment

Gao Quanxi represents a ‘school’ of Chinese scholars who have been insisting on a Hayekian-model of legal constitutionalism for a long time. And following Chen’s political constitutionalism, Gao proposes his own as a response and redress. He defines “political constitutionalism” as a sub-category of constitutionalism which is applied only in exceptional times, namely, the founding moment and the declining moment.

In effect, Gao has limited political constitutionalism to the genesis of a legal constitution rather than the kind of substitution of legal constitutionalism that Chen conceives. The moment of political constitutionalism is the re-presence of the people. But where should we find “the people”? Gao discerns the use of “the people” at four levels: as political community, as the sovereign, as extraordinary representatives for the constitution making, and as ordinary citizens. The third level is especially tailored to the debate with Chen. And Gao further categorises it into three forms in history: the form adopted by French revolution, the British-American counter-revolution, and the Socialist revolution. Gao describes the British-American one as the paradigm of “counter-revolutionary revolution”.

By using the term, Gao is embracing the paradigm of civic republicanism of Bruce Ackerman.³³ It means that China is at a critical phase of founding constitutionalism, which demands presence of the people; yet “the people” is corrupted as they are living as private individuals who only mind pursuing their own interests. Henceforth, at this disjunction between constitutional emergency and the decline of the constitutional spirit, it is the Hegelian dialectic about “the people” themselves that is vital, which is to say, a move from revolutionizing (the old constitution) to counter-revolution (in the new constitution).

It is the citizens’ self-revolution that bridges the two ends. Against Chen, Gao deems constant revolutions of the Party as signs of absence of the constituent power. And to opt out of this logic necessitates a “passive revolution” of citizens. Formerly a legal constitutionalist, Gao interprets political constitutionalism only in a perspective of genesis. Different from Chen’s treatment of political constitutionalism as a normal model, Gao puts it in the exception. While it is a valuable insight to distinguish the normal from the exceptional, law and pure politics, Gao’s “counter-revolutionary revolution” treats passive

³³ Quanxi, Gao (2010), The People will Be Corrupted, too (Ren Min Ye Hui Fu Hua Duo Luo) (Lecture at Peking University Oct 6th, 2010), <http://www.china-review.com/sao.asp?id=25097> (accessed on December 6th, 2014)

self-education of citizens as the only alternative to the revolutionary tradition of the Party. Presence of “the People”, hence for Gao, is the education of citizenship and civic virtue. This makes his political constitutionalism left with a thin layer as the “presupposition” than the genuine “presence” of the people.

1.5. Summary of political constitutionalism in China

Political constitutionalism in China is indeed a new attempt to broaden the study of China’s constitution in an interdisciplinary approach and to initiate a realistic observation on how China’s political life works. These authors are criticizing legal constitutionalists as deeply ignorant of the framework of China’s constitution. Advocating constitutional adjudication in this context by legal constitutionalists marks a paradigmatic shift though in the name of the neutrality of legal formalism.

The Party-state is brought to the fore of discussions and produces different interpretations. While Backer is arguing that China is developing in the track of Marxism-Leninism, with the Party educating while being fiduciary to the people, Jiang is distancing China’s case from Russia by insisting on the mass line against bureaucratization, and hence we could say, against a fully formed duality of politics/administration that Backer conceives. For Jiang the reform period is a revision to Communism after the Cultural Revolution and a return to “Chinese characteristics”, namely Confucianism “Tianxia Weigong (The world is held in common)” as its organic source³⁴. Confucianism differs from communism in denouncing the teleology of history, which means Jiang rather prefers a picture of dynamics between the Party (also representing the mass) and state, to the “social cohesion” of Backer. However, we should keep in mind that the 1982 Constitution does matter to the divide within political constitutionalism, as institutionalization of the Party status in the constitution concerns whether the party leadership is either a reference point by Jiang, or Supra-state by Backer.

By borrowing constituent power from classical constitutionalism, political constitutionalists in China undermine the normative forces of the constitutional text and human rights prescriptions, and opt instead for re-discovery of functional equivalences in indigenous social orders. Yet, this critical streak of “constituent power” quickly fades and surrenders itself to uncritical acceptance of state ideology and political culture.

³⁴ Namely, it is the cultural resource to “truly unite the different factions of society under a single party”. See Jiang (2014b) 208

2. China's economic constitutionalism

I use the term of “economic constitutionalism” to indicate studies on China’s political economy initiated by scholars who attempt to make sense of China’s “miracle” in recent decades and against the overwhelming pressure of economic globalization. By pursuing a path different from complete privatization, China’s state capacity is said to be preserved in terms of crisis prevention, and manifested in dealing with poverty, labour protection and economic sovereignty against full-scale financialization. This makes China’s governance increasingly studied as an innovative experiment. While liberal economists persistently criticize it as “state capitalism” or “crony capitalism”,³⁵ Left-wing economists are claiming China’s economic practices in fact enrich knowledge of economics with the theory of “bundle of rights”, and separation between ownership and rights to use.

2.1. “Crony capitalism” or preservation of “state capacity”?

The 1982 Constitution and its amendments show a strong concern with regard to economic reforms. Market freedom for a state transitioning from planned economy is appealing and correlated with many conceptions, such as “from status to contract”, “from obligation-oriented to rights-oriented”. These phrases are constantly cited and asserted by economists and private law professors. Though Deng Zhenglai, the main advocate of Hayek’s theory in China, is meant to promote cultural evolution and methodological individualism,³⁶ the increased interest is closely related to Hayek’s criticism of planned economy. The most manifest evidence for economic centrality lies in the constitutional changes themselves and the official ideology that compromised egalitarianism and replaced it with Deng Xiaoping’s advocating “to get wealthy is glorious (Zhi Fu Guang Rong)”.³⁷ The Socialist “social contract” was broken for the sake of mobility and the liquidation of state assets. The Iron Rice Bowl was smashed to explore potentials for

³⁵ Jinglian, Wu (2004) *Economic Reform in Modern China* (Dang Dai Zhong Guo De Jing Ji Gai Ge), (Shanghai: Shiji Publishing House) 395

³⁶ Deng, Zhenglai (2001) ‘Several Comments on Hayek’s Theoretical Map’ (Guan Yu Ha Ye Ke Li Lun Mai Luo De Ruo Gan Ping Zhu), available at: <http://www.china-review.com/sao.asp?id=16499> (accessed on December 10th, 2014)

³⁷ Deng Xiaoping Answered Questions of the American Journalist Mike Wallace (1986) (Deng Xiao Ping Da Mei Guo Ji Zhe Mai Ke Hua Lai Shi Wen), available at: <http://news.163.com/12/0409/08/7UKR413G0001124J.html> (accessed on December 6th, 2014)

competition and efficiency. Critics only worry about the “cronyism” of the market economy, and hence express demands for greater market openness and transparency.³⁸

Till the staging of China’s New Left in the late 1990s, there were no other explanations offered for the Chinese model of economic reforms. It was said that Wang Shaoguang in the early 1990s had already realized the necessity of “state” functioning in the process of establishing market economy. He drafted a report with another scholar (Hu Angang) on the issue of state capacity and submitted it to the central government. China’s subsequent reforms witnessed its effect and Wang’s emphasis on the preservation of state capacity.³⁹

Wang rejects being seen as a New Left scholar, but rather a liberal Left.⁴⁰ His idea is to detach political arguments from debates about regime types, and re-connect to state capacity. And the most important state capacity is the capacity of accumulation,⁴¹ which is especially reflected in the success of China’s 1994 Tax-Sharing Reform. This reform fundamentally changed deficits in the central government and its heavy reliance on local governments. From then on it gained more power to tackle with local protectionism, maintain strong economic sovereignty and arrange economic planning through transfer payments. Wang proposes a constitutional model based on tax sharing that participation of local governments in deciding transfer payments should be constitutionalized.⁴² Huang has elaborated that Wang “called for China’s moving from a premodern ‘tax state’ to a modern ‘budget state’ for the purpose of establishing legislative oversight of the state budget.”⁴³

Therefore, corresponding to the “dual tracks” of plan and market in economics, Wang focuses on “a state system of divided power between the centre and localities” in political theory. The tax reform signifies re-centralization and re-regulation against unregulated marketization, which makes Wang Left-oriented. And the economic sovereignty China preserves enables it to respond to the call for social equity in the new century. As Wang

³⁸ Wu (2004) 395

³⁹ Shaoguang, Wang (1997), Preface 1-8

⁴⁰ Weidong, Ji, (2005) *New Debates on Constitutionalism: Legal and Social Changes in the Era of Globalization* (Xian Zheng Xin Lu: Quan Qiu Hua Shi Dai De Fa Yu She Hui Bian Quian), (Beijing: Beijing University Press)

⁴¹ Shaoguang, Wang (1997) 2

⁴² Shaoguang, Wang (1997) 142

⁴³ Philip C.C. Huang, Introduction to “The Nature of the Chinese State: Dialogues among Western and Chinese Scholars, I”. (2008) *Modern China* 34(1): 3-8

argues in one paper of his book that, “while capital could employ labour, labour could also employ capital”.⁴⁴

In this sense, adaptive capacity⁴⁵ in the process of agenda setting is more important than election politics, Wang deems political legitimacy should be discussed as “to what extent do the policy priorities of the public and of the government correspond across time?”⁴⁶ Six models⁴⁷ have existed and shifted their importance in contemporary China. The public pressure model is increasingly significant, while the closed-door one is hardly ever applied.

Wang’s proposal hence is similar to post-democracy in discussing responsive government, which does expand the field of political theories, such as taking economic democracy⁴⁸ into consideration. In this theory, what the government could do is more important than who comprise the government, which is also closely connected to the state capacity in his economic theory.

2.2. Philip C. C. Huang: “informal economy” and “service-oriented state”

As a sociologist, Huang prefers detailed and scientific studies, and he has done important research on informal labour⁴⁹ in China. He finds that official statistics is unreliable, as the foundational categories of “employee-workers” are flawed by outdated ideology and

⁴⁴ Shaoguang, Wang (2007) *Run The State Affairs Well To Ensure Peace Of The Nation: Aim and Path for State Transformation (An Bang Zhi Guo: Guo Jia Zhuan Xing De Mu Biao Yu Tu Jing)*, (Beijing: Life-Reading-Knowledge Book).⁴⁴

⁴⁵ Wang argues that the adaptive capacity of China’s political system is surely the most critical component of the “China’s model”, namely, “one-size-does-not-fit-all pragmatism”. in Shaoguang, Wang (2009)

⁴⁶ Shaoguang, Wang (2008b) ‘Changing Models of China’s Policy Agenda Setting’, *Modern China* 34: 56-87. 58

⁴⁷ They are: the Mobilization Model (policy makers go out of their way to arouse the interest of the public and try to win their support for the public agenda); the Closed-Door Model (Decision is reached from within the inner circle of top political decision makers and excludes the participation of the public); the Inside Access Model (The agenda is not proposed by policy makers but by official brain trust that is close to the core of power); the Reach Out Model (Policy advisers publicise their proposals, hoping to arouse public opinion powerfully enough to break down the barriers); the Outside Access Model (A citizen or a group of citizens submit suggestions on public affairs to central decision makers); and the Popular-Pressure Model (Agenda initiators pay more attention to mobilizing public opinion to exert pressure on decision makers).

⁴⁸ See Shaoguang Wang (2008a) *Four Lectures on Democracy (Min Zhu Si Jiang)*, (Beijing: Life-Reading-Knowledge Book)

⁴⁹ Huang defines the informal economy as “workers who have no security of employment, receive few or no benefits, and are often unprotected by labo(u)r laws”. in Philip C.C. Huang (2009) 405

theoretical projection.⁵⁰ There are two main points to be noted, “first is the focus on a minority of relatively high status group of formal (white collar) employees and (blue collar) workers along with state officials, to the neglect of the majority of the workforce; second is the mistaken equation of the self-employed among China’s labouring peasants and workers with ‘private entrepreneurs’ and ‘private enterprises’”.⁵¹ By taking the self-employed labourers and semi-proletarian migrant workers into consideration, Huang converts the image to “the realistic comprehension of China’s labouring people” that in fact informal labour is the majority of China’s labour force. “The rise and spread of that informal economy is the truly big social story of China’s economic development in the Reform period.”⁵²

The exploration of “informal labour” has theoretical importance for founding a whole set of *theories* to study China compared to the overreliance on western categories. From economics to sociology, there is a revealing trend of “Americanization”. For instance, China’s right-wing economists adopted W. Arthur Lewis’s model of “economic dualism”⁵³ to argue that the resolution to “China’s rural problems can be found only in urbanization and vigorous development of the modern urban sector to draw away rural labour”.⁵⁴ In correspondence, sociologists states that China is on the path of transitioning from “a pyramid society” to “an olive society” with a “new middle class”.⁵⁵

To the contrary, Huang depicts the reality as “the persistence of peasants, and hence also of peasant-workers and the petty bourgeoisie” comprising the majority of workforce, which implies that actually “a flask shape” social structure. And the danger is that “such a flask-shaped social structure would become a long-term feature of society, with a minority high-income modern formal economy sitting atop a majority base of low-income informal workers and peasants”.⁵⁶

As a social scientist, Huang is arguing that an integrated labour market and a legal definition of formal labour is not the reality of China, but a theoretical projection imported from the West. The Chinese pattern of agricultural development is not a model of

⁵⁰ Philip C. C. Huang, (2013) ‘Misleading Chinese Legal and Statistical Categories: Labo(u)r, Individual entities, and Private Enterprises’, *Modern China* 39 (4): 347-379. 349

⁵¹ Ibid. 375

⁵² Ibid. 361

⁵³ It argues that with development of the capitalist industrial sector, the surplus labour in the agricultural sector will be reduced and an integrated labour market will be generated. (413)

⁵⁴ Philip C.C. Huang(2009) 415

⁵⁵ Philip C.C. Huang(2009) 416

⁵⁶ Ibid. 426

urbanization, but “capitalization without proletarianization”.⁵⁷ By rooting out theoretical commonality, Huang indeed challenges the telos of legal, economic and social studies in China and the applicability of Western social sciences as an analytical tool. He argues that China is pursuing a third path, neither neo-institutional economics nor orthodox Marxism. Rather, it is a “third hand” experiment that uses the appreciation of public property in the marketplace to establish a social fund, and challenges the state/market division that has been prevalent in market economy. This hybrid and service-oriented state shows “an appropriate balance between the market for creativity, dynamism, and competition and the state for oversight, support, and social equity.”⁵⁸

Again, it is not clear how to make sense of this appropriate balancing. While in the past decades, “informal labour” in China under discrimination and least protection sustained China’s economic miracle based on “state capitalism”, Huang holds the belief that we could convert it to “socialist market economy”. Experiments have already been carried on in Chongqing, one of China’s four municipalities but in poorer conditions economically and geographically. It deploys China’s unique land system to develop public-private-partnership, according to a design of Cui Zhiyuan.

2.3.Cui Zhiyuan and “petty bougeousie socialism”

Like his mentor Roberto Unger, Cui also puts experimentation as a central feature of his writings, and he demands a conceptual recognition of China’s ‘gradualism’ in contrast to Russian “shock therapy” in the arrangement of market, democracy and society.

“Institutional fetishism animates and vitiates the terminology of gradualism and shock therapy: the false belief that abstract institutional conceptions, like the market economy and representative democracy, have a natural and necessary form, namely the form established in the rich industrial countries. In fact, there are different ways of organizing market economies and representative democracies.”⁵⁹

For developing countries, democratic experimentalism is better to take a step-by-step than a comprehensive form in order to explore broadened potentials, which he describes as “the functional equivalents to the prefordist conditions of postfordism.”⁶⁰ What China could

⁵⁷ Philip C. C. Huang, Gao Yuan and Yesheng Peng (2012) ‘Capitalization without proletarianization in China’s Agricultural Development’, *Modern China*, 38(2): 139-173

⁵⁸ Philip C.C. Huang (2009) 430

⁵⁹ Unger and Cui (1994) 78

⁶⁰ Unger and Cui (1994) 81

provide is its “disintegrated” property rights in opposition to the Western “consolidated” rights. This innovation assumes a “bundle of rights” view of property which can be distributed between different holders rather than concentrated in one single entity. This hence reconstitutes property rights and also the social space. It substitutes the question of “who is the owner” for “how to disintegrate and recombine the bundle”. In this sense, property re-emerges as “an important category in legal and political theory”.

With such a bridge, Cui steps from pure economics into social and political dimensions. Borrowing the “liberal socialism”⁶¹ of James Meade -- a Nobel Prize winner in economics in 1977 -- which is used in international transactions, Cui adapts it to the public/private property relation in China, and designs a program of market appreciation of public property used for building up an All-China social fund. As he puts it,

“What is meant by ‘with Chinese characteristics’? I maintain that it is the existence in China of a combination of socialized assets and a market economy. Because of this characteristic [the system] is not social democratic; it is not simply a matter of talking about equity and conducting secondary distribution but concerns the basic system of primary distribution, which is different from capitalism.”⁶²

Instead of being a governmental issue of public distribution separated from the market mechanism, Cui argues that the market could also be used as a natural mechanism of appreciating public property, which is so scarce and consequently well appreciated. His resolution considers market as a free sphere instrumental for property transferrals, while at the same time public property would be competitive in the market, such as land resources. But why will public property always be highly appreciated than liquidated as in the 1990s? Is it a natural tendency devoid of governmental dimension?

2.4. Summary of economic constitutionalism in China

When talking about economic constitutionalism, the link that connects economics with constitutionalism is not immediate. However, with the global economy growing into a

⁶¹ Cui argues it as a “topsy-turvy nationalization” that gives “residual claims” rights to the state as shareholder without granting control rights. See: Zhiyuan Cui (2006a), Liberal Socialism and the Future of China, available at: http://www.networkideas.org/featart/jan2006/Liberal_Socialism.pdf

⁶² Zhiyuan Cui (2006b) “How to comprehend Today’s China: an Interpretation of the “Comparatively Well-Off Society””. *Contemporary Chinese Thought* 37(4): X-XX.

strong challenge to state regulatory capacity, responses to compelling market forces comprise legitimacy claim of government. How to resist marketization that turns all human rights into “a phenomenal republic of interests”⁶³ and constantly pushes the dividing line of the public-private has touched the core of constitutionalism.

But a deeper connection lies in how these scholars step from pure economics to political and legal theories. It is through the adaptive capacity for Wang, institutional experimentation for Cui, partnership between economic efficiency and social equity for Huang, and technocratic upgrading for Heilmann. In Clarke’s terms, their proposals of “governance” build a “flexibility constant”⁶⁴ within. This “pragmatism” diffuses the polarity of market and state, contract and planning. Also in a sense of locality-centrality, the state re-regulation of local governments is the flipside of state de-regulation for the market to function well. State now acts as the guarantor of a well-functioning market economy, and economic sovereignty becomes the guarantor of democratization, in a “constitutional” sense. But I will argue, it is an *excess* of meaning of the “constitution” made possible by ‘market mentality’ (Chapter 9-10).

3. Social Constitutionalism and Indigenization of Law in China

When applying the term “social constitutionalism” here, I intend to delineate constitutional proposals focusing on social networks, culture and traditions, different from institutional terms. Hence some of them appear to have no direct legal relevance. But allow me not to dispose of them too early. In respect of “social constitutionalism” there are four main arguments concerning the uniqueness of Chinese society: informal social network, indigenization of law, Eastern Asian model and Confucianism respectively.

3.1. China’s social network

Among Chinese scholars, Liang Zhiping is said to be the first to become interested in comparative legal cultures. In his early writings, he mapped Chinese legal culture in a

⁶³ Michel Foucault (2008) *The Birth of Biopolitics, Lectures at the College De France 1978-79* (New York: Palgrave Macmillan). 46

⁶⁴ Donald C. Clarke (2010) New Approaches to the Study of Political Order in China, *Modern China* 36(1): 87-99, 91

linear progression toward the modern Western legal culture.⁶⁵ As the legal reform “rests on the outcome of cultural construction”, in the 1980s he writes, “a new civilization... is exactly our hope.”⁶⁶ But soon he began to stress that Eastern and Western legal cultures are different in paradigms but should enjoy equal recognition, and started to explore indigenous social conditions in China.

He finds that in China a certain type of society has survived several political events and historical ruptures,⁶⁷ which could not be conceived in a sense of State (government) and civil society. It could be equivalent to Peerenboom’s term of “social network”.⁶⁸ This society is non-political compared to the meaning of civil society. In contrast, it functions as a bridge between state and individuals. An example at hand will be the Household Contract Responsibility system in China.⁶⁹ This opinion is echoed by Huang that it is a “grey zone between formal state and informal society”.⁷⁰ The seeking of harmony is also found in unique practices of “judicial mediation”⁷¹ in China’s system of adjudication. It exemplifies a kind of adjudication prioritizing resolution of conflicts through mediation and in consistency with requirements of harmony.

In 1997 Liang writes that,

“If we break away from the dichotomy of tradition and modernity, and abandon the practice of observing and criticizing with an arrogant attitude the ideas, behaviour and life-style of the peasantry, then we must admit that formal law, although often regarded as progressive, is not necessarily rational. Relatively

⁶⁵ Zhiping Liang (2002) *Recognition of Law: the Past, Present and Future of Chinese Law* (Fa Bian: Zhong Guo Fa De Guo Qu Xian Zai Yu Wei Lai) (Beijing: CUPL Press, 2002) 34-46

⁶⁶ Quoted from Ji (2009) 135

⁶⁷ Zhiping Liang (2003), ‘Network, Social Network and Civil Society’ (Min Jian Min Jian She Hui He CIVIL SOCIETY), *Journal of Yun Nan University: Social Sciences* (Yun Nan Da Xue Xue Bao: She Hui Ke Xue Ban) 2 (1), available at: <http://www.hongfan.org.cn/file/upload/2010/02/03/1280901595.pdf>

⁶⁸ Randall Peerenboom, Social Network, Civil Society, Democracy and Rule of Law: A New Conceptual Framework. In Chair Hahm, Chaibong Hahm and Daniel Bell, (eds.), *THE POLITICS OF RELATIONALITY: CIVIL SOCIETY, ECONOMICS, AND LAW IN EAST ASIA*, (Rowan & Littlefield 2003). Available at SSRN: <http://ssrn.com/abstract=372680> or doi:10.2139/ssrn.372680

⁶⁹ Zhiping Liang (1997), ‘Law and Order in the Rural Society’ (Xiang Tu She Hui Zhong De Fa Lv Yu Zhi Xu), originally in Ming Ming, Wang, and Si Fu, Wang, (eds.) *Order, Justice and Authority in Rural Society* (Xiang Tu She Hui Zhong De Zhi Xu Gong Zheng Yu Quan Wei), (Beijing: CUPL Press) available at: <http://www.aisixiang.com/data/30937.html>

⁷⁰ Philip C. C. Huang (2008b) ‘Centralized Minimalism: Semiformal Governance by Quasi Officials and Dispute Resolution in China’, *Modern China* 34(1): 9-35. 21-25

⁷¹ Philip C.C. Huang (2005) ‘Divorce Law Practices and the Origins, Myths, and Realities of Judicial ‘Mediation’ in China’, *Modern China* 31(2): 151-203.

speaking, the normative knowledge of the peasantry is not necessarily less advanced or more irrational [simply] because of its traditional characteristics.”⁷²

However, the approach taken by Huang and Liang concentrates too much on finding China’s innovations and continuity of tradition in the present that sometimes they distort the similarity. For example, Huang compares a “Dian” system in China’s feudal period with the Household Responsibility System, as they both separate right to use from ownership of land.⁷³ But as Huang himself puts it, the “Dian” right is similar to a right to mortgage, deployed by poor peasants when they were in need of money that they could temporarily lease their *private* land for exchange. The Household Responsibility system came under the collective ownership of land after the completion of China’s land reform. Against the bigger social context and structure, this equivalence building is too selective and this horizontal social network should not be viewed at the expense of vertical components.⁷⁴

3.2. Zhu Suli: Indigenization of Law

Zhu Suli is an important advocate of indigenization of law, but his argument is less culture-oriented than “utilitarian”,⁷⁵ and more emphasis is put on China as a rural society. The modern, industrialized legal system is hence less related to the countryside and its unique ethics. This discrepancy has been long ignored in Chinese sociology of law and it produces a society having law, especially in the sense of state law, but without order. Zhu argues, legal system is less about legal dogmas,⁷⁶ and should pay more attention to practical reasoning, namely, to “link theory with practice” rather than “develop theory from practice”.⁷⁷ Zhu indeed initiates a powerful “constitutional” attack that “(t)he modern rule of law as an institution cannot be built up by ‘legal transformation’ or by

⁷² Quote from Ji (2009) 135

⁷³ Philip C.C. Huang (2007) ‘Wither Chinese Law?’, *Modern China* 33(2): 163-194. 173-175

⁷⁴ Peerenboom, Randall (2003b) ‘Social Network, Civil Society, Democracy and Rule of Law: A New Conceptual Framework’, In Chair Hahm, Chaibong Hahm and Daniel Bell, (eds.), *THE POLITICS OF RELATIONALITY: CIVIL SOCIETY, ECONOMICS, AND LAW IN EAST ASIA*, (Rowan & Littlefield). Available at SSRN: <http://ssrn.com/abstract=372680> or doi:10.2139/ssrn.372680

Peerenboom is more cautious at this point. While he admits the existence of social network, he also stresses that the vertical structure is undeniable.

⁷⁵ Ji (2009)135

⁷⁶ Suli Zhu, Sociology of Law, (Fa Lv She Hui Xue), available at: <http://www.yadian.cc/paper/20839>, (accessed on December 6th, 2014)

⁷⁷ Suli Zhu (2005) Study Law in the Real World: Reading Robert Ellickson *Order Without Law*, *China Law Review* 1(1): 67-80

transplantation. It must be built from the indigenous resources of China. The reasons for this are found in the locality of knowledge and in limited rationality.”⁷⁸

In the second volume of his book (*Sending Law to the Countryside*) on the People’s Court at the basic level, Zhu carried out an empirical investigation against He’s legal professionalism. Zhu contends that law is about dispute solving, and in the lower-level courts that deal with everyday life, a formalistic legal system is not competent enough to respond to people’s needs. During great social transformations, it is better to keep a dual-track system, so to speak, with the basic level courtrooms focusing more on problem solving, while the appellant level for application of state rules.⁷⁹ By gradually extending state laws to the countryside, people will be educated while needs of the weak will not be totally neglected. Zhu claims that he holds no value presumptions other than being pragmatic⁸⁰ in his empirical studies, and he does not oppose a Party-led constitution as he deems that the CCP is the only power to overcome all the difficulties in further development and has proved itself throughout past tests.

Zhu hence is a sympathizer of political constitutionalism. This is based on his realistic observation of CCP’s political function of social integration and representation. The “system of party-state cross fertilization” has caused an intermingling of “almost all of China’s social, industrial, and educational organizations”. And “(t)his presumption of the bureaucratic state innately preceding the party is not applicable to modern China. As we saw, in modern China, the party preceded the bureaucratic state.”⁸¹ The localized, premodern agricultural society like China is unlikely to evolve “spontaneously” in such a direction to the modern Rule of Law.

Zhu’s point of view is valuable for a detailed analysis of China’s judicial reforms against legal formalism. But Zhu has from the beginning treated law as merely problem solving rather than providing a framework and structuring function as in the modern state. It corresponds to Bourdieu’s deconstruction of the distinction between legal profession and people’s consciousness of fairness. Institutionalized law does not have a monopoly of what is the best way to solve problems, and “social order” as he cites could be a better candidate. But this vague meaning of “social order” is better described as equilibrium rather than substantive values such as human rights. Finally, Zhu applies social Darwinism and

⁷⁸ Quoted from Ji (2009) 134

⁷⁹ Zhu Suli (2000) *Sending Law to the Countryside (Song Fa Xia Xiang)*, (Beijing: CUP Press), 176-196

⁸⁰ Suli Zhu (2009) 33-34

⁸¹ Ibid. 35

subjects this equilibrium to factual effectiveness. Through the bridge of ‘equilibrium’, normative implications refer to evolutionary proofs. Though Zhu is right to argue against an exaggeration of universal normative models, it is problematic to assume all social orders are fair and obeyed willingly.

3.3.Han Dayuan: the Eastern Asian Model

As I have mentioned in the section of legal constitutionalism, Peerenboom has written much on the Eastern Asian Model of constitutionalization -- a family resemblance among East Asian countries that could be used as a path of China’s reform.⁸² East Asian values were expressed in the 1993 Bangkok declaration that prioritizes economic and social rights over civil and political rights, and adopts a two-track reform that both accepts the suggestion of Washington Consensus on macroeconomics and compromises pragmatically. This model is also seen by Han Dayuan as a more adaptable one for transition from Communism as it contains a strategy of “administrative absorption of politics”, which ensures a more stable and controlled process.

Peerenboom’s advocate for the East Asian model is said to be related less to cultural similarities. He opposes categorizing the Eastern Asian Model as influenced by Confucianism. Asia is too broad a region with diverse traditions to be united under one title; and insisting on Confucianism could not deny that we all need human rights. This makes Yu’s critique valid that, if Asian constitutionalism is distinct by attaching to “the roles of economic development, state building and community values” operative in the constitutional framework, then “these roles can also be seen as complements to liberal constitutionalism, rather than a brand new version of constitutionalism”.⁸³

3.4.The turn to Confucianism: imaginations and the retrieval of traditions

With the call for re-establishing public consensus as the cultural basis of constitutionalism, as Habermas “constitutional patriotism” implies, the Confucian tradition is also taken as a proper candidate for constitutional re-imaginings, especially Left Confucianism. Confucianism was at the beginning a philosophical and ethical theory documenting Confucius’s dialogues with his students in the *Analects*. In the Qin Dynasty, it developed

⁸² Peerenboom (2009c)

⁸³ Xingzhong Yu (2009) 123

into state ideology and around 605 AD was used for the standard of national examination for bureaucracy. In general, Confucianism is not a religion with a personal God, but a moral philosophy with Confucius as an exemplary man which also encourages taking political responsibility for ordinary people. Throughout two millennia it contains other theoretical influences from Chinese Legalism, Daoism and Buddhism. But in China's New Culture Movement (from Mid-1910s to 1920s), Confucianism was scorned as "a feudal ritual that eats humanity (Chi Ren De Feng Jian Li Jiao)". A more fierce attack was in China's Cultural Revolution, and after the Revolution seldom could we still discern the influence of Confucianism as intact. The turn to Confucianism in China hence signifies effort to explore the continuous influence of Confucianism in contemporary China.

Daniel Bell's project is both political and "thick". He develops a theory of "illiberal democracy"⁸⁴ based on Confucianism and its practices in East Asia. While social contract in the West is only a metaphor, family-state model could be seen as its equivalence in Asia. More than what the West assumes, familism and filial piety has a more important effect in China. Family is the first and most important school of virtue, contributes to forming a good community, and even justifies breaking the law. Bell in another book⁸⁵ also predicts that China might pursue a Leftist Confucianism in the future, and treats Jiang Qing's Political Confucianism seriously. Jiang had devised a project of Tricameral Legislature in China, with different Houses representing separately the sacred sources, Common People's endorsement and historical legacy.⁸⁶ However, as Bell predicts, it is at the collision moments that we still have to figure out the priority of people's democracy in relation to traditional values, or vice versa.

Responding to the call for "correlating three traditions"⁸⁷ by Gan Yang, who is an important figure of China's New Left working on the culture field, Wang Hui wrote a big book to trace the rise of Chinese thought,⁸⁸ the theme of which is the evolution of Confucius thinking. Wang poses Confucianism in opposition to the Western paradigm of

⁸⁴ Daniel A. Bell and Kanishka Jayasuiya (1995) 'Understanding Illiberal democracy: A Framework', in Daniel A. Bell, David brown, Kanishya Jayasuiya and David Martin Jones, *Towards Illiberal Democracy in Pacific Asia* (New York; ST. MARTIN'S PRESS)

⁸⁵ Daniel A. Bell (2008) *China's New Confucianism* (Princeton: Princeton University Press)

⁸⁶ Ibid. 240

⁸⁷ Namely, Confucianism, Mao's equalitarianism and Deng's market economy

See Gan, Yang (2005) 'Connecting Three Traditions in a New Era—Configuration of Three Traditions and the Revival of Chinese Civilization' (Xin Shi Dai De Tong San Tong—San Zhong Chuan Tong De Rong Hui Yu Zhong Hua Wen Ming De Fu Xing), (Lecture at Qinghua University), available at:

<http://www.aisixiang.com/data/7505.html> (accessed on December 10th, 2014)

⁸⁸ Hui, Wang (2004) *The Rise of Modern Chinese Thought (Xian Dai Zhong Guo Si Xiang De Xing Qi)*, (Beijing: Life-Reading-Knowledge Book)

foundational epistemology. He insists on several concepts that could not be contained by the terms imported from the West, such as China's empire as a gift-giving community different both from imperialism and nation state; or "rites" as an emotional and social bond against institutions.⁸⁹ Finally, in Wang's "war of cultures", western concepts could never catch the genuine Confucianism teaching; there is always already "alienation in the very first communication".⁹⁰ Wang advocates "politics for recognition" but we are left uncertain about what is the alternative teaching he suggests.

In contrast to Wang's rejection of communication, David Hall and Roger Ames make their important contributions in comparative philosophy.⁹¹ They resort directly back to the text of *Analects*. Acknowledging the distinctiveness of Confucianism, they give it a polar explanation for social relationships compared to dualist relationships in the West.⁹² Hall and Ames argue that 'dualism' in philosophical vocabulary is influenced by *ex nihilo* doctrines, which has a radical separation between the determinate and the dependent. 'Polarity' on the other hand indicates "a relationship of two events of which requires the other as a necessary condition for being what it is ... each pole can only be explained by reference to the other."⁹³ Confucianism, in their arguments, is an aesthetic philosophy and repeats a process of learning-creation-communication-attunement. And this process structurally occurs in different spheres, as in thinking, politics, relation with nature, and language. Learning ensures the teaching of traditions; creation promises the new; communication is channelling the possible conflicts between the two; while attunement guarantees harmonization. It provides an immanent cosmos,⁹⁴ without transcendence or separation between knowledge and action. But this for Hall and Ames, does not make Confucianism an existential philosophy, since its concern still lies with interdependence rather than the independent realization of excellence.⁹⁵ Hall and Ames conclusively define Confucianism as person-in-context philosophy, and as a process-in-flux, with the sage king

⁸⁹ Hui, Wang (2008) 'The Liberation of the Object and the Interrogation of Modernity: Rethinking the Rise of Modern Chinese Thought' *Modern China* 2008 34(1): 114-140

⁹⁰ Gunther Teubner (2006) "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors" *Mod. L. Rev.* 69: 327-346

⁹¹ David L. Hall and Roger T. Ames (1987) *Thinking Through Confucius* (New York: State University of New York Press)

⁹² Ibid. 19

⁹³ Ibid. 18-19

⁹⁴ Ibid. 16

⁹⁵ Ibid. 14

as a living model to be imitated,⁹⁶ whose mastership is appreciated in communication and harmonization.

However, their book does not explain whether this self-sufficient system could be accommodated in modern life, or so to speak, whether a polar relationship could be re-cast in perspectives shaped by the modern dualist relationship, such as the conception of “rights”. An effort by Tu Weiming is made to combine historical transformations and philosophical strength in propagating “the third wave of Confucianism”.⁹⁷ Tu depicts the influence of Confucianism as “already functioning in life yet to be found (Bai Xing Ri Yong Er Bu Zi Zhi)”⁹⁸ as inspired by Soren Kierkegaard.⁹⁹ This “living order” assures historical continuity enduring throughout changes and ruptures. Hence, in contrast to Hall and Ames, Tu emphasizes Confucianism as an individual and existential philosophy that could be compatible with liberal values. Tu rejects politicising Confucianism as it was in history, and insists on Confucianism’s ethical function and capacity to co-exist with feminism, environmentalism and other theories. This tolerance and accommodation capacity is the virtue of Confucianism, but at the same time makes it harder to define the “what is”. If Confucianism could be accommodating to any modern philosophy, what is its uniqueness? If we are already living this tradition, what dictates our special loyalty in this retrieval?

The turning to Confucianism as a resource for depicting society and politics is to challenge the social-contract origin of State, democracy and political rights, and enlightenment epistemology. While Wang, Hall and Ames are right to point out the unique quality of Confucianism, they find it hard to state this philosophy in an affirmative and general way except for a concrete description. Generalization will bring forth the concern about the political face of Confucianism – elite politics and its historical role as official ideology. But for another thing, the non-institution makes it harder to replace liberalism and a whole set of theories on State, law, or democracy. No matter whether it is the analogy to existential philosophy that Tu makes, or the focus on interpersonal communication of Confucianism, the key question lies in whether Confucianism is capable of depicting a

⁹⁶ Ibid. 304

⁹⁷ Weiming, Tu, *Selected Works of Tu Weiming* (Tu Wei Ming Wen Ji), (Wuhan: Wuhan Press, 2002), Vol. I, 398-426

⁹⁸ Ibid.346

⁹⁹ Ibid. 85 hence at this point, Tu insists on the individual and existential meaning of Confucianism in contrast to Hall and Ames.

relationship between society and individuals as a learning-adaptation process free of organizational powers.

3.5. Summary of Social Constitutionalism in China

Proposals of social constitutionalism arise from scholars that treat social orders more important than positive law and state organizations. It makes social constitutionalism connect to the wider background of culture or philosophy. And this non-law background is taken as a virtue rather than a vice.

Significantly, China's social constitutionalism intends to argue for an alternative to social contract theory and the state/society distinction. For its theorists, the social and cultural identity organized in the form of social network is different from the civil society assumption that has a close correlation with the positivization of law. Resorting to Confucianism is the cultural resources for Chinese constitutionalists to reject the Western dualist depiction of the individual-society relations.

Whether Confucianism could be an alternative imagination about social relations is connected to the function of Confucianism historically. And it is a debate about Confucianism as an ethical teaching or a politically dominant ideology. Apparently, Bell opts for a 'thick' meaning of Confucianism which emphasises the importance of filial piety, a paternalistic tradition that prioritizes State and the collectivity. In this sense, they mean to say that Confucianism has played its role in forming the political tradition and continuing its influence in contemporary China. This replacement of modern liberal culture, however, demands a strong identity of Confucianism. It is also unavoidable in this case to account for the political face of Confucianism in history. Opposite to them, is the assertion of Confucianism as an ethical theory by Tu, Ames and Hall, who try to separate the historical evil associated with politicising Confucianism from its adaptation to values of "toleration" of modern liberalism. But as an ethical principle, it supplements liberal philosophy rather than projects a thick patriotism as "Confucian constitutionalism".

