

# China's Quest for a Modern Constitutional Polity

By

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## **Abstract**

China's quest for a modern constitutional polity in the past one hundred years is still an unfinished business. It is this research's argument that for China to become a modern polity, it needs further social and political development, so that the Chinese people will have a stake in its polity and its constitutional framing. The research question of this thesis asks what lessons can we learn to support this argument from the analyses of the divergence/convergence between constitutional intents and the social and political needs of the past one hundred years. The key lessons learned in support of the research argument are as follows:

- The traditional Chinese response to scarcity caused its underdevelopment. Underdevelopment in modern time is not an option as it has serious consequences.
- Not actively competing in the world was the ultimate source of China's past decays.
- Functional/institutional designs harming political participation can cause instability.
- Ideology driven social restructuring can be disastrous due to its partiality.
- State directed constitutional framing can hardly be expected to produce constitutionalism.
- Constitutionalism requires social forces putting demands on the state.
- Constitutionalism must be supported by statutes and political reforms.
- The origin of a constitutional idea does not matter as long as it is truly needed in China.

The research result makes clear what the state needs to do in its next phase of development. The current leaders' recognition of the need to put state power under the constitution is a sign of new convergence towards people's demand for rights, rule of law and opposition to corruption and abuse of power.

### **Dedication**

To my wife Rebecca, for her unwavering support of my PhD endeavour

五子之歌: "...民惟邦本，本固邦寧..." 尚書, 夏書

The Song of Five Brothers: "...the people is the basis of a country,  
when the basis is secured, the country is tranquil...", circa 2043 BC.<sup>1</sup>

孔子曰: "...且丘聞之, 君者, 舟也; 庶人者, 水也。水則載舟, 水則覆舟..."

Confucius said to Duke Ai of the State of Lu: "... I have heard rulers are like boats, the  
multitude like water, water can carry boats, water can overturn boats...", circa 484 BC.<sup>2</sup>

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<sup>1</sup> The Song of Five Brothers, The Book of Xia in the Book of History

<sup>2</sup> Xunzi, *Duke Ai*, *Xunzi* 31 《荀子·哀公》篇.

## **Acknowledgements**

The time span under study and the complexity of China's modern development often led this research into multiple layers of details. The author, in many occasions, sought guidance and encouragement from Professor Darby, Professor Rajaei and Professor Sloan. I am indebted to their kind support and would like to take this opportunity to express my sincere thanks to them.

## **Author's Note**

In this dissertation, the rendering of Chinese names into English uses the contemporary Chinese pinyin method. Also, the Chinese convention of placing the family name before the given name is followed. However, for well known Chinese persons and locations, their common English translation in previous Western publications are used. For example, the common Latinized "Confucius" is used instead of the pinyin version as "Kongzi". Also, Peking and Beijing are used interchangeably in the text.

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## Introduction

Currently, there is an unresolved debate in China on constitutionalism.<sup>3</sup> On the opposing side, there are people who question the fundamental necessity for China to practice constitutionalism. They are also suspicious that constitutionalism is but another name for outright Westernization.<sup>4</sup> On the supporting side, made up mostly of academics, economists, legal professionals and dissidents, the argument is for the need of constitutionalism and a liberal democratic polity.<sup>5</sup> This situation begs the question why such debates are still happening. China's experience with constitution framing spans the past one hundred years. As such, constitutionalism should not be an unfamiliar concept. In fact, China's first constitutional attempt began in 1906 and in the past one hundred years it has had a total of eleven constitutions. This unresolved debate on constitutionalism and the frequent constitutional revisions in recent years are indications of dissatisfaction with the current Chinese constitution and political system. As the outcome of this debate may tell us China's future direction, it is timely and important for us to understand the political, cultural and structural problems involved in this debate. Also related to the current debate on constitutionalism is a broader set of issues raised by ordinary people, elites and the political leadership. The issues raised include human rights, rule of law, popular sovereignty, democracy and the boundary between public and private sectors. This situation obliges us to ask: to what extent is constitutionalism an aspect of Westernization and to what extent it is driven by China's own internal needs. The

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<sup>3</sup> This dissertation uses McIlwain's definition for constitutionalism, that "it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law...a constitutional government is by definition limited government"

Charles McIlwain, *Constitutionalism: Ancient and Modern*, (Cornell University Press, 1947), 20, 21.

<sup>4</sup> Ma Zhongcheng, "Constitutionalism is Fundamentally a Weapon of Media War",

[[http://paper.people.com.cn/rmrhwb/html/2013-08/05/content\\_1278294.htm](http://paper.people.com.cn/rmrhwb/html/2013-08/05/content_1278294.htm)], August 5, 2013.

<sup>5</sup> Qian Gang, "The Uncertain Death of "Constitutionalism" [<http://cmp.hku.hk/2013/09/02/33944/>].

question of cultural autonomy vs. Westernization may be a legitimate concern, but whether a regime's constitution is running counter to social norms and expectations, is a more fundamental question.

Successive Chinese regimes since 1906 and their constitutions give us a historical record of the Chinese political and constitutional evolution in the past century.<sup>6</sup> Each constitution in this evolution can be read as the regime's political goal, reflecting its ideology and its understanding of internal and external conditions. At the same time, we must also pay attention to a much larger evolution which is the social evolution of China from a pre-modern, agrarian society to a modern one since the 1840s.<sup>7</sup> The two evolutions: the political/constitutional one and the social one run through China's turbulent modern period intertwined. We can not avoid examining the two evolutions together, noting their convergence, divergence and interactions. Failing to do so can only leave us a partial view.

## **The Research Question**

China's quest for a modern constitutional polity in the past one hundred years is still an unfinished business. It is this research's argument that for China to become a modern polity, it needs further social and political development, so that the Chinese people will have a stake in its polity and its constitutional framing. The research question of this

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<sup>6</sup> The term "evolution" is used in a broad sense in this dissertation to mean fundamental changes, including revolutions and slower evolving changes.

<sup>7</sup> The significance of the 1840s is due to the British invasion of China in the Opium War (1839-1842) and thus brought China into the modern international system of nation states. China's two thousand years old dynastic system began to unravel after the Opium War and came to its final end in 1911. China's transformation from its pre-modern agrarian society to modernity can thus be seen as started in the 1840s.



thesis asks what lessons can we learn to support this argument from the analyses of the divergence/convergence between constitutional intents and the social and political needs of the past one hundred years. Structural, cultural, and institutional perspectives should be considered in these analyses. It should also be the interest of this research to find what the state needs do in its next phase of development.

## **The Research Approach**

This research is a single case study of China's quest for a modern constitutional polity. As such this research fits Anthony Orum's definition of case study as an intensive examination of a single case of a particular phenomenon.<sup>8</sup> The selection of China's constitutional evolution as the research focus fits also what Van Evera and others called the explanatory research case of intrinsic importance, appropriate for the explaining of a particular history and culture.<sup>9</sup> This research also fits the atheoretical and interpretive types of cases per Arend Lijphart or Harry Eckstein's configurative-ideographic and heuristic types of cases.<sup>10</sup> As such, this research is expected to be qualitative, historical and interpretive.

This dissertation uses Chinese historical material extensively, but it is not a writing of history. This research follows Paul A. Cohen's approach to understand the Chinese problems as "they are experienced in China by Chinese," i.e. to see it from "a more

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<sup>8</sup> A.M. Orum, "Case Study: Logic" in *The international Encyclopaedia of the Social and Behavioural Sciences*, ed. Neil J. Smelser and Paul B. Baltes, (University of Michigan, 2001), 1509-1513.

<sup>9</sup> Stephen Van Evera, *Guide to Methods for Students of Political Science*, (Cornell University press, 1997) 78, 86, 87, and Gary King, Robert Keohane, Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, (Princeton University Press, 1994), 4, 18.

<sup>10</sup> Colin Elman, Miriam F. Elman, eds, *Bridges and Boundaries: Historians, Political Scientists, and the Study of International Relations*, (MIT Press, 2001) 145.

interior, less Western-centered perspective."<sup>11</sup> This is not to deny Western influences on Chinese responses. In fact it is not possible to think of Chinese political evolution uninfluenced by the West in terms of both thoughts and practices. This dissertation's approach is also influenced by historical, sociological and discursive institutionalisms.<sup>12</sup>

As to what it is not, this dissertation is not a comparative study of constitutions, nor is it a theory building exercise. Rather it is a study of Chinese constitution making in the juncture of state and social forces, struggling for modernization and survival under internal and external pressures. Specifically, each of the Chinese constitutional changes will be examined for convergence or divergence with the social norms and expectations of the time. The elimination of the Chinese gentry class after 1949 and the subsequent socialist transformation are of particular interest to this study as these are major social changes precipitated by ideological constitutions. Likewise the rise of cadres as a new class during the Mao period and the current rise of the urban middle class demanding rights are part of the major social changes to be examined.<sup>13</sup> The final analysis of this research is on the current debate on constitutionalism. In this regard, the new leadership's recognition of the need to put state power under the constitution can be seen as a sign of a new convergence towards the public demand of rights, rule of law and opposition to corruption and state abuses.

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<sup>11</sup> Paul A. Cohen, *Discovering History in China, American Historical Writing on the Recent Chinese Past*, (Columbia University Press, 1984), 153, 154, 196.

<sup>12</sup> Ira Katznelson, "Structural and Configuration in Comparative Politics" in *Comparative Politics, Rationality, Culture, and Structure*, eds., Mark Irving Lichbach and Alan S. Zuckerman, (Cambridge University Press, 1997) 81-112, and Kathleen Thelen (1999), *Historical Institutionalism in Comparative Politics*, *Annual Review of Political Science* 2, 379.

<sup>13</sup> This is similar to Milovan Djilas' assertion of the cadres as a new class in the Soviet block. William Hinton described the Chinese cadre style as commandism, all emulating the command style of Mao.

## **Situating the Dissertation**

My literature review has covered the following areas: 1) Modern Chinese history and political thought; 2) Chinese constitutional evolution; 3) Western political and constitution influence on China; 4) Chinese cultural and political impediments to polity building and constitutionalism; 5) The current Chinese constitution and its revisions and 6) The contemporary Chinese debate on constitutionalism and the broader issues raised by ordinary people, elites, and state actors. For areas one to five, relevant information can be found mainly in secondary sources. For the last area, mainly primary materials can be found from Chinese sources and on Chinese web-sites.

From my literature search, I have found so far there is a lack of systematic analysis of China's political/constitutional evolution in relation to its social evolution in the past century. There is yet to be found a monograph length study focused on this topic. Thus a gap exists in the literature for a synthesis of China's political/constitutional evolution with its social evolution as well as with its further transformational needs. I seek to fill the gap in the literature by providing a tighter linkage between social and constitutional evolutions under changing internal and external conditions.

When one looks at the contemporary debate on constitutionalism, on one side are the supporters of constitutionalism. They are mostly academics and economists: Cai Xia, Fan Yafeng, Hu Xingdou, Li Buyun, Qian Gang, Qin Qianhong, Shao Jian, Ye Haibo, Zhang Qianfan and others. They are my interlocutors. On the opposing side of the debate

are mostly the party defenders: Chen Yunliang, Jiang Qinghua, Ke Huaqing, Ma Zhongcheng, Qiang Shigong, Wu Junfei and others. They are my detractors.

