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Samson Yuen

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# Debating Constitutionalism in China: Dreaming of a liberal turn?

SAMSON YUEN

Xi Jinping's first term as China's new president has been jam-packed with ambition and action. It began with his nationalistic call to pursue the "Chinese Dream" (*zhongguomeng* 中国梦), a vision aimed at China's national rejuvenation but decidedly straying from the 2008 Beijing Olympics slogan, "One World, One Dream." Then came the campaign against corruption and graft in the upper echelons of the Party, during which a handful of important officials were impeached, one of them the former Chongqing Party secretary, princeling rising star Bo Xilai. Following close afterward was a "mass line" rectification campaign that vowed to clean up the four undesirable work styles, featuring self-criticism meetings among Party cadres as well as a movement against liberal elements in the media and civil society.

Meanwhile, a heated debate on constitutional government has also emerged. Fought by liberal reformists and party conservatives, the debate was staged under a partly wishful and partly strategic optimism that Xi might rekindle the long-interrupted political reform. On the one hand, liberal reformists drew inspiration from Xi's open-minded remarks in a speech delivered on the 30<sup>th</sup> anniversary of the 1982 Constitution in December 2012. Xi said, "No organisation or individual has the privilege to overstep the Constitution and the law, and any violation of the Constitution and the law must be investigated."<sup>(1)</sup> Liberals read Xi's comment as a sign of his determination to undertake a liberal overhaul of the political system. Deliberately leveraging this optimism, they urged the Communist Party (CCP) to uphold constitutional government, ensure the rights enshrined in the Chinese Constitution, and set up checks and balances on the power of the Party-state.

In response, a loose coalition of conservatives, including party ideologues and leftist intellectuals, responded by unleashing a spate of ferocious counterattacks in a number of key Party publications. Adopting an ideological stance, they argued that constitutional government is a by-product of Western capitalism, incompatible with China's own practice of socialism, and that China's political system must reflect the country's social and cultural conditions. In this respect, China is incompatible with Western notions such as constitutionalism, representative democracy, the separation of powers, and judicial independence. They argued that the campaign for constitutional government was part of a malicious Western plot to subvert the CCP, just as Gorbachev's constitutional reform brought about the dissolution of the Soviet Union.

This essay examines the arguments in the debate by situating it in the current status of the Constitution and its future role in China's political life. First, it looks at the state of the Chinese Constitution, its unfulfilled promises, and the obstacles to full implementation. Second, it reviews the current

episode of constitutional debate and summarises the arguments both for and against implementing constitutionalism in China. It seeks to show that, despite the Party's tolerance of the on-going intellectual debate on constitutionalism, the recent crackdown against civil society suggests that Party leaders have made a conservative move against the actual practice of constitutional government, which diminishes hopes for genuine political reform.

## *China's quest for constitutional government*

The struggle for a constitutional state has been a perennial theme for more than a century in China. The earliest experiment could be traced to the constitutional reforms in the late Qing. At that time, moderate reformers followed the footsteps of Japan to establish a constitutional monarchy, but soon failed in the wake of a brewing revolution. Then in the Republican Era came various attempts to establish a constitutional state, but none of them were successful, given the frequent infighting between Republican warlords. Neither did the KMT government under Chiang Kai-shek achieve much success after reunification. Although the government issued the "Constitutional Draft of May 5<sup>th</sup>" (*wuwu xiancao* 五五宪草) in 1936, the vote for a new Constitution was called off by the rapid escalation of the Japanese invasion.<sup>(2)</sup>

Up to then, China had remained an authoritarian single party state for a decade. Despite the existence of a constitution, citizens' rights were mostly suspended, and the KMT was notorious for terror tactics against suspected communists and political opponents. In response, the Communists, trying to increase their popularity, took advantage of the Second United Front to press for constitutional government. In February 1940, Mao Zedong spoke at the opening ceremony of the Yan'an Association for the Promotion of Constitutional Government. His speech, entitled "Constitutional Government under New Democracy" (*Xin minzhu zhuyi de xianzheng* 新民主主义的宪政), harshly criticised the KMT's one-party dictatorship and called for a new-democratic constitutional government.<sup>(3)</sup>

1. Xi Jinping, Speech on 30th anniversary of the current version of the Constitution, 14 December 2012, [http://news.xinhuanet.com/politics/2012-12/04/c\\_113907206.htm](http://news.xinhuanet.com/politics/2012-12/04/c_113907206.htm) (accessed on 20 September 2013).
2. Xiaohong Xiao-Planes, "Of Constitutions and Constitutionalism: Trying to Build a New Political Order in China, 1908-1949," in Stéphanie Balme and Michael W. Dowdle (eds), *Building Constitutionalism in China*, New York, Palgrave Macmillan, 2009.
3. Mao Zedong, "Xin minzhu zhuyi de xianzheng" (Constitutional government under New Democracy), 20 February 1940, [www.marxists.org/chinese/maozedong/marxist-org-chinese-mao-19400220.htm](http://www.marxists.org/chinese/maozedong/marxist-org-chinese-mao-19400220.htm) (accessed on 21 September 2013).