4. Summary of this chapter

This chapter links back to chapter 1 and the proposal of legal constitutionalism in China. In China, more schools are arising to interpret China's constitutional orders different from a

future shaped by judicial constitutionalism. They are invoking old and new resources to view China's constitutionalism in a new light.

Also related to the three social orders in chapter 2, new constitutional schools have conceptualized different images about China's constitutional order. China's political constitutionalism is a combination of China's socialist tradition against legal institutionalization. It on one hand puts the Party-state structure in analogy to the constitutional convention in China, while on the other hand it stresses the convention as more important than constitutional laws. Economic constitutionalism aims to connect the socialist infrastructure with China's market reform to configure a socialist market system. The vicious "state capitalism" in the 1990s is expected to convert to a positive use of market in service of public interest. Social constitutionalism tends to imagine beneath legal institutions a social order that is a-political, and society generating its own norms via culture, social cooperations and teaching. This social network treats the political generation of law implied in positivism as its chief opponent.

In common, these propositions coincide with theoretical changes that demand a reflection on the tradition of positivism. Positivism highly simplifies the relationship between law and society, especially for China, who in history does not have the tradition of "Rule of Law" in the Western sense. The legal culture, as Law and Development explores, is a necessary support for the ideal to take root; but at the same time, could not be simply instrumentalized.¹⁰⁰ This is especially the case with Confucianism in China. Confucianism as an existential *constitution* of life contradicts the normative meaning of classical constitutionalism; and this in turn generates anxiety about how to justify it before modern liberalism. Either that or it is simply not needed, as Wang argues. This reconciliation and justification is an imposed requirement that uses constitutionalism as an ideological tool to measure social norms that are not all one-sized. And why should liberal constitutionalism be used as a standard of projection rather than the opposite that it should respect China's effective social order?

Here lies the inversion thesis of China's second-round constitutional discourses. Formalism and positive law, confronting their failure in implementation, turn to be a paradigm crisis. If constitutionalism has to reflect the people's political existence as its aim,

¹⁰⁰ David M. Trubek (2004) The "Rule of Law" in Development Assistance: Past, Present and Future, in M. Bauerle et.al, (eds), *Haben wir wirklich Recht?* Available at: http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/20109/1/2_CALE%20Books2.pdf

is it not the case that the classical constitutional model should concede what is *de facto* existence rather than the opposite – the *construction* of a universal political existence?

But on the other hand, who could define and have knowledge of what is the political existence in China that reflects the essential needs of Chinese people other than what is real and what keeps certain equilibrium? Or how could we understand the disequilibrium – the substantive loss of the working class, the migrant workers deprived rights to choose their lifestyles otherwise? While it may be right to contest who has a final say on constitutionalism, it may be also contestable who has a final say about the identity, especially when there is no democratic channel to speak?

While Carl Schmitt puts substantive equality as the basis of a political community, he argues for constituent power as the people's will rather than the people's identity, as the identity is a given requisite for the will which itself could not be disaggregated and upgraded. But this is precisely what he is condemned and not the case for contemporary constitutionalism which rises from the margin of classical constitutionalism but turns the table against it. For contemporary constitutionalism, the people's will has to be qualified with the integrative capacity, and democracy has to be evaluated against who enjoys the democratic outputs.

The shortcomings of democracy hence bring forth the crisis of constituent power of the constitutional paradigm. As China's "illiberal democracy" shows, this new paradigm is not going to be attributed to a political will expressed by the people but an existential status that relies on history, culture, regime performances and equilibrium. To say it is a new type of democracy, is to displace democracy that links the subject of democracy with his capacity to express his will. Hence I discern in this second-round of China's constitutional discourses a turn that democracy and constitutionalism are disconnected with political rights and reconnected to identity that has a higher-than-political meaning. Identity in contemporary constitutionalism is treated as a higher value than the political exertion of constituent power, namely, *constituencies without constituent power*. This will enable constitutional re-imaginings.

The national identity of China is strengthened in this negation of liberal constitutionalism, which however, does not mean China has its own answer to its "constitutionalism" proper. In this chapter, I mapped their different legitimacy claims, which are largely understood as meta-democratic values, whether in regard to integration, responsiveness or social

harmonization. And in the next part, I focus my attention on the general paradigm shift that China borrows to define constitutionalism with its own characteristics.

Part III.

Theoretical Re-imaginings on Constitutionalism

Chapter 5.

Contemporary Constitutional Re-imaginings

Introduction

After reviewing China's constitutional changes and the turn of the second-generation constitutional discourses, this chapter provides an understanding of essential complexities in these discourses, namely, an increasing loss of the shared meaning of "constitutionalism". In China, a three-decade reform influences both the material appropriation of the socialist constitutional structure, and also how this newly-formed hybridity is interpreted. And China's second-generation constitutional discourse on "with Chinese characteristics" calls for constitutional re-imaginings, namely, a redefinition about the monological understanding of constitutionalism. It examines the "point of departure" that contemporary constitutionalism claims.

This chapter reviews classical constitutionalism and discovers ambiguities in the constitutional paradox that lead to the contemporary renovations. In the first section, I put forward the constitutional paradox as it emerges from the intense Kelsen-Schmitt debates. Then I point out what gaps can be discerned in Schmittian arguments that lead to contestations and revisions, especially to the pole of constituent power. Despite the crisis of constituent power and the nation-state constitutional model, in the final section, I pose the question as whether the constitutional paradox could be rethought in terms of critical constitutional theories.

1. The Constitutional Paradox – the Kelsen-Schmitt debate

While in China constitutionalism is mainly imported as a legal concept, in classical constitutionalism the word "constitutionalism" is never a purely legal thematic as the

school of legal constitutionalism assumes. Shaped by the French Revolution¹ and indicated in the term “fundamental law”, aspects of “foundation” have always implied more than a collection of laws. The paradox of constitutionalism is composed of two poles as constitutional form and constituent power. The intriguing issue of self-government and the compromise of sovereignty before the law has been under interpretation ever since social contract theories.² In a key contribution to the constitutional paradox, Martin Loughlin and Neil Walker have put the paradox in a concise way. As they write,

“Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the ‘consent of the people’ and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms. The people, in Maistre’s words, ‘are a sovereign that cannot exercise sovereignty’; the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established. This indicates what, in its most elementary formulation, might be called the paradox of constitutionalism.”³

The divide between legal constitutionalism in an American model and political constitutionalism in a British model,⁴ or between the continental and common law jurisprudence, does not override constitutionalism as a coupling between law and politics in the cores of both *Rechtsstaat* and “Rule of Law”.⁵

It is mainly in the influential pure theory of law of Hans Kelsen that constitutionalism is portrayed as a purified legal system, which concerns the “particularity of law to regulate its own creation” that professes to be “value free”. This approach to “validity” makes the multiplicity of legal norms united through a hierarchy of legal authorization, and at the

¹ Nico Krisch (2010) *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (Oxford: Oxford University Press) 49

² see chapter 7 of this thesis on Luhmann

³ Martin Loughlin and Neil Walker (2007), ‘Introduction’ in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. (Oxford: Oxford University Press), 1

⁴ Martin Loughlin’s writings reflected British political constitutionalism, as in his book *the Idea of Public Law*

⁵ As Schmitt writes in his *Constitutional Theory*, England’s public law development took a distinctive course because “the medieval feudal masters and estates and their representation made their transition into modern state relations through a gradual and imperceptible development”, while in the continental Europe, the unification were achieved through “princely absolutism” (98-99). But even for the unwritten constitution in Britain, Schmitt argues that its unity of provisions still lies in a political will external to these norms rather than its purely systematic completeness.

Carl Schmitt (2008) *Constitutional Theory* (Durham, NC; London : Duke University Press) 70

apex of which there is a “historically first” constitution. This constitution, however, must also refer to a *Grundnorm* to base the validity of the original constitution, which for Kelsen is a logical *presupposition* that demands no further explanation.⁶ If this indeed establishes a basis for review of “constitutionality”, it yet has difficulty in understanding attribution of constitutional changes to the original text in a purely procedural sense. Carl Schmitt, while admiring this legal science of Kelsen’s, tries to bring the extra-legal dimension back to discussions of constitutionalism. “State of exception”, dangerously utilized by him, is a strong case to reveal when all valid legal norms are suspended and dependent upon a power of decision to retain their application.⁷

This Kelsen-Schmitt debate intensifies the paradox of constitutionalism to a great extent. Rather than use attribution and presupposition to contain decisions within normativism, Schmitt juxtaposes the two as separate, and decisionism implies an extra-legal and pre-legal dimension to law.⁸ It pierces Kelsen’s system of law in a *strategically* acute way, but in the meantime the question of “who decides” becomes the label of Schmitt’s theory of “decisionism”. And the “commisional decision” of the president is easily fused with the “sovereign decision”⁹ of the constituent power of the people, which makes Schmitt often characterized as an apologist for the Nazi Regime.

It is in his *Constitutional Theory* that Schmitt intended to provide a more normative and republican theory of constitutionalism, but in no way less critical towards reduction of constitutionalism to constitutional laws. According to Chris Thornhill, it is a “more complete and subtler” approach that “signals a limited though significant reapproachment with liberalism”.¹⁰ In this book, Schmitt puts forward two oppositions to Kelsen’s pure law. Firstly, he argues the purity of Kelsen’s legal system concerns merely “functions” rather than “substantial *being* and legal *functioning*”,¹¹ which questions the material establishment of Kelsen’s system of law. And secondly, Schmitt argues that positivism

⁶ Scott Veitch, Emiliios Christodoulidis and Lindsay Farmer (eds.) (2012) *Jurisprudence: Themes and Concepts* (London : Routledge) 38-44

⁷ Schmitt (2008)157

⁸ Carl Schmitt (2004) *On the Three Types of Juristic Thought* (Westport, Conn.; London: Praeger) 68

⁹ Carl Schmitt (2008)109-110

In arguing the role of “constitution-making” assembly, Schmitt calls it “sovereign dictator”. Because there is no constitutional norms, this dictatorship is not commissarial. But it also acts “in the name of and under commission from the people, which can at any time decommission its agents through a political act.”

¹⁰ Schmitt (2008)2

¹¹ Schmitt (2008)64

only takes those actually valid to be valid, hence “(i)n its place appears the tautology of a raw factualness.”¹²

These two critiques imply two sides of positivism, one is materialization of normativism, and the other is factuality in the place of normativity. I want to explain more about the second critique. It implies that Schmitt was aware of the “absolute” constitutionalism which takes substantive “order” as constitutionalism,¹³ which he is always accused of. But what Schmitt intended to reveal is that Kelsen wanted to complete an incompatible merging of the factualness of positive law with normativism derived only by virtue of reason and justice. But

“A *norm* can be valid because it is *correct*. The logical conclusion, reached systematically, is natural law not the positive constitution. The alternative is that a norm is valid because it is positively established, in other words, by virtue of an existing *will*. A norm never establishes itself.”¹⁴

A norm could only be recognized than positively established.¹⁵ This also corresponds to the first critique of materialization. Schmitt’s key refutation to Kelsen’s theory, I argue, is not decisionism versus normativism, but he contributes to a juxtaposition of two “sources” of law. The *Grundnorm* is impossible to establish itself while claiming to be a pure norm. And instead, Schmitt contrasts a natural law notion of normativism with a positive law thinking that is based on the will of law-making, as he calls them “*alternatives*”. It implies a distinction “between efficacy as condition for validity, and the reason for the validity of a legal norm. The former is a fact, but as a fact it cannot be the reason for validity of legal norms.”¹⁶

People’s *will* that authorizes law hence also implies an artificial disconnection of law from natural reason. This reveals a *modern* basis of legal science and centrality of positivism, which is described by Habermas as a “reconstructive” relationship between validity and facticity.¹⁷ Just as Thornhill calls for a re-consideration of positivism,¹⁸ it *contextualizes*

¹² Schmitt (2008)64

¹³ Schmitt (2008)62

¹⁴ Schmitt (2008) 64

¹⁵ Luhmann argues in his *Law as a Social System* (438) that “Positive is not natural but is posited and hence can be observed as a decision. Positive is not speculative but is founded demonstrably on facts and statutes. And positive is not negative.”

¹⁶ Veitch, et al.(2012) 40

¹⁷ Habermas (1996) 21

¹⁸ Thornhill (2012a) 375

the supremacy of “constituent power” and the people’s “will” in historical circumstances of modernity, replacing “reason” in natural law. But right because of this, the people’s will becomes the *ultimate* end of legitimation, from which modern democracy stems. As Schmitt claims,

“The fact is a constitution is valid because it derives from a constitution-making capacity (power or authority) and is established by the will of this constitution-making power. In contrast to mere norms, the word ‘will’ denotes an actually existing power as the origin of a command. The will is *existentially present*; its power or authority lies in its *being*.”¹⁹ (my emphasis)

Restoring constituent power to constitutionalism does not mean that Schmitt essentializes all laws as political or that there is no “law” properly called. He was rather meant to point out that modern law derives all its legitimacy from democracy and the people’s will – the democratic ontology of modern constitutionalism. Nevertheless, his argument is ambiguous enough that for Hans Lindahl, Schmitt’s takes the “existing will” to be the existential being of constituent power commits what he accuses Kelsen of and celebrates ontology of substances.²⁰ Schmitt is the positivist rather than Kelsen,²¹ Lindahl objects, especially concerning the naturalness of “we” in Schmittian theory. Though Schmitt is right to see the “we” as irreducible to an aggregation of “I”s, “the first-person plural perspective is rendered synonymous to a substantive equality between the members of a polity.”²²

Theoretically, constituent power is rather indefinable for Schmitt. It could only reappear as a fact. It is a constitution-making fact, but itself is not a normative fact and does not contain normativity. Hence as a “stop rule”²³ for normative inquiry, it always falls short and is always in contrast to normativism. But then why do we give it such a high status? Cutting from Schmitt’s historical analysis of how the people’s will becomes God,²⁴ positivism increasingly is dissociated from its democratic implications initially as a

¹⁹ Schmitt (2008) 64

²⁰ Lindahl (2007) 16

²¹ Ibid. 22

²² Ibid. 14

²³ Luhmann (2004) 445

²⁴ see the reference in Schmitt (2008) 198

Schmitt argues that from the 16th century, with the establishment of state and sovereignty, the condition of political universe becomes pluralistic. This is accompanied with “an absolute privatization of every religion”. However, Schmitt argues that it did not mean that “religion lost its value – quite the opposite. The state and public life generally were rendered *relative and devalued*. Religion as the highest and absolute thing becomes the affair of the individual.”

liberation movement from religion.²⁵ But also due to this turn to “immanence”,²⁶ Antonio Negri argues, Schmittian “constituent power” loses its connection with democracy, and has affinity with the implication of “sovereignty”.

The crucial point I want to make here is that while Schmitt has brought the paradox back to a pure theory of constitutional law, constituent power itself is under dispute. The first argument concerns its naturalness and condensation in nation States. Secondly, as in Claude Lefort’s accounts, it is problematized with regard to the understanding of continuity and discontinuity of its exertion.²⁷ Negri also argues for a “temporary singularity” of constituent power as an objection to Schmitt’s.²⁸ He argues that “the immanence [of Schmittian theory] is so profound that at first sight the distinction between constituent and constituted power fades”. It implies that constituent power though is supreme legitimacy, is nonetheless subject to continuous process of self-transformation. Thirdly and more radically, is constituent power not a *political* construct that is used for purposes of exclusion of the “alter”, whose *humanity* could not be denied in the ambit of citizenship? In the next section, I will unpack these diverse attacks on the understanding of constituent power in Schmittian theory.

2. Complexities of Constituent Power

In the book *The Concept of The Political*, Schmitt acknowledges how hard it is to get a clear definition of the political as it is used relatively in contrast to other spheres.²⁹ In order to get more than the “obvious” answer of politics – liberal culture³⁰ that privatizes politics into individual rights, turns public foes into private enemy, and reduces democracy to party coalition based on interests – Schmitt moves to the “sovereign” position, which is

But in Claude Lefort’s arguments, this is rather a political phenomenon that reduces the meaning and the field of “the political” via definitions of the political science.

see Lefort (1988) 213-255

²⁵ Schmitt argues, “democratic identity rests on the idea that everything inside the state involving activation of state power and government only occurs within the confines the people’s substantial similarity to one another. It is clear that all democratic thinking centres on the idea of immanence... That is the meaning of the principle ‘the people’s voice is the voice of God’.”

see Schmitt (2008) 266-267

²⁶ Negri categorizes Schmitt in the immanence group among the three constitutional thinking (transcendence, immanence and the juridical) he maps.

²⁷ In talking about French Revolution, Lefort argues how to perceive this event as that “a break has occurred, but that it did not occur within time, that it establishes a relationship between human beings and the institution itself; that it makes society a mystery.”

see Lefort (1988) 213

²⁸ Antonio Negri, *Insurgencies: constituent power and the modern state*. (Minneapolis, Minn.; London: University of Minnesota Press, 2009)

²⁹ Schmitt (1996a)20

³⁰ Schmitt (1996a) 102, Note 7

discerned by Heinrich Meier as shifting from “defensive” (of “the political”) to “offensive”.³¹ When confronting the state of war which necessitates the sovereign decision of normalcy and exception, political existence is trans-domained and intensified across other autonomous distinctions. For Meier this means that “(t)he conception of domains is replaced by a model of intensity.”³²

State sovereignty serves the purpose of intensification to make “the political” appear, but becomes the curse of Schmittian theory. The terrible crimes committed to human rights by the Nazi Regime cause people to question that, will state always act as facilitator of rights protection? If state turns to be the chief persecutor of human rights, where should we turn to? With deep reflections on positivism, international law regimes start to develop after World War II . The United Nations is founded along with its charter systems concretizing human rights norms, especially the *Universal Declaration of Human Rights* of 1948, the *International Covenant on Civil and Political Rights* of 1966 (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* of 1966 (ICESCR).³³ In transitional justice cases of Rwanda and Yugoslavia, the International Criminal Tribunals set up by the Security Council enable individuals to directly emerge as the subject of international law rather than by means of state action, which indicates that state consensus no longer could be seen as the only validation and root of international law. This break from constitutional ratification brings a quality shift to the international legal regime toward its “global” nature. In Anne-Marie Slaughter’s account, horizontally close cooperations between political institutions disaggregates state sovereignty as an entity and forms “a new world order”.³⁴ Accordingly in the theoretical level, liberal international relations theory should replace those realistic assumptions. International law not merely reflects nation state interests but also disciplines international relations away from its aggressiveness for power.³⁵

International law’s tremendous developments problematize the constructed entity of State and its separation of humanity according to territory and citizenship. What if State is just

³¹ Heinrich Meier (1995) *Carl Schmitt & Leo Strauss: the Hidden Dialogue*. (Chicago; London: University of Chicago Press)18 and 20

³² Ibid, 22

³³ ERIKA DE WET (2006) ‘The Emergence of International and Regional Value System as a Manifestation of the Emerging International Constitutional Order’, *Leiden Journal of International Law*, 19(3): 611-632

³⁴ Anne-Marie Slaughter (2004) *A New World Order*. (Princeton, N.J.; Oxford: Princeton University Press,)

³⁵ Anne-Marie Slaughter (1995) ‘International Law in a World of Liberal States’, (1995) *EJIL* 6:503-538

an “imagined community” as famously put by Benedict Anderson?³⁶ The proliferation of legal regimes goes along with the decline of states as “attribution” points.³⁷ As Thornhill argues, “(i)n society marked by a post-constituent constitution, law’s authority is left to repose on inner-judicial principles, and its final point of constituent regress *vanishes*.”³⁸ This brings the “legitimacy” crisis of State. And the state “theory” is investigated rather than taken for granted. Constitutionalism in history as a power-limiting device is a misleading notion, Preuss argues.³⁹ The territoriality, sovereignty and the constitutional order were combined together to constitute a national and political community and keep other plural orders from emerging as competitors. State territory imposes a generalization of sociality on a space accompanied with an exercise of impersonal authoritative power. In this sense, “(t)he state does not have a territory, it *is* a territory”.⁴⁰ So to speak, constitution is not limitative of a pre-existing power, but constitutive of the society. It is creating its Self.⁴¹

By problematizing organization of the “multitude” into a collective polity, Preuss poses question over “constituent power”, which acts as the fundamental legitimacy of constitutionalism. Factually it never exists as such an entity, which could always be problematized against this conception of “an appropriate self-organization of the people”,⁴² and enables a permanent questionability about inclusion.

For Preuss, it is not legal rigidity preventing self-constitution that induces the crisis of classical constitutionalism, but the homology of a community taken for granted that prevents constitutive potentials in the multitude being heard. Compared to “constituent power”, Preuss is less critical towards the “constitutional form”. For him, law is rather neutral for use and is an effective register for pluralism against any given community. Since every “constituent power” is an attribution, the use of constitutional form anew could *a posteriori* relate back. By this means, political self-constitution could immediately be

³⁶ Benedict Anderson (2006) *Imagined communities: reflections on the origin and spread of nationalism* (London: Verso)

³⁷ Dieter Grimm (2010) ‘The Achievement of Constitutionalism and its Prospects in a Changed World, in Petra Dobner and Martin Loughlin (eds.) *The Twilight of Constitutionalism?* (Oxford: Oxford University Press) 16

³⁸ Thornhill (2012a) 375

³⁹ Ulrich K. Preuss (2010) ‘Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?’ in Petra Dobner and Martin Loughlin (eds.) *The Twilight of Constitutionalism?* (Oxford: Oxford University Press) 23

⁴⁰ *Ibid.* 27

⁴¹ *Ibid.* 33

⁴² *Ibid.* 35

located in legal experiments, though this correspondence between law and politics is nowhere to be touched in Preuss's theory.

But I want to insist here that Preuss's critique is not a simple denunciation of constituent power. For Preuss, it raises the constitutional paradox to a *higher* level of community–multitude relationship, expressed by Lindahl as “sameness and selfhood”.⁴³ While interpreting the Kelsen-Schmitt debate, Lindahl expands it,

“A collective can only act by re-acting to what, preceding it at every step, never ceases to confront it with the question, ‘Who are we?’. *Constituent power comes second, not first*: from the very beginning, and as its beginning, collective selfhood is eccentric, decentred with respect to the other as well as to the strange. Here, then, is the main contribution of the paradox of constituent power to an ontology of collective selfhood: the collective self exists in the modes of questionability and, by way of its acts, of responsiveness.”⁴⁴ (my emphasis)

By exploring the presumption of the constitutional “impasse”, Lindahl rather develops and converts it into a legitimating meta-code, namely, “the problem of justifying the inclusion and exclusion required for political unity.”⁴⁵

Here we could see clearly a series of shifts that change the status of constituent power in classical constitutionalism. The critiques of positivism and developments in international law challenge State as the guarantor of human rights. State as the supreme legal personality⁴⁶ is increasingly seen as a contingent and historical construct that serves the political *exploitation* of law⁴⁷ rather than the validation of law, and needs to be rethought with internationalization. This “temporalizes” constituent power and explores the expansion and formation of community via a meta-code of inclusion and exclusion. If Schmittian political community explains constituent power on the basis of “who decides”, it is now problematized as “who decides who decides?”⁴⁸ or else, people outside the community will never have a say in the deciding process. As Chantal Mouffe comments, “(t)he unity of the state must, for him [Schmitt], be a concrete unity, already given and

⁴³ Lindahl (2007)14

⁴⁴ Ibid. 21

⁴⁵ Ibid. 22

⁴⁶ Saskia Sassen (2008) *Territory, Authority, Rights: from Medieval to Global Assemblages*. (Princeton, NJ; Oxford: Princeton University Press) 129-130

⁴⁷ As indicated in Preuss's theory.

⁴⁸ Miguel Poiaras Maduro (2003) 95

therefore stable. ... Because of that, his distinction between ‘us’ and ‘them’ is not really politically non-constructed, it is merely a recognition of already-existing borders.”⁴⁹

These indeed constitute compelling challenges to the indefinable but supreme existence of constituent power in Schmittian theory that even he could not well respond to. Richard Bernstein hence argues, Schmitt’s homogeneity is both real and reflective, both concrete and existential.⁵⁰ Schmitt admits that, “(w)here the constitution-making power exists, *there is also always a constitutional minimum*, ... the revolutionary elimination of a constitution can even be designated somewhat rightly as mere *constitutional change*, but naturally only when one presupposes this *permanence* of the subject of the constitution-making power.”⁵¹(my emphasis)

Here, apparently, Schmitt has to deviate from his “intensity” claim to accommodate with the “permanence” claim of constituent power. This temporalization, as correctly recognized by Negri and Lefort, will question the supremacy of constituent power as residing in merely a revolutionary act. Lindahl argues that there is an “inverted symmetry” in the synthesis that “if the activity of constituent power discloses an irreducible passivity in political unity, a no less irreducible passivity is embedded in constituent power’s activity.”⁵² By putting it like this, Lindahl supposes that every constitutional law embodies a certain constituent element inside it in the form of “inaction”. And in this sense, the stake holder definition could express the constituent power, namely, an “identification/empowerment” function.⁵³ Otto Kirchheimer also points out in the context of a decrease in homogeneity, more attention should be paid to the legal basis for democracy that Schmitt should acknowledge.⁵⁴

Toward Bernstein’s critique of the “existential” sense of constituent power in his theory, Schmitt yet argues the Bourgeois Rechtsstaat is *dissolution* of democracy and freedom in a legal and institutional manner from their political principles of identity and representation. “The equality of everything that bears a human face is incapable of providing a foundation

⁴⁹ Chantal Mouffe (1993) *The return of the political* (London; New York: Verso) 49 and 54.

⁵⁰ Richard J. Bernstein (2011) ‘The Aporias of Carl Schmitt’, *Constellations* 18(3): 403-430

⁵¹ Schmitt (2008)140-143

⁵² Lindahl (2007)19

⁵³ Lindahl argues that “(t)he act of constituent power institutes political community, and does so not only by positing an interest that is held to be common to all members of a community, but also who has a stake in that interest. This is tantamount to an act that at once identifies and empowers individuals as members of a community”. See Lindahl (2007) 20

⁵⁴ William E. Scheuerman (ed.) (1996) *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (Berkeley, Calif.; London: University of California Press) 74

for a state, a state form or a form of government. No distinctive differentiations and delimitations may be derived from it; only the elimination of distinctions and boundaries may be.”⁵⁵ This shapes Schmittian constituent power in fact is a *re-presence*⁵⁶ rather than a pure presence of constituent power that will never be materialized in politics.

This highlights Schmitt’s insistence on the “politicality” of constituent power and his denunciation of expansive developments of international law. In the depoliticization of international law, Schmitt predicts a spread of humanitarianism to acclaim the end of war. But for Schmitt, it will generate absolute enmity and be the cruellest as a war to end all wars. “If and when this condition (a world state) will appear, I do not know. At the moment it is not the case.”⁵⁷ For Leo Strauss, this account constitutes an admission of possibilities. And if international law could eliminate the distinction of “politicality”, all Schmittian political and constitutional theories will collapse, as the concept of the “enemy” is directly challenged. As Maier unpacks it,

“If the enemy attacks, the will to ward him off is fully self-evident. The enemy defines him as enemy by means of the attack; ... The rhetoric of the defensive, however, not only helps Schmitt conceal the theoretical difficulties in his concept of the political. As a rhetoric of ‘pure politics’, his defensive rhetoric gives him the double political advantage of shielding his own purely political position against all normative criticism and of simultaneously enabling him to attack ... the enemy who engages in politics in an unpolitical and even anti-political guise violates the honesty and visibility of pure politics.”⁵⁸

A similar critique is also made by Derrida.⁵⁹ Both focus their fire on the ontology of “the political”, the ground of all Schmitt’s theory. To this, Schmitt could hardly pronounce a defence except that current circumstances *are* political. And to transform the situation is still political in nature, and maybe forever so. This, I will argue, is adopted by Michel Foucault in his critical theories and “how” politics that liberation in and through history is a complex political process.

⁵⁵ Schmitt (2008)257

⁵⁶ Schmitt (2008) 40

⁵⁷ Schmitt (1996a) 54

⁵⁸ Meier (1995) 9

⁵⁹ Chapter 5 in Jacques Derrida (2005) *The Politics of Friendship*, (London: Verso)

Here before going deeper into separate challenges, I roughly point out three challenges to different degrees that are intrinsically connected. The decline of positivism and sovereignty claims in the post-WWII background gives birth to an expansion of international law regimes which dissociate recognition of human rights from state rectification. The State is problematized regarding its ultimate legitimacy as *the* political community, which *is* never united and whose homogeneity *is* superficial rather than substantive as Schmitt supposed. By problematizing who is included in and excluded from the community without a proper means of deciding so, constituent power instead of being the locus of people's will, is revealed instead as a construct *without* a will and a given fact *without* decisions. This necessitates the expansion of the community by means of right to dissent and to be heard. To the extreme, radical pluralism will render the political framework of constitutionalism redundant in the end. To summarize, the internationalization, inclusion and exclusion through time and claims of pluralism are challenging constituent power of Schmittian theory in various aspects.

3. Defending the constitutional paradox with critical constitutional theories?

Thornhill in discerning this development of human rights jurisprudence via judicial comity, argues for the recognition of the *dialectic* relationship between the constituent and the constituted in human rights jurisprudence, which comprises “classical constitutionalism” *as well as* “contemporary constitutionalism”.⁶⁰ As he puts it,

“Indeed, rights and constituent power are often allowed to appear as antinomies. If approached in a functionalist perspective, however, constituent power and rights always acted as inextricably linked dimensions of classical constitutionalism: rights meant that constituent power could be fully internalized in the political system, and they enabled the political system to exploit such power as an element of its inner abstraction.”⁶¹

Thornhill's functional re-interpretation of the constitutional paradox serves to rescue the paradox from a *substitution* claim made by contemporary constitutionalism, which has a potential to reduce political meaning of constitutionalism fully to judicial constitutionalism.

⁶⁰ Thornhill (2012a) 369

⁶¹ Ibid. 391

For this jurisprudence, “the objective presumption of external (national) constituent power (always inherently counterfactual) is approaching final redundancy.”⁶² Without recognition of “the inner adaptive” function of rights, the constituted agent of the judiciary and their human rights jurisprudence is trapped in the “auto-constituent logic”.⁶³

This is also the worry of Dieter Grimm when faced with global legalization and European integration immediately taken as constitutionalization.⁶⁴ It propels Grimm to consider providing a checklist that remains neutral vis-à-vis specific instantiations of constitutionalism (in its state form). He argues that constitutionalism must contain five characteristics as necessary and sufficient requirement.⁶⁵ These five characteristics make constitutionalism “a special and particularly ambitious form of legalisation”.⁶⁶ A mere collection of human rights cases and legislations for Grimm is not yet “constitutionalism”, as historically “constitutionalism” signifies a transformation from medieval plural orders to an absolute state where this term was first applied. It symbolizes the foundational meaning of constitutionalism rather than merely its function of limiting power.

Grimm hence distinguishes between the founding and functioning of “constitutionalism”. The naming of “constitutionalism” indicates systematization of plural orders, while rights and democracy are only secondary values of constitutionalism. Observing the five characteristics at the global level, four of them changed except for the first criterion that “the constitution remains as set of legal norms which owe their validity to a political decision”.⁶⁷ To let law be law is always a precondition demanding a democratic decision before any co-originality could be instigated. Public endorsement of rights protection *by* law is not reducible to an attribution of effects of rights protection *as* law; to put it succinctly, what is law is never self-authorized by its product. This presupposition holds against the disaggregation and mobilization of legal systems. For Grimm, as soon as there is no global legislator, and the duality of “what makes law law” is still lacking,⁶⁸ “the

⁶² Ibid. 398

⁶³ Ibid. 375

⁶⁴ Dieter Grimm (May 2005) ‘Integration by constitution’, *I.Con* 3(2&3): 193-208

⁶⁵ The five are: a) it is a set of *legal* norms; b) it regulates the *establishment* of public power than a mere modification; c) the regulation is comprehensive; d) the distinction between *pouvoir constituent* and *pouvoir constitue* is essential to the constitution; e) Constitutional law is higher law
see Grimm (2010) 9

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ming-Sung Kuo (2009) ‘Between Fragmentation and Unity: The Uneasy Relationship Between Global Administrative Law and Global Constitutionalism’. *SAN DIEGO INT’L L.J.* Vol. 10: 439-467

limitation by societal constitutions will always be self-limitation guided by the actors' interests, not the common interest".⁶⁹

This difference between processing and integration indicates a democratic/political surplus.⁷⁰ Emiliios Christodoulidis interprets classical constitutionalism especially in a relational perspective, as he writes,

“Our theorists appear to have hit a theoretical impasse here – the notion of a structure-defying event that somehow implausibly registers as ‘constitutional’ despite the conditions of its individuation – and have assumed it an insight.”⁷¹

This leads Christodoulidis to a different understanding from Lindahl's constructive understanding of the Kelsen-Schmitt's debate. For Lindahl, the formula of the *Rechtsstaat* has to be preserved as “the manner in which modern democracy deals with this aporia”⁷² that “spells out the institutional conditions for ‘political action of the *subject*’”.⁷³

Christodoulidis acknowledges this “after-the-event” stake-holding concept of constitutionalism, however, argues for intensification and a severance – an impasse that stays as an impasse that defies being reconciled. “The reflexivity – ‘am I really represented in the ‘we’? – becomes one that is impossible to be pre-contained at either level. Consent to inclusion can only be certified after the event, that is, after the invocation of the ‘we’ has been effected. It is this temporal economy that makes it ‘impossible for a we to say ‘we’. If this is the case, it is *a fortiori* so when the invocation relies on *a priori* institutionalization of a relationship, and it is at this point that the logic of substitution kicks in.”⁷⁴

For Christodoulidis, constituting is at the same time subjectification; while for Lindahl, subjectification is forever an impasse but in the meantime needs a minimum categorisation provided by the constitution. While Lindahl is right to criticise the lack of any element that could be attributed to the constitutional naming in Christodoulidis's argument, the latter is also questioning whether the attribution has already passed over the “constituent” moment.

⁶⁹ Ming-Sung Kuo (2010) 20

⁷⁰ Emiliios Christodoulidis (2007b) 'Against Substitution: The Constitutional Thinking of Dissensus' in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. (Oxford: Oxford University Press) 201

⁷¹ Ibid. 201

⁷² Lindahl (2007) 23

⁷³ Ibid. 23

⁷⁴ Christodoulidis (2007b) 205

Here lies the value of critical theories which have put a focus on the constitutional moment, rather than on the homogeneity of political systems before and after it. They focus on the ground-shifting moment of “what is politicizable”, namely, how to invoke “the political”. This is especially important in the vanishing of constituent power as ultimate political legitimacy, which implies an absence of the generic category of “the political”. Contemporary constitutionalism is one attempt to upload this lack of constituent power to a new level concerning the “subject” issue, while I will argue in chapter 9, critical theories are problematizing complexities in the modalities of the representation of the subject.

4. Summary of this chapter

In this chapter, I have argued why conceptual re-imaginings on constitutionalism become so central to the material process of “constitutionalization”. Through the inflationary channel of human rights, synthesis between constituent power and constitutional law as condensed in nation states is destabilized. But more importantly, this denaturalization of political community has brought forth the “subject” issue of constituent power. The meta-code of inclusion and exclusion, questionability and responsiveness of political community turns to be the chief concern of contemporary constitutionalism as I will further explore.

“Contemporary constitutionalism” though has a stronger reliance on judicial comity, is not merely a retreat to Kelsen’s pure legal system. It is a re-investment in and re-generation of the constitutional paradox. Three oppositions are discerned in their battles with Schmitt – who is the chief advocate of constituent power: the internationalization of human rights, inclusion and exclusion through time, and radical pluralism defying “the political”.

Reinterpretations of the “paradox” have divided arguments between using and admitting the impasse. In Christodoulidis and Lindahl’s disagreements on the Kelsen-Schmitt debates, they are emphasizing, however, not the two poles of classical constitutionalism, but their relationship and the “how” question about (re)presence of the constituent subject. This is in fact the core of contemporary constitutionalism. As Loughlin and Walker put it,

“By establishing a unity of a people and by expressing the purposes of this association in universal and aspirational terms, is it not possible that the constitution acquires its mature meaning not at the foundational moment but only in its aftermath, through continuous deliberation within the institutions of the

polity about the import of the event and the (evolving) character of the association? The constitution is, on this interpretation, to be treated not simply as a ‘segment of being’ but a ‘process of becoming’.”⁷⁵

The notion of “inclusion” and this “aftermath” have re-shaped the paradigm of constitutionalization so that constituent power comes *second*.⁷⁶ But to what extent is the “fidelity” maintained in this “becoming”? It is the key question asked by critical constitutional theories while admitting the “becoming”. In the next part, I will discern three approaches to contemporary constitutionalism more clearly, while in this chapter, I stop at this summary depiction of their problematization while also hinting at the value of critical constitutional theories.

⁷⁵ Loughlin and Walker ‘Introduction’ (2007), 3-4

⁷⁶ Lindahl (2007), 21

Chapter 6.

Constitutionalism-lite¹

Introduction

This chapter focuses on the first approach to contemporary constitutionalism, which relies on a continuity of constitutional semantics, constitutionalism-lite. Using a historiography of jurisprudence, this school opts for a perception of the incremental developments of human rights, and the renovations of conceptions of democracy. European integration is cited as a salutary experience to develop a new constitutional thinking for the post-national constellation.

This model of “common law constitutionalism” has for one thing dissolved the paradox of classical constitutionalism and proposed a ‘jurisgenetic’ framework of constitutionalization; while for another thing, ‘constitutionalism’ is preserved for expressing “political prudence” in general. It implies that ‘constitutionalism’ could be translated and deployed in a broader use. This translation must proceed with justice done to the methodology itself -- a disaggregation of the holistic myth of nation state constitutionalism and a reconfiguration according to the abstract “common interest”. The question that must be asked of this approach is whether it is not an over-stretching of the specific meaning of ‘constitutionalism’?

In this chapter, I firstly explore the perceptions of Joseph Weiler and Mattias Kumm on the issue of European integration. Human rights jurisprudence and developments of international laws are their key re-investments in the constitutional paradox in a manner that finally change it. In the third part, I review arguments made by the chief advocate of the “new constitutionalism” – Neil Walker, and decode the implications of “constitutionalism-lite”.