## **Methodology**

As the research is based on China's experience in modernizing in the past one hundred years, the nature of the analysis is expected to be contextual and historical. Given the scale of the problem and the time span involved, textual analysis and interpretation using mainly secondary sources is an appropriate method. However, for the ongoing debate in China on constitutionalism I will use mainly primary sources. The methodology used in this research is stock taking from both primary and secondary sources to carry out the analyses and interpretations.<sup>14</sup> This case study also follows the research question method, i.e. methodologically let the research questions drive the stock taking and the analytic process. The research then examines the evidences found to see if they support the research argument. The way to know for this research is by cross examination of relevant literatures, and by observation and interpretation following the research questions.<sup>15</sup> Such knowledge is understood at the outset to be partial and imperfect knowability.<sup>16</sup>

## **A Research Road Map for the Chapters**

For each chapter, the research needs to be mindful of the following four areas:

1. Which groups were empowered to take part in Chinese constitution framing.
2. Questions raised by ordinary people, elites, state actors regarding rights, rule of law,

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<sup>14</sup> Stephen Van Evera, 4.

<sup>15</sup> Ellen Perelman, Sara R. Curran, eds, *A Handbook for Social Science Field Research, Essays & Bibliographic Sources on Research Design and Methods*, (Sage Publications, 2006), 169.

<sup>16</sup> King, Keohane, Verba, 7.

corruption, abuse of power, constitutionalism and democracy.

3. Constitutional responses to the questions raised.

4. Who authorized the laws and what were the limits of state authority.

The introduction chapter first spells out the research question and the background why the research question arise. It then situates the research in the current literature and explain the research methodology. Lastly it provides a research road map for the rest of the chapters as follows:

Chapter I, entitled "The Dynasty's Last Wish: an Absolutist Constitutional Monarchy", focuses on the first modern constitution that the Chinese state tried to bring in from the West and why it failed. A good understanding of China's pre-modern social structure and how it evolved over time under Western pressure is to be established first. This is also the period the Chinese cultural resistance to the West was the strongest. As such the research of this chapter has an interest in the cultural and political impediments to modernization. The following authors and their work formed the sources of this research:

**Anthropologists:** Myron Cohen, Eric Wolf

**Chinese thinkers:** Kang Youwei, Liang Qichao, Sun Yatsen, Wang Tao, Yen Fu

**Chinese philosophers:** Confucius, Mencius, Huang Zhongxi, Xunzi

**Historians:** Chen Weikun, Pan Wei-tung, Douglas Reynolds, Mary C. Wright

**Political scientists:** John Dunn, John King Fairbank, Andrew Janos, Barrington Moore Jr., Theda Skocpol

**Sinologists:** Wm. Theodore de Bary, Joseph Levenson, Benjamin Schwartz, Fung Yulan

Chapter II, entitled "The War Torn Period and its Final Attempt at a Liberal Constitution", analyses the war torn and transitional period between 1911-49. The warlords in the first half of this period adopted Western parliamentary constitutions. The differences between them is due to their preferences for either a confederacy or a unitary state. In the second half of this period, the Leninist parties: the Nationalist Party (KMT) and the Chinese Communist Party (CCP), both adopted the Soviet style single party constitution. Both parties came under great pressure under the Japanese invasion. As a result there was no meaningful development on the constitutional front, except during the brief moment when the two Leninist parties thought they may need to form a coalition government between them after the Second World War. A multi party liberal democratic constitution was the result but it fell to disuse as the civil war came out in favour of the CCP. However, culturally the wartime period happened to be the least controlled period. The Chinese, by then, had passed the denial phase in their attitude towards the West. Western thoughts, ideologies and values were greatly welcome by the young elites. As such, the research of this chapter is more about the constitutional history of this transitional period and the related Western cultural and ideological impacts. The following authors and their work formed the sources of this research:

**Anthropologists:** Fei Hsio-tung, Eric Wolf

**Chinese thinkers:** Luo Jialun, Sun Yatsen, Carsun Zhang,

**Historians:** William Hinton, Pan Wei-tung, Jay Taylor, Yu Yingshi

**Political scientists:** Stephen C. Angle, Robert E. Bedeski, Chien Tuan-sheng, Chow Yung-teh, John Dunn, John King Fairbank, Samuel Huntington, Andrew J. Nathan, Situ Yi, Theda Skocpol, Yang Nienqun

Chapter III, entitled "Constitutions of the People's Republic of China", is devoted to the constitutional changes under the communist regime. Large scale social restructuring happened in the first 27 years of the CCP rule. The three constitutions during this period reflected Chairman Mao's social theories at different phases. Mao's three constitutions turn out to be an aberration to the Chinese constitutional development. The next 20 years were under the rule of Deng Xiaoping. Deng reversed many of Mao's programs and open-up China to the world. The constitution Deng initiated in 1982 is the first CCP constitution trying to respond to social demands. Accordingly, the research of this chapter is focused on the ideological, structural and the constitutional changes. The following authors and their work formed the sources of this research:

**Anthropologist:** Myron Cohen

**Chinese commentators:** Chen Shimei, Du Guang, Gao Wangning, Li Dali, Li Hongling, Liu Shanying, Nan Xian, Yu Yuxin, Zhang Ming

**Chinese dissidents:** Cai Chongguo, Liu Guokai, Wan Runnan, Wang Xizhe, Yang Xiaokai

**Historians:** Lucien Bianco, George Black, William Hinton, Jean-Louis Margolin, Robin Munro, Song Yongyi

**Political economists:** Prem Shankar Jha, David T. Mason

**Political leaders:** Deng Xiaoping, Liu Shaoqi, Mao Zedong, Wan Li

**Political scientists:** Tom Darby, John King Fairbank, Fan Yafeng, Francis Fukuyama, Leong Liew, Alan P. Liu, Theda Skocpol, Wei Li, Dennis Tao Yang, Yuan Weishi

Chapter IV, entitled " Contemporary Social Responses and the State's Plan Going Forward", focuses on current developments. It captures the contemporary social responses to political deficiencies, the current debate on constitutionalism and President Xi Jinping's commitment to deep reform. The following authors and their work formed the sources of this research:

**Chinese commentators:** Du Zhifu, Pei Minxin, Wang Xin, Xia Ming

**Chinese dissidents:** Li Yizhe (Wang Xizhe), Liu Xiaobo, Wang Dan, Wei Jingsheng, Yang Xiaokai

**Detractors:** Chen Yunliang, Jiang Qinghua, Ke Huaqing, Ma Zhongcheng, Qiang Shigong, Wu Junfei

**Government sources:** The Third Plenum of CCP's 18th Congress, Wang Huning, Xi Jinping

**Interlocutors:** Cai Xia, Fan Yafeng, Hu Xingdou, Li Buyun, Qian Gang, Qin Qianhong, Shao Jian, Ye Haibo, Zhang Qianfan

**Political scientists:** Larry Cat'a Backer, Stephanie Balme, Du Guang, Keith Hand, Samuel Huntington, Barrington Moore Jr., Andrew J. Nathan

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The concluding chapter offers an overall summation of the lessons learned from China's constitutional evolution. It revisits the original research question first, to be followed by the key lessons learned in support of the research argument. A concluding reflection section forms the last part of this chapter.

A bibliography section forms the last part of this dissertation.

## Chapter I

### The Dynasty's Last Wish: an Absolutist Constitutional Monarchy

China's last traditional dynasty, the Qing (1644-1911), began to show signs of social instability at the beginning of the 19th Century. The long period of peace in the 18th Century saw China's population grew from 138 million in 1700 to 381 million by 1820.<sup>17</sup> As a pre-modern agrarian society, the dynasty could hardly sustain a population this size much above a subsistent level of existence. It began to experience more banditry and rebellions. Unfortunately, the dynasty's troubles were soon to expand, as a new form of threat began to appear on China's coast.<sup>18</sup> In 1839 Britain brought war to China so to continue its opium trade in order to offset its trade deficit. Subsequent to the Sino-British Opium War of 1839-1842, China suffered more set backs due to large scale peasant rebellions and more foreign invasions till the end of the 19th Century.<sup>19</sup> By then Western merchants and missionaries had long acquired residence rights in the interior under the protection of unequal treaties and extraterritoriality; Western gun boats and merchant steamers could navigate freely in interior waters; opium trading and usage were legalized

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<sup>17</sup> Angus Maddison, *The World Economy: A Millennial Perspective*, (Development Centre of OECD, 2001), 242, 248, 261-265, 241.

<sup>18</sup> Historically, most threats to China's security came from inner Asia, hence the need of the Great Wall. Before the Western invasions, threats from China's coast were mostly minor pirate activities.

<sup>19</sup> Wellington K. K. Chan, "Government, merchants and industry to 1911" in *The Cambridge History of China, Vol II*, eds. Denis Twitchett and John K. Fairbank, (Cambridge University Press, 1980), 594. The increased frequency of internal rebellions after the Opium Wars can be gleaned from *The Veritable Records of the Qing Emperors* (大清历朝实录), [<http://lib.tsinghua.edu.cn/database/lcsl.htm>]: 1836-45: 246; 1846-55: 933; 1856-65: 2332; 1866-75: 909; 1876-85: 385; 1886-95: 314; 1896-1911: 633. Out of the many large rebellions, the Christian inspired Taiping Rebellion from 1850 to 1866 alone had ravaged 16 out of a total of 18 provinces and had more than 600 walled towns sacked. When all the major rebellions were over by 1873, China suffered a population lost close to 60 million, making all the foreign invasions pale in comparison in terms of physical damages. And the foreign encroachments include the Anglo-French Expedition of 1856-1860, the Sino-French War of 1884-1885, the Sino-Japanese War of 1894-1895, and the joint expedition of the Eight-Nation Alliance to put down the Boxer Rebellion in 1900.

under British pressure and China's custom offices in all treaty ports were under foreign control.<sup>20</sup>

Yet the most threatening scenario to China was the possibility of being carved up into several colonies by the foreign powers who wanted to solidify their exclusive sphere of influence claims.<sup>21</sup> There is no doubt that such unimpeded foreign encroachment was only possible due to the worsening internal decay since the early 1800s. John King Fairbank described the situation after 1800 as follows: over population, a subsistence level of existence, the thin and superficial dynastic rule, the complete failure of the Manchu regular troops to handle even small rebellions, and the corruption and cultural decay among the scholar-official class.<sup>22</sup>

The decaying pattern of China in the 19th Century was the opposite to the Western developmental pattern of the same period. Fairbank pinpointed the culprit of this decay at the Qing state itself, for not keeping up its political/functional development with the social changes. Mary C. Wright analyzed the twelve years between 1862 and 1874, known as the Tung-Chih Restoration period, to understand the revival process of the Qing Dynasty.<sup>23</sup> Despite its success in putting down the massive Taiping Rebellion and the many reforms, including the successful launching of China into Western style

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<sup>20</sup> This arrangement was to ensure a low tariff for foreign goods and the timely payment of foreign debts and indemnities of lost wars.

<sup>21</sup> Exclusive sphere of influence claims: Russia in the North-West, and Manchuria, Japan in Manchuria and Fujian Province, France in Guangdong, Guangxi and Hainan Provinces, Germany in Shandong Province, Britain in the Yangtze River Valley provinces and Shandong Province, and at the same time the US and Britain advocated the Open Door Policy to keep China in one piece.

<sup>22</sup> John King Fairbank, *The Great Chinese Revolution 1800-1985*, (Harper & Row, 1986), 63-67.

<sup>23</sup> Tung Chih is the name of the reign period of Emperor Tung Chih (1862-1874). Known heroes of the time were scholar-officials turned provincial military leaders: Zheng Guofan, Li Hongzhang, Zuo Zhongtang and Zhang Zhidong.

international diplomacy for the first time, Wright concluded that "the requirements of a modern state proved to run directly counter to the requirements of a Confucian order."<sup>24</sup>

As China's problem multiplied in the second half of the 19th Century, the situation became more desperate. The young Emperor Guangxu, supported by reformers, attempted a reform in 1898 with the goal to bring in a Western parliamentary system and a constitution specifying a division of power. This is known as the Hundred Day Reform because it lasted only 104 days. It was cut short by a coup orchestrated by the emperor's own aunt, the Empress Dowager Cixi, with the support of royal Manchu conservatives. But merely a year later, Cixi found it necessary to return to the reform path. She changed her mind after the joint invasion of the Eight-Nation Alliance to put down the Boxer Rebellion in 1900.<sup>25</sup> Douglas Reynolds called Empress Dowager Cixi's reform till 1911 the golden decade of Xinzheng (New Policy 新政) Revolution.<sup>26</sup> The reform programs brought in by Cixi include: the termination of the 1300 years old imperial examination system,<sup>27</sup> to be replaced by a Western/Japanese style education, the introduction of modern police and prison systems, military reform, sending students abroad, and the introduction of Western commercial and civil laws in the hope of winning Western powers' relinquishment of their extraterritorial rights in China.