Communist support for constitutional government turned out to be an expedient strategy once the Party seized power in 1949. The People's Republic of China promulgated robust constitutions, but not the promised constitutional government. Three earlier versions of the Constitution, enacted in 1954, 1975, and 1978, not only failed to check the swelling power of the Party-state but also ignored citizens' rights that had been enshrined in the constitutions.

The current Constitution, ratified in 1982, is China's longest-functioning constitutional document.<sup>(4)</sup> Drafted by a committee of constitutional theorists, it reflected Deng Xiaoping's resolve to lay an institutional and legal framework for China's reform and opening. It dropped the notion of class struggle, placed top priority on economic development, and incorporated non-Party members into the modernisation drive. The 138 articles of the constitution make no mention of the Communist Party – except briefly in its preamble, which declares the Party's role in leading the Chinese people of all nationalities. Liberal elements were kept and amplified from previous versions. Article 2 says that "the organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels." Article 35 promises the "freedom of speech, of the press, of assembly, of association, of procession, and of demonstration." Article 36 protects the "freedom of religious belief."

The problem, however, is the lack of implementation. Although the constitution in theory limits state power and protects a number of liberal rights, it lacks any meaningful mechanism for enforcement. Peking University legal scholar Zhang Qianfan (张千帆) described China's Constitution as a "dead letter," contrary to a "living constitution" that "virtually 'grows' as it is applied and adapted to the changing social reality."<sup>(5)</sup> For instance, although the Chinese Constitution protects freedom of assembly and association, the government almost never grants applications for public assembly. In addition, so far there has been only one case of judicial application of the Constitution in Chinese courts. In 2001, the Supreme People's Court ruled that Qi Yuling would receive a remedy for an alleged violation of her right to education as provided by the Constitution – the first time in history that a constitutional provision was cited as the legal basis for a judicial decision. Although this ground-breaking application was rendered as "China's Marbury case," it was also the last case in which the court invoked constitutional provisions.<sup>(6)</sup> Rumours even held that the Supreme People's Court issued an internal directive forbidding courts from "judicialising the Constitution" (*xifanfa sifahua* 宪法司法化).<sup>(7)</sup>

Neither is there any permanent mechanism for challenging laws and resolving clashes between legal provisions. Unlike in the West, China does not have either a constitutional court or a constitution-interpreting judiciary, though courts do have some power to review specific administrative actions.<sup>(8)</sup> Although a special committee has been set up within the Standing Committee of the National People's Congress (NPC) since 2002 to review laws for their constitutionality, it has not yet ruled any law unconstitutional, except, arguably, in one case: the Sun Zhigang incident in 2003, which sparked a public outcry, forced the State Council to rescind the Custody and Repatriation regulations that allowed police to detain persons without residency permits. The decision came after the Standing Committee of the NPC stated that it would rule such regulations unconstitutional if they were not rescinded. In the end, a formal constitutional review was still avoided.

Despite four subsequent constitutional amendments<sup>(9)</sup> and the trend toward more Chinese citizens referring to constitutional provisions as tools of "rightful resistance,"<sup>(10)</sup> the failure to enforce the Constitution makes it

fair to say that China has "a constitution without constitutionalism" (and as will be shown, this very point is turned into a question-begging argument for rejecting constitutionalism). One major reason, as Zhang Qianfan puts it, is that enforcing the Constitution "would have triggered pervasive conflicts of interests." For example, just compensating people removed from their lands will translate into a reduction in government revenues and the personal gains of officials. Taking elections seriously will result in Party officials losing their offices, and hence their power and rewards. Both offend the status quo and disturb stability, and none are desirable for the Party leadership.

## Liberals calling for constitutional government

In spite of the rigid political atmosphere in post-Tiananmen China, liberals' calls for constitutional government have surfaced from time to time. One notable example was Charter 08, a manifesto published in 2008 and signed by more than 350 Chinese intellectuals and activists. The bold manifesto, which drew inspiration from the anti-Soviet Charter 77 in Czechoslovakia, demanded constitutional government, electoral democracy, and the elimination of one-party rule. One of its drafters, Liu Xiaobo, was awarded a Nobel Peace Prize, but the Charter also antagonised the Party leadership, who punished Liu with an 11-year jail sentence for "subverting state power."

Another proposal, which adopted more concrete and less subversive terms than Charter 08, appeared on the Internet on 25 December 2012. Known as the "Proposal for a Consensus on Reform" (*gaige gongshi changyi shu* 改革共识倡议书), the statement was drafted by legal scholar Zhang Qianfan and supported by more than 70 prominent liberal intellectuals and activists.<sup>(11)</sup> The carefully crafted statement demanded the enforcement of the Chinese Constitution and a proper definition of the relationship between the Party and the government. It called for the full implementation of intra-party democracy as well as more transparency and openness in administrative affairs. It championed judicial independence, urged local courts to delink from local finances, and proposed the establishment of an independent constitutional court in the People's Congress. Despite its moderate recommendations, the petition, which was posted by Zhang on his blog and widely circulated on Weibo, was soon removed and censored by state authorities.