¹ Borrowed from Krisch (2010)

1. Internationalization and Europeanization: the disarming of democracy with constitutional tolerance and incrementalism

As I mentioned in the previous chapter, international law regimes have brought great changes to jurisprudence derived from a positivist model of state laws. The Lauchpacht school's understanding of international law as a technical gesture away from the political in the post-World War I background has now generated a new human rights jurisprudence that is undermining the political dimension of states.² *Ius cogens* was introduced through article 53 of the Vienna Convention on the Law of Treaties of 1969, which though is made through treaties, has a "quasi-constitutional nature" for the international society.³ As Erika De Wet introduces it, it is at present primarily focused on cases of "the out-lawing of unilateral use of force, genocide and the prohibition of slavery and racial discrimination".⁴ But the *Barcelona Traction* decision of the ICJ provides a bridge that *ius cogens* would have *erga omnes* effect. This gives the hope that if in the international society there is an increasing convergence on "values", constitutionalization of international law is possible.

It is the "values system" that matters for De Wet. To constitutionalize "the rudimentary international value system"⁵ is accompanied with "the view that human rights have developed into the core of international value systems".⁶ Though it is still subject to that more human rights would gain "customary international law status",⁷ such conditionality of enforcement, for De Wet, can benefit particularly from a potential spill-over effect of well-developed regional values systems. The European Convention for Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) sets an exemplary role in forming intermediary-level and regional human rights systems.

It would follow that for De Wet Europeanization should not conflict with internationalization, and yet a doctrinal study of European cases rather suggests otherwise.

² Martti Koskenniemi (2007) 'The Fate of Public International Law: Between Technique and Politics', *MLR*, 70 (1):1-30,1-3

³ Jan Klabbers (2011) 'The European Union in the Global Constitutional Mosaic', in Neil Walker, Jo Shaw and Stephen Tierney (eds.) *Europe's Constitutional Mosaic* (Oxford : Hart Pub.)290

⁴ Erika De Wet (2007) 'The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-Making', *PER/PELJ*, (10)2: 20-46, 26

⁵ *Ibid.* 27

⁶ *Ibid.* 26

⁷ *Ibid.* 34-35

By selectively approving of *Rukund* rather than *Yusuf* and *Kadi*,⁸ De Wet avoids accounting for the divergent practices in her experimental field of EU, and appropriates hierarchical tensions as “*functional biases*”. These “biases” distort “values” and thus are in *greater* need of redress by values system, rather than a proof of an absence of a congruent values system, even in a relatively homogeneous region like the EU.

“What would be the relevant international values?” asked Martti Koskenniemi. In the international world, there is no semblance of values as the common good defined by domestic constitutional laws “beyond the languages of diplomacy and positive law whose very fragmentation and indeterminacy provided the starting point for the search for an (implicit) constitution”.⁹ In Bruno Simma’s and Dirk Pulkowski’s accounts, deformalization in hierarchy is the essential problematic for international law in the globalization process. The self-contained regime of international law presents itself as functional *lex specialis* against *lex generalis*, especially manifested in four regimes: the EU, international human rights regimes, WTO and diplomatic law.¹⁰ International rapporteurs are in disagreement over what qualifies the “specific” nature, whether it is an exception to or an application of the general international law.

It is a downside trend if international law is subject to technocratic splits between these *lex specialis*, Koskenniemi argues. It collapses the vertical and systematic feature that any law including the international law needs, “in such (and other) ways, traditional international law is pushed aside by a mosaic of particular rules and institutions, each following its embedded preference”.¹¹ It makes the controversy between WTO and WHO, or between investment rights and environmental rights subject to specific expert reasoning and forum shopping. And in disagreement with De Wet, he argues, “if deformali(z)ation has set the house of international law on fire, to grasp at values is to throw gas on the flames.”¹² Instead, for Koskenniemi it is time to re-politicize the international law regime through *contestations* against its dark side as managerialism and a technique of governance.

⁸ Aware that European constitutionalization does have a tension with the international level, such as in the decisions of *Kadi* and *Yusuf*, De Wet finds the ideal of her projection in a later case of *Rukund*. In this case, by reviewing actions of the Security Council as against obligations in the ECHR as well as ICCPR, the Swiss court “strengthened both the regional and international value systems”. This is the manifestation of the spill-over effects based on congruent understanding of human rights and the possibility of “values system” at the European and international levels.

⁹ Koskenniemi (2007)15-16

¹⁰ Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in international Law’, (2006) *The European Journal of International Law*, 17(3): 483-529, 512

¹¹ Koskenniemi (2007) 9

¹² Koskenniemi (2007) 16

It is the systemic question of human rights jurisprudence inspired by international law developments that is concerned here. While De Wet's "values system" translates juridical rights into moral commitment, Koskenniemi is concerned with moral responsibility to commit to Rule of Law ideal. Jan Klabbers is right to mediate between the two and argue that, though *Ius cogens* is still based on treaties rather than universally shared values, sticking to "virtue ethics" could bridge constitutionalization and internationalization.¹³ In common with De Wet, this calls for doctrinal studies to be strengthened so as to clarify trends of value convergence or divergence, while this is done also with a faith that Koskenniemi holds in human rights and justice. Contestations and values consensus are rather co-referential; and in the absence of laws, values and principles will bring the overlapping jurisdictions¹⁴ from disorder to order.

No matter whether it is value-congruence or the contestation of international law, the shared resolution is not to return to nation state constitutions. Values and principles express "constitutionalism" in isolation from a statal frame of the "constitution", which should not be too hastily passed as irrelevant. Protection of rights is certainly a superior value to the integrity of a legal system for its own sake. Mattias Kumm has suggested a historiographic reading of jurisprudence, which argues that the legal 'big bang' theory and revolutionary origin of law are undermined in jurisprudence after the "total constitution",¹⁵ and the end of Cold War. We are passing through Classical Legal Liberalism and Liberal-Democratic Constitutionalism, and now we are "all Political Liberals"¹⁶ and commit to human rights, democracy and Rule of Law. This should drive us away from high positivism and develop "law in context" jurisprudence instead.¹⁷ Joseph Weiler also reminds us of a receptive attitude that, if this process of internationalization is understood in a "geological" sense rather than as a pathology,¹⁸ we could get a fresh lesson not only on law and jurisprudence, but also on democracy and constitutionalism.

¹³ Klabbers (2011) 288

¹⁴ Paul S. Berman (2007) 'Global Legal Pluralism', (2007) *Southern California Law Review*, 80(6): 1159

¹⁵ Mattias Kumm (2005) 'The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History', *German Law Journal*, 6(2): 319-355, 342

¹⁶ *Ibid.* 346

¹⁷ *Ibid.* 334

¹⁸ Weiler explains his intention to deploy the metaphor of "geology", which is "a serious methodological commitment" to "dealing with time, with history" (548-549). Firstly, this approach to the past is "instrumental" in the sense that "it can illuminate the present". Secondly, different from historical approach that emphasizes change, Weiler argues that "geology stratifies". "By stratifying geology folds the whole of the past into any given moment in time ... [which] turns to be crucial for the particular understanding of the

European integration stands right in such a controversial position. Starting from its treaty basis, European integration has deepened after a 50-year evolution. In the foundational phase from 1958 to mid-1970s, the adoption of “the doctrine of Supremacy” helped to constitute the architecture of “Higher Law” rather than merely an order of federate states. In the second phase from 1973 to mid-1980s, the expansion of “implied power doctrine” played an important role in the mutation of community competence. In the third phase after 1992, “the move to majority voting Article 100a is couched as a residual measure and derogation from the principal measure, which requires unanimity, namely old article 100.”¹⁹ It is shifted to the “‘default’ procedure for most internal market legislation, and the other procedure of other articles is an exception”.²⁰

But Weiler has clearly discerned that in the second phase, “juridical-legal” construct has left out the political and social concerns intrinsic to the issue of integration. The formed European governance “is – and will remain for considerable time – such that there is no ‘government’ to throw out”.²¹ It is undeniable “the corrupting effect ... on the civic sensibilities of the European peoples and on the very meaning of what it means to be democracy”, Weiler admits that, “its questionable democratic quotidian praxis represents the invasion of a market mentality into the sphere of politics whereby citizens becomes consumers of political outcomes rather than active participants.”²² Throughout the European integration process, the technocratic accomplishment and professionalism have become the legitimation and internal culture of the Commission corresponding to the external corruption of democracy that Weiler understands as a bi-directional or circular process.²³

But Weiler then asks provocatively: “Why should Europe be democratic”?²⁴ Neither the One Nation Ideal nor the *de facto* experience of federal states could satisfy the European model. But this is the salutary experience Europeanization could provide as *Sui Generis*.

international legal system.” Hence by using “geology”, Weiler argues an “accretion” effect, in common with Kumm’s historiography of jurisprudence, which calls for an evolutionary perspective.

J.H.H Weiler (2004) ‘The Geology of International Law – Governance, Democracy and Legitimacy’, *ZaoRV* 64:547-562

¹⁹J.H.H. Weiler (1991) ‘The Transformation of Europe’, *The Yale Law Journal* 100(8): 2458

²⁰ Ibid. 2459

²¹ J.H.H. Weiler (2000) ‘Why should Europe be a Democracy: The Corruption of Political Culture and the Principle of Constitutional Tolerance’, in Francis Snyder (ed.), *The Europeanisation of Law: the Legal Effects of European Integration*. (Oxford: Hart) 215

²² Ibid. 216

²³ Ibid. 216

²⁴ Ibid. 217

Instead of answering the challenge of the idea of the constitution in either Kelsenian or Schmittian sense, Weiler posits the constitutional tolerance as the aim of Europeanization built on the ashes of World War II, in which “alienation...became annihilation”.²⁵ Weiler denies that “democracy is the objective, the end, of European construct”.²⁶ The “bitter experience” distances Europe both from ‘constitutionalization’ and ‘integration’, the two terms suggested by Grimm;²⁷ it is instead to provide a constitutional form without intervening in member states constitutions. They would keep their distinct identity and retain their “otherness” vis-a-vis each other. This is what tolerance means: the inclusion of others without transforming them into us.

Let us assume it is possible that an ever-closer union could keep intact the nation states constitutions. Then it is clear for Weiler that the field and the issues of constitutional importance are limited and reduced to judicial conflicts to a tolerable degree, rather than dominate everyday life and the “fighting democracy”.²⁸ For Weiler, an either-or conception of constitutionalism still focuses on sovereign will, community of the people, solidarity without pluralism and politics in exceptional and antagonistic form. This would mean that the EU’s *Sui generis* constitution after the Second World War has not accomplished its break from the positivism that once infected it.

Instead, a “common law constitutionalism” is a proper paradigm to best capture the European experience as the interplay of concept and praxis. And this model could be generalized as the “interplay of Exit and Voice”, to borrow from Albert Hirschman’s theory.²⁹ “Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intra-organizational correction and recuperation ... Crudely put, a stronger ‘outlet’ for Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction.”³⁰ While it is “Exit”, when it is related to “Voice”, it is no longer a politics of “who decides?” but a proportional balance that the bad side of “Exit” could be used for the good side of “Voice”. This is a “contrapunctual law”,³¹ using Miguel Maduro’s word, namely, if all actors, while preserving the internal points of their legal order, will commit to some common

²⁵ J.H.H. Weiler (2000b) ‘Federalism and Constitutionalism: Europe’s Soderweg’, available at: <http://ftp.infoeuropa.euroid.pt/database/000036001-000037000/000036583.pdf>, 10

²⁶ Ibid. 10

²⁷ Grimm(2005) 193-208

²⁸ J.H.H. Weiler (2005), ‘On the Power of the Word: Europe’s Constitutional Iconography’, *I.Con* 3(2 & 3): 185

²⁹ Weiler (1991) 2411

³⁰ Weiler (1991) 2411

³¹ Maduro (2003) 100

meta-methodological principles of substantive character in the protection of coherence and universality and broadly the promotion of political integration beyond the State.

Weiler has to meet a number of criticisms which are diagnosed by him as a strange combination of theoretical trends of Kelsen and Schmitt. Criticism is Kelsenian in its aspiration for a European *Grundnorm*, which still underscores the search for the ultimate source of authority in the Schmittian sense. While Grimm problematizes whether a written constitution could invoke the patriotism for Europe, Weiler sees it as the secret attempt to drag Europe back to its wrongs and the trap of positivistic jurisprudence. Constitutionalism should not be interpreted through its exception but its quotidian practices, Weiler argues.

It is right for him to emphasize the normative dimension of law and disconnect from explaining legal authority through the state of exception and sovereign will, which leads to the bitter lesson of positivism. But this does not justify a refutation of any “foundational” question or any link of laws to the authority that produces them. It is one question to admit that the constitution is a norm rather than a political decision, but it is another question to confine norm formation only to judicial praxis and exclude doubts from thick republicanism.³²

It is the departure from the foundational question that makes Weiler categorize Kelsen and Schmitt both as his opponents. This misses the critique of Schmitt on Kelsen and his formulation of the nature of “positivism”, to borrow George Jellinek’s term, as the “normative power of the factual”.³³ For Schmitt the reason for considering constitutionalism in the state of exception is to ward off the danger that institutional and orderly politics fetishes itself into positivity without normative correctness any longer in sight. But in his arguing against Schmitt as well as Kelsen, Weiler rather mistakes the total order of positivism for the foundational claim of the legal system. In this sense, his enemy is not *positivism*, but *democracy* and *thick republicanism*.

Consequently, removing the ‘foundational’ question chiefly serves the understanding of judicial indeterminacy as constitutional politics, in contrast to democratic disquiets in the street. Therefore, we could say, Weiler’s chief jurisprudential contestation is to reduce the

³² “Thick Republicanism” is used by Kumm to imply “emphatic republicanism” or “thick constitutional patriotism” that reflects the specificity of a particular community. It is contrast to “thin constitutional patriotism” understood merely as an attachment to the universal moral principles contained in national constitutional texts. see Kumm(2005) 321

³³ Schmitt (2004) 68

extraordinary politics of constitution-making, and to redefine “constitutionalization” as incrementalism, praxis and narratives of the Word Constitution.

This “Sonderweg” of European constitutional order developed by Weiler is influential for other authors in reimagining jurisprudence in its practical terms and in making use of legal indeterminacy to conceive democracy and upgrade authority. And in this process, Europeanization is hardly separated from globalization. Weiler uses the European model, chiefly decouples constitutionalism from democracy and disarms thick republicanism with a higher-constitutional value of tolerance of “otherness”. To include those that are not part of the will of the existent political community is a superior value than the integrity of the community. This in effect manifests a big step to regenerate constitutionalism with insights derived from international law.

2. Mattias Kumm: “Constitutionalism” and “Rational Human Rights Paradigm”

Mattias Kumm shares the same faith as Weiler, that Europeanization is a historical achievement that should not be dismissed. European integration and its reflection on “bitter experiences”, commitment to human dignity and rule of law, and ambition to build up a union different from the American hegemony are a brave enough attempt out of traditional jurisprudence.³⁴ Its success in modelling a new constitution depends on whether we could *commit* to it without thick constitutional patriotism; or as Kumm puts it, re-invigorate republicanism without republican jurisprudence.³⁵

Confronted with the same dilemma of EU Constitutional Treaty, Kumm proposes a thought experiment that could make sense of EU conflictual judicial practices, which is named by Kumm as “Constitutionalism” against Legal Monism (as reflected in *Costa*) or Democratic Statism (as in *Kadi*). “Constitutionalism refers to a position according to which a set of universal principles central to liberal democratic constitutionalism undergird the authority of public law and determine which norms take precedence over others in

³⁴ Mattias Kumm (2004-2005) ‘To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty’, *Colum. J. Eur. L.* 11(3): 481-522, 489

³⁵ Mattias Kumm (Fall 2006) ‘Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called’, *Am. J. Comp. L.* 54:505-530.

particular circumstances”.³⁶ “Principles”, “values” or an “ideal ought” rather than “a text (the constitution)” or “a source (we the people)” are of prime import to Kumm’s paradigm. It names a judicial examination of the authority of law, which is an inverse logic of positivism. It tests whether from these judicial practices there is a substitute for thick republicanism that could be made sense. This archetypical framework and justification in public reason is the core of Kumm’s “Rational Human Rights Paradigm”.

Kumm argues with Robert Alexy’s theory on rights that, if having a structural understanding of judicial practices, we could find that except two cases – as the “excluded reasons” and an anti-consequentialist debate of means-ends -- most rights practices apply a proportionality test to decide concrete cases. In every case adjudicating rights, we start from a *prima facto* right violation and get access to court, but whether it could turn into a *definitive* violation depends on the process of balancing. Proportionality principle provides four prongs for a “checklist” to examine the violation, which are: a legitimate aim, a suitable means, necessity and a balancing test (“The greater the degree of infringement, the greater the importance of reasons supporting the infringement must be”³⁷). This checklist provides “an analytical structure for assessing whether limits imposed on the realization of a principle in a particular context are justified.”³⁸

But it is not only a justification of *outcomes*, but also a paradigm to examine public reason. The “rights reasoning” reflects “the structural richness of reasoning about political morality”,³⁹ and shares “important structural features with rational policy assessment”.⁴⁰ Thus it is also a modelling of and a commitment to political liberalism. By asking “what justifies” like Socrates did, Kumm reverses judicial function as an agency of interpretation which could only interpret laws already given. Rather than supervising *outcomes* of legislation, it is for Kumm “a right to contest” as a re-elaboration of judicial function. This new right bridges between rights and authority as Arendt suggests in the term “jurisgenesis”.⁴¹

³⁶ Mattias Kumm (2011) ‘How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Models of Public Law’. In Jürgen Neyer and Antje Wiener (eds.), *Political Theory of the European Union*. (Oxford/New York, NY: Oxford University Press) 125

³⁷ Mattias Kumm (2007) ‘What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement.’ in G. Pavlakos (ed.) *LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY* (Hart). 148

³⁸ Ibid. 137

³⁹ Ibid. 133

⁴⁰ Ibid. 140

⁴¹ quoted from Habermas (1996) 148

With this principle-based “Constitutionalism” at hand, it is also possible to act as “a distinctive cosmopolitan framework for the construction of coherently principled yet pluralist world of public law”.⁴² It bridges classical public law world with constitutional pluralism, and enables a cosmopolitan turn. For Kumm, this kind of pluralism is “not deep and hard, but shallow and soft”.⁴³ This nature of soft principles makes possible a broader thought experiment of the cosmopolitan turn which integrates international law with national constitution, the small “c” along with the big “C” into *one* cognitive framework. As Kumm asks “what if the real puzzles, pathologies and peculiarities are connected to the way national constitutional lawyers imagine constitutional law, rather than the way international lawyers imagine international law?”⁴⁴

The Cosmopolitan paradigm is necessary for Kumm to make sense of four phenomena in today’s global world: the interface between national and international laws, the internally complex governance structures within international law, the functional re-conceptualization of sovereignty, and basic structural features of contemporary human rights practices.⁴⁵ But with closer observation, these four tasks are not equal. Rather, the “functional reconceptualization of sovereignty” is more than a description of institutional practices, but the thought experiment itself.

Same as “the proportionality test” for constitutionalism, in the cosmopolitan framework, four *principles* could also encompass overlapping jurisdictions and public authority. They are: the principle of legality, the jurisdictional principle of subsidiary, the principle of due process and the substantive principle of respect for human rights and reasonableness. The principle of legality is the first step for building up gradated authority with a shift from rules of conflict to rules of engagement; the principle of subsidiary replaces the language of sovereignty in the service of international capacity building; the principle of due process is to ensure good governance; and the principle of proportionality is to provide a checklist for public justification.⁴⁶

⁴² Kumm (2011)135

⁴³ Kumm (2011)136

⁴⁴ Mattias Kumm (2009) ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State’, In J. L. Dunoff and J. P. Trachtman (eds.) *Ruling the World? International Law, Global Governance, Constitutionalism* (Cambridge) 261

⁴⁵ Ibid. 262

⁴⁶ Ibid. 274-310

But a composition of the four all starts from “a principled framework”⁴⁷ for constitutional pluralism that hollows “authority” out of its material existence. Principlization of “legality” dissociates its link to positivism and provides an openness to plural norms. As Kumm argues, “why should one think of legality in the somewhat schizophrenic way, sharply separating international from domestic legality? ... Why should the idea of legality not generally require that the law be taken seriously, whether it is domestic or international law?”⁴⁸ If Kumm’s thought experiment aims to merge two paradigms of the international and the national, it is the *hypothesis* that sovereignty could be re-conceptualized. But dematerialization of conflicts about legality rather turns the hypothesis into a *defect* of the thought experiment, and a need for further gradation through equivalent principles. Reconceptualization of a cosmopolitan public authority alternative to state sovereignty hence is the hypothesis, the principle and the conclusion as well.

The “graded authority” in effect is a paradox. It treats authority as derived from justification in a linear way and as a matter of degree. But if that is the case, we do not even need a graded authority, even the principle of legality, because we only need rights and reason. For Kumm, commitment to legality is not necessary to explain, but it is precisely this commitment gives a forum for public reason, which itself could not be graded. This commitment to the rule of law is an inheritance from European traditional jurisprudence⁴⁹ which Kumm takes into his new jurisprudential thinking without indebtedness. His paradigm seems to experiment with a reason to commit, but once we commit, the nature of the reason as a thought experiment falls out of sight.

Using justification principles is crucial to reconcile the two poles of classical constitutionalism, as it eases the tension between the rights question and the authority question. Instead, Kumm formulates it as a question of right to contest authority or right to engage in forming authority. It is correct to say authority should be justified by public reason and human rights, but this justification does not enable an immediate connection between the two poles. Even if we admit there is a right to contest authority, it is an extra-legal right as it must *produce* the authority. In this sense, it is also distinguishable from other judicial rights that are subject to “proportionality”. As once it is put to

⁴⁷ Ibid. 273

⁴⁸ Ibid. 276

⁴⁹ For Ming-Sung Kuo, legal neutrality and professional community lie as the backbones of Europe’s recovery from Nazi blow.

In Ming-Sung Kuo (2009b) ‘From Myth to Fiction: Why a Legalist-Constructivist Rescue of European Constitutional Ordering Fails’, *Oxford Journal of Legal Studies* 29(3): 579-602, 597

supervision of the judiciary, it is surrendered to an authority which submission suspends its contestation. Hence the right to contest is not able to be *contained* within judicial indeterminacy in its jurisgenetic meaning. Proportionality as a legal principle could not encompass the extra-legal right to contest, or to put in the other direction, the register of right to contest is unable to be supervised by the courtroom, if consistency of Kumm's paradigm is tested.⁵⁰

In sum, Kumm's paradigm is not merely a legal one supervised in the courtroom since the "right to contest" is always extra-legal in disguise and rejects given authority. The path dependence of legal experimentation is in contradiction with contestability of authority. And it is thus too early to dispose of the philosophical thinking about the structure and foundation of law, and replace democracy with equivalent principles of judicial indeterminacy.

3. Neil Walker: the "Constitutionalism-lite": "democratic deficit" relative to "sovereignty surplus"

Neil Walker holds different views from Weiler and Kumm on the process of European integration. And in his diagnosis, the crisis of European constitutionalization is rather due to a simplified formulation of the constitutional issue at the beginning of the integration which now develops into a "crisis of ideals". "The founding values of peace and prosperity no longer have the resonance they did in the years of post-War austerity."⁵¹ The crisis rather enables the necessary change to deepen inquiry into European constitutionalization. The complexity of European integration embodies three levels of constitutional claims: output legitimacy, regime legitimacy and polity legitimacy.⁵² While the European project

⁵⁰ The conflict between rights could be referred to Costas Douzinas (2003) 'The paradox of Human Rights', *Constellations* 20(1): 51-67

⁵¹ Neil Walker (2003a) 'Constitutionalising Enlargement, Enlarge Constitutionalism', *European Law Journal* 9: 365-385

⁵² Ibid. As Walker explains, "(t)here is a complex relationship between the three major functions of constitutionalism and the satisfaction of these legitimacy dimensions. A first major function of constitutionalism may be termed community-mobilising. Here we are concerned with 'constitution as process', with the way in which the making or reforming of the constitutional order defines, involves, and commits those who are the subjects of the constitution also as its authors and, through their authorship, as members of the political community thus established. A second major function of constitutionalism is that of institutional design. This concerns the role of the constitution in the establishment of the institutional matrix and 'power map' of government. A third major function of constitutionalism is that of polity affirmation."

starts from a common regulatory cause and in service of economic purposes, international organizations as the means to achievement of these purposes demand increasing attention. But the “‘polity’ legitimacy, was barely, if at all, registered, as this would require the unlikely assumption that the European Union’s Treaty predecessors had initially sought to construct, or succeed in constructing, anything as grand as a ‘polity’.”⁵³

In solving this ideal-in-crisis, Walker has mapped and categorized the diverse schools and their projections about European constitutional future into six D’s (Denial, Delegation, Demarcation, Disaggregation, Displacement, and Dualism).⁵⁴ These disagreements regrettably have not found a proper container for their differences. A methodological innovation is needed to set up a common language about constitutionalism so as to allow for broader imagination to take hold. Walker does share Kumm’s thinking on the transferability of constitutionalism, and he starts not from rights practices but directly from the conception of the genetic code of “*Verfassungsverband*”,⁵⁵ to argue that “‘whereas ‘state’ is clearly a norminal category, ‘constitution’ is ambiguously poised between the norminal and the adjective”.⁵⁶ To do justice to both holistic constitutionalism and multi-level constitutionalism, several prejudices should be overcome. Two groups are delineated by Walker in accordance with their similar pitfalls, norminalist, formalist and substantive positions on one side, essentialist, culturalist and epistemic positions on the other side.⁵⁷

⁵³ Ibid.

⁵⁴ The “Denial” group holds the view that nothing of much import has changed in Europe, while the “Delegation” group argues the democratic accountability should be taken care of by keeping in mind the issue of delegation. “Demarcation” treats the democratic deficit as a virtue rather than a vice. In “Disaggregation” group, democracy becomes an adjective rather than a noun, which inspires engagement of the people with knowledge and motivation to put things in common. “Displacement” is the inverse of denial while the “Dualism” group insists on “a dual or multi-level democracy with each level holistic and demos-presupposing in its own terms.

See Neil Walker (2007b) “Europe at 50 -- A mid-Life Crisis? ‘Democratic Deficit’ and ‘Sovereignty Surplus’: Part Three of the Constitutional Trilogy”, (September 2007) Mario Einaudi Center for International Studies, Working Paper Series No. 11-07. Available at: <http://www.einaudi.cornell.edu/sites/einaudi.cornell.edu/files/publications/11-2007.pdf> 5-8

⁵⁵ Neil Walker (2010c), Multilevel Constitutionalism: Looking Beyond the German Debate, in Kaarlo Tuori and Suvi Sankari (eds) *The Many Constitutions of Europe* (Ashgate) 144

⁵⁶ Ibid. 145

⁵⁷ Ibid. 148-151 As Walker puts, Norminalist approach makes constitutionalism a floating signifier, while essentialism is its negative side which “maintains that meaning is fixed and invariable”. Formalism and substantivism both borrow from state template without considering whether “the connection between the non-state version and the state original... is a tenuous one.” In the other group, culturalism emphasizes identity, solidarity and allegiance, and epistemic approach embraces “a scheme of intelligibility”. They “place a heavy burden on the defender of post-state constitutionalism to explain just how this is possible.”

After this categorization, Walker asks, “(h)ow, if at all, do we move beyond this divide?”⁵⁸ It is a balance between “abstraction” and “disaggregation”.⁵⁹ In terms of abstraction, a general issue must be “acknowledged by both mind-sets”,⁶⁰ on the meta-definition of constitutionalism “as referring to that *species of practical reasoning* which, in the name of some defensible locus of common interest, concerns itself with the organization and regulation of those spheres of collective decision-making deemed relevant to the *common interest*.”⁶¹(my emphasis)

The meta-constitution, namely, the “common interest” indicates that for Walker we could possibly have a constitution which is detached from nation states. This success depends on an unfolding of state constitutionalism and detecting where its paradigm shift lies. So after balancing in “abstraction”, Walker starts “a secondary inquiry”, in terms of a “disaggregation”. Constitutionalism in state practices is “a cluster concept”,⁶² as Walker puts, which “synchronically and diachronically”⁶³ combine four layers: juridical, political-institutional, popular and societal layers. What is more, in the modern state constellation, there is a further layer as “frame of frames”, or “holism of holisms”,⁶⁴ namely a co-articulation of the four layers. This fifth layer must be different from other four layers, and it is adjectival rather than nominal, or else we will be trapped in the “epistemic” pitfalls as formerly mentioned. This is a crucial layer in Walker’s theory that I will return to later.

From Walker’s disaggregation, it is clear that the material constitution immediately turns to be *one* layer of the five that regime or performance legitimacy for Walker is a shallow diagnosis of the debate at hand. The crisis rather concerns an “authority” problem, namely, “the disappearance of any settled, singular grid for defining the relations between legal orders”.⁶⁵ It concerns the third function of constitutionalism – constitutionalism as *polity legitimation*. As Walker puts it,

“By polity legitimation is meant the fundamental acceptance of the entity in question as a legitimate political community – as one possessing the authority to

⁵⁸ Ibid. 151

⁵⁹ Ibid. 151

⁶⁰ Ibid. 152

⁶¹ Ibid. 152

⁶² Ibid. 154

⁶³ Ibid. 154

⁶⁴ Ibid. 154

⁶⁵ Neil Walker (2008), ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global disorder of Normative Orders’. *Int J Constitutional Law* 6(3-4): 373-396, 373

subject matters that significantly affect the life chances of the putative community's member to collective decision making. At the same time, such legitimation must inspire, in a related fashion (since the authority of legal and political power is inseparable from its social acceptance), a sufficient sense of social identity or 'we feeling' as to induce compliance with and thus to render effective the collective decisions made on its behalf and in its name. However modest or ambitious the threshold of common attachments may be, without it, there will be no polity at all, much less a legitimate one."⁶⁶

But different from "*polity*", "polity legitimation" intrinsically embodies the legitimate formation of a "community", and in common with Habermas, this "legitimation" in its epistemic sense is linked to the "motivational" question of the individual, the "we" feeling.⁶⁷ Right at this point, Walker could debate against the group insisting on democratic ontology as the defining character of constitutionalism. The "We" feeling for Walker rather puts democracy under scrutiny. "Where constitutionalism involves the qualification of democracy, the terms of such qualification tend to possess a meta-democratic pedigree ... Yet, its performative meaning is itself a form of higher order or meta-democracy – of a democracy about democracy (or about whatever other form of quotidian political organization is chosen)."⁶⁸

Constitutionalism as polity legitimation hence implies an "iteration of democracy".⁶⁹ It is in tension with democracy, but also connects to democracy in a reconcilable manner. This same logic is constantly applied in Walker's writings, in his discussion about the "doctrinal and disciplinary" publicness,⁷⁰ and the lawness of law,⁷¹ namely, the situated law and uncharted law. For Walker, situated law is a combination of partly structure of legal texts, partly intra-systemic recursiveness of law and partly law's symbolically self-corroborating tendencies.⁷² This combination secures law's co-ordinates and prevents new candidates

⁶⁶ Neil Walker (2005a) 'Europe's Constitutional Momentum and the Search for Polity Legitimacy' (2005) *International Journal of Constitutional Law* 4(2): 211-238, 212

⁶⁷ Ibid. 215

⁶⁸ Neil Walker (2010b), 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship'. *Rechtsphilosophie & Rechtstheorie* 39(3): 206-233, 229

⁶⁹ Neil Walker (2008) 373-396

⁷⁰ Neil Walker (2012), 'On the Necessarily Public Character of Law', in Claudio Michelon, Haris Psarras, Gregor Clunie, Christopher McCorkindale (eds.) *The Public in Law* (Ashgate) Available at SSRN: <http://ssrn.com/abstract=1704412> 4

⁷¹ Neil Walker (2010a) 'Out of Place and Out of Time: Law's Fading Co-ordinates'. *Edinburgh Law Review* 14: 13-46, 16

⁷² Walker (2010b) 225

from emerging, such as the New Governance.⁷³ But also due to this, uncharted law, though has shortcomings in all the four layers as Walker has delineated, exhibits an “intensely reflexive legal politics of charting, which is also a politics of definition, and indeed a politics of inquiry into the very limits of our imagination of law as a useful form of practical reasoning”.⁷⁴

Here, let me come back to the fifth layer as Walker has made, and it is clear that this layer for Walker is a special layer that is preserved even all the other four failed. Initially served as a methodological disaggregation to test the paradigm shift, the fifth layer manifests its singular value. Its existence alone reveals that constitutionalism is not holistic, but the all-embracing quality is given to “an ‘open’ or ‘relational’ constitutionalism”.⁷⁵ And this symbolic quality will not be affected by any material failure of translation. Walker puts it as “the final irony”.⁷⁶

“It is precisely because the language of constitutionalism, considered as a normative technology, finds it ever more complex and difficult to address the problem of communal living it poses in and for a post-state world, that it becomes all the more important to retain the language of constitutionalism, considered as a symbolic legacy, as an insistent reminder of what and how much is at stake.”⁷⁷

But then why does Walker not just insist on the symbolic value from the beginning instead of being involved in the futile effort of overruling material constitutions, since the symbolic constitutionalism is not to be affected by the material reality? Here lies the key objection of Nico Kirsch to what appears already as “fit” or “family resemblance”⁷⁸ in Walker’s “scheme of intelligence”.⁷⁹ Though Walker indeed notes the probably different environments of source and destination of the translation, his abstraction of “constitutionalism” to “political prudence” eliminates its particular and historical origin in order to guarantee a “fit”. “This already presupposes that constitutionalism’s explanatory value and justificatory roots are indeed universal ... As a result of this approach, Walker comes to define the concept in such an abstract way that the actual challenges of translation disappear; constitutionalism becomes a mere ‘symbolic and normative frame of

⁷³ Neil Walker and Grainne de Burca (2007a), ‘Reconceiving Law and New Governance’, *Columbia Journal of European Law* 13(3): 519-538

⁷⁴ Neil Walker (2010a) 45

⁷⁵ Neil Walker (2010c)

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Neil Walker (2012)31

⁷⁹ Neil Walker (2012)13

reference.”⁸⁰In Krisch’s perspective, Walker’s experiment does not replace the specific meaning of nation-state constitutionalism, but ends with a multiplication of the meaning.

The process of searching for an equivalence though failed could be used for *diagnosing* the European case that Walker argues, “this democratic deficit is intimately related to a rather less well-known phenomenon, what I call the ‘sovereignty surplus’ of the EU.”⁸¹ To return to the crisis of Europeanization, the urgent task is to insist on the symbolic value of “constitutionalism” and charted the uncharted governance structure in Europe so as to prove sovereignty could “be plausibly claimed by the EU itself”.⁸² A revision of the Westphalian system is proposed to introduce complementarity between state law and international law.⁸³ Universalizability, by means of the cosmopolitanism of Habermas, “can guarantee an appropriately inclusive structure of ongoing argumentation and a suitable general scheme of implementation.”⁸⁴

It is the discourse alone that sustains all the broken promises about the constitutional future, while at the same time, this indicates that the discourse must empty itself enough to equate with potential candidates, or precisely speaking, against “finalité”.⁸⁵ But devoid of all institutional legitimacy, how could Walker’s constitutionalism act as the placeholder rather than (as criticized by himself) “a floating signifier”? If Walker, against Kumm, intends to go “thickly” into polity, community and democracy, this temporal “incompleteness” always leads him to elide the “thickness”. Therefore, we could see the same turn occurs in him as did in Kumm, the “authority” issue is always subject to “legitimation” based on reason and discourses. And in common with Weiler, reflections on positivism lead to open thinking of “authority” and depend on justification, praxis and complementarity between law and governance. Walker’s emphasis on polity legitimacy instead of regime legitimacy focusing on material institutions is only half done, as the “we” is also subject to self-reflexivity, chiefly represented by human rights jurisprudence and stakeholding construct through adjudication. Here, it is clear how a critical movement to restore constituent power comes back to the legal register.

⁸⁰ Nico Krisch (2010) 36

⁸¹ Neil Walker(2007b)

⁸² Neil Walker(2007b)

⁸³ Neil Walker (2010a) 38

⁸⁴ Neil Walker (2005b) ‘Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law’, *EUI Working Paper* No. 2005/17, available at:

<http://cadmus.eui.eu/bitstream/handle/1814/3762/WPLAWNo.200517Walker.pdf?sequence=1> , 7

⁸⁵ Neil Walker (2003) 5

4. Summary of this chapter

In this chapter, I reviewed three authors who are inspired by the process of European integration and human rights jurisprudence that is expected to *re-present* constituent power in a new light. Walker sought it in a forward-looking constitutional moment, different from Ackerman's. While Ackerman's constitutional moment is only projected back from its consequences, "the understanding of constitutional theory and praxis in particular advanced below nonetheless suggests good reasons not to view popular mobilisation as the defining property of a constitutional moment. Rather, a more expansive and multidimensional conceptualization of what is properly of constitutional moment is sought."⁸⁶

The philosophy of praxis is brought into the picture, and equips us to understand the evolutionary process of the emergence of a new perspective. Ackermann's projection of constituent power onto 'moments' has functioned to displace more incremental progress and undermined the depth of history, as Lefort might have argued.⁸⁷ It is time to re-examine how constituent power appearing in the exceptional case could be re-discovered in ordinary politics.

All this gives them a critical task to distance themselves from a mere "attribution" of constituent power to constitutional law. Without denouncing huge developments of human rights, a new jurisprudence stemming from a post-positivist conception of legal authority and democratic ontology is my focus. The effort of all three authors is to re-invest in democracy with lessons derived from Rule of Law. If law is democratically made, then this democratic quality has also to be examined by its outcomes—inclusiveness of human rights.

This jurisgenerative archetypical framework also embodies justification and semantics. New types of rights are developed to bridge the gap formerly lying between rights and democracy, such as rights to contest, rights to engage, rights to self-government, rights to association, and rights to demand justification, etc. In all, rights to democracy. This optimization of democratic potential by means of human rights merely shifts the original

⁸⁶ Neil Walker (2003) 3

⁸⁷ Lefort (1988) 221

question rather than answers it.⁸⁸ If at the beginning the question is how to secure legal authority when faced with flexibility and the technocratic use of human rights regime, the answer we get is to make good use of this fluidity. The danger of law being captured by sectorial interests and opportunistic flexibility becomes the *reflexivity* in this justification culture. As Ming-Sung Kuo acutely puts it, this reflexivity “transposes democracy to the legal principles of proportionality, rationality, and subsidiarity, and then construes them in light of the notions that refer to social responsiveness such as democratic experimentalism.”⁸⁹ New constitutionalism, rather than accounting for democratic deficit, revises implications of democracy instead.

⁸⁸ As Christodoulidis rightly puts it, this pluralism will turn the vicious into the virtuous, process into product, and hence make optimization co-opt negation.
in Emiliios Christodoulidis (2013) ‘minefield of misreckonings’: European’s constitutional pluralism (2013) manuscript.