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<sup>24</sup> Mary C. Wright, *The Last Stand of Chinese Conservatism, the Tung-Chih Restoration, 1862-1874*, (Stanford University Press, 1957), 312.

<sup>25</sup> The Eight-Nation Alliance of: Austria-Hungary, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States.

<sup>26</sup> Douglas R. Reynolds, *China, 1898-1912, The Xinzheng Revolution and Japan*, (Harvard University Press, 1993).

<sup>27</sup> This imperial examination system was created in 605 AD, during Sui Dynasty. Its purpose was to select civil servants using a non-hereditary method, i.e. via an open and fair examination of the classical teachings on morality and proper rule; on state institution evolution over the centuries and on general state crafts. Thus it allowed upward mobility to all classes in theory, and at the same time it maintained a classical Confucian indoctrination throughout the population, and tied all aspiration to high offices to the well being of the state. The reason for its termination in 1905 was due to its curriculum had no modern content.

It was in the context of Cixi's Xinzheng Reform, and specifically in the context of judicial reform, the subject of importing a Western style constitution became acceptable to the court. The subject matter was first brought up by non-state actors such as Wang Tao 王韜, who raised the idea after his tour of Scotland in 1870.<sup>28</sup> The more powerful advocate of this idea was Zhang Jian 张謇 who had great influence on the leading provincial governor generals at the time. Through them he was able to present his translations of the Japanese parliamentary system and constitution to Empress Dowager Cixi.<sup>29</sup> Zhang Jian's enthusiasm on the Japanese constitution was based on his impression of a thriving Japan during his visit to the Osaka Expo in 1903.

Besides the influence of opinion leaders of the time, two pivotal events convinced the Qing court that it must respond to the public desire for a modern constitution. The first pivotal event was the 1894 Chinese naval defeat by Japan. This defeat was a tremendous shock to the Chinese elites and it was particularly humiliating.<sup>30</sup> It jolted the Chinese to a serious review of their plight. They draw two conclusions from this event: 1) the Self Strengthening Policy beginning in the 1860s to arm the Chinese army and navy with Western military equipment, a thirty years of military build up, was not enough to defend China. China's problem was not simply a lack of military equipment. 2) the Japanese

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<sup>28</sup> Wang Tao happened to be the translation assistance to the Scottish sinologist James Legge at the time.

<sup>29</sup> Zhang Jian 张謇 happened to be the imperial first scholar 状元 of the time. He was a visionary and a courageous man for his extremely risky move to refuse to enter into imperial service. Instead he returned home to experiment with agribusiness in cotton farming, textile mills and a number of other local industrial enterprises. In 1901 he proposed to bring in a parliamentary system, and in 1903 he advocated the importation of a modern constitution.

<sup>30</sup> It was particularly humiliating not only because Japan was so much smaller in geographical size than China, but also because Japan was seen as culturally and racially close to the Chinese (同文同种), i.e. shame on us, if the Japanese can why can't we?

success was due to its more thorough Westernization. The Japanese Emperor Meiji initiated the Meiji Restoration in 1868 and in thirty years Japan was able to defeat China. The secret, the Chinese concluded, was that Meiji Japan had adopted a Western style monarchical constitution.

The second pivotal event was even more precipitating; it was the unambiguous defeat of the Russian army and navy by Japan in 1905. This was a shocking event the world over, simply because in the racially charged 19th Century, this meant for the first time a non-white people defeated a white imperial power. To the Chinese at the time, the constitutionally armed Japan was clearly superior to the Tsarist Russia yet without a constitution. The Prussia-French war, the US-Spanish war, and the Sino-Japanese war were all re-analysed using this constitutional lens. The subsequent constitutional movements in Russian, Turkey and Iran all served as vivid examples for this view.<sup>31</sup> A convergence of opinions on the urgent need of a modern constitution followed and the Qing court came under tremendous pressure to satisfy this desire of the educated public.

On 16 July 1905 the Qing court announced its decision to dispatch five ministers abroad to investigate the governmental and constitutional systems of Japan, Great Britain, the US, Germany and France. On their return, the five ministers unanimously recommended the adoption of a modern constitution for China. Empress Dowager Cixi then issued the fateful decree of "Preparing for the Establishment of a Constitutional Government 预备立

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<sup>31</sup> Cheng Weikun, "Sino-Japanese War and the late Qing Constitutional Movement", (Chinese Academy of Social Science, 2007 08 25),[<http://jds.cass.cn/Item/5986.aspx>].

宪喻" on 1 September 1906.<sup>32</sup> It was a fateful decree because the dynasty fell eventually on its mishandling of the introduction of a modern constitution.

After Cixi's decree, a process of comparing various foreign constitutions followed. At the end, the Qing court decided to use the Japanese Meiji Constitution as its blueprint for the following reasons: 1) The Japanese Meiji constitution was proclaimed by the emperor as his gift to his people and it thus ruled out the need of public consultation and approval; 2) copying the Japanese scheme allowed the Qing to proclaim and retain the dynastic form of state and with the emperor to rule supreme; he is sacred, inviolable and above the constitution (存国体而固君权; 君上神圣不可侵犯); and 3) it also allowed the Qing to proclaim the Manchu reign in perpetuity in the formal text of the constitution.<sup>33</sup> These points were the basis of the articles in the Qing draft for an absolutist monarchical constitution, namely "The Principles of Constitution by Proclamation 钦定宪法大纲," as adopted on 27 August 1908. The obvious problem with this draft is that the Chinese emperor, despite the name "Son of Heaven," is not a direct descent from heaven, unlike the Japanese myth of the emperor line descending directly from its founding deity, the Goddess of the Sun. The Chinese Son of Heaven's rule is contingent, i.e. it can be challenged and even overthrown should he misrule.<sup>34</sup> The fact the Manchu rule was a foreign one proves this point and now that it can be proclaimed in perpetuity is patently problematic and alien. The Qing's intent in this constitutional draft was transparent enough for all to see. Soon, the court was accused of riding the public sentiment for a

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<sup>32</sup> Douglas R. Reynolds, 187, 188.

<sup>33</sup> Pan Wei-tung, *The Chinese Constitution, A Study of Forty Years of Constitution-making in China*, (Institute of Chinese Culture, Washington D.C., 1945), 145-147.

<sup>34</sup> Mencius (372-289 BC), explained to King Xuan of Qi that regicide of a despot is justifiable, *Mencius* 1.2.

modern constitution. But in truth, its intent was all along to dress up an absolutist design in the garb of a modern constitution. Its phased nine year timetable with the first national election scheduled for 1916 and a national assembly in 1917 was quickly denounced as a delaying tactic. From this point on, court and society was heading towards the final show down. In the end, China's first attempt to have a modern constitution failed, ending in the final demise of the Qing Dynasty in 1911.

### **Analyses of Qing's Failures**

The failure of China's first attempt at a modern constitution affords us multiple layers of analyses. But first, what is the nature of this failure? Is it simply a program failure or a wrong move in the introduction of the constitution? Or is it part of a much larger failure, and at what level, e.g. at the institutional/functional level, or at the social/structural level, or at the cultural level?

Before we enter into these analyses, we need to clear one question first, i.e. what were the principles that regulated China's political system in the past? If we understand constitutionalism broadly as a set of rules that define the roles of state institutions, then there must be something of this nature in China's long history of state building, whether written or unwritten. Based on Ming Dynasty records, Pierre-Etienne Will showed dynastic China's political order had something analogous to constitutionalism, although it is not a document in the Western legal sense. According to Will, the Chinese constitutional form was made up of three parts: 1) the classical teachings as living in the minds of people and in their daily sayings, i.e. the Confucian social norms and



expectations; 2) ancestral edicts formed in the early part of a dynasty (祖宗之法); and 3) the evolving administrative and penal laws.<sup>35</sup> Along this line of argument, even earlier records can be found.<sup>36</sup> The earliest record of a state institutional design can be traced to the Canon of Yao 堯典 (King Yao, circa 2356-2255 BC). It established the precedent that merit and virtue should be made the criteria in selecting officials and rulers.<sup>37</sup> Under Zhou Dynasty (1122-255 B.C.), it had Zhou Rites (周官 or 周礼) as the guide for how to organize government institutions.<sup>38</sup> The Zhou institutional design had evolved over the centuries to become the six boards or the six ministries design of the later dynasties, all the way down to the 19th Century.<sup>39</sup> To ensure future government officials to be well trained in past dynasties' reasons for institutional changes, it was made a core subject in the nation wide imperial examination.

However, if we can thus say there was a broad sense of constitutionalism in China's past, we can not say it had the same Western sense of constitution as law to delimit the power of the state.<sup>40</sup> The urgent problem in the 19th Century was first the traditional six ministries lacked many functions needed in a modern world. For example, there was no ministry for foreign affairs. In fact there was no concept of international law, or an understanding of the need of science and technology, or the need of compulsory schooling for all children, and the need for international trade, economic and industrial

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<sup>35</sup> Pierre-Etienne Will, "Epilogue: Virtual Constitutionalism in the Late Ming Dynasty", in *Building Constitutionalism in China*, eds., Stephanie Balme and Michael W. Dowdle, (Palgrave MacMillan, 2009), 261-273.

<sup>36</sup> Stephanie Balme and Michael W. Dowdle, eds., *Building Constitutionalism in China*, eds., (Palgrave MacMillan, 2009), 5.

<sup>37</sup> King Yao picked Xun and King Xun picked Yu for succession. Both selections were based on merits.

<sup>38</sup> Pan Wei-tung, 137.

<sup>39</sup> The six boards of bureaucracy, war, revenues, public works, law, and education/rites.

<sup>40</sup> James McClellan, *Liberty, Order, and Justice, An Introduction to the Constitution Principles of American Government*, (Liberty Fund, Inc., 2000), 38.

development. The old imperial examination tested no such subjects. In light of China's clear inferiority in political and military capacity when compared with Western powers, it is not difficult to come to the conclusion that China's old institutions and its political jurisprudence must change. The question was change to what extent.

The first generation reformers in the 1860s argued all that was needed was to import Western technologies and military equipment. They claimed the Chinese core belief in morals was superior and should be retained. This is the famous Ti-Yong formulation, viz. Ti (体) means the Chinese body as constituted by Chinese learning and it is foundational, and Yong (用) means usage which is not foundational and can adopt Western methods.<sup>41</sup> But by late 19th Century and particularly after China's defeat by Japan in 1895, Chinese elites came to understand that more fundamental changes were needed. The old institutional design, whether we called it China's unwritten constitution or not, had to be substantially modified or even changed completely.<sup>42</sup> Thus entered the debate of importing a modern constitution at the end of the 19th Century.

### **Analyses of the Social Condition**

From a social development point of view, the Chinese social evolution in the 1800s looked very different from the European developmental pattern. It is not that China had started the 1800s with a much disadvantaged position. In fact before the 1800s, China was the world's dominant economic power. The Development Center of OECD estimated

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<sup>41</sup> This formulation is generally credited to Governor-general Zhang Zidong (1837-1909). Although similar ideas can be found in the 1860s. Zhang Zidong's original phrase was: "Chinese learning as substance and Western learning as function 中学为体，西学为用".