- Constitution of the People's Republic of China, 4 December 1982, <http://english.people.com.cn/constitution/constitution.html> (accessed on 21 September 2013).
- Zhang Qianfan, "A Constitution without Constitutionalism? The Paths of Constitutional Developments in China," *International Journal of Constitutional Law* 2010, Vol. 8, No. 4, pp. 950-976.
- Robert J. Morris, "China's Marbury: Qi Yuling v. Chen Xiaoqi – The Once and Future Trial of Both Education & Constitutionalization," *Tsinghua China Law Review*, Vol. 2, No. 2, 2010, pp. 274-312.
- Zhang Qianfan, "A Constitution without Constitutionalism? The Paths of Constitutional Developments in China," *art. cit.*
- Eric C. Ip, "Judicial Review in China: A Positive Political Economy Analysis," *Review of Law & Economics* 2012, Vol. 8, No. 2, pp. 331-366.
- Four constitutional amendments have been made since 1982. The 1988 and 1993 revisions recognised the legitimacy of and promised equal protection for private enterprises. The 1999 revision promulgated the rule of law. The 2004 amendment protects private property and human rights. See [www.npc.gov.cn/englishnpc/Constitution/node\\_2824.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2824.htm) (accessed on 27 September 2013).
- The concept is used to refer to a form of partially institutionalised popular contention against the state whereby aggrieved citizens seek to legitimise their causes by making use of the state's own laws, policies, or rhetoric in framing their protests. See Kevin J. O'Brien and Lianjiang Li, *Rightful Resistance in Rural China*, Cambridge, Cambridge University Press, 2006.
- "Gai ge chang yi shu" (Proposal for a consensus on reform), [www.mingpaonews.com/download/ga20121227\\_1465.pdf](http://www.mingpaonews.com/download/ga20121227_1465.pdf) (accessed on 27 September 2013).

The censored petition created dramatic repercussions in the following weeks. *Southern Weekend* (*Nanfang Zhoumo* 南方周末), a Guangzhou newspaper known for its progressive attitude, planned its 2013 New Year issue with an opening essay boldly entitled “Chinese Dream, the Dream for Constitutional Government” (中国梦, 宪政梦).<sup>(12)</sup> The essay regarded China’s current quest for constitutional government as an unfinished historical enterprise and associated this goal with Xi Jinping’s “Chinese Dream,” a strategy weaving high-level official rhetoric with liberal demands for political opening. This, however, struck the nerves of the Party leadership. State propaganda authorities immediately ordered *Southern Weekly* editors to undertake several drastic revisions before they agreed on a sanitised final version, in which all 17 mentions of “constitutionalism” (*xianzheng* 宪政) were removed.<sup>(13)</sup> Around the same time, *Yanhuang Chunqiu* (炎黄春秋), a liberal Beijing magazine, published an opening piece called “Constitutional Government is the Consensus for Political Structural Reform” (宪法是政治体制改革的共识), which was similar to the title of the December petition.<sup>(14)</sup> Unlike *Southern Weekly*’s poignant tone, the latter adopted a legal perspective and urged the authorities to implement the neglected constitutional clauses. In response, state censors blocked the magazine’s website for two weeks.<sup>(15)</sup>

The censorship of both publications, one in Guangdong and another in Beijing, shows that there is no regional difference in terms of the Party’s intolerance of high-profile support for constitutional government. Rather than localised reactions from provincial party bosses, the concerted nature of the censorship effort suggested that it was more likely a decision from the Party centre to drive out liberal voices. Liberal activist Wen Yunchao, who writes as *Beifeng* (北风), said in an interview that the *Southern Weekend* affair resulted from journalists’ “miscalculation of Xi’s stance towards dissent,” which “led some in Beijing to believe there was an opportunity to raise the bar and take to the street with placards.”<sup>(16)</sup>

### Counterattacks from party conservatives

Counterattacks from party conservatives targeting constitutionalism began to gather pace in May 2013 with the support of state media. Ironically, this conservative turn came as a “surprise,” as it followed the arrest of the neo-Maoist ex-Chongqing chief Bo Xilai, a move that might have seemed like a liberal turn in Chinese politics. In early May, overseas media reported that the central government had ordered higher education institutions to obey the “Seven Don’t Speaks” (*qibujiang* 七不讲), which banned teachers from discussing universal values, press freedom, civil society, civil rights, the Party’s historical mistakes, the privileged capitalist class, and judicial independence.<sup>(17)</sup> Another party document advanced 16 points aimed at increasing control of the political quality of young teachers in higher institutions. The document, which appeared at the end of May, was originally dated early May – around the time that the “Seven Don’t Speaks” was leaked – which led analysts to link them together.<sup>(18)</sup>

These leaked edicts set the scene for two waves of counterattacks against constitutionalism. The first wave came around late May as Renmin University law professor Yang Xiaoqing (杨晓青) wrote a long piece in *Red Flag Manuscripts* entitled the “Comparative Study of Constitutional Government and the People’s Democratic Regime” (宪政与人民民主制度之比较研究), which was reposted on the *Seeking Truth* website.<sup>(19)</sup> The article contrasts the constitutional government of Western democracies with the People’s Democracy (*renmin minzhu zhidu* 人民民主制度) in China, arguing that “constitutionalism belongs to capitalism, but not socialism.” On the same day, *Global Times*,

a hawkish Party newspaper, ran an editorial criticising constitutionalism as a roundabout route to repudiating China’s developmental path.<sup>(20)</sup> On 29 May, *Party Construction* (*dangjian* 党建), a journal published by the Propaganda Department, published an essay entitled “Recognise the Basic Nature of ‘Constitutionalism’” (认清“宪政”的本质) which described constitutionalism as a “discursive trap.” The author, Zheng Zhixue (郑志学), was likely a pseudonym – as suggested by its Chinese homophone meaning “political science” (*zhengzhi xue* 政治学).<sup>(21)</sup> In June, *Red Flag* published an essay by Wang Tingyou (汪亭友) called “A Few Thoughts on the Question of Constitutionalism” (对宪政问题的一些看法), which attacked constitutionalism as “a means of abolishing the leadership of the CCP and the socialist system.”<sup>(22)</sup>