⁸⁹ Ming-Sung Kuo (2009b) 579-602

Chapter 7.

The Sociological Approach to Constitutionalism and Globalization

Introduction

As argued in chapter 6, the epistemic approach leaves the inertia of material institutions unanswered. The attempt to ease the rigidity through a “placeholder” concept of constitutionalism as Walker proposes, gives the adjectival meaning of constitutionalism priority compared to the material one. But to borrow a Derridian narrative, “(h)ow to go, more precisely, to this value of ‘rights’ constructed on the analogy between what the noun designates (*le droit*, ‘right’, *das Recht*) and what the adjective or adverb means (direct, rigid, rectilinear)?”¹

The suspension and navigation of the institutional rigidity needs an external contextualization, which re-formulates the legal validity question as *production* of validity. Systems theory could provide a way to condition “path dependence” and transform it to a “path shaping moment” (Bob Jessop),² as systems theory provides a potential to discuss the normative question in a functional sense. This is prerequisite for re-imaginings, and it is the methodological departure shared by Gunther Teubner, Saskia Sassen and Bob Jessop in their arguments about globalization in a sociological perspective.

In this chapter, I will start from Luhmann’s systems theory and the merit of the sociological approach to constitutionalism. Secondly, I explain this intermediary approach exemplified in Saskia Sassen’s observations of incipient process of globalization. In the third section, I am focusing on Gunther Teubner’s “societal constitutionalism” and changes made to the classical constitutional paradox. In the end, my main purpose is to generalize the sociological approach to contemporary constitutionalism and the alternative it claims to provide.

¹ Jacques Derrida (2002) ‘Privilege’, in *Who’s Afraid of Philosophy: Right to philosophy I* (Stanford, Calif.: Stanford University Press) 45

² Bob Jessop (2002) *The Future of the Capitalist State*. (Cambridge: Polity) 92

1. Luhmann's sociology of constitutionalism: structural coupling of law and politics, law and economy

Luhmann's sociological approach to constitutionalism and Rule of Law begins with a critique and problematization of traditional theories. For Luhmann, these theories are inconsistent in dealing with the relationship between law and politics. No matter whether it is Bodin's natural law theory, Hobbes's social contract or the virtue and corruption of government as for Hume, a "unification" perspective is adopted by them in viewing law and politics. Therefore, in dealing with the core problem of modern state—the problem of resistance, Luhmann says this: "Here lies the hidden motif of all theories built on the unity of politics and law. In other words, the difference between the legal system and the political system can be understood, under the prevailing premises, as legitimate resistance to the political exercise of law".³

This unification is unconvincing if interprets resistance to one system as immediately accepted by the other system. But neither the legal system nor the political system can tolerate exceptions. "Thus one demand for, or attempt at, closure opposes another. At the same time, crucial points of view are exposed by this confrontation."⁴ "Closure and confrontation" hence are Luhmann's approach to explaining the relationship of law and politics, in his reading of the schema of the *Rechtsstaat*. The *Rechtsstaat* is a schema "which makes possible to define two *reverse* perspectives as a *unity* to celebrate it as an achievement of civilization: the juridical shackling of political force and the political exploitation of law".⁵

The legal system can do without a sovereign but does need decisions on claims, while the political system culminates in the sovereignty of the people, but remains sovereign even when it comes to the question of not deciding.⁶ Though it is hard to imagine two separate systems, they are indeed "operatively closed and non-congruent" based on different internal coding. Yet because of that, law gains its universal relevance for society and autonomy from the political system, so that we could talk about the "Rule of Law". So instead of seeing the separation as a problem, it "can be seen as the precondition for the increase of the interdependence ... The democratization of the political system and the

³ Luhmann (2004) 361

⁴ Ibid. 362

⁵ Ibid. 368 (emphasis added)

⁶ Ibid. 365

positivization of the legal system have only been able to develop by conditioning and stimulating each other”.⁷ The “structural” coupling “means the possibility of growing out of an external difference”.⁸ *Externality* not only assures relative autonomy but also conditions their interdependence which also restricts their autonomy.

The structural coupling of two autonomous systems of law and politics is based on mutual “irritability” and is used by Luhmann for arguing normativity.⁹ Irritation enters as “information” of the environment into the “internal preparedness” of the system. In this sense, the social communication system depends on a structural coupling with the psychic system of consciousness. “Only when consciousness is involved can society be affected by its environment”.¹⁰ Without communication in consciousness, coding could not secure connectedness to stimuli in the environment. Hence here lies a link that is deeply conditioned by modern individualism as a mode of conceptualising the individual-society relationship.

Modern individualism has a historical origin in economic developments, yet is not explained by Luhmann in purely economic terms such as a mere replacement of household economy by contract and property. Rather he stresses only in the second half of the eighteenth century, “a structural coupling of subsystems”¹¹ was made possible, when separate economic and political systems were coupled by means of a new concept of the *constitution* that “institutions find a form”.¹² There are two separate couplings between law and economy and law and politics, which I will explain further as it concerns the public/private law distinction as well as the constitutional as distinguished from other positive laws.

Firstly, economic interests were divorced from their specific contexts and “homogenised” by legal operations. As Luhmann puts, “(t)he concept of interest, even more so than the concept of subjective rights, points to the fact that the legal system has built up a highly sensitive reception and transmission station for economic news”.¹³ Usability of money further enabled to establish a self-contained autopoietic economic system. Luhmann has emphasized the “constitutive” relation between law and economy that sociology of law

⁷ Ibid. 380

⁸ Ibid. 371

⁹ Ibid. 385

¹⁰ Ibid. 384

¹¹ Ibid. 388

¹² Ibid. 388

¹³ Ibid. 390

should not ignore.¹⁴ Contract regulation historically underwent a shift from the law of property to the law of obligations, due to the change in its concepts from initial *particular* performances between the contracting parties, to the general *institutionalization* of freedom of contract and its orientation to the future. It extends to further being coupled with the political system in the eighteenth century, due to the concept of “representation” springing forth from property, and the claim of “freedom of contract”. Through them, the structural coupling between economy and law “became the medium of political power”, as the political system was experimenting with how far it “can do with intervention without putting the autopoiesis of the respective systems at risk, that is the self-regenerating forces of money and law”.¹⁵

Property right and contract freedom provide occasions for a branch of law called private law, while the “state” is the carrier of the coupling of political and legal systems—“however only under the special condition that the state was given a constitution which made positive law the instrument of choice for political organization and, at the same time, made constitutional law a legal instrument for disciplining of politics”.¹⁶ This is especially developed in North America. The Constitution adds an additional achievement “of a collision rule” and refers to rules of interpretation. The Legal system hence establishes a distinction between constitution and other law *internally*, which brings about the implications of “constitutionality”. As Luhmann puts it,

“Thus positive law can even perpetuate itself ... The traditional legal hierarchy of divine law, eternal law or variable natural law, and positivistic law vanished. Its cosmological and religious fundamentals had dissipated anyway. Instead, the constitution proclaimed that the responsibility for all law lies with the legal system ... As soon, however, as the distinction emerged between constitutional/unconstitutional and legal/illegal, the constitution gathered momentum. Now the law mustered a mechanism, which was secured by self-exemption, to pronounce itself illegal.”¹⁷

It completed the self-referential closure of legal system, and replaces the unformulable rule of the sovereign state -- “invisibility of the problem and its solution, its incommunicability ... what could be called the meta-constitutional meaning of the

¹⁴ Ibid. 390

¹⁵ Ibid. 402

¹⁶ Ibid. 404

¹⁷ Ibid. 407

constitution”.¹⁸ From here, the constitution is argued through “contingencies” of evolutionary achievements of system couplings -- the functional terms of systems theory.

With this contingency opened to the future, variety increases while the mechanism for generating ‘redundancy’ becomes a problem. It burdens the exclusion effect and the externalization requirement of systems. For Luhmann, it turns to be a crucial question “on whether and how the apparatus of classical constitutionalism can be adapted to the developments of the welfare state”.¹⁹ Decision making transforms greatly in welfare states, and for Luhmann, makes welfare states become “a fast-selling item”.²⁰ It is manifested in the expectations held of a constitution that the individualist-rational use of property is expressed as “in itself increased welfare”.²¹ This induces “the flip side”²² of subjective rights that ignores the impossible fusion of psychological operations and social operations and undermines the objective validity of subjective rights. It reduces legal reflexivity to “a cybernetic matching”, and Luhmann re-orientes the discussion to the guiding distinction of “inclusion and exclusion” in the world society.

Before moving to Gunther Teubner’s development of Luhmann’s theory in the context of globalization, I want to argue for the contribution of systems theory to the heuristic framework of constitutional debates. Against resorting to meta-level normative theory as natural law or theology, Luhmann understands constitutionalism in terms of the operative closure and structural couplings of legal and political systems. What is normative lies in this *coupling* rather than located in either the constituent power or constitutional form or in any co-originality between the two. Systems theory bases “reflexivity” on the coupling of law and politics conditioned by “externalization” -- a structural distinction and interdependence, other than merely politicization of legal indeterminacy. This externalization also reveals possibilities to exit from the juridification of rights, which is unable to be explained by the legal approach that emphasizes *access* to court and *engagement* in justification. Rather, with systems theory, we are able to answer the question that Derrida poses as how the “right of” in a juridical sense could be re-oriented to “right to” that emancipates it from institutional inertia.

¹⁸ Ibid. 410

¹⁹ Ibid. 412

²⁰ Ibid. 412

²¹ Ibid. 415

²² Ibid. 418

But Luhmann's functionalism also releases contingent innovations. And a number of questions could be asked *of* Luhmann this time: If the State and its constitution are only contingently conditioned by modern individualism, the regime of property and contract, and the coupling between economic, legal and political systems, why could a new public and private law distinction not enable a new coupling appropriate to global society? Why could contingencies not transgress the structure rather than always maintain the structure? Why not think contingency *about* the structure more than contingency *of* structure? In this sense, it is fair to make a critique of systems theory for its historical selectivity, especially its correlation with modern individualism and specific concepts of property and contract that build a certain consistency into the idea of the structural coupling. As we have witnessed in today's world, subjective rights tuned in accordance with the economic logic is a real trend, which is no longer a "normativization" or "codification" question that the objectivity of law could manage closure over. Rather it is a new phase of "normalization" or "regularization" in a Foucauldian sense.²³ The economic imperative demands fast decision-making and an immediate translation into law, which fuses the divide between legal and economic systems to the extent that the closure and interdependence could not be maintained as before.

This is where Gunther Teubner revises Luhmann's theory which I will explain in the third part. Teubner inherits the heuristic framework of systems theory and critically adapts it to new paradoxes brought about by globalization. The contingency and irritation emphasized by systems theory make it possible to imagine alternatives to modern individualism, property rights, public/private law distinction, and human rights implications for doctrine of law. So a paradigm shift might appear, for Teubner, when subjective rights become stimuli for configuration of new *paradoxes*. Teubner hence develops his "societal constitutionalism" to confront globalization, which challenges the state ensemble in accordance with which classical constitutionalism is primarily modelled.

2. Reconfiguration and the releasing movement of denationalization

Before approaching Teubner's societal constitutionalism, I want to first cite Saskia Sassen, who contributes to examining the "endogeneity trap" in the current discussion of nation

²³ As Foucault wrote in the chapter "Right of Death and Power over Life" in *The History of Sexuality*, the development of bio-power "was the growing importance assumed by the action of the norm, at the expense of the juridical system of law." (p144)

states and globalization. As Sassen points out, “(a) focus on the outcome rather than the tipping point is typical of much of the literature on globalization; this then leads to comparisons of the national and the global and easily falls into the trap of assuming that if the global exists it is in spite of the national”.²⁴

This consequentialist thinking ignores that the “new” in history is rarely simply *ex nihilo*. For Sassen it is necessary to develop a more detailed and complex heuristic framework with three constitutive elements as capabilities, tipping points and organizing logics. And the three capabilities she gives relate to territory, authority and right. In this case, nation-state constitutionalism and its translatability is a question of re-configuration. The heuristic value of “re-configuration” should not be underrated, as it shifts a grand argument of the national and the global to deciphering *continuities and discontinuities*²⁵ of the process.

For Sassen, to explore discontinuities beneath the surface of continuities or vice versa, we have to pay attention to the dynamics between the state and the private realm. Capitalism from its first formation was both national and global. Its current condensation was shaped by a joint effort by both private and state actors. But in the phase of political nationalism, it is “a distinctive road from a decentralized polity whose legitimacy derived from ‘law’ to a centralized national state that becomes the source of law. ... where the state is the highest form of legal personality.”²⁶ The supreme legal personality of nation states is constructed by positivism and separated from the global nature of capitalism. Now, the law and economy movement has increasingly released “structural tendencies that make international competition today function primarily as a mechanism for denationalizing capital.”²⁷ Global financialization in this sense creates the chance to decode the mystery of legal personality supreme in nation-states.

Bob Jessop in his writings clearly elaborates these effects due to the transformation of the mode of production, from Fordism to post-Fordism. In effect, globalization, more than in a territorial shift, is a relativization of scale and acceleration of time. “(T)he hypermobile form of financial capital depends on their unique capacity to compress their

²⁴ Saskia Sassen (2008), 9

²⁵ Ibid. 12

²⁶ Ibid. 129-130

²⁷ Ibid. 140

decision-making time, whilst continuing to extend and consolidate their global reach”.²⁸ It is put by Jessop as the conquest of space by time.²⁹

Compared to Jessop’s welcoming of the post-national trial-and-error circle of governance and meta-governance,³⁰ Sassen rejects scholarship “that sees the state as merely evolving and adapting”,³¹ as there is still a distinctive role for the nation state to play in global politics. Precisely speaking, denationalization instead of post-national governance is the description that Sassen employs in her theory about globalization. A “critical” and acute observation on the “constitutive” elements more than merely adaptive elements is important so as “to wit, that one strategic locus lies deep inside the national.”³² Concerning the importance of local struggles and democratic participation, Sassen still emphasizes a subjective dimension against the scientific tone of Jessop. The advent of the moment of jumping track (from the national to the global) depends on all the three capabilities being re-configured, a condition yet to be fulfilled.³³ The third capability ‘rights’ is especially so, if we observe how the global actors in international institutions and multinational companies travel freely, whereas the third world labour are confined in their territory unless they are transformed into a service.³⁴

Along with Teubner, intermediation is the distinctiveness of the sociological approach of Sassen. She admits that “incipient and partial are two qualifiers I usually attach to my use of denationalization”.³⁵ Globalization is chiefly unbundling, decoding and releasing. But could this process deliver any normative meaning, such as regulation? It is hardly so. If there are normative values, it lies in a releasing of the natural forces of global capitalism, and “a reduced set of interactions between citizens and the state”³⁶. As Sassen puts it,

“The state’s power can be seen as historically coalescing into an overwhelming centripetal effect on a bundle of potentially disparate elements including spatio-temporal orders. That centripetal condition is today coming under multiple

²⁸ Jessop (2002) 112

²⁹ Bob Jessop (2003) ‘Globalization: It’s about Time too!’ *Political Science Series, Institute for Advanced Studies, Vienna*, 85

³⁰ Jessop (2002) 268

³¹ Sassen (2008)144

³² Sassen (2008) 145

³³ Compared to shifts toward international specialized “regulatory commissions” (the power/authority capability) and global cities and financial centers (“spatiality” capability), the subjective dimensions of the three capabilities – rights -- is revealingly lacking.

³⁴ Saskia Sassen (2007), chapter 5, in *A Sociology of Globalization* (New York; London: W.W.Norton Company

³⁵ Sassen (2008)306

³⁶ Sassen (2008)319

centrifugal effects. Although partial, this transformation begins to make legible the presence of diverse spatio-temporal orders within the putative unitary time-space of the national.”³⁷

Despite a gloomy picture of democracy at the global level, Sassen calls for a redeployment of citizenship empowerment, such as immigrants’ movements in the global cities as a frontier zone. Sassen completes a profound mapping of the complex globalization issue and best manifests what “re-configuration” means even in the presence of states. And due to this, the releasing movement from the encasement of the nation State in global financialization is given a positive meaning in Sassen’s theory.

3. Gunther Teubner’s “societal constitutionalism”: society’s self-regulation

Gunther Teubner adopts the heuristic value of systems theory while distancing it from the analysis of the State form. As Christodoulidis puts it, “(s)ystems theory is at its core a phenomenology: in inviting a re-thinking of conditions of openness and closure in the handling of complexity, it delimits what is thinkable institutionally against vast terrains of that which is not. Institutional imagination releases contingencies selectively.”³⁸ It therefore provides “a purchase point for critique”.³⁹ In the global context, when the development of global economy has eroded the traditional public/private law distinction, and a new normative basis is not yet in place, “human rights” plays such a role for critique. Luhmann has indicated such a turn, in the emergence of a new coding of “inclusion and exclusion” in the global world, and it is developed further by Teubner.

For Teubner, to perceive challenges of globalization to the constitutional politics demands a re-moulding of constitutionalism itself. The current constitutional crisis is correlated with social fragmentation, which is not “caused” by globalization but “aggravated” by it to the extent that the “equilibrium” of the state ensemble is hardly maintained. This means that the normative question of globalization for Teubner is re-formulated sociologically, different from the pursuit of a global hierarchy of norms. Unlike the discursive approach to

³⁷ Sassen (2008)398

³⁸ Emiliios Christodoulidis (2011) “Of Boundaries and ‘Tipping Points’: a Response to Gunther Teubner”, *Social & legal Studies* 20(2): 238

³⁹ Ibid. 238

politicizing legal sources, or searching for a global polity, globalization for Teubner is not one-dimensional legal or political reductionism.⁴⁰ As he writes,

“The normative question, then, is no longer how hitherto constitution-free social spheres of global society might be constitutionalized. The question is rather, how can nationalist’ experiences with societal constitutionalism be transformed under the different condition of globality? In particular, how is the role of politics for transitional subconstitutions then to be formulated in the magical triangle of politics, law and autonomous social spheres?”⁴¹

Two tasks are concerned in this new constitutional mode of sociological “re-configuration”, namely, the concern “to release the energies of political power in nation-states and, at the same time, to limit that power effectively, according to the rule of law”.⁴² It is a double movement: constitutive and limitative movements, generalization and re-specification. I will elaborate Teubner’s theory on globalization and constitutionalism in six points, and see how he transposes national experiences to the global context and the inspirations for contemporary constitutionalism derived from it.

The first noticeable point is Teubner’s sociological approach as an intermediate position that it avoids the “chronic deficits”.⁴³ Like Sassen, Teubner is also defying these requirements such as the non-existence of demos, cultural homogeneity, a deliberating public, or political parties. These lines of thinking will lead to proposals of re-nationalization or re-politicization. For another thing, a compensatory constitutionalization is trying to build a global polity when national constitutions are weakened, which still sticks to the path of power and politics.⁴⁴ For Teubner, both tracks are wrong and unable to perceive the trend of social fragmentation. Instead the “societal constitutionalism” he proposes avoids this “methodological nationalism”, departs from the state-politics centrality, and relocates politics as a social *sub*-system. Hybridity defines the processing instead of a possible worldwide politicization. The non *ab novo* position of the sociological approach could induce two conclusions: firstly, it is the main task to break from the state-politics centrality; secondly, due to the factual asymmetry, we will not have

⁴⁰ Andreas Fisher-Lescano and Gunther Teubner (2004) ‘Regime Collisions: The vain Search for Legal Unity in the Fragmentation of Global Law’, *Mich. J. Int’l L.* 25: 999-1046 999-1005

⁴¹ Gunther Teubner (2012) *Constitutional Fragments: Social Constitutionalism and Globalization* (Oxford: Oxford University Press) 7

⁴² Gunther Teubner (2011a) ‘Constitutionalizing Polycontextuality’, *Social & Legal Studies* 20(2): 210

⁴³ Teubner (2012) 2

⁴⁴ Teubner (2011a) 210

a political centre in the global sphere. In accordance with this, the proposal of societal constitutionalism will be a question of *processing* the couplings of law, politics and other autonomous subsystems.

After reformulating the normative question, it is clearer to observe closely the double movements generated. For Teubner, “(t)ransnational sub-constitutions do not strive towards a stable balance but rather follow the chaotic pattern of a ‘dynamic disequilibrium’ between the contradictory developments – between the autonomization and the limitation of the functional logics of subsystems. Up to now, the new global constitutional orders have for the most part established only constitutive rules which have normatively supported the freeing up of various rationalities at the global level. Today, however, it has become clear that there is a need for re-orientation.”⁴⁵ The re-orientation and limitative movement is to curb the uncontrolled dynamics of fragmentation and the negative externalities along with their expansion, in order to perceive and respond to the urgency of the global financial crisis. Teubner’s question is: when will the limitative movement (rather the constitutive movement) start?

What is distinguished in global society is that rationality of fragmented social systems is maximized with “a spiral of growth”.⁴⁶ But in today’s ‘addiction’ society, earlier chances of self-correction appear to be ignored and be available only at the last minute of “hitting the bottom”. As Teubner puts it, “(o)nly then is the understanding lucid enough, the suffering severe enough, the will to change strong enough, to allow a radical change of course.”⁴⁷ However, “hitting the bottom” is *not* the “constitutional moment” indicated by Teubner as he continues to write,

“The constitutional moment refers to the imminent experience of crisis, the experience that an energy released in society is bringing about destructive consequences, the experience that can be *overcome* only by a process of self-critical reflection and a decision to engage in self-restraint. The phenomenon of social systems experiencing the dark side of their promise of progress is, ultimately, *not* a deviation from the ‘healthy’ course of things; it is not an error to be avoided. On the contrary, this experience almost seems to be necessary precondition for changing their internal constitution. Ultimately, then, it is a

⁴⁵ Teubner (2012) 10

⁴⁶ Teubner (2012) 99

⁴⁷ Teubner (2012) 82

system's pathological tendencies that bring forth the constitutional moment, the moment of imminent catastrophe in which the decision is made between the energy's complete destruction and its self-restraint. »⁴⁸

Our contingent experiences of catastrophes might be usually regarded as “constitutional moments”, yet for Teubner it is the normal moment of self-correction and distinguished from another moment of “collapse”. The *experience* of the dark side of “catastrophe” will play the role of “precondition” of self-correction of the “internal” constitution. This experience does not necessarily need to be experienced actually; a warning regarding the pathological “tendencies” is enough to bring forth a self-restraining “constitutional moment”, which will be a moment for capillary constitutions to initiate their collective learning, rather than an actuality of “hitting the bottom” or an experience of fundamental collapse. Here Teubner shares the same view as Weiler does towards the “exception”. But then as asked by Christodoulidis, “(h)ow would we *even know* that tipping points have been reached, that destructive energies can no longer be tolerated?”⁴⁹

Deviation from an imminent experience of constituting (from catastrophe) gives the constitutional question of societal constitutionalism an extension in experimentation, rather than a decision or a paradigm shift. This is the second point of Teubner's theory. What's more, there is a change in classical constitutional *thinking*, which Teubner names as a “hybrid constitutionalization”.⁵⁰ Which “is required in the sense that in addition to state power, external societal forces – that is, formal legal norms and civil society's counter-power from other contexts (media, public discussion, spontaneous protest, intellectuals, protest movements, NGO, trade unions, professions and their organizations) – exert such massive pressure on the expansionist function system so that it will be constrained to build up internal self-limitations that actually work”.⁵¹ It is the third point.

This is the internal differentiation of functional systems with the interplay of a variety of “reflection-centers”. This differentiation concerns the spontaneous sphere, the organized sphere and a self-regulatory sphere of the communicative medium. The dynamic of globalization opens chances to reshape the relation between the spontaneous and the organized spheres. Global protest movements will play the main example of “global

⁴⁸ Teubner (2012) 82, emphasis added

⁴⁹ Christodoulidis (2011)242

⁵⁰ Teubner (2012) 84

⁵¹ Teubner (2012) 84

scandalization”⁵² in the global public sphere, and push the professional-organizational spheres into a cognitive re-orientation. *Lex Mercatoria* for Teubner would be a perfect example for unsettling the old distinction between the public/private, and the spontaneous sphere/the organizational-professional sphere by means of soft norms and international arbitration.⁵³ It is social peripheries in the shadow of politics that motivate the process of societal constitutionalization. Paradox, which is used for Luhmann to indicate the counterfactual consistency and autopoiesis of social subsystems, plays a more significant role in Teubner’s theory.

Fourthly, sheer contingency is what Teubner inherits from Luhmann’s “contingency” but combines with Rudolf Wietholter’s concern of “paradox of law”⁵⁴ and Derrida’s “deconstruction as justice”. It favours non-teleological strategies of de-paradoxification in particular. As Teubner puts it,

“In a comparison with the contradiction-driven dynamics in classical social theory, the specific features of a paradox-driven dynamics emerge. The interplay of de-paradoxification -- re-paradoxification is anything but a cumulative sequence of negations, a ‘transcending’ of contradiction, a progress of the spirit. It is more a case of the return of the same, a continual oscillation between paradox and structure, a dialectic without synthesis. The ebb and flow between paradox and difference show an experimenting, incremental, exploratory production of orders that have to stumble over contingencies. And worlds of meaning are continually

⁵² Gunther Teubner (2011b) ‘Transnational Fundamental Rights: Horizontal Effect?’ *Rechtsphilosophie & Rechtstheorie* (40)3: 196-215

⁵³ Gunther Teubner (1997) ‘Global Bukowina: Legal Pluralism in the World Society’, in Gunther Teubner (ed.) *Global Law Without a State*. (Brookfield: Dartmouth) 15-21

⁵⁴ Gunther Teubner (2005) ‘Dealing with Paradoxes of Law: Derrida, Luhmann, Wietholter’, in Oren Perez and Gunther Teubner (eds.) *Paradoxes ad Inconsistencies in the Law*. (Oxford: Hart)

Teubner praises Wietholter’s observations that “*Conflicts of laws are nothing but epiphenomena of legal paradoxes*” (p51). This pushes the question of dealing with paradoxes into the foreground. Luhmann criticizes it as “legal negativism” (p53), but for Teubner, it rather is a progress reformulating rights-versus-institution issue(p51). Then Teubner says: “However much systems theory and deconstruction analyse the syntax of paradoxes, or rewrite their semantics as a combination of textuality and society, the real question is their *pragmatics*” (p55). Beyond Wietholter’s *normativism* and *sociologization* of paradox and Luhmann’s *recognitionism*, he proposes Derrida’s *theologization* of paradox (p59).

afflicted by their deconstruction, which repeatedly lets chaos break back into civilization.”⁵⁵

As I asked previously, why does Luhmann’s contingency stop at the question of “structure”? Is there a line that prevents contingencies jumping out of the structural control? Here lies Teubner’s critique towards Luhmann’s systems theory for “the exclusive site it reserves for the reflection of transcendence”.⁵⁶ He writes, “what is excluded from the reflection of law is the boundaries of the meaning of law itself ... While Luhmann asks about the law’s justice to its environment, he does not ask about its justice to the world”.⁵⁷ And it is Derrida that contributes with “this transcendence of positivity”⁵⁸ and brings “a disquieting awareness of transcendence back into the highly rationalized world of economy, science, politics and law.”⁵⁹ A discourse of “a possible other of law”⁶⁰ is “law’s transcendence as a temporalization, a futurization that cannot be made present, whereby justice can always only mean a postponement to the future.”⁶¹ But transcendence of law through time also means putting law’s systemic specificity to question. It hence not only revises the meaning of structure of systems, but also the meaning of “paradox”.

Thus fifthly, this thinking of “justice” also transforms the style of thinking on law and transcends the distinction between subjective rights and objective law, individuals and institutions. The legal question is no longer about fundamental rights attributed to individual actors, but whether “fundamental rights [can] be made effective against social communicative media themselves, rather than against social actors? ... Must the horizontal effect of fundamental rights be implemented through organization and procedures, rather than through subjective rights?”⁶² Disposing of Luhmann’s objective validity of subjective rights, Teubner deems the “horizontality” of human rights is just a reiteration of the old language of state action. For him human rights could also adapt people to new normativity in the formation and against the dark side of social matrix and social process. But Christodoulidis asks, “if that is the case, is it really true that there is *any significant distinction to be drawn here between juridification and constitutionalisation?*” Though starting from constitutionalization due to the distance from juridification, Teubner ends

⁵⁵ Teubner (2005)54

⁵⁶ Teubner (2005) 58

⁵⁷ Teubner (2005) 58

⁵⁸ Teubner (2005)58

⁵⁹ Teubner (2005) 58

⁶⁰ Teubner (2005) 61

⁶¹ Teubner (2005) 61

⁶² Teubner (2012)12

with treating constitutionalization as a cognitive conclusion for the “norm of norms” through which the legal subsystem gets its own closure for recognition, rather than a “politicizable” question of navigation of the current disorder of legal authority.

Finally, we are reaching the conclusion of global constitutionalization as a process of “double fragmentation of world society”. Teubner argues,

“As a result of the first fragmentation, the autonomous global sectors insist stubbornly on their own constitutions, in competition with the constitutions of nation states. Moreover, unitary standards of a global constitution are rendered utterly illusory by the second fragmentation of the world into various regional cultures, each based upon social principles of organization that differ from those of the western world”.⁶³

Teubner also brings back legal pluralism, but not in the sense of “groups and communities”, but “discourses and communicative networks”. The pluralism differs from Walker’s universalizable particularity as “(t)he social source of global is not the lifeworld of globalized personal networks, but the proto-law of specialized, organisational and functional networks which are forming a global, but sharply limited identity.”⁶⁴

Different from fragmentation and discourses about the legal regime in the first approach I delineated, Teubner’s constitutional sociology duplicates the fragmentation into the inquiry into what is law itself. But also due to this, he converges with Walker that constitutionalism is not only an institutional achievement, but also a symbolic constitutionalization with a meta-code of public interest. It will unravel and continuously produce paradoxes without teleology or identity presupposed. However, the six points of Teubner’s theory are closely connected and form a circle. The sociological approach plays an intermediate role without “hitting the bottom” possible in the global polity. Then we are in a hybrid process of constitutionalization with several reflection centres, and it is hence a contingent de-paradoxification – re-paradoxification process guided by global human rights. The sociological process of globalization hence becomes the model of societal constitutionalism, embracing contingency and temporalization, and hybridity turns to be the product more than a methodological starting point. As Christodoulidis comments,

⁶³ Teubner (2012) 14

⁶⁴ Teubner (1997)7

“Teubner’s suggestion is for a re-thinking of societal constitutionalism in the direction of a reflexive constitutionalism, one that avoids the double danger of, on the one hand, tying constitutionalism to a largely redundant framework of the nation-state, and on the other, of invoking a global constitutionalism that can claim neither the resources nor the institutional density to get it meaningfully off the ground.”⁶⁵

However, we could trace all the points and the circularity produced to his use of “reflexivity” in the first place. It is closely related to his reduction of “hitting the bottom” to capillary constitutions. Instead of “hitting the bottom” as a political breaking point, internal politicization puts human rights as a contingent learning and self-correction device that could be re-invested in, a re-entry that is only “nominally political”.⁶⁶ Though revisions are made to Luhmann’s structural coupling in accordance with the globalization process, Teubner does not touch the political element itself. The perceptions of politics and politicality stay at the same signifier of state “government”. I will argue, in Chapter 9 that, this is the main contribution of Foucault’s “governmentality” that decomposes the intelligible nature of “government” and re-opens discussions about “what is politicizable”.

The separation between politics and constitutionalization, materiality and process, originates in Teubner’s break from state-politics-centrality without possibility of “uploading” politics in the global sphere. Christodoulidis argues that the sociological approach surrenders the normative dimension to the functional dimension in a sense of instrumentality, and hence is “reactive” to rather than “reflexive”⁶⁷ about the structure. The immunisation of “structure” from “operation” is also criticized by Marcelo Neves.⁶⁸ But without that structure and referring to it, we could not distinguish whether we are in a normal or pathological development, or whether the limitative movements have already taken place. Just as if the *Lex Mercatoria* could be seen as an example of societal

⁶⁵ Christodoulidis (2011) 238-239

⁶⁶ Emiliios Christodoulidis (2013b), ‘On the Politics of Societal Constitutionalism,’ *Indiana Journal of Global Legal Studies* 20(2): 629-663

⁶⁷ Ibid. 646

⁶⁸ Neves argues that, when Teubner contrasts “hypercyclic connection” of element, process, structure and identity, with Luhmann’s interdependent moments (self-reference, reflexivity and reflection), it is unfair to deem Luhmann’s autopoiesis does not include the structural element. But Luhmann does not refer primarily to the structural dimension”. (248) When Teubner uses “socially diffuse law” to describe state legal order and plural quasi-legal orders, Neves argues that Teubner does not further reveal there is no autopoiesis law in the strict sense that could contain the two and its collisions. (258) in Marcelo Neves (2001), ‘From the Autopoiesis to the Allopoiesis of Law’. *Journal of Law and Society* 28(2): 242-64

constitutionalism, we could hardly discern what the meaning of the “societal” and whether it is a continuation of neo-liberal rationality that even rationalizes the criteria of reflexivity.

Derrida in his theory of deconstruction and decolonization, has brought the “reappropriation” question to the fore. And he asks, “how to do something more and other than overturn and (thus) reappropriate?”⁶⁹ We could ask Teubner the same question as “*how to deparadoxify and reparadoxify*”? The temporalization of paradoxification, however, ignores what Luhmann defines as “invisibilization of paradox”, which means the “paradox” is used for rendering material conflicts invisible to the degree of being “counterfactual”. So how could we make transgression at the structural level instead of feeding the structure with “double pluralism”? Luhmann definitely agrees that the legal system is about justice and should always orient itself toward it. However, the direct link between justice and law in this modern and positive law system is rather lacking.⁷⁰ This reservation contrasts with Teubner’s optimism about the narrative on “justice”. Teubner’s sociological approach really catches the point of deconstruction through and through, but he temporalizes paradoxes in a non-conflictual way. Instead of unfolding the heterogeneous confrontation, Teubner develops it into “theologization of paradox”.⁷¹ But without considering the relationship between the material and symbolic levels, societal constitutionalism finally surrenders itself to the epistemic paradox, as a power-free discourse.⁷²

4. Summary of the sociological renovation of the constitutional lesson

Discussions of the sociological approach to globalization seem to distract us from constitutionalism, which we traditionally perceive as a legal discipline. Rather it re-formulates the question, and the sociological approach undeniably contributes to paying attention to state theory and discussing globalization more broadly than debates on territory

⁶⁹ Jacques Derrida, ‘the Crisis in Teaching’, in Derrida (2002) 103

⁷⁰ Luhmann (2004)

Luhmann acknowledges that “(t)he legal system wants to be just, regardless of the facts. ... the topic ‘justice’ touches on the point which enables us to overcome the difference between natural law theories and positive law theories of the traditional kind.”

⁷¹ Teubner (2005) 59

⁷² Ming-Sung Kuo (2013) ‘Semantic Constitutionalism at the Fin De Si ècle: What If Constitutional Ordering is Simply a Reflection of Constitutional Episteme?’ (2013) *Warwick School of Law Research Paper No. 2013-21*. Available at SSRN: <http://ssrn.com/abstract=2304731>

He argues that, “Once being disembodied from the political, discursive communities, the constitutional order imagined in the constitutional fragments is only the reflection of a constitutional episteme. It may be scientific but is not political.”

or jurisdictional shifts. The sociological approach elevates the problematique of globalization challenge to a level where “path dependence” itself is posed as a sociological question, and consequently, the institutional foundation, norms and legality could not be taken for granted. It opens the discussions to what social conditions will enable a possible and necessary jump of track in law.

Systems theory fits in such a requirement because it provides a heuristic framework to discuss the *formation* of norms in a functional sense. The controversial meta-talk is replaced by structural couplings of social subsystems, especially law and politics and law and economy. Teubner acutely detects a “spiral of growth” in the process of globalization, which will cause also a structural drift between politics and economy. Global financialization challenges the temporal dimension of political decision-making process, and the effectiveness of separate juridical authority. Legal fragmentation has its origin in this discrepancy between the politically maintained state ensemble and the incapacity of states to respond to crisis of regulations that have a social, global and accelerated nature. Hence in contrast to “normativization” that is based on legal and political decisions, Teubner rediscovers “human rights” as a meta-code for hybrid and societal constitutionalism that could breed positive dynamics. And he borrows from Derrida transcendence in a “future to come”, which undermines Luhmann’s emphasis on the objective validity of law and the structural dimension of systemic coupling.

The general constitutional lesson we could derive from Teubner’s approach is that constitutionalism is a whole set of social arrangements than merely a “field” of law. Realization of “justice” is a successive configuration of social subsystems. The old formula of constitutionalism is rather a conditioned configuration based on modern individualism, concepts of property and contract, and political accountability of government to regulate by means of “constitutionality”. In the global world, the cluster to bind these elements is lacking; and what is more, the double fragmentation reveals that for the “alter” of state constitutionalism, conceptions about these ingredients are diverse and yet to be re-configured. Justice instead of legality opens the door for non-legal culture in the sense of a “double pluralism”.

Welcoming as this approach is, the ambiguous meaning of “justice” is not paid adequate attention to by Teubner. This return to meta-talk could not account for material deviations that obstruct, if not mutate, the symbolic processing. It is also unclear how the double fragmentation could be transgressed with a reference to law whose meaning is already

determined. In the next chapter, Marcelo Neves will attack particularly this “rationality” reserve in Teubner’s pluralization of autopoiesis of law.

Chapter 8.

Deconstructing “Constitutionalism” and Insights from “Peripheral Modernity”

Introduction

This chapter is devoted to the third approach to “contemporary constitutionalism” which views “constitutionalism” as a particular good not to be made universal. The formula of “Rechtsstaat” for authors taking this approach, is based on positivization of law that reflects a transition from natural law to modern rationalization of law, which should not be seen as a proper depiction of the social orders in non-western countries. Promoting “constitutionalism” and its positivist paradigm will enslave constituent power in these places other than for their benefit of “constitutionalization”.

Therefore, this new approach intends to decode “constitutionalism” encased as such and seeks to decouple the Rule of Law ideal from imperialist politics. The Rule of Law ideal must be decoupled from the political exploitation of it. Radical pluralism and concrete orders especially pose challenges to classical constitutionalism and its coupling of law and politics.