<sup>42</sup> The change out completely option was proposed by Kang Youwei 康有为 during the 100 Day Reform in 1898.

China's total GDP made up 33% of the world's total GDP and its population made up 37% of the world's total population back in 1820.<sup>43</sup> However, the OECD figures also show that although China's GDP was the largest among the nations in 1820, its per capita GDP was merely a third of England's or the Netherlands'. China's urbanization rate was also low. It was merely 3.8% of its total population compared to 20% in Western Europe in 1820. Besides these economic differences, the question remains why China's development pattern was so different.

By applying Ian Morris's developmental model for a broad structural analysis, it appears that China had hit the hard ceiling of its social development at around 1800.<sup>44</sup> According to Morris, when the hard ceiling of development is reached, it requires the society to either attempt a total transformation or revolution, or facing the possibility of spiralling out of control. Then the horsemen of apocalypse will ride: famine, disease, war, involuntary migration, and state collapse. Indeed, famine, rebellion, involuntary migration, state failure did happen massively to China in the second half of the 19th Century.<sup>45</sup> Looking back, the Chinese dynasty cycle may well be a reflection of its social development cycle. Only after famine, rebellion, or war had done substantial damages, can a new dynasty make a new start with a much reduced population and land becomes redistributable again. Morris further explains, that to break this agrarian hard ceiling needs us to tap into the energy of fossil fuel, as the West had done after 1750, and thus make industrialization, based on coal and later on oil, possible and out of the agrarian

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<sup>43</sup> Angus Maddison, *The World Economy: A Millennial Perspective*, (Development Centre of OECD, 2001), 242, 248, 261-265.

<sup>44</sup> Ian Morris, *Why the West Rules for Now, the Pattern of History, and What They Reveal About the Future*, (McClelland & Stewart, 2010), 557-560.

<sup>45</sup> Migration here includes forced migration due to civil war, invasion, flood or famine.

bind. But this explanation of Morris does not take into account the fact that China did deep drilling for brine, natural gas and oil long ago, but for various reasons it remained agrarian.<sup>46</sup>

The classical Western developmental paradigm posits: scarcity leads to innovation, which leads to social/structural changes and then to political/functional and cultural changes.<sup>47</sup>

But the Chinese pattern in the 1800s appears to be: over population leads to scarcity, which leads to frugality and a general toleration of subsistent level of existence. A reduction in government administration followed in order to lighten the load on the population. Such reduction of government vitality was possible only when the state was not under threat from without. This way of handling scarcity also has a cultural root in antiquity. According to Xunzi (313-238 BC), the predecessor of the Legalist philosophical school, a ruler's responsibility is to "train men's desires" and to see to it "that desires do not over extend the means for their satisfaction."<sup>48</sup> China's agrarian political economy would have the security of the agricultural producers as its top priority. Its tendency was to exalt agriculture and to disparage commerce (重农轻商) and thus sacrificed its overall development.<sup>49</sup>

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<sup>46</sup> Joseph Needham's multi-volume work: *Science and Civilization in China* was condensed by Robert Temple into a single volume, with Needham's introduction: Robert Temple, *The Genius of China, 3000 Years of Science, Discovery and Invention*, (Simon and Schuster, 1986), 51-54; 78-81.

<sup>47</sup> Andrew Janos, *Politics and Paradigms: Changing Theories of Change in Social Science*, (Stanford University Press, 1986), 5, 147-48.

<sup>48</sup> Xunzi, "Chapter 19, A Discussion of Rites" in *Xunzi*: "人生而有欲，欲而不得，則不能無求。求而無度量分界，則不能不爭；爭則亂，亂則窮。先王惡其亂也，故制禮義以分之，以養人之欲，給人之求。使欲必不窮乎物，物必不屈於欲。"

<sup>49</sup> Mary C. Wright, 148.

Joseph Needham similarly puzzled over why the Industrial Revolution did not occur in China in the fourteenth Century when its capacity for industrialization could match what England had achieved in the late eighteenth Century.<sup>50</sup> For instance, 11<sup>th</sup> Century Song Dynasty was already producing iron, steel and coal in large tonnage.<sup>51</sup> One obvious explanation for the Song situation is that its development was cut short by the Mongol conquest of China. Invasion by central Asian people as a source of disruption of China's development is certainly an acceptable explanation.<sup>52</sup> But the Chinese cultural un-martial orientation was also a factor that invites invasions in the first place.<sup>53</sup>

It appears Ian Morris' broad structural model can go only so far. The cultural factors identified above appear to have directed China's political response to scarcity in a different way. On the cultural question, we need to ascertain whether it is the source of social decline as the Western cultural paradigm predicts or the other way around, that is:

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<sup>50</sup> Justin Yifu Lin, "The Needham Puzzle: Why the Industrial Revolution did not Originate in China", *Economic Development and Cultural Change*, (Vol. 43, No.2, 1995), 269-292.

"Needham found evidence that China began losing ground to Europe in the technological race only after the scientific revolution had occurred in Europe". According to Lin, China's lack of scientific development was due to China's honour and incentive system which diverted the talented towards the dynastic central bureaucracy. The imperial examination system indoctrinated one dominant ideology and produced high officials steeped in classical learning only. These factors were possible only because China's culture was never seriously challenged before the arrival of the West.

<sup>51</sup> Robert Hartwell, "Markets, Technology and the Structure of Enterprise in the Development of the Eleventh Century Chinese Iron and Steel Industry", *Journal of Economic History*, (26, 1966), 29-58.

<sup>52</sup> E. L. Jones, *The European Miracle*, (Cambridge University Press, 1987), xxvi.

According to Jones: "...a different imperialism is to be indicted. This was the command economies imposed by dynasties from the steppes of Central Asia: Ottoman, Mughal and Manchu, all of them latter day models of the Mongol onslaught...that determined the fate of the East", not the Asian mode of production or the West's encroachments as the Marxists would have it, and Liang Qichao, *The New Citizen*, (Liaoning People's Publisher, 1994), 26,27. Liang estimated a quarter of China's history or more was under some form of Central Asian rule, partial or complete.

<sup>53</sup> Joseph R. Levenson, *Liang Chi Chao and the Mind of Modern China*, (Harvard University Press, 1953), 117-119.

it is the result of social/structural change as the Western classical structural paradigm predicts.<sup>54</sup>

### **Analyses of the Cultural Situation**

Mary C. Wright's conclusion that the Tung-Chih Restoration between 1860-1876, despite its great success in many ways, failed because "the requirements of a modern state proved to run directly counter to the requirements of a Confucian order". Wright's conclusion raised a cultural conservatism question which warrants a deeper examination. Wm. Theodore de Bary took issue with Wright's characterization of the Confucian order as inherently conservative.<sup>55</sup> Well known Neo-Confucian scholars in Song, Ming and Qing Dynasties refused to accept dynastic rule as the true Confucian political order.<sup>56</sup> They challenged the legitimacy of dynastic law as unlawful law because it was the law for the benefit of one family.<sup>57</sup> They went so far as to claim the sages' way had not been practiced in all the dynasties.<sup>58</sup> According to de Bary, Neo Confucians' liberalism is apparent in their advocacy of community compacts (乡约), local schools/assemblies, local self government, and in their courage to speak up and even to be martyrs.

What the Neo Confucians were nostalgic about was the freedom and the flourishing of philosophical schools during China's feudal period before 211 BC. But the ultimate

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<sup>54</sup> Andrew Janos, *Politics and Paradigms*, 143-146.

<sup>55</sup> Wm. Theodore de Bary, *Asian Values and Human Rights, a Confucian Communitarian Perspective*, (Harvard University Press, 1998), 160.

<sup>56</sup> In Song Dynasty (960-1279 AD): Cheng Yi, Cheng Hao, Zhu Xi, Hu Yuan; in Ming Dynasty: Huang Zongxi, Gu Yanwu, Wang Fuzi, Wang Yangming and in Qing Dynasty: Lu Liuliang, Fang Dong Shu, Wei Yuan, Kang Youwei, Liang Qichao, Liu Shipei, Liang Suming.

<sup>57</sup> Huang Zongxi, *Waiting for the Dawn: A Plan for the Prince*, trans. Wm. Theodore de Bary, (Columbia University Press, 1993), 91-93.

<sup>58</sup> Wm. Theodore de Bary, *The Trouble with Confucianism*, (Harvard University Press), 66,72.

Confucian political ideal was in the sage king era before the feudal period, when the position of kingship was not hereditary and it was passed on based on merit and virtue, from King Yao (尧 circa 2356-2255 BC) to King Shun (舜 circa 2294-2184 BC) and then to King Yu (禹). They named the sage king era "The Great Harmony 大同" when "all under the heaven belong to the public 天下为公", and the feudal period as "local prosperity 小康" for each feudal state, meaning that it is less ideal but still acceptable. The Neo Confucians considered the dynastic system outright wrong for treating all under the heaven as one family's private property. The ideal "all under the heaven belong to the public 天下为公" together with its meritocratic and socialistic/welfare utopianism was espoused by Confucius himself in the Book of Rites.<sup>59</sup> This turns out to be the ultimate political ideal of Confucianism, persisting through two millenniums of dynastic rule. A high ranking Qing official and geographer, Xu Ji-yu 徐繼畲, 1795-1873, claimed the lost ideal "all under the heaven belong to the public 天下为公" for the past two thousand years can actually be found in the modern West and particularly in the American system. Xu saw George Washington as a modern King Yao 尧 who did not pass his position to his own son.<sup>60</sup> This ancient political ideal find its strongest echo yet in Sun Yat-sen's revolutionary movement at the end of the 19th Century. Sun shrewdly declared that his republican revolution was to aim for "The Great Harmony when all under the heaven belong to the public 天下为公" and thus linked modern republicanism to the ultimate political ideal of Confucianism. The modern Chinese term for republic is gong-he (共和)

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<sup>59</sup> "to select the wise and capable 选贤与能", "to provide for the autistic, widowed, abandoned, handicapped and the sick 矜寡孤独废疾者皆有所养.", in: Confucius, "The Great Harmony 礼运大同篇," in *The Book of Rites 礼记*; or: James Legge, trans., "Li Yun Datong Pian, Book VII", in *The Book of Rites*, [<http://www.sacred-texts.com/cfu/like/like07.htm>].

<sup>60</sup> Xu's eulogy of the American system is inscribed on a plaque at the base of the Washington Monument.

which is a Japanese translation of the Western word: republic. Thanks to the erudite Japanese translator, who found a reference in the Chinese annals of the year 841 BC. In that year, the Baron of Gong 共, by the name of He 和 was elected by the nobles to take over the reign from a disposed tyrant. This historical record of an election is seen by the Japanese translator as a form of republic in ancient China. In fact the first year of the Gong-He 共和 reign, i.e. 841 BC, is also used as the starting year of the Chinese annals system. Chinese republics after 1911 all use the term Gong-He 共和 to mean republic, a fitting connection to the beginning event of the Chinese annals system, namely the non-hereditary election of Baron Gong-He 共和 in 841 BC.<sup>61</sup>

From the above we can see the complication that can follow by characterizing the Chinese dynastic system as a conservative Confucian order as Wright had done in her book, *The Last Stand of Chinese Conservatism*. Similarly, Joseph Levenson's assertion that Confucianism is now a thing of the past, a museum piece, needs to be re-assessed too.<sup>62</sup> Fairbank noted that in the West, the dynamic vitality of the Confucian reformist tradition had just begun to be studied in the 1980s.<sup>63</sup> Nevertheless the Confucian' political ideal, being fixed in antiquity, first in the sage king era for universal harmony, then settled for the feudal local harmony, can be interpreted as a sign of poverty of ideas. The

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<sup>61</sup> Tao Dabai, "Baron Gong-He 共伯和", [<http://www.taodabai.com/88941422.html>], and Encyclopaedia Britannica, "The Bamboo Annals 竹书纪年", [<http://www.britannica.com/topic/Bamboo-Annals>]. 《竹书纪年》前 841 年，共伯和受诸侯推举，“行天子事，号曰‘共和元年’”。共和十四年，又归政于周宣王，自己“逍遥得志于共山之首”。《太平御览》卷 879 引《竹书纪年》，共和行政，是中国历史，尤其是编年史上的一件大事。正是从共和行政开始，中国的历史有了确切的纪年，从此一直到今天，千百年来不曾间断，是中国历史得以保证延续性的重要开端。按《史记》卷十四《十二诸侯年表第二》，共和元年，岁次庚申，即公元前八四一年。

<sup>62</sup> Joseph R. Levenson, *Confucian China and Its Modern Fate: a Trilogy*, vol. 3 (University of California Press, 1968), 3.