State media returned to silence until a second wave began in late July and peaked in mid-August. In July, new left intellectuals Hu Angang (胡鞍钢) and Wang Shaoguang (王绍光) challenged the idea of civil society in two separate essays. The former piece, entitled “Why People’s Society is superior to Civil Society” (人民社会为何优于公民社会) and published in *People’s Daily Overseas Edition*, brought up the notion of the People’s Society in which the core undertaking is to improve citizens’ welfare (*minsheng* 民生) by adopting the mass line (*qunzhong luxian* 群众路线).<sup>(23)</sup> The latter, Wang’s “‘Civil Society’ is a Crude Neoliberal Myth” (「公民社会」是新自由主义编造的粗糙神话), which appeared in *People’s Forum*, discredited civil society as an ill-defined concept fabricated by neo-liberalism.<sup>(24)</sup> On 1 August, online commentator Wang Xiaoshi (王小石) posted a provocative piece called “If China descends into unrest, the situation can only be worse than the Soviet Union” (中国若动荡, 只会比苏联更惨) on the official Xinhua Net.<sup>(25)</sup>

12. Dai Zhiyong, “Zhongguo meng, xianzheng meng” (Chinese Dream, the dream for constitutional government), unpublished but available online: [www.bbc.co.uk/zhongwen/trad/chinese\\_news/2013/01/130104\\_nanfangzhoumo\\_newyear.shtml](http://www.bbc.co.uk/zhongwen/trad/chinese_news/2013/01/130104_nanfangzhoumo_newyear.shtml) (accessed on 24 September 2013).
13. “Women bi renhe shihou dou geng jiejin mengxiang” (We are closer to our dream than ever before), *Southern Weekend*, 3 January 2013.
14. “Xianzheng shi zhengzhi tizhi gaige de gongshi” (Constitutional government is the consensus for political structural reform), *Yanhuang Chunqiu*, January 2013, available on <http://comments.caijing.com.cn/2013-01-04/112406679.html> (accessed on 25 September 2013).
15. “Yanhuang Chunqiu website closed down after editorial on constitution,” *South China Morning Post*, 5 January 2013.
16. Patrick Boehler, “Timeline: Activist’s list of Chinese political arrests shows crackdown is gathering pace,” *SCMP*, 2 September 2013, [www.scmp.com/news/china-insider/article/1298316/info-graphic-activists-list-chinese-political-arrests-shows](http://www.scmp.com/news/china-insider/article/1298316/info-graphic-activists-list-chinese-political-arrests-shows) (accessed on 26 September 2013).
17. “Jing Hu daxue zaoling ‘qibujiang’ jintan xinwen ziyou pushi jiazhi” (Universities in Beijing and Shanghai ordered to obey the “Seven Don’t Speaks,” forbidding talk of press freedom and universal values), *Ming Pao*, 11 May 2013.
18. “Xi Jinping xinzheng: qibujiang hou youyou shiliu tiao” (New policies of Xi Jinping: Sixteen points after the Seven Don’t Speaks), BBC Chinese, 28 May 2013, [www.bbc.co.uk/zhongwen/simp/china/2013/05/130528\\_china\\_thought\\_control\\_youth.shtml](http://www.bbc.co.uk/zhongwen/simp/china/2013/05/130528_china_thought_control_youth.shtml) (accessed on 26 September 2013).
19. Yang Xiaoqing, “Xianzheng yu renmin minzhu zhidu zhi bijiao yanjiu” (A research comparison of constitutionalism and people’s democracy), *Red Flag Manuscript*, Vol. 10, 22 May 2013, [www.gstheory.cn/hqwq/2013/201310/201305/t20130521\\_232618.htm](http://www.gstheory.cn/hqwq/2013/201310/201305/t20130521_232618.htm) (accessed on 26 September 2013).
20. “Xianzheng’ shi dou quanqi fouding zhongguo fazhan zhilu” (Constitutionalism is a roundabout route to reject China’s developmental path), *Global Times*, 22 May 2013, <http://opinion.huanqiu.com/editorial/2013-05/3957200.html> (accessed on 26 September 2013).
21. Zheng Zhixue, “Renqing ‘xianzheng’ de benzhi” (Recognise the basic nature of “constitutionalism”), *Party Construction*, 29 May 2013.
22. Wang Tingyou, “Dui xianzheng wenti de yixie kanfa” (A few thoughts on the question of constitutionalism), *Red Flag*, June 2013.
23. Hu Angang, “Renmin shehui weihe youyou gongmin shehui” (Why people’s society is superior to civil society), *Renmin Ribao Overseas*, 19 July 2013, [http://paper.people.com.cn/rmrhwb/html/2013-07/19/content\\_1270853.htm](http://paper.people.com.cn/rmrhwb/html/2013-07/19/content_1270853.htm) (accessed on 23 September 2013).
24. Wang Shaoguang, “Gongmin shehui’ shi xin ziyozhuyi bianzao de cuzao shehua” (Civil Society is a neoliberal myth), *Renmin Luntan*, 31 July 2013, <http://theory.people.com.cn/BIG5/n/2013/0808/c40531-22488604.html> (accessed on 23 September 2013).
25. Wang Xiaoshi, “Zhongguo ruo dongdang, zhihui bi sulian gengcan” (If China descends into unrest, the situation can only be worse than the Soviet Union), *Xinhuanet*, 1 August 2013, [http://news.xinhuanet.com/world/2013-08/01/c\\_116766533.htm](http://news.xinhuanet.com/world/2013-08/01/c_116766533.htm) (accessed on 24 September 2013).