The first part of the chapter will apply Marcelo Neves’s revision to systems theory to understand blindspot of classical constitutionalism and the sociology of law. His theory is complemented by Nico Krisch’s post-national governance and Brian Tamanaha’s ontological conception of “legal pluralism”. While their contributions to the translation question between the delivering and the receiving ends of “constitutionalism” is perceived, this chapter argues whether it is a paradigm shift, as Thornhill puts it, “pluralism as constitutionality”.¹

¹ Chris Thornhill (2012b) ‘legal pluralism: the many books on Europe's many constitutions’, *Social and Legal Studies*, 21: 413-423

1. Marcelo Neves: “Allopoiesis” of law and “Transconstitutionalism”

As I have mentioned in the thesis introduction, both Habermas and Luhmann have written on the big transformation from natural law to positive law. This transition has shaped the threshold of studies of the “sociology of law”, and especially a positivist generation of law. Marcelo Neves, with his empirical studies of the social orders in “peripheral modernity” has criticized the “autopoiesis” of systems theory of Luhmann as having its blindspot. It is especially the political exploitation of law that is under Neves’s attack.

Neves starts with an examination of Luhmann’s borrowing of the concept “autopoiesis” from biology. This borrowing is also accompanied with an addition. As Neves introduces it, this concept “has its origin in the biological theory of Maturana and Varela”,² and “(i)n the first instance, it refers to the quality of a system to build itself the components of which it consists.”³ In the biological term, it deals with the autonomy of life-systems, “characterized by closure in the production and reproduction of elements”.⁴

Luhmann borrows this concept and applies it to his sociological study, which brings a crucial addition -- the (psychic and social) “meaning systems” that are distinguishable from “(organic and neurophysiological) non-meaning systems”.⁵ This, while maintaining the autopoietic character in the system’s self-observation, also introduces and “enables a new combination of closure and environmental openness”,⁶ namely social communication dependent upon individual cognition. This shift in theoretical backgrounds makes Neves question in what sense society could be characterized as “real-necessarily closed”. As he puts it, “(a)lthough the reproduction of communications realizes itself within the society exclusively (self-referential closure), communications exist inevitably about the (psychic, organic, and chemical) environment (openness)”.⁷

Though Neves agrees with the operative closure and the functional differentiation of law implied by the concept “autopoiesis”, he disagrees with the “paradigm” of differentiation, namely, “the stratification principle (vertically)”. Neves hence makes a distinction between

² Neves (2001) 243

³ Neves (2001) 243

⁴ Neves (2001) 244

⁵ Neves (2001) 244

⁶ Neves (2001) 245

⁷ Neves (2001) 249

“autopoiesis of law” in the ideal sense and “positivity of law”, and contests the latter. This is because positivism inflates law with over-political meanings. As he puts it,

“To the extent that the differentiation principle was based on a distinction between ‘upper’ and ‘under’, only the ‘highest’, that is, ‘the political system, had self-referential autonomy. Law remained overdetermined by politics and a political-legitimizing static moral; it did not have its own specific code difference between ‘yes’ and ‘no’ exclusively.”⁸

It is apparent that in spite of all present legal forms, Neves argues for a possible “law” that is horizontal without the hierarchical architecture, otherwise it would be subsumed to political coding. For Neves, positivism impedes the cognitive openness of the legal system to the environment and radicalizes its closure. Without this openness, the legal system cannot take measures to “de-paradoxicalize its self-reference and, therefore, ensure connectivity for further operations.”⁹ This rigidity rather makes Luhmann’s conception of the legal system blind to new values or morals so that it is not only “unlearning” but also imposing its particular and selective values on the global world. This institutionalization of legality distances itself from the claim of justice. As Neves puts it, “the moral neutralization of the legal system is inherent in the positivity of law, makes a theory of justice as exterior as well as superior criteria of positive law irrelevant for Luhmann. The systemic theory of law reduces the question of justice to either “adequate complexity (outer justice)” or “consistency of decisions (inner justice)”,¹⁰ which if it does not “eliminate” the problems of justification of Habermas’s theory, at least displaces it.

Neves’s critique of Luhmann’s systems theory is not about the autonomy of law, but about this autonomy as sustained by its coupling with the political system that keeps it from learning from the “alter” – ‘other’ knowledges about law in other areas of the world. So Luhmann’s depiction of the world society exaggerates the application of the legal science he observed in the society he was in, and this “autarchy” impedes “autonomy” of a genuine legal science to emerge. What’s more, it is correlated with political hierarchy. It is in the intrinsic nature of positive law that the political domination inserts itself and particularly feeds on the paradigm of positivism.

⁸ Neves (2001) 249

⁹ Neves (2001) 251

¹⁰ Neves (2001) 253

In contrast to “autopoiesis of law”, Neves suggests the term “allopoietic law” as the best description of the reality that “in certain fixedly demarcated territorial spheres of validity the functional differentiation of a domain of legal action and experience has not adequately developed, and therefore, no self-referential system was built, that would be capable of orienting the normative expectations and of regulating the interpersonal behavioural contexts.”¹¹ In these areas, the positive law paradigm is unable to depict how norms are generated and function, which Neves describes as “the very lack of operative autonomy of the positive law of state.”¹² The legal system in these states is not systematized in a positivist manner; but undeniably, it is their law.

The attempt to interpret this lack as a “corruption” at the application level of autopoiesis is not a good answer for Neves, as empirical studies show that the general “social exclusion” occurs not as “secondary exclusion” *within* subsystems but as “primary exclusion” *from* them. Instead of politics or the political system, it chiefly concerns social integration, or in Habermas’s terms, whether the communicative action of law has functioned well to integrate the whole society. In this sense, Neves’s refutation is far from an empirical correction, as he poses the exclusion question to the level of “over-integration and under-integration”¹³ that “is expanded and intensified resulting in the releasing and generalizing of destructive consequences which act against the validity of differentiating legal codes and against a constitution based on the rule of law and which represents the structural coupling of law and politics.”¹⁴

In this background, the concrete order has an important role to play. Neves argues that “concretization” reveals “a de-legalizing political reality and a de-constitutionalizing legal practice”.¹⁵ “Constitutionalism” if confronted with its scandalous and divergent practices in non-western countries, rather acts as an ideological tool. But underneath this “symbolic constitutionalism”, it is rather the “impossibility” of such a coupling that is the true reflection of the legal system in peripheral countries. In these peripheral countries, Neves argues, a constitutional rationality is super-imposed on what are in effect constitutional orders alien to it. And this “rationality of rationalization” is unable to be restored through

¹¹ Neves (2001) 258

¹² Neves (2001) 258

¹³ Neves (2001) 261-262

¹⁴ Neves (2001) 261

¹⁵ Neves (2001) 260

Gunther Teubner's "socially diffuse law"¹⁶ or Ladeur's post-modern language game which could only bring about "pluralisation of autopoiesis".¹⁷

In Derrida's critique of the centrality of "the political" in Schmittian theory, he questioned Schmitt's correlation of the "concrete order" to a political framework.¹⁸ This framework is constitutively enabled by a philosophical *polemic* about the friendship and enmity, which also inversely stresses the necessity of rulership. The rationality of "constitutionalism" for Neves does the same thing to the rule of law and inflates it with a political hierarchy. Law is instrumental to political rule and is dissociated from its moral values. This is especially the case of "foundational constitutionalism" which imagines a single act of founding a community and makes it its common will.

To deviate from this pitfall, Neves achieves a functional understanding of nation-state "constitutionalism" as protection of rights and limitation of power, and fixes its use as such. Hence he both denounces the overuse of "constitutionalism" to solve all problems arising in the global world, while preserves certain transferrable functions of "constitutionalism" that he could apply through his own terminology of "transconstitutionalism". But then what would the "transconstitutionalism" tackle as its object if it is not to establish an order?

This reveals that "transconstitutionalism" builds on a contemporary circumstance of already existent diverse legal orders, so that the question of founding and institutional establishment does not require explanation. To use Neves's term, it is the "comity" of judicial orders at local, national, international, supranational and transnational levels¹⁹ that necessitates the thinking of "transconstitutionalism". It is apparent that, by arguing the comity, Neves already intentionally suspends their "vertical" implications and regards them as "functional" comity as De Wet does. In dealing with the relations between these orders, Neves advocates the "Engagement Model" compared to the "Convergence Model" and the "Resistance Model".²⁰ The key difference between the three models lies in a

¹⁶ Neves (2001) 257

¹⁷ Neves (2001) 256

¹⁸ Jacques Derrida (2005) *The Politics of Friendship*, (London: Verso) chapter 5.

In Derrida's argument, the need of generalization is connected to Schmittian question of "who is the enemy" and "who is the friend". This polemic serves to separate concrete encounters from the political frame of human relationships so that 'the political' is always kept from being challenged and acts as an ultimate base.

¹⁹ Marcelo Neves (2013) *Transconstitutionalism* (Oxford: Hart Publishing Limited) 74

²⁰ Neves (2013) 162 Instead of regarding national constitutions as sites for implementation of international law (convergence model) or a basis for resisting globalization (resistance model), "Engagement Model" acts as "interlocutor offering a way of testing understanding of one's own traditions and possibilities by examining them in reflection of others." (p163)

demand for presence of what he calls a *transversal* entanglement among these orders. The encounter of different orders is what is sought by the paradigm, an engagement which neither promises a convergence nor a pure resistance which would collapse the “bridge of transition”.²¹ The latter finds expression in “Rule of Law” and “Human Rights” which are preserved as a common language expected to radically revise their current particularity in order to properly include the “alter”.

Different from Teubner’s “inclusion of persons”, Neves stresses the being “worthy of personality” as the threshold concept. As he puts it,

“(I)nclusion as a person is what makes respect for the integrity of body and mind possible. As a two-sided form, the person constitutes a structural coupling between human being and society, serving to face the danger both that the integrity of the person’s biopsychic substrate will be violated or destroyed by the expansion of society and that, on the contrary, the latter will be destroyed and disintegrated by lack of limits on human desires and drives.”²²

The conditioned closure of social system to psychic system here is brought back with the question of “recognition”,²³ and a discourse about “non-identity and identity”.²⁴ Only at this level of “recognition”, countries of peripheral modernity could gain justice in the “discursive identity and alterity”.²⁵ We should applaud that Neves raises the question of engagement and participation to the level of identity and subject. Global justice should be realized on the basis of a formation of global constituent subject rather than a mere attribution of stakeholders. However, what concerns us here lies in whether such subject-formation could be registered in the constituted comity of judicial orders, as suggested by Neves.

It is closely related to Neves’ diagnosis of conflicts and overlaps of different judicial orders in today’s world, which is put by him as “normatively symmetric and cognitively asymmetric”.²⁶ And the asymmetry in cognition has to be redressed for Neves through the common value of human rights. “Ambivalence”²⁷ is suggested by Neves to indicate at one

²¹ Neves (2013) 82

²² Neves (2013) 160

²³ Neves (2013) 170

²⁴ Neves (2013) 170

²⁵ Neves (2001) 264

²⁶ Neves (2001) 255

²⁷ Marcelo Neves (2007) ‘The symbolic force of human rights’, *Philosophy Social Criticism* 33: 411-444

hand “the notion of eternal, essential, ahistorical rights”,²⁸ while at the other hand, “an accomplishment of modern society”.²⁹ Human right is not an “invention” without “roots” in pre-modern society, but it “represents a substitute for the older notion of natural law”,³⁰ and relates to the “open-ended character of modern society.”³¹

This transition from natural law to positive law, and the consequence of functional differentiation coupled with a future orientation, are crucially recognized both in the writings of Luhmann and Habermas. But Neves treats it to some degree as a terminological change which does not influence the symbolic continuity. He describes it as a “transformation of unstructured complexity into structured complexity”³² that makes human rights cognitively sensitive to the surplus of possibilities and risks inherent in modern society. Human rights enable the “generalized inclusion of humankind in the legal sphere”,³³ contingently accompanied with recognitions of “a normative claim of pragmatic universality.”³⁴ It is in the pragmatic universality of human rights, the diverse legal rationalities are engaged and communicated. Though it is unclear there will be a correspondence between the universality and particularity, Neves argues that “(t)he symbolic force of acts, texts, declarations and discourses of a normative character serves both to maintain the lack of rights and to mobilize people to construct and enforce rights.”

Here, we see a striking convergence of ideas of Neves with Walker’s “final irony”, though they are radically different at the threshold. The semantics that finally unites them does not necessarily accord with material configurations; and perhaps because of that, the symbolic sustains its pure motivational value. Here, the “counterfactual” meaning of the “symbolic” is replaced with purification irrespective of facticity. While for Walker, it is best summarized as “cosmopolitanism”, for Neves, it is a learning stream of “pluralism”. In this sense, transconstitutionalism is a coupling of the legal science and law (as the term “interface norms” indicates³⁵), rather than a coupling of law and politics as in classical constitutionalism.

²⁸ Neves (2007) 412

²⁹ Neves (2007) 416

³⁰ Neves (2007) 416

³¹ Neves (2007) 416

³² Neves (2007) 416

³³ Neves (2007) 417

³⁴ Neves (2007) 417

³⁵ Neves (2013) 173

Neves in no way calls for an overall attack on modernity and he instead emphasizes the “threat of societal dedifferentiation”.³⁶ But in another sense, the “symbolic” value in recognition of universalism and the ahistorical meaning of human rights enables its permanent move toward moralization, primarily in the transgression of the state-centred fundamental rights. Back to discussions on positivity, Neves treats the positively-maintained boundary of law in fact as contingent condensation of the symbolic value in its current nation-state shape. And the potential to transgress it lies in a concretization process of a “right to inclusion and dissent”.³⁷

It should not be said that in Luhmann’s theory, this movement has not been predicted. The conversion of classical constitutionalism by “the development of the doctrine of human rights” is explained by Luhmann as “the unfolding of a fundamental paradox”³⁸ between individual and law. In human rights jurisprudence, this open paradox of social contract was substituted for “violation and outrage” of human rights.³⁹

However, Luhmann has discerned a key distinction between the concepts of integration and inclusion. Human rights jurisprudence indeed has a deparadoxification effect as it undermines the existent legal orders, which we could borrow Teubner’s phrase to describe as a “releasing” process. But for Luhmann, it is a deepening of functional differentiation. Without integration, a rebuilding of equality and the couplings of different social systems, the functional differentiation is indeed severed by the medium of inclusion.

On the contrary, Neves argues that communication over human rights is the key integrative force of the society. The so called polity is not integrated if fundamental rights prescribed by law serve as a partisan instrument for elites. This legitimate claim is hard to deny. As exemplified in the case of China, the *facticity* of over-integration and under-integration undoubtedly hollows out the meaning of constitutionalism. But it does not enable the flipside of this argument that insistence on the universal signifier of human rights could establish any legal system in peripheral countries. In Neves’s writings, he does not answer whether in countries of peripheral modernity there is a legal system properly called, just as Kelsen is questioned by Schmitt on the point of real functioning instead of abstract function. Between the universal signifier and the particular register for the engagement

³⁶ Neves (2007) 417, and also mentioned in Neves (2013)179

³⁷ Neves (2007) 436

³⁸ Luhmann (2004) 487

³⁹ Luhmann (2004) 487

model, Neves does not explain how any possible inscription could close the gap, and to pragmatically correspond to the universality.

As far as the re-moralization of law in the modern society is concerned, Luhmann instead argues for the impossibility of bridging the two types of reflexive thinking. As he writes,

“(I)t is worth noting that there are apparently two different reflexive theories in the modern legal system, namely the theory of reason and the theory of positive law, and the difference between them cannot be bridged. This is a difference between principles and sources of law ... Validity and justifying reasoning cannot be reconciled and hence one must opt for one version or the other.”⁴⁰

If Neves purports to transgress the fragmented legal regimes at the level of legal rationality, he must denounce the institutionally signified and sustained “legality” at the same time. But then this would mean a rupture of, and withdrawal from, the “bridge of transition” that his fundamental model of “engagement” relies on.

2. Nico Krisch: radical pluralism with a structure

While Neves’s critique on universal claim of constitutionalism, I proceed with Nico Krisch’s “pluralism” that professes to have a normative value. Krisch argues that his “pluralism” is posed at a structural level, compared with Walker’s “constitutional pluralism” and other compromised forms of “institutional pluralism”.⁴¹ “Radical pluralism” as he insists on, is not only a resolution to conflicts of law, but also a theoretical undoing of the logic of “constitutionalism”.

With regard to Walker’s “constitutionalism-lite”, Krisch argues that there are in fact three ways in which constitutionalism and pluralism relate: containment, transfer or break.⁴² Walker’s approach for him, has stretched the meaning of “constitutionalism” without a proper boundary. In a backward translation of constitutionalism, Krisch uncovers the “enlightenment” rationality embodied in “constitutionalism” of its foundational meaning grounded as such. By means of a revolutionary practice and a contingent event, the Pre-constitutional subject disappears from this thought. Since its inception, it replaces

⁴⁰ Luhmann (2004) 448

⁴¹ Nico Krisch (2005) ‘Europe’s Constitutional Monstrosity’, *Oxford journal of Legal Studies*, 25(2): 321-334, 323

⁴² Nico Krisch (2010) 14-16

“limitational constitutionalism”, and through Habermas, its contemporary appeal continues in various forms of “constitutionalism-lite” that stresses the overarching structure as essential traits.⁴³

Pluralism, though unable to provide a comprehensive framework, for Krisch, at least names the *gap* between constitutionalism and a polycentric governance in the post-national world before denouncing the latter too easily. So in a methodological sense, it is a more prudent type. But more than that, pluralism has a normative dimension itself which Krisch professes to explore. He states his conception of pluralism as “a vision that takes societal fragmentation to the institutional level.”⁴⁴ This fragmented institutionalization contradicts what we usually consider to be the meaning of “institutionalization” – a defragmentation. It also converts the meaning of “authority” from institutionalized “binding” to “persuasion” and “gradation”. Through these, Krisch gives out three other normative appeals as great adaptability, contestatory space, and the equidistance to conflicting claims to ultimate authority.⁴⁵

“Equidistance” is an interesting term that Krisch applies in examining the virtue of pluralism. As he puts it, “if all constituencies are to have decision-making powers beyond merely being listened to, but shall not be able to dictate or veto a particular decision, then no decision can fully bind them all, and each level has to retain the rights to challenge it.”⁴⁶ *Indecision* hence gains its normative importance in this non-teleological and non-dominant nature. Also the equal potential for all *constituencies* is vital for Krisch to develop his idea of Global Administrative Law, which I will save for later arguments.

Krisch borrows a term from Chandran Kukathas: “archipelago” of associations,⁴⁷ which implies co-existence, tolerance and compromises between different orders. Instead of “empire”, it is “umpire” of associations changed with “individual’s allegiances”.⁴⁸ It is from here -- right to associations – that Krisch propels Habermas’s co-originality between private autonomy and public autonomy further toward his own suggestion of “individual public autonomy”. It is a critique and moralization of Habermasian public autonomy –

⁴³ Krisch (2010) 50

⁴⁴ Krisch (2010) 69

⁴⁵ Krisch (2010) 78-89

⁴⁶ Krisch (2010) 86

⁴⁷ Krisch (2010) 91

⁴⁸ Krisch (2010) 92

being “aware of their imperfection, their need to be reinterpreted in the very processes by which such public autonomy constitutes itself”.⁴⁹

Yet, my arguments against Krisch are not toward the loose framing that his pluralism imports, but his strategy that strikingly contradicts that radical pluralism. Krisch, in the last three chapters of his book, intends to account for the problem of uncertainty and sees how productive the theory of praxis could be.

Praxis picks up one element from the ambit of philosophical jurisprudence: the “feedback effects”.⁵⁰ This paradigm is “likely to follow a different logic than the initial creation of a regime: new actors may be mobilized and previous participants may see their participation in a new light.”⁵¹ Instead of critiques that certainty is lost in this flexibilization, Krisch argues that there is some degree of certainty in the “entrapment”⁵² of socialization process that “if actors fail to protest against new authority claims, they may later find themselves entrapped in this initial (if tacit) acceptance: in a context of path-dependence, a shift of the argumentation framework is difficult to undo at a later stage.”⁵³ At this point Krisch compromises his radical pluralism and reduces it to *degrees* of hierarchy relative to constitutionalism. Pluralism does not mean there is no hierarchy left, but is rather “bracketed”⁵⁴ than “overarching”,⁵⁵ and in a manner of “arguing” rather than “bargaining”.⁵⁶ Finally, the effects of hierarchy and our *habit* of seeing only hierarchy as the proper form of the legal system are undermined to the extent that “(w)hether the contrast between the ‘vertical’ and ‘horizontal’ dimensions is ultimately useful may be doubted ... More substantively, we may understand both vertical and horizontal conflicts as expressions of a competition among constituencies – as rival claims of different vertical societal groups that might be nested in one another, overlap, or be altogether ???separately”.⁵⁷

Again, the local, national, and supranational actors are put at an equal footing as “competition of constituency”. At last, even the “conflict-of-law” model⁵⁸ Krisch formerly

⁴⁹ Krisch (2010) 95

⁵⁰ Krisch (2010)230

⁵¹ Krisch (2010)230

⁵² Krisch (2010)248

⁵³ Krisch (2010)248

⁵⁴ Krisch (2010)240

⁵⁵ Krisch (2010)226

⁵⁶ Krisch (2010)234

⁵⁷ Krisch (2010)231

⁵⁸ In mapping “pluralism of pluralisms”, Kirsch sides himself with systemic pluralism which is close to the “conflict-of-law” model. Krisch (2010)76

harnesses his pluralism to, becomes also inappropriate so that it should be replaced by the term “interface norms”.⁵⁹ Conflicts management is no longer applicable; and far from distributing jurisdictional powers among *a priori* unconnected orders as the term of “collision” implies, “enmeshment and joint engagement in a common space”⁶⁰ as pluralist *thinking* indicates requires a reflection on terminology as well.

But what are they competing for, if not hierarchy or a victory? If we summarize the virtue of pluralism, it lies in the avoidance of “teloi”⁶¹ and the reduction of power effects of institutionalization to the minimum. What extent of minimum could enable equal chances and equidistance is unknown, yet it is impossible to be zero. As if it is none, the “feedback” paradigm will also go bankrupt. The feedback paradigm must work with a preservation of effects which is not the totally free emergence for any constituency.

The distance Krisch inserts between Global Administrative Law and the global constitution⁶² is quickly lost with this feedback practices. In lieu of seeking for the impossible presence of global *constituent power*, he converts his argument to a more practical and concrete question as “who is the right *constituency* of global administration” or “*accountable to whom*” practicality (emphasis added)?⁶³ This practical reasoning for the positive use of a Janus-faced formula replaces doubts about the general framework and its current absence. It also reminds us to *think* about “whether individual freedom is best promoted by subjection to clear rules or by participation and deliberation over the content of law”.⁶⁴

Ming-Sung Kuo is right to detect more significant jurisprudential implications of the Global Administrative Law hiding under this humble “administrative” title--“the new *nomos* of boundary-blurring.”⁶⁵ He argues that “what defines global administrative law as a new paradigm of law is a post-public legitimacy instead of its inter-public legality.”⁶⁶ In concept it “goes beyond Hart’s strict separation of the rule of recognition from normative

⁵⁹ Krisch (2010) 288

⁶⁰ Krisch (2010)288

⁶¹ Krisch (2010)296

⁶² Benedict Kingsbury, Nico Krisch and Richard B. Steward (2005) ‘The Emergence of Global Administrative Law’, (Summer 2005) *Law and Contemporary Problems* 68: 15-62 Available at: <http://scholarship.law.duke.edu/lcp/vol68/iss3/2>, 28

⁶³ Nico Krisch (2006) ‘The Pluralism of Global Administrative Law’, (2006) *EJIL* 17(1): 247-278, 250-251

⁶⁴ Nico Krisch (2010) 281

⁶⁵ Ming-Sung Kuo (2012), ‘Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law’, *International Journal Of Constitutional Law* 10 (4): 1050 - 1075

⁶⁶ Ibid.

judgment.”⁶⁷ This *excess* of pluralism, however, depends also on a conceptual perception of “concrete orders”. In the next section, I will explain the philosophical implications of the “concrete order” with Brian Tamanaha’s ontological concept of “legal pluralism”.

3. Legal Pluralism at the ontological level

For Brian Tamanaha, a mapping of different legal pluralism shows a key difficulty facing this scholarship is that the stage is already occupied by legal centralism, in the sense that the latter decides the former.⁶⁸ Legal pluralism in order to manifest its normative and paradigmatic values, must be “left with the assertion that the legal included the non-legal, while unable to provide a certain standard by which we are to identify the distinctively legal (now in the broader legal pluralist sense) from the truly non-legal (those normative orders even legal pluralists would not want to call law).”⁶⁹ Tamanaha hence quotes Sally Engle Merry’s complaint, “why is it so difficult to find a word for non-state laws? (S. E. Merry, ‘Legal Pluralism’ (1988))”

It is the requirement of “science” that dooms the fate of legal pluralism, as “legal centralism” decides not only the sources of law, but also the definition of law, thus it assumes an ideological function. And to counter this and claim the normative value of “legal pluralism” we must raise the question to an *ontological* level, as Tamanaha puts it,

“What legal pluralists fail to see is that this refinement upon living law inserts a disabling *equivocation* into the heart of their concept of law. In taking the second step, legal pluralists traverse an ontological divide which separates the obvious question: *how are concrete patterns of social ordering (first definition) related to the institutional identification and enforcement of norms (delimiting criterion)?* The former refers to what people in a social group actually do, the practices and customs they feel obligated to and follow as a matter of ongoing social action; the latter refers to the coercive apparatus of that social group, to (in legal pluralist terms) that group’s ‘legal’ institution. Since these two aspects are very different,

⁶⁷ Ibid.

⁶⁸ Brian Tamanaha (1993) 192-217

Tamanaha reviews that the core credo of legal pluralism is that “there are all sorts of normative orders not attached to the state which nevertheless are *law*.” This shows that legal centralism leaves its impact on the *definition* of law that is an issue of *science*. This scientific definition gives the legal reality incredible difficulties in justifying it is law without hierarchy, without state and devoid of scientific standard, but as social facts.

⁶⁹ Ibid. 193-194

and they are derived from alternative ways of viewing law, which of the two is ‘law’?” (my emphasis)⁷⁰

The *disabling equivocation* pointed out by Tamanaha indicates a scientific rationality that is implanted with the process of modernization. An objective legal order is depicted as the best means to protect the individual sphere from intervention that makes his “rights” system. This, however, with anthropological findings, is proved more and more as a western colonization of the social orders and a transplantation of the legal system that has only limited applicability.

Tamanaha hence radicalizes the deficit in the model of Ehrlich’s “living law”,⁷¹ as it neglects that differences between state law and folk law are in effect an existential one. Ehrlich’s application of the common term “law” “indicates that the distinction between the two is inconsequential, one of degree – a matter of form not substance.”⁷² But for Tamanaha, there should rather be a separation between rule of conduct and norms of decision. The former indicates that “the norms operate through the social force which recognition by a social association imparts to them, not through recognition by the individual members of the association.”⁷³ It does not need the positivist nature of decision and prescription. To borrow from Griffiths’s word, “(l)egal pluralism is the fact”.⁷⁴

The living “concrete order”, if is put in genuinely scientific meaning, defies generalization and rationalization into a mode, a paradigm and an institution. It is only in accordance with the Western scientific criterion that they could not be seen as “normative”. Instead of feeling ashamed for lacking in scientific nature, legal pluralism should rather be justified in “why no attempt to formulate a single scientific or cross-cultural definition of law can succeed”.⁷⁵

This determines Tamanaha’s arguments in the formula of “Rule of Law” and “Constitutionalism”. He strongly argues against the World Bank “Good Governance” program and declares that “the rule of law has no blueprint, no standard structure, no concrete or visible manifestation, and it is not something that can be constructed on

⁷⁰ Ibid. 206

⁷¹ Ibid. 205

⁷² Ibid. 209

⁷³ Ibid. 209

⁷⁴ John Griffiths (1986) ‘What is Legal Pluralism?’ *J. of Legal Pluralism* 24:1-55

⁷⁵ Tamanaha (1993) 192

demand. There is no known timetable for building the rule of law.”⁷⁶ To take his argument further, any *building* of the rule of law is rather destined to fail when the “connectedness of law” principle⁷⁷ is bypassed in the arrogance of those who provide the models.

Fundamentally, who could claim to know the truth, and who has the “state of knowledge”?⁷⁸ Between *for* and *by* or *of* the benefit of recipient countries and their people lies the unbridgeable schism of “constitutionalism” between the formula and the spirit.

The constitutional government as applied in the West only delivers enslavement in the periphery, which is revealing in the case study of transplanted laws. “To what extent is state law really involved in maintaining societal normative ordering?”⁷⁹ Tamanaha asks. Similarly to how Neves used the terms over-integration and exploitation by the political system, Tamanaha also finds that “the state legal system is best seen not as a mechanism for maintaining societal normative order, but as an instrument of power in society, available primarily for the elites, ... In post-colonial regions which have traditionally been their area of special interest, state law is better understood by way of *contrast* with the lived norms of social order, not *equivalence*.”⁸⁰ (my emphasis)

It is vital to point out that in this transplantation, law is hollowed out in its functions. But it is difficult to understand Tamanaha’s suggestion as well as other radical pluralism advocates about how we might observe a contrast without the “disabling equivocation” in the first place. And in Tamanaha’s important descriptions of what legal pluralism should be, he does not tell us *how* to argue about law in legal pluralism. It might be the “difficulty” that is imposed by legal centralism that Tamanaha claims to avoid, but the intention to “equate” is always also the endeavour of naming the unnamed. As in Derrida’s contestation of Levi Strauss, the “proper” name always marks obliteration. While legal pluralism argues that we must pay attention to the scientific question of “what is law”, it does not opt out of the trap of Western consciousness to give everything a name.

Along with the logic of “equidistance” of Kirsch, Tamanaha also claims that pluralism has an extraordinary *tolerance* to deliver. Paul Berman has made the comment that, “pluralist processes, institutions, and practices for managing hybridity ... can instantiate a social

⁷⁶ Brian Z. Tamanaha, ‘The Primacy of Society and the Failures of Law and Development’, (2011) *CORNELL INT’L L.J.* 44:209-247

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Tamanaha (1993) 210

⁸⁰ Tamanaha (1993) 211

space in which enemies can be turned into adversaries.”⁸¹ Legal pluralism in Tamanaha’s sense must withdraw from seeing any norms as more competent and privileged. For Walker, this proposal of “non-order of orders” is just avoiding the criteria of success. “For pluralist nonorder to prevail, in any comprehensive sense, this will depend ... on the failure of any other candidate metaprinciple to achieve even a modicum of structural influence.”⁸² Instead of generalizing concrete orders into an institutional frame, it is pluralism that will accommodate both the institutional norms for decision and rules of conduct. Legal pluralism in this sense encompasses not only the diverse sources of law but also the non-teleological generation and thinking of laws, which could be understood as pluralism about pluralism.⁸³

If Pluralism gains a higher normative ground it is due to the fact that it is a more precise description of forms of normative life instead of a search for meta-criteria or regulatory effectiveness. It hence relies heavily on empirical inquisitions into the “actual extent of social control activity”.⁸⁴ This is why I emphasize the important conception of “concrete orders” in all assertions of legal pluralism. It is the bridge of how “facticity” gains its normative meaning.

“In any event, the important point is that scholars studying the global legal scene need not rehash long and ultimately fruitless debates (both in philosophy and anthropology) about what constitutes law and can instead take a non-essential position: treating as law that which people view as law. This formulation turns the what-is-law question into a descriptive inquiry concerning which social norms are recognized as authoritative sources of obligation and by whom.”⁸⁵

But is there still a functional definition reserved for law? Instead of what Tamanaha claims as “legal development”,⁸⁶ all norms have to be submitted to scientific “positivism”.⁸⁷ It

⁸¹ Berman (2007) 1192

⁸² Walker (2008) 391

⁸³ Thornhill argues that pluralism is not only a paradigm, but also different *understandings* of pluralism (416). in Chris Thornhill (2012b)

⁸⁴ Tamanaha uses Griffiths word to claim that legal pluralism is an unmediated look at social reality against the claim that “for scientists, a concept of what law is must precede any observation of law as fact”.

⁸⁵ Berman (2007)

⁸⁶ Tamanaha replaces “Rule of Law” with a concrete title as “legal development” which is defined as “a retail enterprise – it’s about getting legal institutions to adequately deliver services to meet legal demands.” But we are left with little tools to further examine how Tamanaha could define the “development” of law. Without any connection to generalization, Tamanaha’s “development” claim is also bankrupt as there is no comparison possible.

⁸⁷ Max Horkheimer defines the thinking of positivism as concerned only “with appearances and with what things actually offer to us of themselves” (p37). “In degrading the known world to a mere outward show,

surrenders itself to factual diversity. Here, even if Tamanaha strongly opposes the formalism and neo-formalism of Hayekian theory, he nonetheless concedes the epistemic side of Hayek's theory that law is deregulation.

I want to emphasize that Tamanaha does raise an important opposition of the "concrete orders" in the scientific, ontological and philosophical level. His theory fundamentally rejects "constitutionalism", as it reveals the impossibility of this model to reflect local constitutional orders. The translation issue is especially sharp between the developed and developing countries, which turns transplantation into enslavement. In this sense, radical pluralism does initiate a fierce attack on constitutionalism and bring insights about the constituent subject and real participation. However, the key question is how the issue of participation is represented by differences in rationality and re-invested at the level of knowledge, so that the radical dimension in this pluralism is re-entered into a discourse about science and empirical descriptions. This is how such a radical approach finally resorts to a preservation of symbolic constitutionalism although, at the threshold, the symbol is a false placeholder.

4. Summary of this chapter

In this chapter, I focus on radical pluralism which puts forward pluralism in a jurisprudential sense ("pluralism as constitutionality" in Thornhill's word). Anthropological research has established cultural equivalences to the legal profession and institutions that have traditionally acted as the only loci of the law. Rather, these scholars argue that the thesis of integration through law as modernity projects has never been completed. The definition of law as a monopoly of power to *decide* conceals the fact that folk laws that inform people's living and the rules of conduct they follow are also important.

I fully agree on the point that there are social norms different from a law decided by legislatures and executed by judiciary. And minorities whose voices are repressed in the rationality of modernity are truly victims of a universal legal science. Law and Development literature makes key contributions to revealing the gap and the translation difficulty of constitutionalism. Local constituent powers are systematically displaced by an

positivism makes peace, in principle, with every kind of superstition ... [as it] reduces all possible knowledge to a collection of external data. (p38)

In Max Horkheimer (1972) 'Materialism and Metaphysics', in *Critical Theory: Selected Essays* (New York: Herder and Herder)

agency constituted according to the Western ideal and serving imperialism. In this sense, the so-called constitution breaks with the spirit of constitutionalism.

But what is endangered by this pluralism lies in an all-too-easy building of “functional equivalences” without the principle of equivocation examined. Consequently, functions of law are seldom preserved in these equivalences. It might be a trap that legal pluralism tries to avoid, namely, that the existent definition of law overdetermines potential imaginations. But as long as law has a specified meaning against the whole social system, a battling with the positive law and state law should be carried on. As Luhmann has acutely pointed out, this is functional differentiation severed rather than overruled. It is manifested in the three authors that their radical claims at the level of rationality finally find reconciliation with the institutions that they have once claimed to share no “property” with.⁸⁸ Though radical pluralism professes a radical break, to carry through this radical change is more complex than simply to offer a discourse about otherness.

⁸⁸ Ranciere’s word in Jacques Ranciere (1999) *Disagreement: politics and philosophy* (Minneapolis, Minn. ; London : University of Minnesota Press) 8

Chapter 9.

Political Constitutionalism in a Critical Perspective

Introduction

With the three approaches to contemporary constitutionalism that we have visited it is undeniable that constitutional thinking has been greatly enriched, whether it be constitutional tolerance, polity legitimation, or rights to inclusion and dissent. This chapter problematizes whether it is too early, nonetheless, to proclaim a paradigm shift as ‘contemporary constitutionalism’ indicates. Especially with regards to the lack of the political dimension in the three contemporary constitutional candidates, it asks whether classical constitutionalism still has a lesson to deliver.

This chapter uses Foucault’s critical theory to provide a critique. What I take from Foucault is his discussion on ‘politicality’ and his critique of ‘economization of power’. In today’s crisis of constituent power, Foucault insists on the complexity of the emancipation thesis and observes a transposition of power into knowledge and economy of representation. He suggests that in contemporary society, power is organized differently and market mentality penetrates the logic of constitutionalization. Foucault describes how this transformation occurs and whether we could credibly claim to opt out.

There are two main sections in this chapter. Section one elaborates Foucault’s critical methodology to approach ‘politicality’, and how this methodology could be applied under conditions of globalization. Following that, I am arguing Foucault’s finding of the market mentality is a deeper inquiry of today’s globalization phenomena compared to the resolution provided by pluralism. Neo-liberalism and its effects on the coupling between law and economics demand a deeper understanding.

1. “The Political” in Foucault’s writings

In his writings, Thornhill discerns that contemporary constitutionalism arises in the context of the vanishing point of political legitimacy – the nation states. And because of this vanishing, it brings about the legitimacy crisis of constitutionalism. Negri generalizes it in

such a radical stance that “(i)f in the history of democracy and democratic constitutions the dualism between constituent power and constituted power has never produced a synthesis, we must focus precisely on the negativity, on this lack of synthesis, in order to try to understand constituent power.”¹

This is manifested in the three approaches to contemporary constitutionalism which claim to provide *alternatives* to positivism and power-centrality – a claim of decoupling law and politics in constitutionalization. But in arguing this opting out of politics, the three approaches also confine politics in a certain register and definition. But it is questionable whether this is the truth; or with the critical move out of the location of power and politics in nation-States, the definition of power and politics also needs a renovation. In this part, I provide a Foucauldian critical approach to re-introducing and arguing ‘the political’.

Among Foucault’s works, three² are deemed as his political writings. They are categorized on the basis of the topics that have a political nature, which is, of course, a limited view. In this section, I will start with Foucault’s political writing *Society Must Be Defended* but suggest that it is a broader question of ‘politicality’ that captures Foucault’s concern. From here, I will explain what constitutional lessons we could benefit from Foucault’s inquiry.

1.1. Power and discourse

The book *Society Must Be Defended* is considered as showing Foucault’s concentration on sovereignty and repression, in contestation with Schmitt.³ But in the “Course Summary”, Foucault addresses a broader concern beyond the critique of ‘sovereignty’. He argues that these studies were not only carried in a historical sense of how ‘the political’ is institutionalized from ‘the social’ *field*, but more importantly, aimed to explore “how has war (and its different aspects: invasions, battles, conquests, relations between victors and vanquished, pillage and appropriation, uprisings) been used as an *analyzer* of history and, more generally, social relations?”⁴ (my emphasis)

This “analyzer” should be noted, as it leads to the focus of Foucault’s later writings. Two discourses are discerned following and corresponding to the course of history. On the one

¹ Antonio Negri (2009) 12

² They are “*Society Must Be Defended*”, “*Security, Territory and Population*”, and “*Birth of Biopolitics*”

³ as Agamben contrasts the two in *State of Exception*.