<sup>63</sup> Fairbank, 140.



source of this poverty could very well be the fact that China's interaction with the world's other major civilizations was infrequent enough before the 19<sup>th</sup> Century. The problem with this rear mirror view for political future is self evident.

Nevertheless, in our time, not a few East Asian countries with deep Confucian roots have shown they can modernized successfully. These include Japan, South Korea, Taiwan, Hong Kong and Singapore and now even the once iconoclastic China is seeking to reclaim its Confucian heritage. These examples show Confucianism may not be the impediment to modernization as previously thought. On the contrary, some considered the current Asian development as rooted in Confucian values.<sup>64</sup> Also, Wright's own research on the Qing Restoration shows amply that it was the Confucian gentry and scholars that came to the rescue of the Qing state. Had it not for their deep sense of Confucian values in public responsibility the Qing could have collapsed even earlier, i.e. during the massive Taiping Rebellion in the 1860s.

For the Qing failure to reform, we can safely say when an ossified autocratic dynastic system happened to be within its exhausted agrarian phase and came face to face for the first time with modern industrial and capitalist nation states, the condition was sufficient to cause a total failure as described in Wright's book. This is so regardless of whether it is Confucian or not, evidenced by the fall of the Ottoman Empire and other pre-modern states: Egypt, Iran and India when they came under the modern pressure. Should the combination be a feudal state and an agrarian society, the likelihood of the feudal lords

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<sup>64</sup> Daniel A. Bell, Hahm Chaibong, ed., *Confucianism for the Modern World*, (Cambridge University Press, 2003), 5, and Robert Kaplan, "Asia's Rise is Rooted in Confucian Values", *The Wall Street Journal*, (Feb. 6 2015).

fighting to maintain local control and a general martial spirit among the population may exist. This is the case of Japan which is also Confucian. The Japanese feudal character and the Bushido spirit had effectively rendered Western extraterritoriality pointless.

But for the Qing situation, one thing is clear, that the classical Western structural-functional paradigm does not apply. It does not apply even before the West brought war to China in the 1840s. After the 1840s the Chinese pattern resembles somewhat the reverse, i.e. the functional-structural paradigm, but not exactly in that sequence. What China has gone through in the 19th Century was concurrent political, social, economic and cultural changes.<sup>65</sup>

It is also evident that there was a pre 1800 cultural decay in China, a decay despite the Confucian effort to counter it. The modern cultural paradigm theory posits the failure of cultural reproduction precedes social and political decay.<sup>66</sup> In this regard, it is well known that Chinese Confucian scholars in early Qing flocked to philology as a safe haven simply to avoid Manchu suspicion of any political activism. Thus they abandoned their Confucian responsibility to be the social conscience and critique. This in essence was the source of the Han scholarship vs. Song scholarship debate (汉学与宋学之辩), with the former focus on philology and the latter on the political reform role of Confucianism. The safe haven of Han scholarship, i.e. philology, was what the Neo-Confucians called the shameless degeneration of the time.<sup>67</sup> The problem with this situation is that it does not

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<sup>65</sup> Fairbank, 42.

<sup>66</sup> Andrew Janos, *Politics and Paradigms: Changing Theories of Change in Social Science*, (Stanford University Press, 1986), 143-46.

<sup>67</sup> Liang Qichao, *The New Citizen*, (Liaoning People's Publisher, 1994), 173.

match the Western cultural paradigm theory exactly because the source of the Chinese pre 1800 cultural decay was political in origin. It came from the insecurity of the Manchus, who as a small foreign tribe, struggled to reign over a massive Chinese population of hundreds of millions. They demanded open submission in the form of Chinese men wearing the Manchu pig tail hair style or face the death penalty. In addition, the Qing court engineered periodic purges of the Chinese scholar rank via trumped up charges of insubordinate writings or poetries, known as "crimes of words 文字狱."<sup>68</sup> Thus the suspicious Manchu reign caused the seeking of safe haven in philology and the subsequent political silence and cultural decay among the Chinese elites. Thus seen, the Qing pre 1800 cultural decay cannot be pinned on Confucianism but rather mainly on dynastic oppression due to the insecure Manchu reign.

### **Analyses of the Institutional Situation**

Fairbank looked at the Qing un-development and interpreted it at the institutional level. To Fairbank, the fault evidently lay in the monarchy itself, the superficiality of its administration, and its inability to be a constitutional modern central government.<sup>69</sup> At the end of the 18th Century, the Chinese population had more than doubled under the long peaceful reign of Emperor Qian Long (1711-1799). This growth of numbers was also accompanied by a growth in the commercial sector. Fairbank pointed out that this growth of commerce and of the private sector in China before the Western invasions was not well understood until significant later research findings.<sup>70</sup> There were extensive exchanges through the interior port of Hankow by the mid 18th Century. This means

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<sup>68</sup> Liang Qichao, 166.

<sup>69</sup> Fairbank, 118,119.

<sup>70</sup> Ibid., 62.

China had a genuine internal market in which supply from various sectors could meet demands elsewhere within the country. Large fleets of Chinese sailing junks also handled the coastal trades with South East Asian countries. One British observer estimated in 1840 the port of Shanghai surpass London in tonnages handled.<sup>71</sup> Due to very light custom exactions, the Chinese empire in the 18<sup>th</sup> Century can be seen as a vast free trade area.

However, by early 19th century, general dissatisfaction arose due to government unresponsiveness to the growth of population and economy. How can we understand this Qing government unresponsiveness? First, as a very large agrarian dynasty, the Qing court's all consuming concern was order and stability, necessitated by the high occurrence of rebellions as recorded in the "Veritable Records of the Qing Emperors 大清历朝实录." Getting overtly rich by any sector or by any great invention could only imbalance the carefully crafted agrarian equilibrium. From the state's perspective, there was no real urgency to go beyond the political economy of an agrarian society that is until Western powers showed up at the door. Secondly, the Manchus, as a small foreign tribe reigning over a massive Chinese population, must focus on how to position their own people in top military and political positions. They discouraged their own people to engage in low status activities such as commerce or production. Over time they became quite out of touch with the economic activities beneath them. Maritime trade and naval power were low on their priority. This Manchu lack of appreciation of economic activities was reflected in the fact that commerce and trade were neither encouraged nor protected and these activities were hardly taxed at all. Thus commerce was left in the private and the

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<sup>71</sup> Ibid., 49.

Chinese sector, leaving the government more and more irrelevant to economic growth.<sup>72</sup>

In short, the reigning Manchu tribe saw no great need to exert themselves, China was simply so large and able to sustain them comfortably enough.

The superficiality of the Qing rule was also reflected in its simplistic and inadequate administration at the local level. In the Qing system, the county was the lowest administrative unit, with each controlling upwards to 250,000 population by 1820, but with a single magistrate acting as both administrator and judge.<sup>73</sup> For the Qing bureaucracy to function with so little man power at the local level, it relied heavily on the support and cooperation of local gentries. The local elites were given honours and privileges for their services and thus made them identify with the imperial political system.<sup>74</sup>

After 1800, shortage of food supply and rebellions became more frequent and yet one finds the Manchu military institution not maintained. The Manchu banner forces, staffed by hereditary military families, had degenerated into a class that live off government salaries but were unable and unwilling to risk life to put down even small rebellions. This also explains the lack of robust resistances to later Western invasions. This situation caused Chinese scholar-officials and the gentry class to enter into organizing provincial

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<sup>72</sup> Ibid., 62.

<sup>73</sup> The county magistrate was not supplied with staffs. He was responsible to hire his own aids and office runners. The imperial bureaucracy thus forced the magistrate to be creative in finding his own funding and caused corruption to be inherent in the system.

<sup>74</sup> Myron Cohen, *Kinship, Contract, Community, and State, Anthropological Perspectives On China*, (Stanford University Press, 2005), 23.

military forces in the 1850s and 1860s, in order to put down local rebellions and thus shifted military power into provincial Chinese hands over time.<sup>75</sup>

### **The Manchu and Han Chinese Schism**

Fairbank's analysis of the institutional non-development is revealing. It shows the Chinese non development, besides its agrarian political economy cause, had also a social/structural cause, i.e. the Manchu and Han Chinese schism and the inability of these two social groups to merge into one over 267 years of the Qing existence. This schism was not apparent in the 1860s, as Chinese gentries and Manchu officials were focused on Qing's revival. After the failure of the 100 Day Reform of 1898, the Manchu and Han Chinese schism came to the surface. The Manchu ruling class became more suspicious when military and economic power continuously shifted into provincial Chinese hands. On the Chinese side, they were increasingly alarmed at the court's willingness to sacrifice Chinese interest to save the Manchu reign, exemplified by the court's acceptance of the British demand to legalize opium trade and usage. Manchu nobles' suspicious or arrogant utterances from time to time did not help. These included their constant questioning whether a modern constitution is good only for the Chinese and not for the Manchu and the famous outburst: "Chinese as our house slaves have no ground to complain if we choose to share our wealth with our foreign friends 军机大臣刚毅: 我家之产业, 宁可以赠之于朋友, 而必不碑诸家奴".<sup>76</sup> By the early decade of the 20th Century, the Chinese

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<sup>75</sup> e.g. the Hunan Provincial army 湘军 under Zeng Guofan and the Anhui Provincial army 淮军 under Li Hongzhang.

<sup>76</sup> Lu Xun, "Miscellaneous Works of Lu Xun" in *The Collected Works of Lu Xun*, [http://www.ziyexing.com/luxun/weiziyoushu/luxun\_zw\_weiziyoushu\_34.htm], *Ziyexing Net* 子夜星网站 2011 09 25.

elites had developed a general impression of the Manchu ruling class's political incompetency, and China's fate in the 19th Century could have been entirely different had it been a Chinese dynasty.

### **Analyses of the Evolving Social Structure**

As we have seen, the classical Western structural-functional paradigm does not fit well with the Chinese situation. The institutional and cultural paradigms fit better to the Chinese case but need further analyses as to their root causes. According to Fairbank, a new understanding of China's evolution emerged in the 1980s.<sup>77</sup> The new understanding is that domestic problems were already making the Qing Dynasty fall apart: overpopulation, increase in unemployed literati, official corruption, military weakness, social cleavage between Manchu and Han Chinese, and a growing number of the poor were more ready to rebel. The Western encroachment no doubt had the effect of hastening the fall of the Qing. However, in terms of physical damages, Western invasions paled in comparison to internal rebellions. Nevertheless, the West's impact proved to be more subversive and long lasting. Chinese rebellion or Central Asian invasion, even when successful, merely bring in a new dynasty, i.e. they do not change the Chinese political structure or cultural identity fundamentally. Whereas the Western impact shakes the confidence of the Chinese elites and make them question the soundness of their belief system. The West in effect has brought to China a new kind of crisis it has not seen in its entire 2000 years long dynastic history. However, out of this chaos, new social forces were emerging that would soon revolutionize Chinese life.

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<sup>77</sup> Fairbank, 105.