In this demagogical and widely circulated piece, Wang attacked public intellectuals for plotting to replace China's socialism with the Western "capitalist and constitutional model." He argued that if China were to democratise, the consequences would be much worse than for the resource-rich Russia after the disintegration of the Soviet Union. *Global Times'* editorial on 5 August largely agreed with Wang's view, saying that it is "consistent with the mainstream of Chinese society."<sup>(26)</sup>

The Party's offensive soon reached its peak. From 5 August, *People's Daily Overseas Edition* ran front-page editorials for three consecutive days criticising constitutional government.<sup>(27)</sup> Mostly repackaging arguments from previous critiques heightened by an uncompromising tone, these essays argued that constitutionalism is not only incompatible with Chinese socialism but also susceptible to a Western – principally US – plot to subvert the Communist Party. All three were written by a certain Ma Zhongcheng (马钟成), described as a Senior Research Fellow of the Hainan-based "Oceanic Security and Cooperation Institute." Analysts believe that Ma is probably not a real person but rather the Chinese short-form of "loyal to Marxism" (*zhongcheng yu makesi zhuyi* 忠诚于马克思主义).<sup>(28)</sup> On 19 and 20 August, the website of Party journal *Seeking Truth* reposted two articles from *Haijiang Online* (海疆在线), a leftist website also based in Hainan. The essays, written by Gao Xiang (高翔) and Zheng Li (郑里), ferociously criticised constitutionalism as a "challenge against the spirit of the 18<sup>th</sup> National Congress" and a "US conspiracy to infiltrate China."<sup>(29)</sup> Both authors were Research Fellows in the same institution where Ma worked. Details of the institute were not available online, but insiders claimed that this covert organisation has strong ties to the military.<sup>(30)</sup> More recently, in mid-October, *Seeking Truth* (求是) published a lead article under the name of Qiu Shi (秋石), calling for the "consolidation of ideological foundation" in the Party and among the people (巩固党和人民团结奋斗的共同思想基础) and also attacking the ideas of universal values, Western democracy, and constitutional government.<sup>(31)</sup>

These criticisms generally fall into three lines of argument. The first is to argue that having a constitution does not necessarily entail constitutionalism. Accordingly, China already has a robust constitution, and has been rectified and improved according to new circumstances. As the highest law, the constitution specifies the basic political structure of the state and enshrines the basic rights and freedoms to be enjoyed by its citizens. All individuals and institutions, including the Communist Party itself, ought to govern the state according to the Constitution (*yixian zhiguo* 依宪治国) and all other laws (*yifa zhiguo* 依法治国). This, however, is different from implementing constitutionalism as a political system, because there is no inherent relation between constitution and constitutionalism. As Yang Xiaoqing argues, polities can have a constitution without constitutionalism, for example the late Qing, while some polities can have constitutionalism without a constitution, like the United Kingdom.<sup>(32)</sup>

On the contrary, the argument goes, constitutionalism is a political doctrine (*zhengzhi zhuzhang* 政治主张) produced by capitalist systems. Found on the basis of capitalist market economy and private property, it exercises the separation of powers, parliamentary and representative democracy, and judicial independence. Although these political designs could limit the power of the state to a considerable extent, they are vulnerable to the dominant influence of the capitalist class. Worse still, majoritarian politics might also lead to the blatant infringement of minority rights. As China is a socialist state where the political and socio-economic system is drastically different from (and superior to) Western constitutional democracies, constitutional-

ism is not compatible with China. Hence, there is no need for any mention of the term "constitutionalism," even the politically correct "socialist constitutionalism" (*shehui zhuyi xianzheng* 社会主义宪政), because China's socialism has already absorbed the non-essential elements of constitutionalism, such as human rights, equality before the law, market economy, and press freedom, into its "Chinese characteristics." And even as Mao Zedong had mentioned the need for constitutional government before 1949, he attached the idea to New Democracy and distinguished it from that of capitalist and socialist democracy. With the triumph of the Communist Party in 1949, new-democratic constitutionalism was replaced by the "People's Democratic Dictatorship" (*renmin minzhu zhuanzheng* 人民民主专政).