⁴ Michel Foucault (2003) *Society Must Be Defended: Lectures at the Collège de France, 1965-76*. (London: Penguin) 266

hand, there is obviously an evolution that happened from Middle Ages onward, and since then the right to wage war was taken less as indicating individual or group relationships but more as increasingly monopolized by the State. This change is described by Foucault as, “a society completely permeated by warlike relations was gradually replaced by a State endowed with military institutions.”⁵ War becomes “the cipher of peace”,⁶ and “continues to rage within the mechanisms of power”.⁷

A permanent divide hence is drawn in the entire social body that “it puts all of us on one side or the other”.⁸ War divides victors and losers, while power claims to mediate from a neutral standpoint. The institutional power is constructed as the *opposite* to war, and claims legitimacy for its monopoly of violence. To base the power mechanism on constantly reactivating potentials of war only enables the particular (the victor) to proclaim it as universal and neutral. The peace and institutional order is always a peace by war and from war, than the philosophically perpetual peace. As Foucault contests,

“It is a matter of establishing a right that is stamped with dissymmetry and that functions as a privilege that has to be either maintained or established; it is a matter of establishing a truth that functions as a weapon. For a subject, speaking such a discourse, the universal truth and general right are illusions or traps”.⁹

Here, Foucault not only pays his attention to the materialized power and war, but also semantic effects produced by this institutional establishment. So to speak, institutionalization of power with a discourse on war and peace embodies a dissymmetry in justification of truth claims -- the “strategic selectivity” of state theory,¹⁰ as Jessop observes. Instead of universality, it is always a certain fashion of ‘socialization’ in service of race, gender or capital accumulation. Foucault names this discourse the first historical-political discourse. It enables a separation of the political from the social.

But there is a second discourse, Foucault soon finds, which precisely challenges the first and the “traditional values of intelligibility”. It is “an explanation from below ... The elliptical and dark god of battles must explain the long days of order, work, and peace.

⁵ Foucault (2003) 267

⁶ Foucault (2003) 268

⁷ Foucault (2003) 268

⁸ Foucault (2003) 268

⁹ Foucault (2003) 269

¹⁰ Bob Jessop (1999) ‘The Strategic Selectivity of the State: Reflections on a Theme of Poulantzas’, *Journal of Hellenic Diaspora*, 25(1-2): 41-78

Fury must explain harmonies.”¹¹ Foucault finds this discourse as “entirely” historical and “(i)t takes as its field of reference the never-ending movement of history”.¹² Though this reaction is in opposition to the first historical discourse, “(i)t is also possible for it to look for support to traditional mythical forms ... a discourse that is darkly critical and at the same time intensely mythical.”¹³

This myth is preserved as the divide between the victor and the loser is undone. Reading the two discourses, whether as historical or counter-historical, Foucault argues that both build themselves on an unqualified philosophical and universal claim of truth about power, yet both are based on a victory that is partial and draws distinctions in the society. It thus implies a *disagreement* between the material history and semantic interpretations of that history. This finding of an independent *discursive power* shifts Foucault’s political writings to broader concerns.

1.2. Discursive power: intelligibility

This power-discourse relationship formulates our truth regime: when power implements a partisan victory, the discourse justifies its universality. For Foucault, the truth discourse dematerialized from the real history will have a more profound and lasting effect, even an “inversion” consequence, as he analyses with reference to domains as diverse as criminality, madness or sexuality. While sex is historically repressed by power, psychoanalysis releases discourses on sex and accumulates their variety around the pan-sexual term of “sexuality” – a permanent investigation of the science of sex. It is in rebutting criticisms toward his idea as “sexuality without sex”¹⁴ that Foucault declares his shift from “discourses” based on “retro-version” of power, to “knowledge” and “intelligibility” being “contemporary” with power.¹⁵ This shapes his new map of investigation into “what is political”, namely, the question of politicality.

In his response, Foucault defends his purpose to study “sexuality” is not to deny the materiality of sex, but poses the least question that “as for sex, is it not the ‘other’ with respect to power, while being the centre around which sexuality distributes its effects?”¹⁶

While sexuality as an *anchorage point* for emancipation from sexual repression, this

¹¹ Foucault (2003) 269

¹² Foucault (2003) 270

¹³ Foucault (2003) 270

¹⁴ Michel Foucault (1979) *The History of Sexuality. Vol.1. An Introduction* (London: Allen Lane, 1979) 151

¹⁵ Foucault (1979) 150

¹⁶ Foucault (1979) 152

unification effect is rather doubtful for Foucault. He argues that, in the psychiatrization of perversions, sex was given a “‘meaning’, that is its finality”.¹⁷ By playing with the discourse of “interplay of presence and absence, the visible and the hidden”,¹⁸ “sex” was caught up “between a law of reality and an economy of pleasure which was attempting to circumvent the law”.¹⁹ Though it is the *inverse* of forbidding pleasure by law, it becomes a fetishism of discourse that is quasi-scientific. Finally, the notion of sex undergoes a fundamental turn that it becomes the most *internal* element of deployment of sexuality organized by power. It is not merely power radiates discourses, but a different power producing intelligibility internal to discourses, which is the *discursive power*. As a consequence, we witness an epistemic change in “what is political and non-political”, namely, a definition and appropriation of “politicality”.

The “inversion” thesis is important in many of Foucault’s writings. After a long period of repression, we are under a new imperative of speaking, confessing and investigating the truth. Truth and science, for Foucault, not only play the role of enlightenment, but are also a means of subjugation. The investigation into madness instead of removing the distinction between the mad and the reasonable has the effects of utilizing madness for the purpose of psychiatric normalization. But the enjoyment of psychiatric treatment of madness is at the same time keeping intact the distinction. It does not constitute a transgression but instead transposes itself to a benevolent discourse entitling the mad certain ‘rights’. For this reason, Foucault emphasizes that we must pay attention to the economy of representation and intelligibility into which power transforms itself. Only with such a purpose, Foucault develops his “micropower” thesis that power is not a thing and an object, but a relationship of subjugation. Knowledge and subject are also political issues, as Foucault writes, “(t)o sustain a scientific discourse is not something that is connected from above or to the side of history: it is part of history as much as a battle or the invention of the steam engine or an epidemic.”²⁰ Accordingly, Foucault distinguishes himself from the Marxist “power of economy”, to explore instead the “economy of power”,²¹ namely *how* power is economized into its contemporary forms.

¹⁷ Foucault (1979) 153-154

¹⁸ Foucault (1979) 153-154

¹⁹ Foucault (1979) 153-154

²⁰ Michel Foucault (1981) *Remarks on Marx* (New York: Semiotext) 126

²¹ Michel Foucault (1980) *Power-Knowledge: Selected Interviews and Other Writings, 1972-1977*. (Brighton: Harvester Press) 119

This signifier and ‘meaning’ building is important for Foucault and also separates him from Luhmann. For Luhmann, history “never can reach the plenitude of non being.”²² Foucault endorses this in his critique of the counter-historical discourse. But on the other hand, a transgression in and through history could only be initiated by making possible the heterogeneity of history first, which concern shapes the methodology Foucault names as “logic of strategy”.

“A logic of strategy does not stress contradictory terms within a homogeneity that promises their resolution in a unity. The function of strategic logic is to establish the possible connections between disparate terms which remain disparate. The logic of strategy is the logic of connections between the heterogeneous and not the logic of the homogeneization of the contradictory.”²³

This highlights the “how” politics of Foucault, a politicizing of *connection* instead of politics of “what”. As Foucault’s micropolitical methodology shows, it concerns historical *discontinuity* which is made as *a natural evolution* with a *medium*. And in examining the globalization discourses with this “how” politics, Foucault claims, “(s)o let’s reject the logic of the dialectic and try to see – this is what I will try to show in these lectures – the connections which succeeded in holding together and conjoining the fundamental axiomatic of the rights of man and the utilitarian calculus of the independence of the governed.”²⁴

1.3.Foucault on governmentality and the turn of constitutionalism – seeking the intrinsic reasons

For Foucault, globalization as a complex phenomenon does not enable a straightforward answer. Rather it is a phenomenon that implies a historical transformation of “liberalism”. Liberal *raison d’Etat* is founded on the three pillars of mercantilism, police state and European balance.²⁵ It is apparent that globalization changes them all to another three pillars: “veridiction of the market, limitation by the calculation of government utility, and

²² Niklas Luhmann (2002) *Theories of Distinction: Redescribing the Descriptions of Modernity*, (Stanford, Calif.: Stanford University Press) 112

²³ Michel Foucault (2008) *The Birth of Biopolitics, Lectures at the College De France 1978-79* (New York: Palgrave Macmillan) 43

²⁴ Foucault (2008) 43

²⁵ Foucault (2008) 5

now the position of Europe as a region of unlimited economic development in relation to a world market.”²⁶ This “successor” of liberalism is named by Foucault as *naturalism*.

But *how* could this happen? Contrasting the two trends, it is impossible for Foucault to consider the transition from the one to the other as a natural process. Rather what appears natural is naturalized by a medium that Foucault finds to be “political economy”. Political economy, as an independent discipline, brings two important shifts to liberalism: one is the notion of “nature”; the other is the possibility of self-limitation.²⁷

At this point, Foucault’s view is similar to Polanyi’s writings on the “self-regulating market”. Political economy separates the market from other *fields* and investigates its unique *rules* accordingly. “Inasmuch as prices are determined in accordance with the natural mechanisms of the market they constitute a standard of truth which enables us to discern which governmental practices are correct or erroneous”.²⁸ This separation and independence of the “economic sphere” from the “political sphere” consequently transforms the governmental *reason* to “success or failure, rather than legitimacy or illegitimacy”.²⁹ Market henceforth turns from “a site of jurisdiction” to “a site of veridiction”,³⁰ as when truth is by nature revealed in and by market, it could not be regulated by jurisdiction, but instead respected and let alone. From “fields” to “reasons”, market mechanism shows its *excess* to spread from a particular mechanism to an organizational rule of the whole society.

This deeply affects the relationship between market and law, and the intrinsic *structure* of law, as Foucault puts it,

“*If there is political economy, what is its corresponding public law? Or again: what bases can be found for the law that will structure the exercise of power by public authorities when there is at least one region, but no doubt others too, where government non-intervention is absolutely necessary, not for legal, but for factual reasons, or rather, for reasons of truth?*”³¹

²⁶ Foucault (2008) 61

²⁷ Foucault (2008) 15

²⁸ Foucault (2008) 32

²⁹ Foucault (2008) 16

³⁰ Foucault (2008) 32

³¹ Foucault (2008) 38, emphasis added

Market and economic fields that are exempted from jurisdiction transform the legal system and structure, which corresponds to Polanyi's thesis on the institutional separation of the political system from the economic system. But differently, Foucault emphasizes a link that must be made explicit – the intelligibility of “political economy”. This *truth claim* by political economy functions equivalently to law so that enables immunity from law and legal regulations.

As a result, it effectuates a competition between “two ways of constituting the regulation of public authorities, two conceptions of law, and two conceptions of freedom”.³² The two have co-existed in the nineteenth and twentieth century European liberalism. One is the revolutionary approach based on natural rights, and the other is the radical approach, which does not start from law but from governmental practices and analyse the *de facto* limits that could be set to this governmentality. Political economy apparently enabled the latter, and with it, the revolutionary approach gradually receded and the utilitarian approach became the more powerful one, in which public reason is explained in the principle of utility. “Governmental reason ... is a reason that functions in terms of interest ... interest is now interests, a complex interplay between individual and collective interests, between social utility and economic profit, between equilibrium of the market and the regime of public authorities, between basic rights and the independence of the governed.”³³ Foucault calls it “the phenomenal republic of interests”.³⁴ Here lies what Foucault takes the essential reason for explaining structural changes to the legal system, and the spread of exemption *to other spheres*.

Liberalism came to its turning point. It has to sacrifice individual's freedom of random action to obey security of economic interests. And globalization becomes an imperative that Europe finds itself “in a state of permanent and collective enrichment through its own competition, on condition that the entire world becomes its market”.³⁵ So the boundary expansion as the phenomenon of globalization is derived from the shifting relationship between market and law. Market exemption changes the structure of law and conception of rights, and renders the closure and framework of law redundant.

For Foucault, this type of politics could no longer be named as ‘politics of discipline’, but the advent of ‘bio-politics’. As he argues,

³² Foucault (2008) 42

³³ Foucault (2008) 43-44

³⁴ Foucault (2008) 46

³⁵ Foucault (2008) 55

“What the physiocrats deduce from their discovery is that the government must know these mechanisms in their innermost and complex nature. Once it knows these mechanisms, it must, of course, undertake to respect them. But this does not mean that it provides itself with a juridical framework respecting individual freedom and the basic rights of individuals. It means, simply, that it arms its politics with a precise, continuous, clear and distinct knowledge of what is taking place in society, in the market, and in the economic circuits, so that the limitation of its power is not given by respect for the freedom of individuals, but simply by the evidence of economic analysis which it knows has to be respected. It is limited by evidence, not by the freedom of individuals”.³⁶

Unlike Polanyi, who deems once the economic field is rooted out of social solidarity and compassion, the conceding of positive law to political economy is inevitable; Foucault argues that economism must work along with scienticism of the political economy to appropriate the fields of politics and law. Pure economicism in pursuit of interests could not unify itself.³⁷ It is the discipline of political economy that provides an independent locus for economicism whose truth value must be *exempted* from governmental reasons. Political economy, which professes to study a unique truth of the marketplace, is a crucial addition to complete the market self-regulation.

To emphasize how political economy is exchanged for governmental reasons is important to preserve a political moment independent from this economy-society penetration. While Polanyi is right to describe how a separation of the economic sphere from society initiates great transformations, the autonomy of legal and political fields is marginal to his diagnosis, as if they were derived spontaneously from an attempt to respond to the market transformation, or to regulations of the fictitious goods. But

“(t)he economic bond plays a very strange role within civil society, where it finds a place, since while it brings individuals together through the spontaneous convergence of interests, it is also a principle of dissociation at the same time ... In other words, the economic bond arises within civil society, is only possible

³⁶ Foucault (2008) 62

³⁷ If economics means profits, it must be the very mechanism that makes profits rather than application of the mechanism to certain subjects, such as the mad or the proletarian. As Foucault puts it, “The bourgeoisie is interested in power, not in madness, in the system of control of infantile sexuality, not in that phenomenon itself.”

Michel Foucault (1980) 102

through civil society, and in a way strengthens it, but in another way it undoes it.”³⁸

The interest conception of rights and accumulation of these interests could not organize themselves into a framework as the closure would be fatal for this conception. This decides why regime of truth and discursive power occupies a more important role in Foucault’s diagnosis of globalization, which is usually defined as an economic expansion *separated from* shifts of authority. In this narrative, the law and market are still treated as two fields, and economy could be re-subjected to legal regulation. But for Foucault, there is an epistemic link between the collapse of the old legal framework and economics, as the latter has higher truth values than any humanly made laws. *This marks the economic displacement of legal rationality.*

In the next section, I will use this link of market mentality back to review contemporary constitutionalism. I am questioning how contemporary constitutionalism could claim to reclaim constituent power by means of ‘pluralism’.

2. Pluralism or political economy: re-presence of constituent power

In the last part, I compared Foucault’s diagnosis of globalization with contemporary constitutionalism and reached the conclusion that Foucault emphasizes a market mentality that continuously transconfigures the legal framework into a regime of interests. For Foucault, this is the essential reason to interpret the phenomenon of globalization rather than internationalization.

But there is another narrative about the same phenomena of loss of the legal sovereignty, especially for developing countries. And this narrative is based on an imperialist meaning of neo-liberalism. In criticizing the World Bank “Good Governance” program and its hegemony, the attack on neoliberalism is concentrated on Hayek’s formulation of the “Rule of Law”. This formula has the pitfall of making law a tool of imperialism, and in this sense could not reflect constituent power in local and peripheral places. This diagnosis is for sure accompanied by a juxtaposition of formalism with pluralism, and the resolution of multiplying applications of the legal institutions. But this, I will argue with a Foucauldian

³⁸ Foucault (2008) 302

critique, is a shallow diagnosis and ignores that pluralism is the other face of Hayekian formalism. Neo-liberalism and its influences should not only be understood with respect to formalism, but also the market mentality as Foucault emphasizes.

2.1. Formalism in Hayek's theory

Hayek's legal formalism, as the target of anti-globalization theorising, is correctly recognized. Hayek does suggest a "Rule of Law" formula. In his book *The Road To Serfdom*, Hayek indeed gives the definition as such,

"It is Rule of Law, in the sense of the rule of formal law, the absence of legal privileges of particular people designated by authority, which safeguards that equality before law which is the opposite of arbitrary government."³⁹

In this definition, "formal law" has its standard that it must guarantee a quality of "equality before law" that is opposite to "arbitrary government". For Hayek, democratic control by "its mere existence" could not prevent power from being arbitrary. It is not the "source" but the "limitation" of power that prevents arbitrary government. "The Rule of Law thus implies limits to the scope of legislation: it restricts it to the kind of general rules known as formal law, and excludes legislation either directly aimed at particular people, or enabling anybody to use the coercive power of the state for the purpose of such discrimination."⁴⁰

Hayek thus makes a distinction between "formal law" and "legislation", which is also a separation between law and the "democratic" making of law. Hayek compares "the welfare of a people" to "the happiness of a man", whose needs could not be expressed as a single end, or a "rank in an order of values which must be complete enough to make it possible to decide between all the different courses between which the planner has to choose", but there is no such a complete ethical code possible. "Common welfare" only "conceals the absence of real agreement on the ends of planning",⁴¹ and extends beyond the limited fields of voluntary agreement. A comprehensive system of delegated legislation is to burden the democratic assembly with a task they are unable to fulfil and to cause dissatisfaction with the democratic institutions.

³⁹ F. A. Hayek (2007) *The Road To Serfdom: Text and Documents* (Chicago: University of Chicago Press). 82

⁴⁰ Hayek (2007) 87

⁴¹ Hayek (2007) 64-65

Hayek in fact acts as the *defender* of democracy against the advocates of comprehensive planning who are “so impatient with the impotence of democracy”. His resolution is to make democratic directions *approximate* to “true agreement”, while others are “left to chance”.⁴² With such an intervention of “true agreement”, any claims to substance of democracy must be suspended, as “(a)greement will in fact exist only on the mechanism to be used”,⁴³ not in any particular ends. With such a step, Hayek disconnects Rule of Law with its legislative mechanism, as legislation still is a planning, even not in an economic sense. Formal law is not positive legislation, and its generality stems not from a democratic will, but a “law” of science.

Criticisms toward Hayek’s formalism have missed the point of this intervention by scienticism, though they are right to point out the depoliticization in Hayek’s theory. The “formal” and “general” requirements of Hayek’s theory not only make economic planning impossible, but also legislation impossible, in which sense Hayek indeed clarifies the value of “Rule of Law” as the opposite of political intervention. But he accomplishes it via science as an intermediate inserted between law and its political authorship. In fact Hayek could perfectly agree that legislation according to the World Bank proposal in the developing countries is a distortion of the genuine laws, and is ignorant of local conditions. He never explicitly implies “formal law” should be importation of the Western legal norms. This hence concerns whether the overwhelming effects of Hayek’s theory are merely simplified in this accusation of “formalism”.

2.2. The epistemological shift of Hayek’s theory: scientism

To consider why science is the crucial intervention inserted by Hayek in decoupling law and democracy, let me first return to how Hayek makes sense of science. In his writings on science, Hayek makes a clear distinction between physical sciences and social sciences, as social sciences have to deal with structures of essential complexity and large number of variables. The functioning of social organism is better served by Darwin’s theory of evolution of natural selection, as “(t)he basic conception of the theory is exceedingly simple and it is only in its *application* to the concrete circumstances that its extraordinary

⁴² Hayek (2007) 73

⁴³ Hayek (2007) 73

fertility and the range of phenomena for which it can account manifests itself.”⁴⁴(my emphasis) Theory of evolution satisfies exactly the “true agreement” standard.

The other important feature of this theory for Hayek lies in its self-scrutiny: a falsifiability of an initial proposition, namely that, with the process of evolution one organism could shift into another organism. This falsifiability enables the evolutionary biology to be named as an ideal science or meta-science. It is both a science and representing scientificity of science. Modelling on this theory, Hayek redefines science not as “prediction and control”, but “pattern prediction”,⁴⁵ namely,

“the prediction that a pattern of a certain kind will appear in defined circumstances is a falsifiable (and therefore empirical) statement ... *The circumstances or conditions in which the pattern described by the theory will appear are defined by the range of values which may be inserted for the variables of the formula.*”⁴⁶

It is an “algebraic” theory,⁴⁷ an “if” plus variables. Particular facts are not overruling the hypothetical science, but internal to the “falsifiability” as the very *definition* of science. In this sense, science for sure could also plead ignorance, as Hayek claims that “(i)t is high time, however, that we take our ignorance more seriously”.⁴⁸ Scientific validity is only challenged when there is empirical refutation, which but is productive for scientific self-reflexivity. In this sense, a falsifiable event could never appear as the rupture of science. It is just a *negative feedback* referring back to scientificity.

With the ‘pattern prediction’, the scientific epistemology of ‘law’ transcends its positive definition, with a mission to explore the truth claims of law. Formalism hence enables its *inverse as pluralism*. As Hayek writes,

“It would seem, therefore, that the conception of law in the usual sense has little application to the theory of complex phenomena, ... This would entirely not be a very useful conception of a ‘law’, and the only generally valid statement about the regularities of the structure in question is the whole set of *simultaneous equations*

⁴⁴ F. A. Hayek, (1967) ‘Theory of Complex Phenomena: A Precocious Play on the Epistemology of Complexity’, originally published in Hayek, F. A. (1967). *Studies in Philosophy, Politics and Economics*, (London: Routledge & Kegan Paul), pp. 22-42. Available at <http://www.libertarianismo.org/livros/fahtcp.pdf> (accessed on December 7th, 2014)

⁴⁵ Hayek, (1967)

⁴⁶ Hayek, (1967) emphasis added

⁴⁷ Hayek, (1967)

⁴⁸ Hayek, (1967)

from which, if the values of the parameters are continuously variable, an infinite number of particular laws, showing the dependence of one variable upon another, could be derived.”⁴⁹

Hence, in the field of complex phenomena, the term ‘law’ is deprived of their institutional meanings, but becomes a pattern of reflexivity. To say Hayek only advocates a certain form of law hence is inaccurate and understates where the true influences of his theory lie. Toward the conception of law, Hayek is rather a pluralist, and argues that the usual conception of law should be replaced with a new level of “spontaneous ordering forces”. Here, in the *Rule of Law as particularization* lies the reason for receptivity of his concept of “Rule of Law” in developing countries than any form of explicit imperialism.

2.3. The scientific linkage to market order

Though we could understand how Hayek disconnects law from politics and re-connects it to science, there seems no reason to connect it with the market mechanism, unless we take on board a statement added by Hayek that, “(i)n the field of social phenomena only economics and linguistics seem to have succeeded in building up a *coherent* body of theory”(my emphasis).⁵⁰ The magic “if” is the crucial analogy between law and scientific approximation, and also science and economic maximization.⁵¹ But to re-specify a meta-science within a specific science, does it not mean that a *privilege* is brought back which will contradict the generality of science? This contradiction forces Hayek to further a distinction between economy and market order, as he clarifies,

“The confusion that prevails here can be ascribed above all to the false idea that the order which the market brings about can be regarded as an economy in the strict sense of the word, ... It can be said, indeed, that all socialism has no other aim than to transform catallaxy (as I am pleased to call market order, to avoid

⁴⁹ Hayek, (1967) emphasis added

⁵⁰ Hayek, (1967)

⁵¹ As Hayek says, “since the theory [economics] tells us that this pattern ensures a *maximization* of output in a certain sense, it also enables us to create the general conditions which will assure such a maximization, though we are ignorant of many of the particular circumstances which will determine the pattern that will appear.” (my emphasis)

using the expression “economy”) into a true economy in which a uniform scale of values determines which needs are satisfied and which are not.”⁵²

In this shift, Hayek distinguishes economy as a “field” from competition as “a procedure”. He is no longer pursuing any individual macro-economy but stressing “methodological individualism” instead. It is essentially a de-institutionalization in service of a preservation of the semantic value of market ordering that separates *ordo-liberalism* from *neo-liberalism*. And the semantic value is an eternal source for *neo-liberalism* to expand irrespective of institutional confinements and boundaries.

In the end, Hayek has to surrender “equilibrium” to competition, as equilibrium presupposes a ranking and a particular configuration rather than infinite variations. Hayek argues that calling the order brought about by competition “equilibrium” is “a none-too-felicitous expression”,⁵³ “since a true equilibrium presupposes that the relevant facts have already been discovered and that the process of competition has thus come to an end.”⁵⁴ But this is not in agreement with the changing order. Equilibrium has to be finally surrendered to a continuous process, economy to price mechanism, and economics as a discipline to an economic *thinking* as the ideal science. This is why *neo-liberalism* is beyond the register of certain economic policies, but a culture of general contractualization.⁵⁵

Henceforth we get a full picture of *neo-liberal* depoliticization starting from formalism of “Rule of Law”. The Rule of Law formula requires a formal law to regulate privileges, which also constrains the government and legislative policy from preferences of certain interests. It hence obeys a law of making law, and a social science of ‘pattern prediction’. Pattern prediction transforms substantive values into a particularization of variables. In this case, ‘equilibrium’ will be co-existent with ‘maximum’, which combination is best exemplified by the price mechanism. Only with the intermediary of science, law is disconnected from the political will, and re-connected with experimentation of the truth value. And in this sense, law made in accordance with ‘global justice’ could be produced without authorship of a global polity, as we could discover ‘law’ in the process of a particular case – the magic ‘if’.

⁵² F. A. Hayek (2002) ‘Competition As a Discovery Procedure’ *THE QUARTERLY JOURNAL OF AUSTRIAN ECONOMICS* 5(3): 9-23, 13-14

⁵³ Hayek (2002) 15

⁵⁴ Hayek (2002) 15

⁵⁵ Alain Supiot, ‘The Dogmatic Foundations of the Market’, (2000) *Industrial Law Journal*, 29(4): 321-345

This is pointed out precisely by Foucault as an “inversion of the relationships of the social to the economic”⁵⁶ made possible by scientism of political economy. Though the economic tone of globalization is well acknowledged, its *expansive* nature, to the degree of deciding law and politics, is not made clear other than terminology of imposition, hegemony or imperialism. Instead of explicit means of exploitation, Foucault argues an internal bridge for this inversion. Social sciences firstly separate themselves from ‘politicality’ with the insertion of truth values, and then in economics find the ideal. Freedom from any predeterminations until the moment of particularization is modelled according to price fluctuation. As Polanyi puts it well, political economy of utilitarianism turns “human” laws to “natural” laws,⁵⁷ or more precisely speaking, re-naturalized laws according to the ideal rationality of economics.

In the second-generation program of the World Bank, “more social, more human” purposes are put in addition to pure economic focuses. But by arguing so, it rather means these social and human values are *fields* left out from the first-generation, which now could be re-used as new *constituencies*. This *variables* is nothing new to Hayekian neo-liberalism. Pluralism, working on the level of variables does not reflect on the structural limits, and the acceptability of these institutions in the first-generation program. It does not examine whether the social and human fields have already been homologized by this total ordering of neoliberalism, as Foucault’s ‘displacement’ implies. For Foucault, complexity of transgression of the total order of neo-liberalism lies in clarifying the function played by political economy in surrendering law to market mentality, rather than holding the belief in a human face of the political economy.

3. Summary of this chapter

This chapter answers for the eclipse of ‘the political’ in contemporary constitutionalism with a Foucauldian ‘how’ politics. I argued how ‘the political’ could be explored by means of critique. With Foucault’s problematization of naturalism of the historical change from State sovereignty to globalization, Foucault argued this naturalism was accompanied by a transfiguration of power relations. It is especially the intervention of discursive power and power of knowledge that provides a link between sovereign power and the economization of power as non-power and as the opposite of power. From it, market decoupling from politics, instead of law coupling with politics dominates the ideal rationality of law.

⁵⁶ Foucault (2008) 240

⁵⁷ Polanyi (1944) 117

Contemporary constitutionalism while acutely observing many shifts of legal forms and authority, does not go deeper enough to the changes in the nature and substance of law. It is not merely a ‘deregulation’ of law of the economic sphere, but ‘displacement’ of law by economic and market mentality, which is a more severe crisis of constitutionalism. The “displacement” thesis of Foucault explains why neoliberal economic policies spread to other social subsystems, and becomes the whole norm of the society. This “excess” links the market with its theoretical significance for constitutionalism, and explains why re-constitutionalization could not be reduced to merely reaction to or re-regulation of the market. In the next chapter I will use this critique to argue why China’s second round social programs only compensates rather than constitutes, as in the latter, market mentality still haunts China’s constitutional path.

Chapter 10.

Back to China's Constitutionalization

Introduction

Following the debate between classical constitutionalism and contemporary constitutionalism, this chapter returns to China's constitutional question. But differently from Part I and II, this conclusion is to re-read it in terms of the complexities that the constitutional theories visited have thrown up.

In this final chapter, there will be three parts. In the first part, I will answer why contemporary constitutionalism arising in the European constitutional tradition has not provided the proper justification for China's constitutional re-imaginings. Although contemporary constitutionalism contests the form of democracy and constituent power, as a self-critique of classical constitutionalism, contemporary constitutionalism has not overruled the coupling between law and democracy in their modern form, nor has it confirmed immediately a type of constitutionalism identifiable as Chinese. The gap between the critique of the West and the justification of the Western "otherness" – constitutionalism with Chinese characteristics -- should be recognized.

Instead I argue that we should retain from contemporary constitutionalism its critical attitude in diagnosing China's own problem and complex circumstances. Henceforth, I return, in part two, to the material question left in the first part of my thesis, namely, the 'democratization of rights protection', and review what has intervened in China's great transformation.

In part three, I argue what the intervention is and how this intervention should be understood. "Market mentality" criticized by Foucault best describes the combination between market as a place and market's effect on constitutional thinking. Instead of proclaiming that China provides a better regulatory model for controlling the perils of marketization, it is crucial to ask why market performance is important for China's New Left as well as China's Neo-liberals, why marketization is essential to governmentality,

and consequently to the constitutional question in China. Market economy has structurally transformed the legal and constitutional frame. Using China's labour law reform to distinguish 'constitute' from 'compensate', I insist that market mentality still haunts China's paradigm of constitutionalization.

This comprises my two engagements with the application of contemporary constitutionalism in China. The first engagement tackles the *mismatch* whereby the institutional deficit in China is taken as coincident with institutional indeterminacy. The second insists that there is much to be learnt from the new constitutional trends, with regard to the complexities of democracy and its dangerous displacement in contemporary society. To summarize, throughout this thesis, I have argued that 'democracy' as the constitutional basis is a complex issue that interplays with many relevant concerns, ranging from forms of representation, economic and social justice, identity politics to fragmentation. With attention to all these complexities, democratization still is the achievement of modern constitutionalism and in contemporary society as well as for the case of China, it not only has not been overruled, but demands tireless critique for its defence.

1. The first engagement with constitutional re-imaginings in China: claims of constitutional pluralism

When discussing "constitutional pluralism", Thornhill critically observes its substance of "pluralism as constitutionality".¹ In this phraseology, Thornhill defines the claim as an attempt of equivocation instead of overruling. In this releasing of potentialities of equivalences, 'constitutionalism' risks being auto-constituently inflated, Thornhill warns.

This warning corresponds to Chapter 4, where I have raised many propositions of China's second-generation constitutional discourses. They are arguing, whether China is a constitutional state or how China's hybrid social order is interpreted also depends on politics of definition about 'what is constitutional'. Contemporary constitutionalism has been receptive to this attempt of extension of constitutionalism beyond its Euro-centralism acknowledging challenges from peripheral countries against the monologue of

¹ See Thornhill (2012b) 413-423

constitutionalism. Three main approaches were delineated in chapter 5 and unpacked in chapter 6-8 of my thesis. Here allow me a short review.

For Neil Walker, the synthesis of constituent power and constitutional form in classical constitutionalism was projected backwards by Ackerman. But as manifested in European constitutionalization, it should be noticed that constituent power is not a final end, as every 'will' of it must be presupposed with an identity of 'we', which is precisely lacking in the context of European enlargement. The right to be included as part of the 'we' hence constitutes a qualification of democratization in European integration. It tests the democratic performance with regard to how integrated we are in the will and what justifies exclusion of someone from this will.

The co-originality of rights and democracy as the 'polity legitimation' for Walker, is formulated as a right to contest authority for Kumm. In a sense of *paradigm*, human rights turns to be a claim of being worthy of legalization and could be directly invested into democratic legislation. It is hence 'a cybernetic system' in Luhmann's word, in which subjective rights immediately have an objective meaning.

Despite such a symbolic common language, this paradigm if workable, still implies this gradation of the polity through human rights jurisprudence, as indicated by Kumm's "commitment" to political liberalism. But if we return to the problematic discerned in the first chapter of this thesis, it is the "legality" and the "legal nature" of China's 1982 Constitution that is central to the dispute. This lack of the judicial channel or commitment to political liberalism hence questions whether "new constitutionalism" could be applied in China, and whether the constitutional language is as "thin" as purely symbolic. The expression of polity or identity as 'we' for Walker in fact could not be separated from the democratic means itself, or else this "gradation" thesis could not be justified. In China's Confucianism, this focus on the cultural basis of patriotism albeit its incompatibility with modern liberal democracy or its perception of the constitutional identity in a pre-democratic sense would be a problematic test for Habermasian 'co-originality' thesis.

For Teubner, constitutionalization should retain its meaning at the level of 'socialization'. The political system which is situated as a social subsystem could not be singularized and assumed as a 'will' to determine this sociological process. In such a sense, what is 'democratic' and 'constitutional' is proportionate to the configuration and couplings between social subsystems. The configuration approach is similar to the 'articulation'

approach of Peerenboom which focuses on the particular articulation in the particular context. It could be varied from the Party as the integrative force of China's society, to the Eastern Asian model of authoritarianism. Certainly, it would not be intended by Teubner, but in this allowing for re-configuration, a new criterion has not yet been put forward to distinguish what is a constitutional configuration from an unconstitutional configuration, if for Teubner, the 'constitutional' language is subject to societal self-understanding and evolution. The same would be applied to Zhu's "indigenization of law" which has not yet provided social ordering other than effectiveness.

Teubner's theory indeed surmounts the dilemma of confining democracy to a political field separated from 'the social', and rebuilds the societal relevance of 'democracy' and 'constitutionalism'. The social configuration is not subject to political decisions and could only be 'irritated'. But if this claim is taken seriously, Neves argues, then Teubner could no longer maintain the autopoietic law. This diagnosis of the 'inflation' of constitutionalism, however, does not return Neves to classical constitutionalism, but pushes him further to criticize the political exploitation of 'Rule of Law' which task Teubner has not finished, he argues. For Neves, preservation of the mystery of 'constitutionalism' is a remnant of conceiving the legal system as a hierarchical order. Hence in dealing with the coupling of law and democracy in Luhmann's theory, Neves takes democracy not as a foundation but a series of disagreements in law-making. The right to be included and dissent scrutinizes whether constitutionalism descends to an elite instrument and lacks the integrative capacity of the political community.

If the right to dissent is fundamental then the institutional guarantee to pronounce dissensus must be effective. The exercise of dissensus rejects essentialization of a polity or identity, as the 'Chinese characteristics' implies. To claim a constitution with Chinese characteristics without allowing contestation of these characteristics betrays the spirit of radical pluralism and in effect relies on pluralism to justify substantive homogeneity.

Albeit new constitutional trends open up the gate of potentialities, might they too not have their own limits, such as the effectuation of 'human rights jurisprudence' in the core of their propositions? For Luhmann, the autonomy of the legal system is conditioned by a coupling with the political system that makes law 'law' and allows no exception. The sovereign must refrain from deciding in legal cases so as to guarantee the Rule of Law. This is hence not a decoupling but indeed a coupling with politics. So the relative autonomy of the legal system, which contemporary constitutionalism uses for a register,

has already been implicated with this political condition. In this sense, contemporary constitutionalism is advancing on the basis of classical constitutionalism, not replacing it. Therefore, this self-critique of contemporary constitutionalism still keeps a distance from confirming automatically the “otherness” of classical constitutionalism, such as ‘constitutionalism with Chinese characteristics’.

2. The problematic of China’s constitutionalization: democratization of rights protection

Instead of translating a justification of an “identity constitutionalism”² of China, let us perceive the analytical tool from contemporary critical theories and return to the beginning of this dissertation. I started with an argument that is often made about China’s Rule of Law, namely, the lack of ‘judicial autonomy’. This lack problematizes whether China has a modern legal system and is a constitutional state. It is usually addressed by many proposals on what kinds of mechanisms China could apply to strengthen it, toward which I have no objections. This thesis, however, has tried to provide reasons for the unsuccessful building of the modern legal system in China at a deeper and sociological level.

In chapter 1, by analysing the ‘strategy’ of rights protection in China, I have discerned that the unique controversy in China’s constitutionalism in fact concerns the legal *nature* of the 1982 Constitution, namely, whether it could be applied as a law. In the practices of rights adjudication, constitutional rights in China could not have legal effects without firstly being concretized through legislation. The principle of “democratic centralism” questions whether human rights jurisprudence could go as far as “judicialization of the constitution” explicitly forbidden in the constitutional text. A “Marbury v. Madison” moment aspired for by legal constitutionalists in China in this perspective has projected too much on China’s constitutional future, as the emergent new schools protest.

But even if it were not necessary to establish a constitutional court other than the current legislative review in China, in the practices of rights adjudication in China insufficient concretization leaves many constitutional rights without remedy. And it is unclear who could decide which constitutional rights should be protected through legal concretization. The demand for a channel to respond to the remedy-deficit of rights could be termed

² I give this name to a turn in China’s constitutional discourses from legal formalism to legal instrumentalism in service of a cultural identity of “Chinese”. This turn has also been observed by Tamanaha and Trubek in the “Law and Development” movement. See Tamanaha (2011), Trubek (2004)

China's 'democratization of rights protection' – aiming to redress a revealing asymmetry existing between private law rights and political and social rights in this entitlement.

It is in this sense, I argued, that this failure in establishing the modern Rule of Law should not be analysed merely in practical terms, but also related to China's great transformation of social orders, and put in constitutional theories and sociology. Instead of observing that there are more laws, we should penetrate this phenomenon and inquire into whether these laws could function as laws.