On the constitution question, we need to understand how the Qing court actually diverged from the dominant new thinking and the evolving social forces that ultimately doomed its first and last attempt at a modern constitution. We can first look at China's social classes and then follow each class's evolution during this period to understand the final divergences.

In the traditional Chinese perspective, Chinese society is made up of four social classes: shi (士 the educated and political class), nong (農 the farming class), gong (工 the artisan class) and shang (商 the merchant class). The first thing to notice of this classification is that it does not cover all social categories. It is rather a productive and a political ranking, with the shi class on top and the nong (farming) class comes second. The reason the farming class enjoys a higher status than the artisan and merchant classes is because it is considered the primary productive class whereas the merchant class is viewed almost as parasitic. The dynastic ruling tribe is outside of this classification, as well as the military, the entertainer, the prostitution and the begging classes, as these were all seen as non-productive classes. Another missing class in this ranking is the gentry class. This is because the gentry class formed part of the farming class, they happen to be the well to do and the land owning farmers, but still farmers. The key issue here is how these productive classes evolved in the course of the 19th Century. First, let's examine from the bottom of the "shi nong gong shang" classification:

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**The Shang (商 Merchant) Class** The merchant class had a low status in the traditional Chinese society, but it hardly seemed to encumber them as a thriving class.<sup>78</sup> They carried on with their business quite successfully as shown in the pre 1800 Yangtze River Valley trade and the coastal trade with South East Asian countries. As the later 19th Century brought international trade to China, they became even richer. The Chinese merchant class proved to be resourceful and were able to hold their own even in the face of foreign advantages. When steamships began to be used on China's main rivers in the late 19th Century, the Chinese junk fleet expanded to handle the increase of local trade. Not long after, Chinese enterprises bought and operated their own steamships.<sup>79</sup> It did not take long for the Chinese merchants to begin to handle most of the foreign trade, reducing the position of the foreign merchants almost to that of an agent working into the hands of native dealers.<sup>80</sup>

The power of merchant was also obvious in their guild organizations. Guilds and Chinese chamber of commerce served the broader community in a variety of ways, mostly they assisted in municipal services such as welfare relief, roads, bridges, water supply, fire fighting, and local defence.<sup>81</sup> All these services they did to gain official recognition and patronage and it also represented the merchants' Confucian public mindedness.<sup>82</sup>

As trade and external relation continued to develop, professional people began to emerge in the big cities and treaty ports. As these people enjoyed an alternative and more reliable

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<sup>78</sup> Myron L. Cohen, 28.

<sup>79</sup> Fairbank, 96-99.

<sup>80</sup> Wright, 179,180.

<sup>81</sup> Chinese chambers of commerce were inspired by Western examples in the treaty ports.

<sup>82</sup> Fairbank, 57.

upward mobility, they were no longer keen in the examination path. Also the merging of the upper gentry, degree holders and the merchant class began to appear and was known at the time as the "gentry-merchant (绅商)" class.<sup>83</sup> The newly merged class tended to live in big cities. They were either former upper gentries turned urban absentee landlords, or rich urban merchants investing in farm land to gain the gentry status and privileges.

Merchants' investment in land was not capital forming behaviour in the modern sense. But soon high provincial officials began the policy to bring large scale commercial and industrial projects to their areas, as they could not wait indefinitely for Beijing to make such initiatives.<sup>84</sup> For these projects, the provincial officials relied on the newly merged gentry-merchant class (绅商) for both their investment and for their business acumen.

This was known at the time as "official directed and merchant managed 官督商办" enterprises. These projects included textile mills, telegraph lines, railways, coal, iron, steel complexes, and modern banks.<sup>85</sup> This is also the beginning of China's habit in state capitalism.

The new Chinese merchant-gentry configuration reminds us of Barrington Moore's liberal social configuration. Moore's social configurative theory posits: when the landed class merged with the bourgeoisie and with the bourgeoisie in the driving seat, the resultant social force inclines towards liberalism as in the case of England.<sup>86</sup> Should the new

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<sup>83</sup> Wellington K.K. Chan, "Government, merchants and industry to 1911" in *The Cambridge History of China, Vol II*, eds. Denis Twitchett and John K. Fairbank, (Cambridge University Press, 1980), 420.

<sup>84</sup> Fairbank, 158.

<sup>85</sup> Ibid., 116.

<sup>86</sup> Barrington Moore, Jr., *Social Origins of Dictatorship and Democracy, Lord and Peasant in the making of the Modern World*, (Beacon Press, 1966), 413.

configuration be dominated by the landed class, the resultant social force is likely to be conservative as in the case of Germany and Japan. We shall see later how this newly merged class conduct itself in the fight with the court on the introduction of the new constitution. Further down the road in the republican period, they contributed significantly to the coffer of the Nationalist Party.

### **The Gong (工 Artisan) Class**

Although the artisan class rank higher than the merchant class, this class suffered a significant decline when Western industrial product began to flood in. Traditional textile productions in the villages were completely wipe out, and even silk production struggled under British/Indian and Japanese competition. The introduction of technical means and modern enterprises caused further unemployment. The artisan class's future seemed to lie with the nascent indigenous industrial endeavours, but the new Chinese attempt at industrialization were hampered by fierce competition from the West with huge capital and technological advantages. Later, this class formed the basis of the urban proletariat class in the republican period. Traditionally, the artisan class had little political influence in Chinese society. However, in 1911 they were concerned enough to have participated in large numbers in the three petitions that year for the early convening of parliament to debate the constitution issues. Thus they form part of the convergence for a modern constitution.

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## **The Nong (农 Farming) Class**

The farming class was made up of two sub-classes: the gentry class which is made up of rich farmers with substantial land holdings and the small farmer class, or what is commonly called today the "peasant" class. The small farmers have meagre land holding or even no land holding, in which case they were tenant farmers. These two subclasses have different political roles.

### **Small Farmers (or "Peasants")**

In the past, there was no equivalent term in China for the European term: peasant. The traditional Chinese term for farmer (农夫) was not a term of contempt as the European term peasant may imply. The small farmers formed the base of the nong class which as a whole ranked second from the top of the "shi, nong, gong, shang" classification. This is understandable in an agrarian society, as farmers made up close to 80% of the total population and they were seen as the prime producer of important commodities: food stuffs. Within the nong class, the small farmers' respectability was not greatly different from that of the gentry. After all, the gentry were farmers too, living in the same rural setting. A close knit social fabric did exist between the small farmers and the gentry in the rural setting.

Not a few Western anthropologists had noticed how Chinese "peasants" differed significantly from peasants in other parts of the world.<sup>87</sup> Notably they had an unique lack of organizational capacity, like a heap of loose sand, and with high mobility when

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<sup>87</sup> Eric R. Wolf, *Peasant Wars of the Twentieth Century*, (Harper & Row Publishers, New York, 1969), 105.

compared to European and Russian peasantry and they were prone to banditry and revolt.<sup>88</sup> However, the massive Taiping and other rebellions had demonstrated unmistakably that the Chinese "peasants" were capable of organizing large military campaigns on both the rebellion side and on the gentry side.<sup>89</sup> This military capability of the Chinese "peasants" will be demonstrated again in the 1949 social revolution.

Modern Chinese also use the term "peasant" to describe Chinese small farmers, due to their acceptance of the questionable Marxist characterization of the Chinese dynastic period as feudal and the Chinese farming masses as peasants. The modern Chinese term for "peasant" 农民 turned out to be a neologism borrowed from the Japanese translation of the term for "peasant union," and it only began to appear after 1931.<sup>90</sup> Myron Cohen debunked the modern and erroneous characterization of the Chinese small farmers as peasants. Cohen's detailed anthropological work shows the Chinese small farmers were actually functioning in the market, managing their farming business as family enterprises.<sup>91</sup> This required them to be functionally literate, at least on a need to know basis, to handle contracts, land transactions and various village level and market town interactions. However, due to the need to cross reference with most Western writings and with the modern Chinese neologism nongmin 农民, this dissertation will follow the common usage to refer to the Chinese rural masses as peasants, but with an understanding of its origin.

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<sup>88</sup> Barrington Moore, Jr., *Social Origins of Dictatorship and Democracy, Lord and Peasant in the making of the Modern World*, (Beacon Press, 1966), 199, 208.

<sup>89</sup> The top military strategist and commander in the Taiping Rebellion, Li Xiucheng, was originally a village charcoal maker.

<sup>90</sup> Myron L. Cohen, *Kinship, Contract, Community, and State, Anthropological Perspectives On China*, (Stanford University Press, 2005), 312.

<sup>91</sup> Ibid, 4, 13, 25, 26, 29, 30, 31, 42, 71.

As over population continued in the later part of the 19th Century, land for cultivation per farming family dwindled further. Growth of trade did not mean peasant life improved. Many of the destitute and unemployed farmers from the crowded areas migrated to marginal lands in the mountainous West and Southwest, where government was thinly spread making revolt more plausible.<sup>92</sup> Legalized opium trade with Britain also drained China of its silver currency and thus created a fiscal crisis for the small farmers year after year, as they must exchange copper currency for silver to pay taxes at a growing exchange rate disadvantage.<sup>93</sup>

By the early 1900s the Chinese upper classes were changing, but not the Chinese farming people. The rise of the gentry-merchant coalition had serious consequences for community life in the villages. The small private cultivators began to lose out to the big land investors from the cities. In introducing reforms, no one bothered to consult the masses in the villages. This continued to be so in the republican period after 1911. By the 1920s some tenant farmers became practically landlord's slaves.<sup>94</sup>

From 1840s to 1911, the small farmers' fiscal burden had at least doubled in order to finance wars, national debt owed to foreign banks, indemnity payments and reforms. When more upper gentries were attracted to the large cities and became absentee landlords, the traditional social fabric between gentry and small farmers deteriorated. The small farmers were thus without spokesmen who could present their grievances to the

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<sup>92</sup> Fairbank, 64, 65.

<sup>93</sup> This was a money supply problem not well understood even in the West before the 1930s, Ibid., 92 and Wright 152-153.

<sup>94</sup> Ibid., 160-161.

state and making them more prone to revolt. The "Veritable Records of the Qing Emperors 大清历朝实录" showed the frequency of revolt trending up again from 385 incidents between the nine year period of 1876-1885 to 653 in the five year period between of 1886-1911.<sup>95</sup> The rural masses' lack of spokesmen implies the nascent provincial and national assemblies for the constitutional debate would have no input from them. This lack of representation of the farming masses will plague subsequent constitutional effort in the republican period.

One hidden function of the rural masses of China was to the force to end decaying regimes. The large scale "peasant" rebellions in the 1850s and 60s had no doubt wounded the dynasty severely. However, the rural masses were not involved in Qing's constitutional process or in the 1911 overthrow of the Qing. It was an elite precipitated national revolution.

### **Gentry (Shen 绅)**

As noted before the gentry as a group was not explicitly named in the "shi, nong, gong, shang" classification. As rich farmers, the gentry lived in the same rural setting as the small farmers and the two groups jointly form the nong class. The gentry were not a hereditary group but rather an open group for whoever that can rise to the land owning status. But besides being cultivators themselves, they also played the pivotal intermediary role between officialdom and the rural masses. They acted as spokesmen for the rural community towards officialdom and as government policy promoters towards the masses.

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<sup>95</sup> Marianne Bastid-Bruguier, "Currents of Social Change", in *The Cambridge History of China, vol II*, eds. John K. Fairbank and Kwang-Ching Liu, (Cambridge University Press, 1980), 591-94.

In addition, they help the magistrate to organize public projects such as bridges, roads, irrigation, local schools, militia and community watch, market town operation, moral instructions and guidance, in the arbitration of disputes, festivals and religious events. For their support, the state guaranteed their privileges and status.