The second category of arguments is that China's political system is unique and superior to Western democracies, thus incompatible with constitutionalism. Contrary to Western constitutional governments, China practises what is known as the People's democratic system (*renmin minzhu zhidu* 人民民主制度). It exercises public ownership at the core, though allowing some degree of private property. Besides, the state represents "the basic interests of the broadest number of people." There are no factions, no other power-sharing parties, and no interest groups. All power comes from the people, and is in turn vested in the Communist Party. Thus state power is unified, contrary to the separation of powers, and is exercised through the People's Congress, which is popularly elected by the people and unifies legislative and executive power. The judiciary is not independent. According to the official line, the judiciary ought to exercise its functions independently according to the law (依法独立行使职权), and must accept the political, ideological, and organisational leadership of the Communist Party. The legitimacy of the Party comes from the revolution rather than elections. The military must be placed under the leadership of the Party. The idea of civil society must give way to a more superior people's society, which truly represents the interest of the people.

The third is to argue that the campaign for constitutionalism is a Western conspiracy to reject China's developmental path and subvert the rule of the CCP. It holds that the term "constitutionalism" is a discursive trap (*huayu xianjing* 话语陷阱). Once people are allowed to adopt it, China will be led by the thinking behind it and have its system entirely transformed. *People's Daily's* Ma Zhongcheng put this rather concisely. In his first essay, "Consti-

26. "Shi zhongguo ruo dongdang, zhihui bi sullivan gengcan" (Analyse 'If China descends into unrest, the situation can only be worse than the Soviet Union'), *Global Times*, 5 August 2013, <http://opinion.huanqiu.com/editorial/2013-08/4206935.html> (accessed on 24 September 2013).

27. "'Xianzheng' benzhi shang shi yizhong yulunzhan wuqi" ("Constitutionalism" is essentially a weapon in a public opinion war), *People's Daily Overseas*, 5 August 2013; "Meiguo xianzheng de mingbu fushi" (American constitutionalism is no more than a name), *People's Daily Overseas*, 6 August 2013; "Zai Zhongguo gao suowei xianzheng zhineng shi yuanmuqiyu dianfu shehuizhuyi zhengquan" (Doing constitutionalism in China can only be like catching fish in a tree, subverting the rule of socialism), *People's Daily Overseas*, 7 August 2013.

28. Frank Langfitt, "China's Debate: Must The Party Follow The Constitution?", *NPR*, 18 September 2013.

29. Gao Xiang, "Xianzheng chao shidui shibada jingshen de tiaoxin" (The Constitutionalism wave is a defiance of the spirit of the 18th National Congress), *Seeking Truth Online*, 19 August 2013, [www.qstheory.cn/zz/wwtj/201308/t20130819\\_261266.htm](http://www.qstheory.cn/zz/wwtj/201308/t20130819_261266.htm) (accessed on 23 September 2013); Zheng Li, "Xianzheng" lilun shidui Zhongguo gaige de ganrao he wudao" (The theory of "constitutionalism" misguides and upsets Chinese reforms), *Seeking Truth Online*, 20 August 2013, [www.qstheory.cn/zz/wwtj/201308/t20130820\\_261787.htm](http://www.qstheory.cn/zz/wwtj/201308/t20130820_261787.htm) (accessed on 23 September 2013).

30. Qian Gang, "The Uncertain Death of 'Constitutionalism,'" *China Media Project*, 2 September 2013, <http://cmp.hku.hk/2013/09/02/33944/> (accessed on 21 September 2013).

31. Qiu Shi, "Gongguo dang he renmin tuanjie fendou de gongtong sixiang jichu" (Consolidating the collective ideological foundation of the unity and struggle of the Party and people), *Seeking Truth*, 16 October 2013.

32. Yang Xiaoqing, "Xianzheng yu renmin minzhu zhidu zhi bijiao yanjiu," *art. cit.*

tutionalism' is Essentially a Weapon in a Public Opinion War," Ma argued that "constitutionalism" – even in its moderate form as socialist constitutionalism – is a trap set up by the United States to weaken China. According to Ma, China's current situation was similar to the Soviet Union's in the 1980s when Mikhail Gorbachev, Boris Yeltsin, and their legal theorists promoted the ideas of socialist constitutionalism, which he saw as weapons of the ideological and psychological war waged by the US. In the end, constitutionalism "abolished the socialist factor in the Soviet Constitution, abolished the leadership role of the Communist Party, and disintegrated the Soviet Union," and led to a series of "shock therapies" in the early 1990s. In this respect, China's discourse on constitutionalism was no different. Supporters were "funded by a number of US charitable foundations that are in turn backed by American intelligence agencies." The Contemporary Global Comparative Constitutional History Research (当代世界比较宪政史研究) was singled out as an example funded by the Ford Foundation.<sup>(33)</sup>

### **Liberals' rebuttal – with the Party's tacit consent?**

While the debate has been largely dominated by conservative writings, liberals and certain open-minded Party theorists have found space to fight back – although their outlets are limited to the Internet and liberal presses. On 23 May, *Caijing Online* published an article called "Constitutionalism is What Countries under Rule of Law Should Be About" (宪政是法治国家应有之义).<sup>(34)</sup> The article, posted by liberal political commentator Zhang Lifan (章立凡), was in fact an old piece written in 2008 by Xu Chongde (许崇德), a famous Chinese constitutional theorist who helped draft the 1982 Constitution. In June, Singapore's *Lianhe Zaobao* (联合早报) interviewed Chinese legal scholar He Weifang (贺卫方), who urged Xi to stand by his promise and implement the Constitution.<sup>(35)</sup> Another article, entitled "Avoiding Constitutionalism Means Cutting Off the Road Forward for China" (拒绝宪政是断绝中国的前途) and written by scholar Feng Chongyi (冯崇义) and writer Yang Hengjun (杨恒均), was circulated on the Internet, arguing that the question of constitutionalism was a matter of life and death for China.<sup>(36)</sup>