Hence in chapter 3, I devoted myself to making a description of complex institutional transformations in China's Reform period. The concrete form of socialist "democracy" with all the social, economic and political functions integrated by people's communes and work units is dissolved with the adoption of contracts since 1980s. Freedom of contract entitled people to flexibility from the rigid social control, yet it lost its essence as 'freedom' in the context of China's transformation. There is no freedom of *not* entering into a contract, and only by means of this enforced contract without free will, the equality of legal status is recognized. Thus in this process of 'from status to contract', only 'flexibility' and market freedom are derived in China. Contractualization of legal personality coupled with marketization did not bring about democratization as a natural result, nor such liberty in a constitutional sense as assumed in this famous phrase of Henry Maine.

This is why I call forth a re-consideration of the market intervention of China's constitutional changes. This intervention could be observed in the accumulation of laws without the Rule of Law being founded; the asymmetry between the explosion of private law rights and the under-protected social and political rights; and the technical use of law while leaving behind the structural coupling between positivization of law and democratization of politics. But we should be clearer about in what sense this market 'intervention' is perceived in the constitutional thinking. It is far from a market encroachment of the constitutional field, but implies that market leads the rationality of constitutional changes. Just as Supiot makes a distinction between contract as an economic tool and contractualization as a culture,³ I also emphasize that precisely speaking it is the market 'mentality' that bridges marketization of a material sense and of a symbolic sense, and its economic implications and constitutional implications. Law and economics should no longer be taken as two separate *fields*. By examining what 'market mentality' means to

³ See Supiot (2007) chapter 3 and Supiot (2000)

constitutional theory in general, I also apply it back to examine whether the second-generation economic constitutionalism in China has transcended its (first generation) haunting by market mentality. This is my second engagement with constitutional re-imaginings in China.

3. The second engagement with constitutional re-imaginings in China: market mentality

I explored the market mentality with Foucault's critical theories in the Part III of my thesis. This is because Foucault provides an inquiry into the relationship between law and market that is different from a quantitative question of 'more or less' regulation. In tracing the discrepancies between the universal ideal and the particular appearance, Foucault found that the independence of discourses gives 'the universal' a meaning and finality prior to its materialization. 'Absence and presence' changes the manner of talking about the 'universal' and implants a 'scarcity' and 'economy' of representation in this phraseology. It makes the structural lack of 'the universal' turn to be a process of evolution and experimentation, a revelation of the truth, and a contingent particularization of 'the universal'. With this knowledge value, it is *exempted* from the power imbalance that pervades material institutions and history.

As the metaphor of the 'marketplace of ideas' shows, the uncertainty of human knowledge now flirts with an imagery of market: *de facto* diversity is hard to be regulated by any human attempt and should be left alone. From here, the market derives a truth claim -- its approximation to nature -- as it is least intervened by governmental intentions. Henceforth, an inverse movement takes off that human laws have to surrender themselves to natural rules, and the market order becomes the law of law and the legal ideal.

Though in liberalism the market was constructed as "a delegation of sovereignty",⁴ it was still subject to jurisdiction as a material institution.⁵ Yet the market mentality is different: it is dematerialized and more extensive. The market mentality not only collapses one particular legal framework, but collapses the entity and positivism of law in the sense of leaving only the "skeletal" universal commitment to the protection of expectations.⁶ So

⁴ Rittich, Kerry (2004) 199-243

⁵ Foucault (2008) 32

⁶ Professor Christodoulidis has suggested this correction to my unclear formulation of the effects of marketization on positivism. He has pointed out this "skeletal" commitment that I formerly ignored.

that it is more than an interplay of the universal and the particular, as pluralism predicts. Market ordering is a catallaxy, as Hayek argues, which even denounces ‘economy’ as a proper terminology to capture its implications. This is the reason that ordo-liberalism could scarcely close the door to neo-liberalism, Europeanization to globalization, and the constitution to constitutionalization. In Hayek’s theory, it is merely a minimum mechanism, exemplified as the price, which serves as a procedure of finding what nature dictates. The less content it contains, the more prevalently it will be applied.

To say the market ordering penetrates constitutionalization does not merely mean all constitutional laws are private laws, but indicates that constitutionalization could not exclude what market inserts, as market becomes the chief mechanism to explore the truth that was once confined and concealed by politics. When Weiler reviews how market mentality encroaches on democratic sensitivities in the European tradition, he nonetheless concedes ‘inclusion’ is a higher value, no matter how it is related to consumerism. Through the imperative of ‘inclusion’, consumerism steps out of economic field and gains its excess in political theories as ‘*constituencies*’. Here we see clearly the meaning of market ordering – market orders what law should be and should reflect. Without clarifying the market mentality in the sense of constitutional rationality, contemporary constitutionalism and its reflexivity on multiplicity only stays “reactive” as Christodoulidis distinguishes;⁷ while this permanent impossibility of a synthesis of constituent power and constitutional law examined by Negri has not been properly scrutinized as a ‘displacement’ of constitution by market ordering.

This unpacking of what the intervention of “market mentality” is reveals that the constitutional reorientation to marketization is not merely a spatial extension from one field to the other, but also embodies a change to the *historicity* of constitutionalism.⁸ The

⁷ Christodoulidis (2013b) 646

⁸ Jacques Ranciere has commented in his book *The names of history: on the poetics of knowledge* on the emergence of a “scholarly history” (p16) manifested in modern historians’ readings of the event of French Revolution. “The Revolution as an unseen event is provoked by the ‘vacancy of power,’ it ‘takes over an empty space’ beginning with an initial disappearance: ‘From 1987, the kingdom of France is a society without a State.’ [...] This obligation to occupy an empty space consequently institutes a replacement by ‘the reign of democratic rhetoric and domination of societies in the name of the ‘people’”(p37). Ranciere calls this “the republican death of the king” (p66), which re-investment of meaning is to map the historical narrative to the advantage of the poor that were repressed into silence in history. This “geographical” approach “establishes the first condition of historical science: that no spoken word is left without a place” (p66). Now history becomes

universal truth regime about constitutionalism, such as the values of democracy and rights protection, now defies its sociological origin in a modern and positivistic state frame, against Grimm's insistence on distinguishing the primary from the secondary values of constitutionalism.⁹ The eternal truth about constitutional justice discriminates against every incompetent constitution materially condensed and confined. Politicization, instead of a channel, is an obstacle for the truth to present itself; constituent power, instead of the moment of the people's presence, is the closure to 'inclusion of constituencies'. On the contrary, marketization that least intervenes is most approximate to this demand for the natural truth devoid of human activities and positive laws to unfold itself.

In Sassen's analysis of the restoration of the global nature of capitalism from the encasement of political nationalism, the new historical narrative has already been predicted. This scientific and descriptive hermeneutics has already demystified the capacity of the constitution to regulate. In China's New Left's borrowing from Polanyi's theory, the process of constitutionalization was depicted at the same time as an involuntary constitution of labour forces in China. Polanyi's analysis of labour is used as a guide to decode China's legal reforms as in effect being exploited by global capitalism. As a result, this narrative goes, the written constitution and institutionalization are impeding China's self-constitution. Just as Mao once used imperialism to contest Bourgeois republican democracy, the global economy and capitalism inversely endow China's economic sovereignty with democratic implications. The political economy with Chinese characteristics obtains an *excess* of constitutional significance in the sense of self-determination, which is linked to a defence mechanism against global capitalism. As

"historiography" (p41) and the king's death is re-written "in the equilibrium of narrative and science" (p41).

Through this example, Ranciere warns of "a strange paradox that the history of mentalities ceases to be interested in the feeling of time precisely when time goes mad, where the future becomes an essential dimension of individual and collective action; that it ceases to be interested in belief when the latter enters into the immanence of political and social action, while there is a disruption of the relations between the present and the nonpresent, the visible and nonvisible, which mark the perceptible indicators of its territory" (p102). This is why when Foucault emphasizes "the political", the "in and through history" (Michel Foucault, *The Hermeneutics of the Subject*, p526) could not be stressed enough. The territorialisation of the visibility renders the historical changes submerged in a sense of 'mentality', and consequently dependent upon scientific findings. It is distanced from collective "actions", immanent politicality and human interventions. With this "mentality", the "event" of history is rendered as "nonevent", and finally becomes an "evolution" of history. The eclipse of the "political" meaning of the historical changes, compared to the "natural" meaning, is closely connected to today's post-positivism constitutionalism.

⁹ See Grimm (2010) 3-22

in Cui Zhiyuan's propositions, the All-China Social Fund is to co-exist with market and to use market for appreciating public property. Market has not been removed from China's constitutional changes, it instead gains its sovereign significance for China to constitute itself against the rest of the world.

We should admit, applying Polanyi's theory in China makes some sense in a certain way. Without a pre-labour-contract equal status, the labour contract in China is an enforced contract and a contract without freedom. Polanyi's theory has rightly discerned the transformation of labour from its social embeddedness into a fictitious good in the economic field. But it is wrong to argue this process is a-political and the political field is an outcome that only follows such a separation.

We should recognize that in fact fragmentation of modern society is a better term to depict Polanyi's concern of the uprooting and degradation of society, rather than the neo-liberal re-appropriation of the public and private spheres in our context. Also, in this already fragmented society, it is the politicality of *defragmentation* that matters instead of an idealised invocation of a *non-fragmented* China. From here, we could see clearly how ironic the borrowing is of Polanyi's theory by China's New Left to justify a public compensation program to the 1990s privatization, or to imagine a Chinese typology of the configuration of labour and capital could escape the trap of commodification that Polanyi depicts.

I argue instead that China's legal reform is a test case rather than a supporting instance for Polanyi's theory. It is initiated from fragmented laws on property or labour, but it is expected that the harder issues of constitutionalization would follow. However, in my examination of China's labour law and property law legislation, these fragmented laws increasingly manifest incompetence to resolve issues of a constitutional nature, such as the redistribution problem. And conflicts internal to the fragmented law between labour sectors, or between private owners of the working class and the bureaucratic capitalists, are intensifying. Separate regulations are increasingly unable to maintain equilibrium of the legal reform. Actually, fragmented legal reforms only leave a more divided society that makes improbable the double movement of the social and the people's *re-emergence* as predicted in Polanyi's writings. Using Polanyi's theory, though is beneficial to diagnose the severe privatization of social welfare, has not examined the effects of the notion of "interests" on liquidating the collective nature of "the social".

The constitutional inequality beneath equality prescribed by labour law or property law in China begins to reveal the division between the legal form and substance -- the use of law by the Party and the government to resist democratization in China's socialist transformation,¹⁰ which disables law's function of empowerment and law's collective nature. The second-generation discourse on the "social" treats the "social interests" or right to development as a *competitor* with "economic interests" and right to property¹¹, so that the whole constitutional process is no more than an interplay of public and private interests. But "the social" in this sense has no more significance than "the economic". It is not the collective basis of "constituent power", but a partisan component of many "constituencies". This is why I argue that the second-generation constitutional discourse on the social constituency has not overruled the market effects on constitutional thinking. As the fate of China's *Labour Contract Law* indicates, the right to association is given inferior protection to the right to wage. It exemplifies that in China 'to compensate' is privileged over 'to constitute'. This second-generation turn to the social is at best a use of law *for* the society, instead of *by* the society in the democratic meaning.

Hence in this "responsive government", which is put forth as a contestation against and an alternative to "representative government", we should not focus merely on their critical attention paid to 'economic democracy' that seems to have slipped from the domain of representative government; but also the notion of "responsiveness" they have added to constitutional thinking. In Schmitt's political-theological attempt to restore the meaning of "representation" from its entanglement with economic thinking, at least he is right at one point. As he says, "(o)ne cannot represent oneself to automatons and machines, anymore than they can represent or be represented."¹² "Representation invests the representative person with a special dignity", while "(e)conomic thinking knows only one type of form, namely technical precision[...which] requires the actual presence of things."¹³ To respond immediately to interests without a *complexion oppositorium*¹⁴ -- namely, the unity of the plurality of interests and parties -- will inevitably collapse into the economic thinking of constitutionalism, no matter how social these interests are. The immediacy of responsiveness will privilege scientific and technical calculability compared to the political

¹⁰ Balme and Dowdle (2009) 'Introduction', 5

¹¹ As Potter's account of "a legitimacy claim about the tension between property rights and rights to development", see Potter (2011), 61

¹² Carl Schmitt (1996b), *Roman Catholicism and Political Form*, (Westport, Connecticut • London: Greenwood Press), 21

¹³ Schmitt (1996b), 20

¹⁴ Schmitt (1996b), 26

mechanism that is always prone to incompetence and negligence. “Responsive government” instead of invoking the political, renders political constitutionalism redundant.

While Foucault and Luhmann both paid attention to a coupling movement between law and economy, and between two conceptions of rights, they also argued for a distinction between the two to the effect that law itself is not an economic good. In Grimm’s reading, it is what makes law law, not the transposition of law’s products to paradigms. In critiquing contemporary constitutionalism, I want to emphasize that despite their critical values, they are dependent on classical constitutionalism that has founded European jurisprudence and the institutional basis of constitutionalization. And they have not yet replaced classical constitutionalism as a paradigm. China, lacking in basic equality and political rights, should not give up democratization as its mission.

Secondly, confronted with the dilemmas emergent in China’s fragmented law reforms – especially the building of the private law regime, we should also re-stress the importance of political constitutionalism, but in a new form. This is because instead of leading to constitutionalization as a result of a demand for systematization of these laws, legalization deteriorates into a technical tool to postpone the democratic and constitutional moment to advent. If we become constituencies only through these fragmented laws, and their special endowment of legal personality, then the structural asymmetry inside the fragmentation would be lost from sight in our reviewing of China’s constitutionalization.

Defragmentation and demolition of asymmetry of rights protection is political constitutionalism in the new epoch and in more complex circumstances. To criticize the market displacement of the democratic nature of constitutionalism hence was my attempt to re-attach China’s constitutionalization to political reforms that have been forgotten for decades.

Bibliography

Books and Articles:

Anderson, Benedict (2006) *Imagined communities: reflections on the origin and spread of nationalism*, (London: Verso).

Anderson, Perry (January-February 2010) 'Two Revolutions', *New Left Review* 61.

Backer, Larry Cata (2009) 'The Party as Polity, The Communist Party, and the Chinese Constitutional State: A Theory of State-Party Constitutionalism', *Penn State Legal Studies Research Paper* No. 05-2009. Available at: <http://ssrn.com/abstract=1325792>

Backer, Larry Cata (2014) 'Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism', *Modern China* 40(2): 168-195.

Badiou, Alain (2005) 'The Cultural Revolution: The Last Revolution?', *Positions* 13(3): 481-514.

Balme, Stephanie and Dowdle, Michael W. (eds.) (2009) *Building Constitutionalism in China*, (New York: Palgrave Micmillian).

Balme, Stephanie and Dowdle, Michael W. (2009) 'Introduction: Exploring for Constitutionalism in 21st Century China', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Micmillian).1-20

Balme, Stephanie (2009) 'Ordinary Justice and Popular Constitutionalism in China', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Micmillian). 179-197

- Bell, Daniel A., Brown, David, Jayasuiya, Kanishya and Jones, David Martin (1995) *Towards Illiberal Democracy in Pacific Asia*, (New York: ST. MARTIN'S PRESS).
- Bell, Daniel A. (2008) *China's New Confucianism*, (Princeton: Princeton University Press).
- Berman, Paul S. (2007) 'Global Legal Pluralism', *Southern California Law Review*, 80(6): 1155-1237.
- Bernstein, Richard J. (2011) 'The Aporias of Carl Schmitt', *Constellations* 18(3): 403-430.
- Bourdieu, Pierre (1986-1987) 'The Force of Law: Toward a Sociology of the Judicial Field', *Hastings L. J.* 38: 805-853.
- Boyne, Roy (1990) *Foucault and Derrida: The other side of reason*, (London: Unwin Hyman).
- Chen, Albert H. Y. (2011) 'The Law of property and the Evolving System of Property Rights in China', in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*, (London: Routledge) 81-112
- Chen, An (2008) 'The 1994 Tax Reform and Its Impact on China's Rural Fiscal Structure', *Modern China* 34(3): 303-343.
- Chen, Duanhong (2010a) 'Logic connection between constituent power and fundamental laws (Zhi Xian Quan Yu Gen Ben Fa De Luo Ji Guan Lian)', (Lecture at Peking University), Available at: <http://www.gongfa.com/html/gongfapinglun/20101204/1537.html> (accessed on December 10th, 2014)
- Chen, Duanhong (2010b) *Constituent Power and Fundamental Law (Zhi Xian Quan Yu Gen Ben Fa)*, (Beijing: China Legal Publishing House).

- Clarke, Donald C. (March 1995) 'The Execution of Civil Judgments in China', *The China Quarterly* 1995 (141): 65-81.
- Clarke, Donald C. (1996) 'Power and Politics in the Chinese Court System: the Emergence of Civil Judgments', *Colum. J. Asian L.* 10(1): 1-92.
- Clarke, Donald C. (2003) 'China's Legal System and the WTO: Prospects for Compliance', *Washington University Global Studies Law Review* 2: 97-118.
- Clarke, Donald C. (2003b) 'Empirical Research into the Chinese Judicial System', Available at SSRN: <http://ssrn.com/abstract=412660> or doi: 10.2139/ssrn.412660 (accessed on December 10th, 2014)
- Clarke, Donald C. (2003c) 'Corporatisation, not Privatisation', *China Economic Quarterly* 7(3): 27-30.
- Clarke, Donald C. (2010) 'New Approaches to the Study of Political Order in China', *Modern China* 36(1): 87-99.
- Christodoulidis, Emilios and Dukes, Ruth (2007a) 'On the Unity of European Labour Law', in Sacha Prechal and Bert van Roermund (eds.) *The Coherence of EU Law: The Search for Unity in Divergent Concepts*. (Oxford: Oxford University Press) 398-423
- Christodoulidis, Emilios (2007b) 'Against Substitution: The Constitutional Thinking of Dissensus' in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. (Oxford: Oxford University Press) 190-211
- Christodoulidis, Emilios (2011) 'Of Boundaries and 'Tipping Points': a Response to Gunther Teubner', *Social & legal Studies* 20(2):238-243.

- Christodoulidis, Emilios (2013) “‘minefield of misreckonings’: European’s constitutional pluralism”, manuscript.
- Christodoulidis, Emilios (2013b) ‘On the Politics of Societal Constitutionalism’ *Indiana Journal of Global Legal Studies* 20(2): 629-663.
- Cohen, Jerome (December, 1978) ‘China’s Changing Constitution’, *The China Quarterly* 76: 794-841.
- Crosby, Daniel C. (2008) ‘Banking on China’s WTO Commitments: ‘Same Bed, Different Dreams’ in China’s Financial Sector’, *Journal of International Economic Law* 11(1): 75-105
- Cui, Zhiyuan (2006a), Liberal Socialism and the Future of China, available at: http://www.networkideas.org/featart/jan2006/Liberal_Socialism.pdf, accessed on December 10th, 2014)
- Cui, Zhiyuan (2006b) “How to comprehend Today’s China: an Interpretation of the ‘Comparatively Well-Off Society’”, *Contemporary Chinese Thought* 37(4): X-XX
- Cui, Zhiyuan (2007) ‘Toward a Law and Economics of Public Property: China and Beyond’, (Clarke Lecture at Cornell Law School)
- De Wet, Erika (2006) ‘The Emergence of International and Regional Value System as a Manifestation of the Emerging International Constitutional Order’, *Leiden Journal of International Law*, 19(3): 611-632.
- De Wet, Erika (2007) ‘The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-Making’ *PER/PELJ* (10)2: 20-46.

- Deng, Zhenglai (2001) 'Several Comments on the Hayek's Theoretical Map' (Guan Yu Ha Ye Ke Li Lun Mai Luo De Ruo Gan Ping Zhu), available at:
<http://www.china-review.com/sao.asp?id=16499> (accessed on December 10th, 2014)
- Derrida, Jacques (2002) *Who's Afraid of Philosophy: Right to philosophy I*, (Stanford, Calif.: Stanford University Press).
- Derrida, Jacques (2004) *Positions*, (London: Continuum).
- Derrida, Jacques (2005) *The Politics of Friendship*, (London: Verso).
- Dobner, Petra and Loughlin, Martin (eds.) (2010) *The Twilight of Constitutionalism?* (Oxford: Oxford University Press)
- Douzinas, Costas (2003) 'The paradox of Human Rights', *Constellations* 20(1): 51-67
- Dowdle, Michael W. (2009) "Beyond 'Judicial Power': Courts and Constitutionalism in Modern China", in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan). 200-217
- Duckett, Jane (2010) 'Economic Crisis and China's 2009 Health Reform Plan: Rebuilding Social Protections for Stability and Growth?', *China Analysis* 80, available at:
www.chinapolitik.de
- Dunoff, J. L. and Trachtman, J. P. (eds.) (2009) *Ruling the World? International Law, Global Governance, Constitutionalism* (Cambridge: Cambridge University Press)
- Estlund, Cynthia and Gurgel, Seth (2012) A New Deal for China's Workers? Labor Law Reform in the Wake of Rising Labor Unrest. *New York University Public Law and Legal Theory Working Papers* Paper 297 <http://lsr.nellco.org/nyu-plltwp/297>

- Fisher-Lescano, Andreas and Teubner, Gunther (2004) 'Regime Collisions: The vain Search for Legal Unity in the Fragmentation of Global Law', *Mich. J. Int'l L.* 25: 999-1046.
- Foucault, Michel (1979) *The History of Sexuality. Vol.1. An Introduction*, (London: Allen Lane)
- Foucault, Michel (1980) *Power-Knowledge: Selected Interviews and Other Writings, 1972-1977*, (Brighton: Harvester Press).
- Foucault, Michel (1981) *Remarks on Marx*, (New York: Semiotext).
- Foucault, Michel (2002) *The Archaeology of Knowledge*, (London : Routledge).
- Foucault, Michel (2003) *Society Must Be Defended: Lectures at the Collège de France, 1965-76*, (London: Penguin).
- Foucault, Michel (2008) *The Birth of Biopolitics, Lectures at the College De France 1978-79*,(New York: Palgrave Macmillan)
- Gallagher, Mary. E. and Dong, Baohua (2011) 'Legislating Harmony: Labour Law Reform in Contemporary China', in Kuruvilla, Sarosh, Lee, Ching Kwan and Gallagher, Mary. E. (eds). *From Iron-Rice Bowl to Informalization: Markets, State and Workers in a Changing China*. (Ithaca, New York: Cornell University Press)
- Gang, Fan and Woo, Wing Thye (2009) 'The Parallel Partial Progression Approach to Institutional Transformation in Transition Economies: Optimize Economic Coherence, Not Policy Sequence', *Modern China* 35(4): 352-369.
- Gan, Yang (2005) 'Connecting Three Traditions in a new era—Configuration of three traditions and the revival of Chinese civilization' (Xin Shi Dai De Tong San Tong—San Zhong Chuan Tong De Rong Hui Yu Zhong Hua Wen Ming De Fu Xing),

(Lecture on Qinghua University), available at:

<http://www.aisixiang.com/data/7505.html> (accessed on December 10th, 2014)

Griffiths, John (1986) 'What is Legal Pluralism?' *J. of Legal Pluralism* 24:1-55.

Grimm, Dieter (2005) 'Integration by constitution', *I.Con* 3(2&3): 193-208.

Grimm, Dieter (2010) 'The Achievement of Constitutionalism and its Prospects in a Changed World, in Petra Dobner and Martin Loughlin (eds.) *The Twilight of Constitutionalism?* (Oxford: Oxford University Press) 3-22

Habermas, Jürgen (1996), *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge, Mass.: MIT Press).

Hand, Keith J. (2009) 'Citizens Engage the Constitution: the Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan) 221-242

Han Dayuan and Zhang Xiang (1999), 'On the Objectivity and Subjectivity of Constitutional Interpretation (Shi Lun Xian Fa Jie Shi De Ke Guan Xing Yu Zhu Guan Xing)', available at:

<http://www.hflib.gov.cn/law/law/falvfagui/xf%20gjf/LWJ/LWJ%201022.htm>

(accessed on December 6th, 2014)

Han, Dayuan (2004) "The Normative Analysis of 'Protection of Human Rights' in the Constitutional Text" (Xian Fa Wen Ben Zhong Ren Quan Tiao Kuan De Gui Fan Fen Xi), available at:

http://www.chinalawedu.com/news/16900/171/2004/8/ma81553848341118400276368_128117.htm, (accessed on December 6th, 2014)

- Han, Dayuan (2005) 'On Validity of the Constitutional Interpretation (Shi Lun Xian Fa Jie Shi De Xiao Li)', available at: <http://www.yadian.cc/paper/20038/>, (accessed on December 6th, 2014)
- Hall, David L. and Ames, Roger T. (1987) *Thinking Through Confucius*, (New York: State University of New York Press).
- Halverson, Karen (2004) 'China's WTO Accession: Economic, Legal and Political Implications', *B.C. Int'l & Comp. L. Rev.* 27(2): 319-370.
- Hatton, Kyle J. and Pistor Katharina (2001) 'Maximization Autonomy in the Shadow of Great Power: The Political Economy of Sovereign Wealth Funds', *Columbia Law and Economics Working Paper* No. 395. Available at SSRN: <http://ssrn.com/abstract=1787565> (accessed on December 7th, 2014)
- Hayek, F. A. (2007) *The Road To Serfdom: Text and Documents* (Chicago: University of Chicago Press).
- Hayek, F.A. (1967) 'Theory of Complex Phenomena: A Precocious Play on the Epistemology of Complexity', originally published in Hayek, F. A. (1967). *Studies in Philosophy, Politics and Economics*, (London: Routledge & Kegan Paul), pp. 22-42. Available at <http://www.libertarianismo.org/livros/fahtcp.pdf> (accessed on December 7th, 2014)
- Hayek, F.A (2002) 'Competition As a Discovery Procedure', *THE QUARTERLY JOURNAL OF AUSTRIAN ECONOMICS* 5(3): 9-23.
- He, Weifang (2005) 'Chinese Culture and Chinese Legal Science' (Zhong Guo Wen Hua Yu Zhong Guo Fa Xue), Lecture at Beijing University of Agriculture, available at: <http://www.aisixiang.com/data/7518.html>, (accessed on December 7th, 2014)

He, Weifang and Su Yongqin (2006) 'Judiciary Reform and Social Transformation' (Si Fa Gai Ge Yu She Hui Bian Qian), (Lecture on July 16th, 2004 in Peking University) available at:

<http://www.china-judge.com/ReadNews.asp?NewsID=2033&BigClassID=16&SmallClassID=16&SpecialID=28>, (accessed on December 7th, 2014)

He, Xin (2009) 'Administrative law as a Mechanism for Political Control in Contemporary China', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan) 143-162

Heilmann, Sebastian (2010) 'Economic Governance: Authoritarian Upgrading and Innovative Potential', (August 2010) *China Analysis* 82. Available at: www.chinapolitik.de

Horkheimer, Max (1972) *Critical Theory: Selected Essays*, (New York: Herder and Herder).

Howson, Nicholas C. (2006) 'China's Acquisition Abroad -- Global Ambitions, Domestic Effects', *Law Quadrangle Notes* 48(3): 73-84.

Howson, Nicholas C. (2007) 'China and WTO Liberalization of the Securities Industry: Le Choc des mondes or L' Empire immobile?' *Asian Policy* 3: 151-181.

Howson, Nicholas C. (2009) 'China's Restructured Commercial Banks: Nomenclatura Accountability Serving Corporate Governance Reform?' in M. Avery, M. Zhu and J. Cai, (eds.) *CHINA'S EMERGING FINANCIAL MARKETS: CHALLENGES AND GLOBAL IMPACT*, (Singapore: John Wiley and Sons, Asia). Available at SSRN: <http://ssrn.com/abstract=1351853>

Hualing, Fu and Cullen, Richard (2011) 'Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers', *The China Quarterly* 205: 40-59.

- Huang, Philip C.C. (2005) “Divorce Law Practices and the Origins, Myths, and Realities of Judicial ‘Mediation’ in China”, *Modern China* 31(2): 151-203.
- Huang, Philip C.C. (2007) ‘Wither Chinese Law?’, *Modern China* 33(2): 163-194.
- Huang, Philip C.C. (2008a) Introduction to ‘The Nature of the Chinese State: Dialogues among Western and Chinese Scholars, I’”, *Modern China* 34(1): 3-8.
- Huang, Philip C.C. (2008b) ‘Centralized Minimalism: Semiformal Governance by Quasi Officials and Dispute Resolution in China’, *Modern China* 34(1): 9-35.
- Huang, Philip C.C. (2009) ‘China's Neglected Informal Economy: Reality and Theory’, *Modern China* 35(4): 405-438.
- Huang, Philip C.C. (2012a), ‘Profit-Making State Firms and China’s Development Experience: State Capitalism or Socialist Market Economy?’ *Modern China* 38(6): 591-629
- Philip C. C. Huang, Gao Yuan and Yesheng Peng (2012b) ‘Capitalization without proletarianization in China’s Agricultural Development’, *Modern China*, 38(2): 139-173
- Huang, Philip C.C. (2013) ‘Misleading Chinese Legal and Statistical Categories: Labo(u)r, Individual entities, and Private Enterprises’, *Modern China* 39 (4): 347-379.
- Huang, Songyou (2001) ‘Judicialization of the Constitution and its Significance: On One of Today’s Replies of the SPC, (Xian Fa Si Fa Hua Ji Qi Yi Yi—Cong Zui Gao Ren Min Fa Yuan Jin Tian De Yi Ge Pi Fu Tan Qi) *People’s Court Daily (Ren Min fa Yuan Bao)*, August 13th, available at <http://www.gongfa.com/huangsyxianfasifahua.htm> (accessed on December 9th, 2014)

- Huang, Yasheng (July 2005) 'Institutional Environment and Private Sector Development in China', *ASIA PROGRAM SPECIAL REPORT*, 26-32. Available at: http://www.wilsoncenter.org/sites/default/files/AsiaReport_129.pdf
- Jessop, Bob (1999) 'The Strategic Selectivity of the State: Reflections on a Theme of Poulantzas', *Journal of Hellenic Diaspora*, 25(1-2): 41-78.
- Jessop, Bob (2002) *The Future of the Capitalist State*, (Cambridge: Polity 2002).
- Jessop, Bob (January 2003) 'Globalization: It's about Time too!' *Political Science Series, Institute for Advanced Studies, Vienna*, 85
- Ji, Weidong (Dec 2003) 'Normative Structure of the Constitution' (Xian Fa De Gui Fan Jie Gou). *21st Century* (Er Shi Yi Shi Ji). Available at: http://www.chinalawedu.com/news/15300/157/2003/12/li8752123734192213002124736_93996.htm, (accessed on December 7th, 2014)
- Ji, Weidong (2005) *New Debates on Constitutionalism: Legal and Social Changes in the Era of Globalization* (Xian Zheng Xin Lu: Quan Qiu Hua Shi Dai De Fa Yu She Hui Bian Qian), (Beijing: Beijing University Press).
- Jiang, Shigong (2010) 'Written and Unwritten Constitution: A new Approach to the Study of Constitutional Government in China', *Modern China* 36(1): 12-46.
- Jiang, Shigong (2014a) 'Chinese-Style Constitutionalism: On Becker's Chinese Party-State Constitutionalism', *Modern China* 40(2): 133-167.
- Jiang, Shigong (2014b) 'How to Explore the Chinese Path to Constitutionalism? A Response to Larry Cata Backer', *Modern China* 40(2): 196-213.
- Karindi, Liisi (November 2008) 'The Making of China's New Labour Contract Law', *China Analysis* 06, www.chinapolitik.de

- Kellogg, Thomas E. (February 2008) 'Constitutionalism with Chinese Characteristics?: Constitutional Development and Civil Litigation in China', *Indiana University Research Center for Chinese Politics & Business, Working Paper #1*. Available at: http://www.indiana.edu/~rccpb/Working_Paper/RCCPB_WP1_Kellogg_Feb_08.pdf
- Kingsbury, Benedict, Krisch, Nico and Steward, Richard B. (2005) 'The Emergence of Global Administrative Law', *Law and Contemporary Problems* 68:15-62. Available at: <http://scholarship.law.duke.edu/lcp/vol68/iss3/2>
- Klabbers, Jan (2011) 'The European Union in the Global Constitutional Mosaic', in Neil Walker, Jo Shaw and Stephen Tierney (eds.) *Europe's Constitutional Mosaic* (Oxford: Hart Pub.) 287-307
- Koskenniemi, Martti (2007), 'The Fate of Public International Law: Between Technique and Politics', *MLR*, 70 (1):1-30.
- Krisch, Nico (2005) Europe's Constitutional Monstrosity, *Oxford journal of Legal Studies*, 25(2): 321-334.
- Krisch, Nico (2006) 'The Pluralism of Global Administrative Law', *EJIL* 17(1): 247-278
- Krisch, Nico (2010) *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (Oxford: Oxford University Press)
- Kumm, Mattias (2004-2005) 'To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty', *Colum. J. Eur. L.* 11(3): 481-522.
- Kumm, Mattias (2005) 'The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History', *German Law Journal*, 6(2): 319-355.

- Kumm, Mattias (Fall 2006) 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called', *Am. J. Comp. L.* 54:505-530.
- Kumm, Mattias (2007) 'What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement.' in G. Pavlakos (ed.) *LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY* (Hart).
- Kumm, Mattias (2009) 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State', In J. L. Dunoff and J. P. Trachtman (eds.) *Ruling the World? International Law, Global Governance, Constitutionalism* (Cambridge)
- Kumm, Mattias (2011) 'How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Models of Public Law'. In Jürgen Neyer and Antje Wiener (eds.), *Political Theory of the European Union*. (Oxford/New York, NY: Oxford University Press)
- Kuo, Ming-Sung (2009a) 'Between Fragmentation and Unity: The Uneasy Relationship Between Global Administrative Law and Global Constitutionalism', *SAN DIEGO INT'L L.J.* Vol. 10: 439-467.
- Kuo, Ming-Sung (2009b) 'From Myth to Fiction: Why a Legalist-Constructivist Rescue of European Constitutional Ordering Fails', *Oxford Journal of Legal Studies* 29(3): 579-602.
- Kuo, Ming-Sung (2012) 'Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law', *International Journal Of Constitutional Law* 10 (4): 1050 – 1075.
- Kuo, Ming-Sung (2013) 'Semantic Constitutionalism at the Fin De Si ècle: What If Constitutional Ordering is Simply a Reflection of Constitutional Episteme?' *Warwick*

School of Law Research Paper No. 2013-21. Available at SSRN:

<http://ssrn.com/abstract=2304731>

Kuruvilla, S., Lee, Ching Kwan and Gallagher, Mary E., (eds) (2011). *From Iron-Rice Bowl to Informalization: Markets, State and Workers in a Changing China*, (Ithaca, New York: Cornell University Press).

Lefort, Claude (1988) *Democracy and Political Theory*, (Cambridge: Polity in association with Basil Blackwell).

Liang, Zhiping (1997), 'Law and Order in the Rural Society' (Xiang Tu She Hui Zhong De fa Lv Yu Zhi Xu), originally in Wang, Ming Ming and Wang, Si Fu (eds.) *Order, Justice and Authority in Rural Society (Xiang Tu She Hui Zhong De Zhi Xu Gong Zheng Yu Quan Wei)*, (Beijing: CUPL Press) available at:
<http://www.aisixiang.com/data/30937.html>

Liang, Zhiping (2002) *Recognition of Law: the Past, Present and Future of Chinese Law (Fa Bian: Zhong Guo Fa De Guo Qu Xian Zai Yu Wei Lai)* (Beijing: CUPL Press).

Liang, Zhiping (2003), 'Network, Social Network and Civil Society' (Min Jian Min Jian She Hui He CIVIL SOCIETY), *Journal of Yun Nan University: Social Sciences (Yun Nan Da Xue Xue Bao: She Hui Ke Xue Ban)* 2(1), available at:
<http://www.hongfan.org.cn/file/upload/2010/02/03/1280901595.pdf>

Liebman, Benjamin L. (2007) 'China's Courts: Restricted Reform', *The China Quarterly* 191: 620-638

Liebman, Benjamin L. (2007) 'Lawyers, Legal Aid, and Legitimacy in China', in William P. Alford (eds.) *Raising the Bar: the Emerging Legal Profession in East Asia*, (Harvard University Press) pp311-356.

- Lindahl, Hans (2007) 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press) 9-26
- Lin Laifan (2001), *From Constitutional Norms to Normative Constitution (Cong Xian Fa Gui Fan Dao Gui Fan Xian Fa)*, (Beijing: Law Press).
- Loughlin, Martin and Walker, Neil (eds.) (2007) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press).
- Luhmann, Niklas (1998) *Observations on Modernity*, (Stanford, CA: Stanford University Press).
- Luhmann, Niklas (2002) *Theories of Distinction: Redescribing the Descriptions of Modernity*, (Stanford, Calif.: Stanford University Press).
- Luhmann, Niklas (2004) *Law as a Social System*, (Oxford: Oxford University Press).
- Miguel Poiares Maduro (2003), 'Europe and the Constitution: What if This is As Good as it Gets?' in J.H.H. Weiler & M Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press)
- Maduro, Miguel Poiares (2012) 'Three Claims of Constitutional Pluralism', available at: http://www.wzb.eu/sites/default/files/u32/miguel_maduro_three_claims_of_constitutional_pluralism_hu-coll_may_15_2012.pdf
- MacNeil, Iain (2002) 'Adaptation and Convergence in Corporative Governance: the Case of Chinese Listed Companies', *Journal of Corporate Studies* 2(2):289-344.
- Mehra, Salil K. and Tanbei, Meng (2008) 'Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law', *Virginia Journal of International Law* 49(2): 379-430.