As rich farmers, they can afford to fund their promising sons to pursue the long and arduous scholarly path to become future scholar-officials. They also used their wealth to provide credit and make high usury gains from the village poor. For this and other extractions, they earned the reputation of being parasites to some, but others recognize their positive functions.<sup>96</sup> Their ideal was to be scholarly cultivator families (耕读传家). As such they identify with the imperial examination system and the Confucian teachings. This is evidenced by their willingness to take up arm and to organize provincial level forces to put down the heterodox and Christianity inspired Taiping Rebellion. Towards the end of the 19th Century, the upper gentry found new opportunities in the big cities and gradually merged with the merchant elites.

To the Manchu court, the newly merged gentry-merchant class signified further power shift towards the periphery in addition to the military power shift to the provinces since the Taiping Rebellion. The newly merged class had a weaker bond with the imperial court, as they now could find alternative and more practical routes of upward mobility than the old examination route. They began to have real material interest to defend and later came into conflict with the court. The most striking example of their rights protection fight with the court was the railway case. In 1911, the court tried to nationalize

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<sup>96</sup> Moore, 205.



all provincial lines, a very justifiable and necessary act for the creation of a unified national network. However, provincial gentry-merchant groups considered the court's national railway plan to be a sell out to the foreigners. The Sichuan Provincial elites mounted a railway protection movement and violently defied the Qing government. The railway rights movement was one of the preludes to the 1911 national revolution and it was led typically by degree holders of means with landlord-merchant backgrounds who had studied in Japan and participated in the provincial assemblies.<sup>97</sup>

The merged gentry-merchant class proved they can be an impediment to central government reforms. For instance, their tax evasion tactics at the provincial level limited the imperial court's share of revenue intake to 3% of the GDP, making many central government reforms impossible.<sup>98</sup> They also resisted any central government reform that may weaken their privileges or power base. It was the provincial gentry-merchants and the provincial military power that gave the final push to the Qing Empire, not realizing destroying the central power may doom their own future existence as a class should the new central power have no need for their services.<sup>99</sup>

Still, in the first decade of the 20th Century, the newly merged upper gentry-merchant group and the shi class were the better endowed groups to try the parliamentary and constitutional path and they were eager to try it too.<sup>100</sup> The failure of the constitutional

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<sup>97</sup> Fairbank, 160.

<sup>98</sup> Theda Skocpol, *States & Social Revolutions, a Comparative Analysis of France, Russia, & China*, (Cambridge University Press, 1979), 76.

<sup>99</sup> Ibid., 79, 152.

<sup>100</sup> Ibid., 78.

attempt in 1911 also means China lost its first opportunity to try the parliamentary route to modernity and perhaps it was the best chance it had as later events will show.

### **The Shi (士 the Educated and Political) Class**

Out of the shi, nong, gong, shang classification only the top shi class has the right and qualification to be politically active. The other classes' roles are seen as producers.<sup>101</sup> As Mencius (372-289 BC) had explained: "Those who labour with their mind rule and those who labour with their body will be ruled."<sup>102</sup> In its origin, the archetype of a shi was a minor noble during the feudal period of China (1122 BC—256 BC). A shi was typically a younger son of a noble family, who was to be highly trained in the six arts of literature, arithmetic, rites, music, archery and charioteering.<sup>103</sup> To seek employment in various courts, a shi was an itinerant knight-scholar, selling his military stratagems or knowledge of state craft from court to court.<sup>104</sup> Confucius was a shi himself, but he was also the first to popularize the shi training by offering it to all classes.<sup>105</sup> Confucius' own group and other competing shi circles spawned schools in military stratagem, defence tactic, oratory skill, political and moral philosophies. Since 221 B.C., China's dynastic states relied on the shi class to reduce the state's dependency on the great noble families, thus weakening and eliminating them over time.<sup>106</sup> In later dynasties, the shi class began to shed its martial character and became highly civil. Beginning from Han Dynasty (226 B.C. to 206

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<sup>101</sup> Fung Yulan, *A History of Chinese Philosophy, Vol 1*, trans. Derk Bodde (Princeton University Press, 1952), 52.

<sup>102</sup> Mencius, *Mencius* 3.1.

<sup>103</sup> Jacques Gernet, *A History of Chinese Civilization*, (Cambridge University Press, 1996), 64, 77, 87, 89.

<sup>104</sup> The Japanese term Bushi 武士 or samurai circa, AD 797, used the same word shi 士, except they put the emphasis on its martial character hence the descriptive word martial: bu 武 before the word shi 士.

<sup>105</sup> Fung Yulan, *A History of Chinese Philosophy*, 54.

<sup>106</sup> Gernet, 64.

A.D.), a shi would be selected to join the high bureaucracy based on his knowledge of the Confucian classics, thus began the tradition of Confucian literati officialdom. The selection process was eventually institutionalized in the imperial civil service examination system in 605 A.D. and this system lasted till 1905. For this invention of an open and non-hereditary bureaucracy, Francis Fukuyama considers China as "the first world civilization to establish a non-patrimonial modern state."<sup>107</sup>

The Confucian ideal for the shi class is a multi-scale self actualization, starting from self cultivation (xiu shen 修身), to the regulating of one's own family (qi jia 齐家), to the management of state affairs (zhi guo 治国), and ending in the harmonizing of all under heaven, i.e. harmonizing inter-feudal state relations (pin tianxia 平天下).<sup>108</sup> Their cognitive script can be summed up by Fan Zhongyan's writing (范仲淹 989-1052) in Song Dynasty on Confucian universalism: "To be the first to worry about the world's worries and the last to enjoy its pleasures 先天下之憂而憂, 後天下之樂而樂" and "all under heaven as one's concern 以天下為己任."<sup>109</sup> Thus seen, the shi ideal and political calling is lofty and ennobling indeed.

Since the establishment of the examination system in 605 AD, the only path to become a shi was through examinations, and their education must be in the Confucian classics.<sup>110</sup>

In later dynasties, the core of the shi class consisted of the top degree holders in high

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<sup>107</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 10.

<sup>108</sup> Chen Xiaoming, *From the May Fourth Movement to Communist Revolution, Guo Moruo and the Chinese Path to Communism*, (State University of New York Press, 2007), 2, 3.

<sup>109</sup> Wm. Theodore de Bary, *Nobility and Civility, Asian Ideals of Leadership and the Common Good*, (Harvard University Press, 2004) 122.

<sup>110</sup> An educated woman would be addressed as a female shi (nu-shi 女士) even today. A highly educated woman can sometimes be addressed as a sir (先生).

imperial offices, hence the term scholar-officials (儒官), but all degree holders whether employed by the state or not were included in the shi class. In theory, a shi can come from any family background so long as he can rise up through the examinations. In reality, most of them came from well to do gentry families, hence the combined term shi-shen 士绅 was used to name both classes. However, functionally the shi class must be kept separate from the gentry class. This is because their roles and aspirations are widely different. A gentry's interest is in land ownership, local status and local power, whereas a shi's interest is in state-wide power and the central bureaucracy. His perspective is empire wide as the phrase "all under the heaven is his concern 以天下为己任" implies. This system worked against the poor families because they could hardly sustain the long investment required to raise a child in the arduous classical training. But there was never a hereditary barrier in the shi concept, except in the pre-dynastic antiquity.

After the termination of the 1300 years old examination system in 1905 and the final fall of the Qing Dynasty in 1911, the shi concept remained relevant in Chinese society. They are still the political elite who rise up through education, but now they can be from any branch of learning, traditional or Western. The educated shi class, including students in schools, enjoy extra tolerance by society and state for being vocal on social and political ills. The toleration of student activism is also evident in Korea, Taiwan and Japan. In general, the shi class takes a political orientation and they consider themselves bearing heaven given rights to be concerned with the fate of the people.

Thus the shi class can be seen as the prime actor or agent in Chinese society. Western studies on Chinese transformation, particularly those who use the structural lens, tend to focus their research on the gentry and the "peasant" classes and their configurations.<sup>111</sup> They thus missed out the great significance of the shi class in the Chinese polity. For this study to go beyond the structural view to understand the sentiment of the time, the ideational changes, and the motives of the Chinese, the shi class must be analysed. The following examples can give us a picture of the powerful influence and actions of the shi class and their converging new thinking at the end of 19th Century:

### **Kang Youwei (康有为)**

Kang is the leading theorist on why Confucianism in antiquity was actually progressive.<sup>112</sup> He was also the one who organized 1300 fellow metropolitan examinees to petition the throne to reform the dynastic system. Later he became Emperor Guangxu's top advisor for the failed 100 Day Reform of 1898. His reform program included a long term aim for a parliament, and a monarchical constitution with a division of power. After the failed 100 Day Reform and while in exile, he devoted his energy on extending the Confucian ideal of "all under the heaven belong to the public" into a futuristic utopian writing: "The Book of Great Harmony 大同书." This book also calls for gender equality and it was published after Kang's death.

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<sup>111</sup> Well known structural studies that had covered the Chinese social transformation include the following: John Dunn, *Modern Revolutions, an introduction to the analysis of an political phenomenon*, (Cambridge University Press, 1972); Eric R. Wolf, *Peasant Wars of the Twentieth Century*, (Harper & Row Publishers, New York, 1969); Barrington Moore, Jr, *Social Origins of Dictatorship and Democracy, Lord and Peasant in the Making of the Modern World*, (Beacon Press, 1966); and Theda Skocpol, *States & Social Revolutions, a Comparative Analysis of France, Russia, & China*, (Cambridge University Press, 1979).

<sup>112</sup> Steve C. Angle, *Human Rights and Chinese Thought, a Cross-Cultural Inquiry*, (Cambridge University Press, 2002), 127, 132-33.

### **Yen Fu (严复)**

Yen translated many Western works on sociology, economics, law and political theories. They include: *Evolution and Ethics* by Thomas Henry Huxley; *The Wealth of Nations* by Adam Smith; *The Study of Sociology* by Herbert Spencer; *On Liberty* by John Stuart Mill; *A System of Logic* by John Stuart Mill; *A History of Politics* by Edward Jenks; *The Spirit of the Laws* by Montesquieu; and *Primer of Logic* by William Stanley Jevons.<sup>113</sup> Through these translations, he was able to popularize the social Darwinian view of a dog eat dog world of nation states. Yen was convinced that for China to survive in such a Darwinian jungle, it must first build national strength and wealth. In order to do so, China must learn liberalism from the West so to liberate the energy of the Chinese masses. For China to win the hearts of its people and be able to mobilize them, it must build a just legal system, like the one he had personally observed in England. Yen was credited to be the first to effectively influence the high officialdom in accepting Western concepts, largely due to his highly elegant and classical style of translation.

### **Liang Qichao (梁启超)**

Liang was the protégé of Kang Youwei and also one of the top reformers supporting Emperor Guangxu's failed 100 Day Reform.<sup>114</sup> While exiled in Japan, Liang greatly broadened his horizon by reading up Japanese translations of Western social and political theories. He became highly influential among young elites for his idea of renewing the Chinese people to become modern citizens and China a nation state.<sup>115</sup> What was shocking at the time was that he went against the Confucian ideal of universal harmony,

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<sup>113</sup> Benjamin Schwartz, *In Search of Wealth and Power, Yen Fu and the West*, (Harper & Row, 1964).

<sup>114</sup> Joseph R. Levenson, *Liang Chi Chao and the Mind of Modern China*, (Harvard University Press, 1953).

<sup>115</sup> Liang Qichao, *The New Citizen*, (Liaoning People's Publisher, 1994), 1-10.

arguing that it can only lead to a return to brutish life.<sup>116</sup> Liang was convinced the dynastic system caused a general apathy among the Chinese people. To make the Chinese people care for their state and feel they have a stake in it, a modern constitution is a must, and he insisted that the constitutional process must not be a government proclamation. To Liang, it must be "the result of contest between state and people" (故夫宪法者，上下交让之结果也，交让必先以交争).<sup>117</sup> Liang was highly popular for his passionate style of writing and yet erudite in classical scholarship. He was considered the top intellectual of his time and was admired by people like Mao Zedong and others.