Most notably, Cai Xia (蔡霞), an outspoken professor and reform advocate in the Central Party School, published two articles in defence of constitutionalism. The first, published on 30 May and entitled "Promoting Constitutional Democracy should be the Ruling Mission of the CCP" (推进宪政民主应该是中国共产党的执政使命), was intended to rebut Yang Xiaoping's article.<sup>(37)</sup> The second, a 30,000-word piece that appeared three weeks later (推进宪政民主关键在党团结也在党), warned that if the Party refuses political reform it will lose the opportunity to reform altogether.<sup>(38)</sup> Numerous other articles in support of constitutionalism also appeared on the Internet, written by authors such as Jiang Ping (江平), Hua Bingxiao (华炳啸), Tong Zhiwei (童之伟), Guo Daohui (郭道晖), Wang Jianxun (王建勋), Wang Zhanyang (王占阳), Zhang Qianfan (张千帆), Rong Jian (荣剑), and Hu Deping (胡德平). *Yanhuang Chunqiu* devoted its September issue to constitutionalism. Even *Study Times*, the official publication of the Central Party School, published a piece on 5 August that urged the ruling party to kick-start political reform.<sup>(39)</sup>

It is hard to predict the future course of the debate, but so far we are able to make three observations. First, the fact that a debate was unleashed in the first place and dragged on for some time implies that Party leaders, possibly even Xi Jinping, have given tacit endorsement. It shows that the new leadership has broken the tradition of "not arguing" (*buzhenglun* 不争论)

about ideology and political reform, which was set out by Deng Xiaoping in the post-Tiananmen decade and carried forward by Jiang Zemin and Hu Jintao until most recently. Why Xi has chosen to break with tradition, at least partially, is not clear; but his recent policies of mass line rectification and Maoist indoctrination suggest that ideology might play a much more important role in the polity than under his predecessors. Seen in this light, the constitutional debate might be a prelude to the revival of ideological guidance under Xi Jinping's administration.

Second, while conservative voices have dominated the debate through what seems to be a premeditated media campaign, the fact that liberals were able to mount a dignified defence – unscathed by the powerful censorship machinery – suggest that the Party leadership is willing to tolerate liberal opinions to a certain extent. In addition, counterattacks have not yet made it to the highest level of Party propaganda. Experts on Chinese media Qian Gang and David Bandurski both pointed out that the highest level of attack against constitutionalism came from *People's Daily Overseas Edition*, which is not on par with the most official mouthpiece, *People's Daily*,<sup>(40)</sup> although in a later article Qian referred to the repeated mention of "struggling against public opinion" (*yulun douzheng* 舆论斗争) in a more recent op-ed piece in *People's Daily*, suggesting that the attack might be climbing up to a higher level.<sup>(41)</sup> The more recent essay in *Seeking Truth* further confirms the trend. On the other hand, however, public discussion on the topic faced much harsher restrictions. As the offensive against constitutionalism began to fuel Internet discussions, government censors quickly blocked the term "constitutionalism" on *Weibo*. This shows that state authorities can tolerate the discussion on the condition that it remains on an intellectual level without evolving into open public discussion that might induce mobilisation.

Third, while it is not clear to what extent the Party leadership rejects the idea of constitutionalism, some leaders – if not all – have revealed their preference for tighter control on activists and civil society in the past year. There are credibly-sourced rumours that the Party Central has sent down

33. "'Xianzheng' benzhi shang shi yizhong yulunzhan wuqi" ("Constitutionalism" is essentially a weapon in a public opinion war), *People's Daily Overseas*, 5 August 2013.
34. Xu Chongde, "Xianzheng shi fazhi guojia yingyou zhiyi" (Constitutionalism is what countries under rule of law should be about), *Caijing Online*, 23 May 2013, [http://blog.caijing.com.cn/expert\\_article-151497-52108.shtml](http://blog.caijing.com.cn/expert_article-151497-52108.shtml) (accessed on 20 September 2013).
35. "Duihua He Weifang tan Zhongguo xianzheng zhengyi" (Talking with He Weifang about China's constitutional controversy), *Lianhe Zaobao*, 4 June 2013, [www.zaobao.com.sg/special/zbo/story20130604-212263](http://www.zaobao.com.sg/special/zbo/story20130604-212263) (accessed on 21 September 2013).
36. Feng Chongyi and Yang Hengjun, "Jujue xianzheng shi duanqie Zhongguo de qiantu" (Avoiding constitutionalism means cutting off the road forward for China), *Takungpao*, 13 June 2013, <http://news.takungpao.com/opinion/academic/2013-06/1686275.html> (accessed 21 September 2013).
37. Cai Xia, "Tuijin xianzheng minzhu yinggai shi zhongguo gongchandang de zhizheng shiming" (Promoting constitutional democracy should be the ruling mission of the CCP), *Caijing Online*, 31 May 2013, <http://comments.caijing.com.cn/2013-05-31/112850810.html> (accessed on 21 September 2013).
38. Cai Xia, "Tuijin xianzheng minzhu guanjian zaidang zhengjie yezai dang" (The key to promoting constitutional democracy lies with the CCP, and so does the problem), *Takungpao*, 21 June 2013, <http://news.takungpao.com/opinion/highlights/2013-06/1703130.html> (accessed on 21 September 2013).
39. "Zhizhengdang yinggai shanyu lingdao zhengzhi tizhi gaige" (Ruling party should be good at leading political reforms), *Study Times*, 5 August 2013, [http://news.xinhuanet.com/politics/2013-08/05/c\\_125114363.htm](http://news.xinhuanet.com/politics/2013-08/05/c_125114363.htm) (accessed on 21 September 2013).
40. David Bandurski, "China's constitutional debate," *China Media Project*, 14 August 2013, <http://cmp.hku.hk/2013/08/14/33812/> (accessed on 21 September 2013). Qian Gang, "The Uncertain Death of 'Constitutionalism,'" *China Media Project*, 2 September 2013, <http://cmp.hku.hk/2013/09/02/33944/> (accessed on 21 September 2013).
41. Qian Gang, "Parsing the 'public opinion struggle,'" *China Media Project*, 24 September 2013, <http://cmp.hku.hk/2013/09/24/34085/> (accessed 25 September 2013).