- Meier, Heinrich (1995) *Carl Schmitt & Leo Strauss: the Hidden Dialogue*, (Chicago; London: University of Chicago Press).
- Montinola, G., Qian, Yingyi and Weingast, Barry. R. (1996) 'Federalism, Chinese Style: the Political Basis for Economic Success', *World Politics* 48(1): 50-81.
- Mouffe, Chantal (1993) *The return of the political*, (London; New York: Verso).
- Naughton, Barry (2009), 'Understanding the Chinese Stimulus Package', *China Leadership Monitor* 28: 1-12
- Negri, Antonio (2009) *Insurgencies: constituent power and the modern state*, (Minneapolis, Minn.; London: University of Minnesota Press).
- Neves, Marcelo (2001) 'From the Autopoiesis to the Allopoiesis of Law', *Journal of Law and Society* 28(2): 242-64.
- Neves, Marcelo (2007) 'The symbolic force of human rights', *Philosophy Social Criticism* 33: 411-444.
- Neves, Marcelo (2013) *Transconstitutionalism* (Oxford: Hart Publishing Limited).
- Neyer, Jürgen and Wiener, Antje (eds.) (2011) *Political Theory of the European Union*, (Oxford/New York: Oxford University Press)
- Ngai, Pun and Huilin, Lu (2010) 'Unfinished Proletarianization: Self, Anger and Class Action among the Second Generation of Peasant-Workers in Present-Day China', *Modern China* 36: 493-519.
- Pan, Mingming, Three Essays on FDI in China. Available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1023&context=businessdiss>, (accessed on December 9th 2014)

- Pashukanis, E .B. (1978) *Law and Marxism*, (London: Villiers Publications Ltd.).
- Pavlakos, G. (ed.) (2007) *LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY* (Hart)
- Peerenboom, Randall (Spring 2002) ‘Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China’, *Michigan Journal of International Law* 23(3): 471-544.
- Peerenboom, Randall (2003a) ‘Beyond Universalism and Relativism: The Evolving Debates about ‘Values in Asia’’, *Indiana International & Comparative Law Review* 14(1): 1-86.
- Peerenboom, Randall (2003b) ‘Social Network, Civil society, Democracy and Rule of Law: A New Conceptual Framework’, In Chair Hahm, Chaibong Hahm and Daniel Bell, (eds.), *THE POLITICS OF RELATIONALITY: CIVIL SOCIETY, ECONOMICS, AND LAW IN EAST ASIA*, (Rowan & Littlefield). Available at SSRN: <http://ssrn.com/abstract=372680> or doi:10.2139/ssrn.372680
- Peerenboom, Randall (2003c) ‘The X-Files: Past and Present Portrayals of China’s Alien ‘Legal System’’, *Washington University Global Studies Law Review* 2(1): 37-96.
- Peerenboom, Randall (2004) ‘Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia’, *Duke Journal of Comparative & International Law* 15(1): 75-152.
- Peerenboom, Randall (2005) ‘Assessing Human Rights in China: Why the Double Standard?’ *Cornell International Law Journal* 38(1): 71-172.
- Peerenboom, Randall (2006a) ‘What Have We Learned about Law and Development? Describing, Predicting and Accessing Legal Reforms in China’, *Michigan Journal of International Law* 27(3): 823-871.

- Peerenboom, Randall (2006b), 'An empirical overview of rights performance in Asia, France and the USA: the dominance of wealth in the interplay of economics, culture, law and governance', in Peerenboom, Randall, Petersen, Carble J. and Chen, Albert. H. Y. (eds.), *Human Rights in Asia: A comparative legal study of twelve Asian jurisdictions, France and the USA* (New York: Routledge)
- Peerenboom, Randall (2008), 'Law and Development in China and India: The Advantages and Disadvantages of Front-Loading the Costs of Political Reform', *La Trobe Law School Legal Studies Research Paper* No. 2008/15. Available at SSRN: <http://ssrn.com/abstract=1283209> or <http://dx.doi.org/10.2139/ssrn.1283209>
- Peerenboom, Randall (2009a) Economic Development and the Development of the Legal Profession in China, available at SSRN: <http://ssrn.com/abstract=1342287>
- Peerenboom, Randall (2009b) 'Rule of Law, Democracy and the Sequence Debate: Lessons from China and Vietnam', available at: <http://ssrn.com/abstract=1447051>
- Peerenboom, Randall (2009c) 'Middle Income Blues: The Eastern Asian Model and Implication for Constitutional Development in China', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Micmillian) 77-96
- Perez, Oren and Teubner, Gunther (eds.) (2005) *Paradoxes and Inconsistencies in the Law* (Oxford: Hart)
- Pils, Eva (2009) 'Rights Activism in China: the Case of Lawyer Gao Zhisheng', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Micmillian). 243-260
- Pistor, Katharina (2009) 'Banking Reform in the Chinese Mirror', *Columbia Law and Economics Working Paper* No. 354. Available at SSRN: <http://ssrn.com/abstract=1446930> or <http://dx.doi.org/10.2139/ssrn.1446930>

- Polanyi, Karl (1957) *The Great Transformation*, (Boston: Beacon Press).
- Potter, Pitman. B. (2011), 'Public Regulation of Private Relations – Changing Conditions of Property Regulation in China', in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*. (London: Routledge) 51-80
- Prechal, Sacha and Van Roermund, Bert (eds.) (2007) *The Coherence of EU Law: The Search for Unity in Divergent Concepts*. (Oxford : Oxford University Press)
- Preuss, Ulrich K. (2010) 'Disconnecting Constitutions from statehood: Is Global Constitutionalism a viable Concept?' in Petra Dobner and Martin Loughlin (eds.) *The Twilight of Constitutionalism?* (Oxford: Oxford University Press) 23-46
- Qin, Julia Ya (2004) 'WTO Regulation of Subsidies to SOEs – A Critical Appraisal of the China Accession Protocol', *Journal of International Economic Law* 7(4): 863-919.
- Quanxi, Gao (2010), *The People Will Be Corrupted, Too* (Ren Min Ye Hui Fu Hua Duo Luo) (Lecture at Peking University Oct 6th, 2010), <http://www.china-review.com/sao.asp?id=25097> (accessed on December 6th, 2014)
- Ranciere, Jacques (1994) *The names of history: on the poetics of knowledge* (Minneapolis, Minn.; London: University of Minnesota Press)
- Ranciere, Jacques (1999) *Disagreement: politics and philosophy* (Minneapolis, Minn.; London: University of Minnesota Press)
- Rittich, Kerry (2004) 'The Failure of Law and Development: Second Generation Reforms and the Incorporation of the Social', *MICH. J. INT'L L.* 26: 199-243.
- Santos, Boaventura de Sousa (2008), 'The World Social Forum and the Global Left', *Politics & Society* vol. 36(2): 247-270.

- Sassen, Saskia (2007) *A Sociology of Globalization* (New York; London: W.W.Norton Company)
- Sassen, Saskia (2008) *Territory, Authority, Rights: from Medieval to Global Assemblages*. (Princeton, NJ; Oxford: Princeton University Press)
- Scheuerman, William E. (ed.) (1996) *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, (Berkeley, Calif.; London: University of California Press).
- Schmidt, Dirk and Sebastian Heilmann (January 2010) 'Dealing with Economic Crisis in 2008-2009: The Chinese Government's Crisis Management in Comparative Perspective', *China Analysis* 77, available at: www.Chinapolitik.de
- Schmitt, Carl (1996a) *The Concept of The Political*, (Chicago; London: University of Chicago Press).
- Schmitt, Carl (1996b), *Roman Catholicism and Political Form*, (Westport, Connecticut London: Greenwood Press)
- Schmitt, Carl (2004) *On the Three Types of Juristic Thought*, (Westport, Conn.; London: Praeger).
- Schmitt, Carl (2008) *Constitutional Theory* (Durham, NC; London: Duke University Press)
- Simma, Bruno and Pulkowski, Dirk (2006) 'Of Planets and the Universe: Self-contained Regimes in international Law', *The European Journal of International Law*, 17(3): 483-529.
- Sieyes, Emmanuel Joseph (2003) *Political Writings* (Indianapolis/ Cambridge: Hackett Publishing Company)

- Slaughter, Anne-Marie (2004) *A New World Order*, (Princeton, N.J.; Oxford: Princeton University Press)
- Slaughter, Anne-Marie (1995) 'International Law in a World of Liberal States', *EJIL* 6:503-538.
- Stiglitz, Joseph E. (2002) *Globalization And Its Discontents*, (London: Penguin Books Ltd.).
- Sun, Liping (2008) 'Societal Transition: New Issues in the Field of the Sociology of Development', *Modern China* 34(1): 88-113
- Supiot, Alain (2000) 'The Dogmatic Foundations of the Market', *Industrial Law Journal*, 29(4): 321-345
- Supiot, Alain (2007) *Homo juridicus: on the anthropological function of the law*, (London: Verso).
- Snyder, Francis (ed.) (2000) *The Europeanisation of Law: the Legal Effects of European Integration*, (Oxford: Hart).
- Tamanaha, Brian Z. (1993) "The Folly of the 'Social Scientific' Concept of Legal Pluralism", *Journal of Law and Society* 20(2): 192-217.
- Tamanaha, Brian Z. (2008) 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney Law Review*, 30(3): 375-411.
- Tamanaha, Brian Z. (2011) 'The Primacy of Society and the Failures of Law and Development', *CORNELL INT'L L.J.* 44:209-247.
- Teubner, Gunther, (ed.) (1997) *Global Law Without a State*, (Brookfield: Dartmouth).

- Teubner, Gunther, (1997) 'Global Bukowina: Legal Pluralism in the World Society', in Gunther Teubner (ed.) *Global Law Without a State*. (Brookfield: Dartmouth)
- Teubner, Gunther, (2005) 'Dealing with Paradoxes of Law: Derrida, Luhmann, Wietholter', in Oren Perez and Gunther Teubner (eds.) *Paradoxes and Inconsistencies in the Law*. (Oxford: Hart) 41-64
- Teubner, Gunther (2006) "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors", *Mod. L. Rev.* 69: 327-346.
- Teubner, Gunther, (2011a) 'Constitutionalizing Polycontextuality', *Social & Legal Studies* 20(2): 210-229.
- Teubner, Gunther, (2011b) 'Transnational Fundamental Rights: Horizontal Effect?' *Rechtsphilosophie & Rechtslehre* (40)3: 196-215.
- Teubner, Gunther (2012) *Constitutional Fragments: Social Constitutionalism and Globalization*, (Oxford: Oxford University Press).
- Thornhill, Chris (2012a) 'Contemporary constitutionalism and the dialectic of constituent power', *Global Constitutionalism* 1(3): 369-404.
- Thornhill, Chris (2012b) Legal pluralism: the many books on Europe's many constitutions, *Social and Legal Studies*, 21: 413-423.
- Tiffert, Glenn D. (2009) 'Epistrophe: Chinese Constitutionalism and the 1950s', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan).59-76
- Tomasic, Roman (2011), 'Looking at corporate governance in China's large companies-Is the glass half full or half empty?' in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*. (London: Routledge) 182-206

- Tong Zhiwei (2009) 'China's Constitutional Research and Teaching: A State of the Art', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Macmillan) 99-110
- Trubek, David M. (2004) "The 'Rule of Law' in Development Assistance: Past, Present and Future", in M. Bauerle et.al, (eds.), *Haben wir wirklich Recht?* Available at: http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/20109/1/2_CALE%20Books2.pdf
- Tu, Weiming (2002) *Selected Works of Tu Weiming* (Tu Wei Ming Wen Ji), (Wuhan: Wuhan Press)
- Tuori, Kaarlo and Sankari, Suvi (eds.) (2010) *The Many Constitutions of Europe* (Farnham: Ashgate Publishing Limited)
- Unger, Roberto Mangabeira and Cui, Zhiyuan (November-December 1994) 'China in the Russian Mirror', *New Left Review* 1/208
- Veitch, Scott, Christodoulidis, Emiliios and Farmer, Lindsay (eds.) (2012) *Jurisprudence: Themes and Concepts*, (London : Routledge).
- Voon, Tania (2010) 'Open for Business? China's Telecommunications Service Market and the WTO', *Journal of International Economic Law* 13(2): 321-378.
- Walker, Neil (2003a) 'Constitutionalising Enlargement, Enlarge Constitutionalism', *European Law Journal* 9: 365-385.
- Walker, Neil (2003b) 'After the Constitutional Moment', *The Federal Trust Constitutional Online Paper Series* No.32/03. Available at SSRN: <http://ssrn.com/abstract=516783> or <http://dx.doi.org/10.2139/ssrn.516783>
- Walker, Neil (2005a) 'Europe's Constitutional Momentum and the Search for Polity Legitimacy', *International Journal of Constitutional Law* 4(2): 211-238.

- Walker, Neil (2005b) 'Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law', *EUI Working Paper* No. 2005/17, available at:
<http://cadmus.eui.eu/bitstream/handle/1814/3762/WPLAWNo.200517Walker.pdf?sequence=1>
- Walker, Neil and de Burca, Grainne (2007a) 'Reconceiving Law and New Governance' *European University Institute Working Paper* No. 2007/10. Available at SSRN:
<http://ssrn.com/abstract=987180> or <http://dx.doi.org/10.2139/ssrn.987180>
- Walker, Neil (2007b) "Europe at 50 _ A mid-Life Crisis? 'Democratic Deficit' and 'Sovereignty Surplus' Part Three of the Constitutional Trilogy", Mario Einaudi Center for International Studies, Working Paper Series No. 11-07. Available at:
<http://www.einaudi.cornell.edu/sites/einaudi.cornell.edu/files/publications/11-2007.pdf>
- Walker, Neil (2008) 'Beyond Boundary Disputes and Basic Grids: Mapping the Global disorder of Normative Orders', *Int J Constitutional Law* 6(3-4): 373-396.
- Walker, Neil (2010a), Out of Place and Out of Time: Law's Fading Co-ordinates, *Edinburgh Law Review* 14: 13-46.
- Walker, Neil (2010b) Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship, *Rechtsphilosophie & Rechtstheorie* 39(3): 206-233.
- Walker, Neil (2010c), Multilevel Constitutionalism: Looking Beyond the German Debate, in Kaarlo Tuori and Suvi Sankari (eds) *The Many Constitutions of Europe* (Ashgate)
- Walker, Neil, Shaw, Jo and Stephen Tierney (eds.) (2011) *Europe's Constitutional Mosaic* (Oxford: Hart Pub.)

- Walker, Neil (2012) 'On the Necessarily Public Character of Law', in Claudio Michelon, Haris Psarras, Gregor Clunie, Christopher McCorkindale (eds.) *The Public in Law* (Ashgate) Available at SSRN: <http://ssrn.com/abstract=1704412>
- Wang, Hui (2004) *The Rise of Modern Chinese Thought (Xian Dai Zhong Guo Si Xiang De Xing Qi)*, (Beijing: Life-Reading-Knowledge Book)
- Wang, Hui (2008) 'The Liberation of the Object and the Interrogation of Modernity: Rethinking the Rise of Modern Chinese Thought', *Modern China* 2008 34(1): 114-140.
- Wang, Jiangyu (2011) 'The Political Logic of Securities Regulation in China', in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*. (London: Routledge) 227-250
- Wang, Shaoguang (1997) *The Bottom-line of Division of Power (Fen Quan De Di Xian)*, (Beijing: China Planning Press).
- Wang, Shaoguang (2007) *Run The State Affairs Well To Ensure Peace Of The Nation: Aim and Path for State Transformation (An Bang Zhi Guo: Guo Jia Zhuan Xing De Mu Biao Yu Tu Jing)*, (Beijing: Life-Reading-Knowledge Book).
- Wang, Shaoguang (2008a) *Four Lectures on Democracy (Min Zhu Si Jiang)*, (Beijing: Life-Reading-Knowledge Book).
- Wang, Shaoguang (2008b) 'Changing Models of China's Policy Agenda Setting', *Modern China* 34: 56-87.
- Wang, Shaoguang (2009) 'Adapting by Learning: the Evolution of China's Rural Health Care Financing', *Modern China* 35(4): 370-404.

- Wei, Yuwa (2011), 'China's Banking Reforms at the Time of Global Economic Recession', in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*, (London: Routledge).209-226
- Weiler, J.H.H. (1991) 'The Transformation of Europe', *The Yale Law Journal* 100(8): 2403-2483.
- Weiler J.H.H. (2000a) 'Why should Europe be a Democracy: The Corruption of Political Culture and the Principle of Constitutional Tolerance', in Francis Snyder (ed.), *The Europeanisation of Law: the Legal Effects of European Integration*. (Oxford: Hart)
- Weiler, J.H.H. (2000b) 'Federalism and Constitutionalism: Europe's Soderweg', available at: <http://ftp.infoeuropa.euroid.pt/database/000036001-000037000/000036583.pdf>
- Weiler, J.H.H. & Wind, M (eds.) (2003) *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press)
- Weiler, J.H.H. (2004) 'The Geology of International Law – Governance, Democracy and Legitimacy', *ZaoRV* 64:547-562.
- Weiler, J.H.H. (2005) 'On the Power of the Word: Europe's Constitutional Iconography', *I.Con* 3(2 & 3):173-190.
- Weingast, Barry R. (1995), 'The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development', *The Journal of Law, Economics & Organization*, 11(1):1-31.
- Wu, Jinglian (2004) *Economic Reform in Modern China* (Dang Dai Zhong Guo De Jing Ji Gai Ge), (Shanghai: Shiji Publishing House)
- Xiaohong Xiao-Plaines (2009) 'Of Constitutions and Constitutionalism: Trying to Build a New Political Order in China, 1908 -1949', in Stephanie Balme and Michael W.

Dowdle (eds.) *Building Constitutionalism in China* (New York: Palgrave Micmillian) 37-58

Yu, Guanghua, (ed.) (2011) *The Development of the Chinese Legal system: Change and Challenges*, (London: Routledge).

Yu, Guanghua (2011), 'The Role of Mortgages – A Case for Formal Law', in Guanghua Yu (ed.), *The Development of the Chinese Legal system: Change and Challenges*. (London: Routledge) 113-137

Yu, Xingzhong (2009) 'Western Constitutional Ideas and Constitutional Discourse in China: 1978-2005', in Stephanie Balme and Michael W. Dowdle (eds.) *Building Constitutionalism in China*, (New York: Palgrave Micmillian). 111-124

Zhan, Shaohua (2011) 'What Determines Migrant Workers' Life Chances in Contemporary China? Hukou, Social Exclusion and the Market', *Modern China* 37(3): 243-285.

Zhou, Xueguang (2010) 'The Institutional logic of Collusion among Local Government in China', *Modern China* 36(1): 47-78

Zhu, Suli (2000) *Sending Law to the Countryside (Song Fa Xia Xiang)*, (Beijing: CUPL Press).

Zhu, Suli, Sociology of Law, (Fa Lv She Hui Xue), available at:

<http://www.yadian.cc/paper/20839>

Zhu, Suli (2005), Study Law in the Real World: Reading Robert Ellickson *Order Without Law*, *China Law Review* 1(1): 67-80.

Zhu, Suli (2009) 'Judicial Politics as State-Building', in Stephanie Balme and Michael W. Dowdle *Building Constitutionalism in China* (New York: Palgrave Micmillian)

Zimmerman, James, Labor Law: Trends and Practices in China, *The Foundation of Law, Justice and Society in collaboration with The Center of Socio-Legal Studies, University of Oxford* (6), available at:

<http://www.fljs.org/sites/www.fljs.org/files/publications/Zimmerman.pdf>, (accessed on December 9th, 2014)

Zou, Mimi (2009 IIRA) ‘Chinese Labour Law At a Critical Point in History’, available at:

http://www.ilera-directory.org/15thworldcongress/files/papers/Track_4/Wed_W2_ZOU.pdf, (accessed on December 9th, 2014)

Official Documents, Laws and Regulations:

Common Program of The Chinese People’s Political Consultative Conference (1949)

Constitution of The People’s Republic of China (1954)

Constitution of The People’s Republic of China (1975)

Constitution of The People’s Republic of China (1978)

Organic Law of the People's Courts of the People's Republic of China (1979)

Constitution of The People’s Republic of China (1982)

Provisions of the State Council on the Encouragement of Foreign Investment (1986)

The Interim Regulations of the People’s Republic of China concerning the Assignment and Transfer of the Right to Use of State-owned Land in Urban Areas (1990)

Regulations on the Implementation of the Land Administration of PRC (1998)

Contract Law of the People's Republic of China (1999)

Interim Measures for the Administration of Foreign-invested Development and Management of Tracts of Land (1990)

Foreign-invested Development and Management of Tracts of Land, effective on May 19th, 1990, and ceased to be effective on March 7th, 2008.

Legislation Law of the People's Republic of China (2000)

A Decision on Strengthening Legal Interpretation by NPCSC (Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Jia Qiang Fa Lv Jie Shi Gong Zuo De Jue Yi), (issued on June 10th, 1981)

Supreme People's Court (PRC). 2001. Response regarding whether one who violated the constitutionally protected basic right to education of the citizen should bear civil obligation (Guan Yu Yi Qin Fan Xing Ming Quan De Shou Duan Qin Fan Xian Fa Bao Hu De Gong Min Shou Jiao Yu Quan De Ji Ben Quan Li Shi Fou Ying Cheng Dan Min Shi Ze Ren De Pi Fu).

Luo Ruiqing, 'Explanations concerning the *Regulation on Household Registration of People's Republic of China (Draft)*' (Guan Yu Zhong Hua Ren Min Gong He Guo Hu Kou Deng Ji Tiao Li Cao An De Shuo Ming), available at:

http://www.law-lib.com/law/law_view.asp?id=1338 (accessed on December 9th, 2014)

Zhong Fa [1983] 35 (October 12th, 1983) A Notice by CCP & State Council Concerning the Separation of Government from Communes, and Establishing the Township Government (Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Shi Xing Zheng She Fen Kai Jian Li Xiang Zheng Fu De Tong Zhi), available at

<http://cpc.people.com.cn/GB/64184/64186/66701/4495412.html>, (accessed on December 9th, 2014)

A Notice by CCP & State Council Approving and Transferring “Summary of the Convention among Some Coastal Cities” (Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Pi Zhuang “Yan Hai Bu Fen Cheng Shi Zuo Tan Hui Ti Yao” De Tong Zhi, issued on May 4th, 1984. Available at:

<http://cpc.people.com.cn/GB/64184/64186/66678/4493873.html>, (accessed on December 9th, 2014)

Guofa [1986] No.95 (February 18th, 1985) A Notice by CCP and State Council Approving and Transferring “Summary of the Conference on Issues of Yanzi River Delta, Pearl River Delta and Xiamen-Zhangzhou-Quanzhou Delta in Southern Fujian” (Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Pi Zhuan “Chang Jiang Zhu Jiang San Jiao Zhou He Min Nan Xia Zhang Quan San Jiao Di Qu Zuo Tan Hui Ji Yao” De Tong Zhi), available at:

<http://cpc.people.com.cn/GB/64184/64186/66679/4493932.html>, (accessed on December 9th, 2014)

A Notice by CCP & State Council concerning the Promulgation of Three Regulations on State Enterprises (Zhong Gong Zhong Yang Guo Wu Yuan Guan Yu Ban Fa Quan Min Suo You Zhi Gong Ye Qi Ye San Ge Tiao Li De Tong Zhi), issued on September 15th,

1986, available at: <http://cpc.people.com.cn/GB/64184/64186/66680/4493981.html>, (accessed on December 9th, 2014)

Interim Provision on Employment Issues of State Enterprises (Guo Ying Qi Ye Zhao Yong Gong Ren Zan Xing Gui Ding)>, issued on July 12th, 1986, available on

<http://cpc.people.com.cn/GB/64184/64186/66680/4493988.html>, (accessed on December 9th, 2014)

Interim Provision on Employment-in-Suspension Insurance of the State Enterprises’ Workers (Guo Ying Qi Ye Zhi Gong Dai Ye Bao Xian Zan Xing Gui Ding), issued on July

12th, 1986, available at <http://cpc.people.com.cn/GB/64184/64186/66680/4493986.html>, (accessed on December 9th, 2014)

Interim Provision on Experimentation of the Labour Contract System by State Enterprises (Guo Ying Qi Ye Shi Xing Lao Dong He Tong Zan Xing Gui Ding), available at <http://cpc.people.com.cn/GB/64184/64186/66680/4493989.html>, issued on July 12th, 1986, (accessed on December 9th, 2014)

Provision on Contract Responsibility System of State Enterprises (Quan Min Suo You Zhi Qi Ye Cheng Bao Jing Ying Ze Ren Zhi Zan Xing Tiao Li), issued on February 27th 1988, available at <http://cpc.people.com.cn/GB/64184/64186/66681/4494043.html>, (accessed on December 9th, 2014)

A Decision by the General Office of CCP on Managing and Controlling, and Deepening Reforms (Summary) (Zhong Gong Zhong Yang Guan Yu Jin Yi Bu Zhi Li Zheng Dun He Shen Hua Gai Ge De Jue Ding), issued on November 9th, 1989, available at <http://cpc.people.com.cn/GB/64184/64186/66683/4494107.html>, (accessed on December 6th, 2014)

A Notice by State Council Approving and Transferring “Key Points Concerning the 1991 Reform to the Economic System by the Reform Committee of State Economic System (Guo Wu Yuan Pi Zhuan Guo Jia Ti Gai Wei “Guan Yu 1991 Nian Jing Ji Ti Zhi Gai Ge Yao Dian De Tong Zhi), issued on May 20th, 1991, available at: <http://cpc.people.com.cn/GB/64184/64186/66684/4494173.html>, (accessed on December 9th, 2014)

Li Peng, On the Current Economic Situation and on Further Activating Large and Medium Sized SOEs (Guan Yu Dang Qian Jing Ji Xing Shi He Jin Yi Bu Gao Huo Guo Ying Da Zhong Xing Qi Ye De Wen Ti), issued on September 23rd, 1991, available at: <http://cpc.people.com.cn/GB/64184/64186/66684/4494165.html>, (accessed on December 9th, 2014)

A Decision on Several Issues by CCP concerning Establishment of the Socialist Market Economy (Zhong Gong Zhong Yang Guan Yu Jian Li She Hui Zhu Yi Shi Chang Jing Ji

Ti Zhi Ruo Gan Wen Ti De Jue Ding), issued on November 14th, 1993, available at <http://cpc.people.com.cn/GB/64184/64186/66685/4494216.html>, (accessed on December 9th, 2014)

Decision by State Council concerning the Implementation of Tax-sharing System (Guo Wu Yuan Guan Yu Shi Xing Fen Shui Zhi Cai Zheng Guan Li Ti Zhi De Jue Ding), issued on December 15th, 1993, available at: <http://cpc.people.com.cn/GB/64184/64186/66685/4494212.html>, (accessed on December 9th, 2014)

A Notice by State Council Concerning Several Issues of Implementing Bankruptcy Practices of State-Owned Enterprises in several Cities (Guo Wu Yuan Guan Yu Zai Ruo Gan Cheng Shi Shi Xing Guo You Qi Ye Po Chan You Guan Wen Ti De Tong Zhi), available on <http://cpc.people.com.cn/GB/64184/64186/66686/4494327.html>, issued on October 25th, 1994, (accessed on December 9th, 2014)

A Decision by State Council on Promoting Urban Housing Reform (Guo Wu Yuan Guan Yu Shen Hua Cheng Zhen Zhu Fang Gai Ge De Jue Ding), issued on July 18th, 1994, available at <http://cpc.people.com.cn/GB/64184/64186/66685/4494187.html>, (accessed on December 9th, 2014)

Zhu Rongji, Actively Promote Enterprise Reforms and Implement Re-employment Project (Da Li Tui Jin Qi Ye Gai Ge, Ji Ji Shi Shi Zai Jiu Ye Gong Cheng), issued on January 8th, 1997. available at: <http://cpc.people.com.cn/GB/64184/64186/66687/4494373.html>, (accessed on December 9th, 2014)

Guo Fa [1997] No. 10, A Supplementary Notice by State Council concerning the Implementation of the SOEs Merger, Bankruptcy and Worker's Re-employment Project in Several Cities (Guo Wu Yuan Guan Yu Zai Ruo Gan Cheng Shi Shi Xing Guo You Qi Ye Jian Bing Po Chan He Zhi Gong Zai Jiu Ye You Guan Wen Ti De Bu Chong Tong Zhi)>,

issued on March 2nd, 1997, available at

<http://cpc.people.com.cn/GB/64184/64186/66687/4494359.html>, (accessed on December 9th, 2014)

A Notice by the General Office of CCP and State Council on the Stability and Development of Contracting Relations of the Rural Land (Zhong Gong Zhong Yang Ban Gong Ting Guo Wu Yuan Guan Yu Jin Yi Bu Wan Shan Nong Cun Tu Di Cheng Bao Guan Xi De Tong Zhi), available at

<http://cpc.people.com.cn/GB/64184/64186/66687/4494335.html>, issued on August 27th, 1997 (accessed on December 9th, 2014)

Guo Fa [1997] No. 29, A Notice on Establishing Nationwide Security System of Minimum Living in Urban Places (Guo Wu Yuan Guan Yu Zai Quan Guo Jian Li Cheng Shi Ju Min Zui Di Sheng Huo Bao Zhang Zhi Du De Tong Zhi), issued on September 2nd, 1997, available at: <http://cpc.people.com.cn/GB/64184/64186/66687/4494334.html>, (accessed on December 9th, 2014)

A Notice by State Council Concerning the Deepening of Housing Reform to a Next Step and the Acceleration of Housing Construction in Urban Areas (Guo Wu Yuan Guan Yu Jin Yi Bu Shen Hua Cheng Zhen Zhu Fang Gai Ge Jia Kuai Zhu Fang Jian She De Tong Zhi), issued on July 3rd, 1998, available at:

<http://cpc.people.com.cn/GB/64184/64186/66688/4494428.html>, (accessed on December 9th, 2014)

Several Important Decisions by CCP on Reform and Development of State Enterprises (Zhong Gong Zhong Yang Guan Yu Guo You Qi Ye Gai Ge He Fa Zhan Ruo Gan Zhong Da Wen Ti De Jue Ding) issued on September 22nd, 1999, available at:

<http://cpc.people.com.cn/GB/64162/71380/71382/71386/4837883.html> (accessed on December 9th, 2014)

Zhu Rongji, Speed Up Establishing Social Security System, and Ensure Lasting Political Stability.” (Jia Kuai Wan Shan She Hui Bao Zhang Ti Xi, Qie Shi Bao Zheng Guo Jia Chang Zhi Jiu An), issued on May 26th, 2000, available at:

<http://cpc.people.com.cn/GB/64184/64186/66689/4494504.html>, (accessed on December 9th, 2014)

Guo Fa [2001] no.37 A Notice by State Council concerning Sharing Reform of Income Tax (Guo Wu Yuan Guan Yu Yin Fa Suo De Shui Shou Ru Fen Xiang Gai Ge Fang An De Tong Zhi), issued on December 31st, 2001, available at:

http://www.mof.gov.cn/zhengwuxinxi/caizhengwengao/caizhengbuwengao2002/caizhengbuwengao20024/200805/t20080519_21080.html, (accessed on December 9th, 2014)

Several Opinions by State Council Concerning Promotion of the Reform and Opening, and the Stable Development of the Capital Market (Guo Wu Yuan Guan Yu Tui Jin Zi Ben Shi Chang Gai Ge Kai Fang He Wen Ding Fa Zhan De Ruo Gan Yi Jian), issued on January 31st, 2004, available at:

<http://cpc.people.com.cn/GB/64184/64186/66691/4494617.html>, (accessed on December 9th, 2014)

Guofa [2005] 3, Several Opinions by State Council On Encouraging, Supporting and Guiding Individual, Private and Other Non-Public Economy (Guo Wu Yuan Guan Yu Gu Li Zhi Chi He Yin Dao Ge Ti Si Ying Deng Fei Gong You Zhi Jing Ji Fa Zhan De Ruo Gan Yi Jian), issued on February 19th, 2005, available at:

http://www.gov.cn/zwgk/2005-08/12/content_21691.htm, (accessed on December 9th, 2014)

‘The Ten-year Layout for National Economy and Social Development and 8th Five-Year Plan’ (2006), available at: http://www.gov.cn/english/2006-04/05/content_245691.htm

Wen Jiabao, Several Important Issues Concerning Deeply Promoting the Idea of “Scientific Development” (Guan Yu Shen Hua Guan Che Luo Shi Ke Xue Fa Zhan Guan

De Ruo Gan Zhong Da Wen Ti), issued on November 5th, 2008, available at: http://www.gov.cn/ldhd/2008-11/03/content_1138667.htm, (accessed on December 6th, 2014)

Guo Fa [2008] No. 30 Guidelines by State Council Concerning Promoting the Reform and Openness, and the Economic and Social Development to a Higher Level in Yanzi Delta(Guo Wu Yuan Guan Yu Jin Yi Bu Tui Jin Chang Jiang San Jiao Zhou Di Qu Gai Ge Kai Fang He Jing Ji She Hui Fa ZhanDe Zhi Dao Yi Jian), issued on October 16th, 2008, available at: <http://www.china.com.cn/ch-xinwen/content/news081016-2.htm>, (accessed on December 6th, 2014)

Guo Ban Fa [2008] No. 134 An Opinion by the General Office of State Council on Activating Circulation and Increasing Consumption(Guo Wu Yuan Ban Gong Ting Guan Yu Gao Huo Liu Tong Kuo Da Xiao Fei De Yi Jian), issued on December 30th, 2008, available at http://www.gov.cn/zwgk/2008-12/31/content_1192763.htm, (accessed on December 6th, 2014)

Guo Fa [2009] No. 32 Guidelines by State Council Concerning Experiment of Pension Insurance of a New Type in the Rural Areas (Guo Wu Yuan Guan Yu Kai Zhan Xin Xing Nong Cun She Hui Yang Lao Bao Xian Shi Dian De Zhi Dao Yi Jian), issued on September 1st, 2009, available on http://www.gov.cn/zwgk/2009-09/04/content_1409216.htm, (accessed on December 6th, 2014)

State Plan of Action for Human Rights (Guo Jia Ren Quan Xing Dong Ji Hua) (2009-2010), available at: <http://www.chinanews.com/gn/news/2009/04-13/1642873.shtml>, issued in April 2009, (accessed on December 6th, 2014)

Layout for National Economy and Social Development of The 12th Five-Year Plan (Guo Min Jing Ji He She Hui Fa Zhan Di Shi Er Ge Wu Nian Ji Hua Gang Yao), available at: http://www.gov.cn/2011lh/content_1825838.htm, (accessed on December 6th, 2014)

Online Resources:

Mao, Zedong (1939) 'The Chinese Revolution and the Chinese Communist Party', available at:

https://www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2_23.htm

Mao, Zedong (1949) 'On the People's Democratic Dictatorship', available at:

http://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm

Deng Xiaoping Answered Questions of the American Journalist Mike Wallace (1986)

(Deng Xiao Ping Da Mei Guo Ji Zhe Mai Ke Hua Lai Shi Wen), available at:

<http://news.163.com/12/0409/08/7UKR413G0001124J.html> (accessed on December 6th, 2014)

Macleod, Calum. "China reviews 'apartheid' for 900m peasants", (June 10, 2001) *The Independent* (last accessed on December 16th, 2010), the resource has already been removed online.

Zhou Feizhou (2006) 'Ten Years after Tax-sharing System: Institutions and Impacts', (Fen Shui Zhi Shi Nian: Zhi Du Ji Ying Xiang), *China's Social Sciences*, Vol.6 available at:

http://www.chinareform.org.cn/Economy/tax/Practice/201012/t20101206_53871.htm

accessed on December 9th, 2014

Chen Xuebin, A Review of the mid-90s Housing Reform,

http://www.cssn.cn/ts/ts_jpsz/201312/t20131224_923133.shtml (accessed on December

9th, 2014)

"New Amendment to the Law on Election", (Xu Ju Fa Xin Xiu), (2010) *Finance and Economy* (Cai Jing), vol. 6, available at:

<http://magazine.caijing.com.cn/templates/inc/chargecontent2.jsp?id=110396269&time=2010-03-15&cl=106&page=1>, (accessed on December 9th, 2014)

Dong Dengxin (2010) ‘Thirty-year Transition of China’s Enterprise Financing’ (Zhong Guo Qi Ye Rong Zi Ti Xi San Shi Nian Da Bian Qian), *International Financing*, vol.12, available at: http://blog.caijing.com.cn/expert_article-151355-14869.shtml, (accessed on December 9th, 2014)

China, Wall Street and the Global Financial Crisis: Francis Fukuyama talks with Henry Paulson, (March 30th, 2010). Available at: <http://www.csmonitor.com/Commentary/Global-Viewpoint/2010/0330/China-Wall-Street-and-the-financial-crisis-Francis-Fukuyama-talks-with-Henry-Paulson>, (accessed on December 9th, 2014)

Fukuyama, Francis (January 17th, 2011), ‘US democracy Has Little to Teach China’, available at: <http://www.ft.com/cms/s/0/cb6af6e8-2272-11e0-b6a2-00144feab49a.html#axzz3PFfIoNdD>, (accessed on December 9th, 2014)

Barbara Demic, Protests in China over local grievances surge, and get a hearing, October 08, 2011, Los Angeles Times, available at: <http://articles.latimes.com/2011/oct/08/world/la-fg-china-protests-20111009> (accessed at December 9th 2014)

Restructuring of Shanxi Mining Industry Adopts “the State Sector Steps Forward while the Private Sector Retreats”, Mining Entrepreneurs Are About to Resign From the Stage (Shan Xi Mei Kuang Chong Zu Shang Yan Guo Jin Min Tui, Mei Laoban Jiang Tui Chu Li Shi Wu Tai), available <http://finance.ifeng.com/news/20090828/1166577.shtml> (accessed on December 9th, 2014)

An Unconstitutional Draft of Law on Property in Violation of the Principle of Socialism: A Public Letter Written for the Abolition of Article 12 of the Constitution and Article 73 of

1986 ‘The General Principle of Civil Law’” (Yi Bu Wei Bei Xian Fa he Bei Li She Hui Zhu Yi Ji Ben Yuan Ze De Wu Quan Fa Cao An – Wei Xian Fa Di Shi Er Tiao He 86 Nian Min Fa Tong Ze Di 73 Tiao De Fei Chu Xie De Gong Kai Xin) available at <http://www.chinaelections.org/NewsInfo.asp?NewsID=45986> (last accessed on October 10th, 2010). It has already been removed from this site, now is available at <http://news.qq.com/a/20061221/002288.htm> (accessed on December 9th, 2014)

A Public Letter by a Professor of Peking University on Unconstitutionality of Law on Property (Draft) that Reignites the debates Between Socialist Path and Capitalist Path(Bei Da Jiao shou Gong Kai Xin Cheng Wu Quan Fa Wei Xian, Zai Tiao Xing Zi Xing She Zhi Zheng), available at: <http://news.sohu.com/20060223/n241979849.shtml>, (accessed on December 9th, 2014)

Gong Xian Tian (Gong Xian Tian Zhe Ge Ren), available at <http://finance.sina.com.cn/g/20070318/06243416735.shtml> (accessed on December 9th, 2014)

Local Programs of Reforms to Household Registration Were Publicized in 17 Provinces, (Shi Qi Sheng Chu Di Fang Ban Hu Gai Fang An), available at <http://legal.people.com.cn/n/2015/0610/c188502-27131265.html>, (accessed on June 11th, 2015).