an internal memo “Concerning the Situation in the Ideological Sphere” (关于当前意识形态领域情况的通报), also known as Document No. 9, warning Party cadres against seven perils that might lead to the downfall of the Communist Party, the first of which was purportedly Western constitutional democracy.<sup>(42)</sup> It was allegedly the guiding thought behind the “Seven Don’t Speak,” the ban against the discussion of seven topics in schools. The recent campaign-style crackdown against civil society activists and online celebrities is yet another indication of the Party’s resolution to rein in free expression. It shows that, after all, Xi Jinping and his colleagues are not as liberal as people – perhaps wilfully – anticipated. Even if there will be some form of political reform, it will be limited in scale and largely constrained by resistance from within the Party.

### **Conclusion: What does the debate mean for ordinary citizens?**

Whether or not, and to what extent, Party leaders are willing to borrow from constitutionalism will have drastic consequences on Chinese politics. Espousing constitutional government might lead to less interference of the Party into state affairs, possibly resulting in a less powerful state, a cleaner government, a more independent judiciary, and more civil liberties – although all require strong political will from the Party leadership to curb vested interests and, more crucially, to relinquish its own despotic power. Renouncing constitutional government, on the other hand, might result in a tenser political climate than the status quo, as it requires more sophisticated methods of political repression and social control to hold back an increasingly restive and well-informed citizenry. So far the Party leadership has not sent out clear and firm messages regarding the fate on constitutionalism.<sup>(43)</sup> Until they take such a step, the debate on constitutionalism could remain a largely intellectual exchange, and might not have many ram-

ifications for ordinary citizens – especially as state censorship has barred them from participating in the discussion. Yet ironically, *thanks to* censorship and the concerted media campaign to condemn constitutionalism, ordinary citizens may have gained knowledge and understanding of such an obscure notion.

In any event, the prospect for constitutional government appears slim. As recent developments suggest, the Communist Party continues to play an active role in the everyday life of Chinese citizens, with party-building activities growing rapidly in tandem with an expanding civil society.<sup>(44)</sup> “Ruling the state according to law” continues to develop unique Chinese characteristics. The recent anti-corruption campaign indicates that even though the Party leadership pledged to fight corruption regardless of the lowly “flies” and the high-flying “tigers,” the selective targeting of officials shows that the anti-corruption drive is driven by ideology and campaign justice – rather than by building institutions and adopting the rule of law. On the other hand, while the unexpected transparency of the epic Bo Xilai trial pleased some among the liberals, the authorities’ meticulous control of what could be broadcasted and what would be censored from the trial suggests a new model that utilises selective and tightly controlled transparency to manage an increasingly inquisitive citizenry.

Where all this will bring China with respect to the ideals of constitutionalism remains something to be closely watched. As soon as Xi Jinping secures a firm grip in power, or otherwise, more will become certain.

**Samson Yuen is a PhD student in politics at the University of Oxford and is a research assistant at CEFC (samson.yuen@sant.ox.ac.uk).**

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42. Chris Buckley, “China Takes Aims at Western Ideas,” *The New York Times*, 19 August 2013; “Guanyu Dangqian yishi xingtai lingyu qingkuang de tongbao” (Concerning the situation in the ideological sphere), *Mingjing Magazine*, Vol. 43, August 2013.

43. Qian Gang, “The Uncertain Death of ‘Constitutionalism,’” *China Media Project*, 2 September 2013, <http://cmp.hku.hk/2013/09/02/33944/> (accessed on 21 September 2013).

44. Patricia M. Thornton, “The New life of the Party: Party-Building and Social Engineering in Greater Shanghai,” *China Journal*, No. 68, 2012, pp. 58-78; Patricia M. Thornton, “The Advance of the Party: Transformation or Takeover of Urban Grassroots Society?,” *The China Quarterly*, No. 213, 2013, pp. 1-18.