### **Zhang Jian (张謇)**

Zhang was the one who reintroduced the idea for China to adopt a modern constitution after his trip to the Osaka Expo of Japan in 1903. Through his personal connection in high places, he was able to present his idea and translations on the Japanese constitution and parliamentary system to Empress Dowager Cixi. Zhang was perhaps the best example of what a high order shi's life was like. After achieving the imperial first scholar rank (状元) in 1894, Zhang decided to forgo a career in the bureaucracy, which was a very subversive and risky move at the time. He returned home to set up industries in cotton mills, steamship lines, flour, oil, and salt production. He was also involved in philanthropy work in building technical colleges, roads, railways, parks and homes and became the head of the Jiangsu Provincial Assembly. Zhang's life was a case of the

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<sup>116</sup> Liang Qichao, *The New Citizen*, 25 "Should universal harmony be achieved...all people under the heaven will be returned to brutish life 然则大同之后...是率天下人而复归于野蛮也." This is similar to Alexandre Kojève's re-animalised concept under Hegel's Universal and Homogeneous State.

<sup>117</sup> Liang Qichao, *The New Citizen*, 219 (故夫宪法者，上下交让之结果也，交让必先以交争).

combined power of a top shi and a well to do gentry family having connections to the governor generals and the court.<sup>118</sup>

### **Sun Yat-sen (孙逸仙)**

Sun is touted as the father of the republic after the fall of the Qing Dynasty. He was educated in Hawaii in his youth and later studied for a Western medicine degree in Hong Kong. As such, Sun was a non-classically trained shi to engage in the end of the century debate on China's future. Sun brought home the radical idea of revolution and for China to reject the dynastic system for a republic. In 1905 he formulated the Three People's Principles: Minzu Zhuyi 民族主義 for nationalism, Minquan Zhuyi 民權主義 for democracy and Minsheng Zhuyi 民生主義 for people's livelihood, as the political jurisprudence for the future China. Sun's Minsheng Zhuyi or people's livelihood principle is interpreted by some as equivalent to socialism. But there are differences. It is an idea that has persisted in the Chinese political culture. It can be traced to the ancient Minben Sixiang 民本思想, namely the political ideal of treating the people as the foundation of the country. Its earliest mention can be found in the Song of Five Brothers 五子之歌 (circa 2043 BC) from the Book of Xia in the Book of History: "...the people is the basis of a country, when the basis is secured, the country is tranquil 民惟邦本，本固邦寧..." In 1906, Sun further proposed a division of five powers, grafting China's political tradition of censorship and the examination system onto the Western division of three powers. Sun linked his republican cause to the Confucian political ideal of the Great Harmony: "when all under the heaven belong to the public 天下为公." As a result, the phrases: "to build a

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<sup>118</sup> Fairbank, 158.



nation of the people 以建民国", and "to advance towards the Great Harmony 以进大同" are written into the national anthem of the Republic of China.

### **The Final Divergence and Collapse**

The Qing government began to feel the pressure from the provincial assemblies after their first session in 1909, demanding an early convening of a national parliament. The court was criticized again in 1910 by the Political Consultative Council for the same reason.<sup>119</sup> Together these groups organized three large petitions in 1911, each time collecting more than 200,000 signatures, to pressure the court to convene a true parliament. The court refused all three petitions and banned further petition outright and thus closed the path to a compromise.<sup>120</sup>

On the surface the petitions were about the timing of the first parliamentary. What was unsaid from the petitioners' side was: they wanted the parliament to convene before the court's proclamation of its absolutist constitution and thus move the constitution framing process into the parliament. The court's intent was exactly the opposite, it wanted to ensure the constitution to be proclaimed from the throne and thus deny the parliament the right to the constitution framing process. Liang Qichao, on the reform side, pointedly

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<sup>119</sup> Reynolds, 190-191.

<sup>120</sup> Liu Ducai, "Issues Related to the Late Qing Constitution Movement", [<http://wenku.baidu.com/view/4c1bba6c58fafab069dc0202.html>], (China Academic Journal Electronic Publishing House, Issue 1, 2002).

argued that the constitution framing process must involve the public and a proclamation from the court was unacceptable.<sup>121</sup>

The court's goal was to recentralize power in the hands of Manchu princes and hoping thus to preserve the Manchu rule.<sup>122</sup> At the same time, the reform faction was battling the revolutionaries who were gaining in public support. The revolutionaries argued that constitutionalism by definition means to limit state power (汪精卫: 夫各国之立宪, 其精神在于限制君权).<sup>123</sup> What they aimed for was the complete removal of the dynastic system and the Manchu ruling class and to bring in a Western style republic.

The last straw that broke this three way logjam was the court's ill considered announcement on May 8 1911. It announced the first cabinet to operate under the new constitution to be a lopsided Manchu cabinet.<sup>124</sup> This last straw finally pushed many reformers to the revolutionary side. Thus a final convergence between the reform side and the revolutionary side was achieved on a constitution for a republic, not for a reformed dynasty. On October 10, three thousand troops in Wuchang City revolted and declared their intention to overthrow the Manchu Dynasty. Within six weeks all of the southern, central and some of the north-western provinces had declared their independence of the Qing. The court then did a quick reverse and announced the

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<sup>121</sup> Liang Qichao, *The New Citizen*, 219 (故夫宪法者, 上下交让之结果也, 交让必先以交争), and Liang Qichao, *Collected Works and Essays of the Ice-Drinkers' Studio* (Shanghai Zhonghua Book Co., 1936 ), vol. 19, 12-13 (然而立宪之动机起于政府, 而不起于人民, 则其结果必无可观者).

<sup>122</sup> The Regent of Emperor Puyi assigned two of his own brothers to key military positions.

<sup>123</sup> Ma Yong, "Why the Regent did not initiate a Pardon for All?" [<http://chinese.wsj.com/gb/20131227/YMA071002.asp?source=UpFeature>], *Chinese Wall Street Journal*. (汪精卫: 夫各国之立宪, 其精神在于限制君权, 而此所言立宪, 其宗旨在于巩固君权, 然则吾侪谓如此立宪, 适为君主权力之保障, 为政府之护符, 其言有少过乎?).

<sup>124</sup> Nine out of thirteen positions of the first cabinet under the new constitution were to be held by Manchu and Mongol nobles.

Nineteen Creeds (十九信条) or guarantees which at the last minute switched its absolutist stance to a British style constitutional monarchy, but the article for Manchu reign in perpetuity remained. However this last minute move convinced nobody of the court's sincerity. The last push came from the troops stationed east of Peking. They first blocked the court's ammunition shipment southward and then they cabled the court with their ultimatum on October 29. Empress Dowager Long Yu then called in prime minister Yuan Shi-kai to represent her and the six year old boy Emperor Puyi to negotiate with the revolutionaries for the terms of a bloodless abdication. The Manchu rule finally came to its end on February 12, 1912 and China's first attempt to adopt a modern constitution went with it in failure.

However, the dynasty ended not by a unified power but by a group of independent provinces without a clear leader. In truth, it was more of a collapse than an overthrow, but it was also an end without bloodshed. This means China's 2000 year long dynastic period also came to its final end. The path forward was finally won by the revolutionaries and China's future from this point on is to be a Western style republic. The 1911 ending of the Qing Dynasty is known since as a nationalistic revolution, due to the fact that 1) the reign reverted back into Chinese hands and 2) it had changed the political structure, and therefore revolutionary. Within this nationalistic revolution, there was no consciousness yet to call for a major social restructuring at the same time.

## **The Final Analyses**

China's last dynasty came to its final end for trying to bring in an absolutist monarchical constitution. The Qing court's attempt was complicated by many factors: internal decay, external pressure, and the Manchu and Han Chinese schism. But above all it was due to the court's losing touch with its society undergoing changes after the opening up of China to the West. The Qing state's absolutist constitutional attempt simply diverged from the public's desire for a modern constitution that could turn China into a healthy nation state. The court not only diverged from the public sentiment but also diverged from the desires of the real power holders. Since the Taiping Rebellion (1850-1864), military power had shifted to the provinces. The court had since been living on borrowed time because there was no centrally funded army. It was maintained by loyal Chinese provincial officials using their provincial forces. Over the latter half of the 19th Century, economic and industrial power continued to grow in the provinces. Local governance was the goal of the provincial leaders and an absolutist monarchical constitution clearly diverged from their aim. Instead, the Manchu princes were aiming for absolute power and for their reign to be guaranteed in perpetuity when they were precisely not in a position to bargain. The weakness of the ruling house was for all to see, its last three emperors were all boy emperors with their regents picked from the same royal household with little understanding of what was happening much beyond the Forbidden City in Peking. Thus the divergence was ensured.

In sum, the framer of the Qing constitution was the court itself, with the gentry, the provincial leaders and the elites excluded from the framing process. But the public

consensus for the need of a constitution was strong and clear. The public wanted a modern constitution with a division of power, and with them having a share in its framing. The court's absolutist constitution clearly diverged from the public demand. It must also be noted that Chinese public opinion at the time came exclusively from the gentry, the provincial leaders and the elites. The masses were not involved. The agrarian social structure remained intact even though there were significant changes in the upper classes. The great masses of the common people were still largely illiterate and incapable of political participation. On the other hand, when compared to later periods, the political minded elites and gentry were at their peak form at the time. Their high quality soon began to drop together with society's further deterioration. The Qing state was weak and despondent. Its understanding of its own plight and the wider world was limited. Thus it did not fully comprehend the unreasonableness of its move for an absolutist monarchical constitution.

## **Lessons Learned from the Qing Period**

What lessons can we learn from China's first constitution framing to support this research's argument? From the analyses done in this chapter, this research has found a set of lessons to broadly support the research argument as follows:

The social condition China faced in the 1800s was over population and scarcity. The traditional Chinese response to scarcity was frugality, i.e. to accept a subsistent level of existence, to tolerate underdevelopment and a lowering of government administration. The lesson learned here is that the traditional response to scarcity can only work for a

very large agrarian empire, when it is unthreatened by surrounding countries. But the new reality China faced was a world of competing nation states. Underdevelopment in state institutions and social participatory capacity in the newly industrialized world has serious consequences.

The first generation reformers in the 1860s argued all that was needed was to import Western technologies and military equipment. But by late 19th Century and particularly after China's defeat by Japan in 1895, Chinese elites came to understand that more fundamental changes were needed. The old institutional design had to be substantially modified or even changed completely in the modern era. As a result, the 1300 years old imperial examination institution was terminated due to the fact that its curriculum had no modern content. But the termination of the old examination institution also ended the upward mobility path of the classically trained elites and their allegiance to the state, leading to state instability. The lesson learned here is that functional/institutional changes without regard to political participation can lead to state collapse.

For the Qing failure to modernize, we can safely say when an ossified autocratic dynastic system came face to face with modern industrial nation states, the condition was sufficient to cause a total collapse. The lesson learned here is that the root problem was the dynastic form of polity, not Confucianism. In fact, many scholars consider the mid 20th Century rise of the Asian countries as rooted in Confucian values.<sup>125</sup> The dynastic

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<sup>125</sup> Daniel A. Bell, Hahm Chaibong, ed., *Confucianism for the Modern World*, (Cambridge University Press, 2003), 5, and Robert Kaplan, "Asia's Rise is Rooted in Confucian Values", *The Wall Street Journal*, (Feb. 6 2015).

problem is foundational as it causes an apathetic population and at the same time the vitality of the ruling house cannot be sustained.

The Confucian' political ideal, being fixed in antiquity, first in the sage king era for universal harmony, then settled for the feudal local harmony, can be seen as a sign of poverty of ideas. The lesson learned here is that the source of this poverty could very well be the fact that China's interaction with the world's other major civilizations was infrequent enough before the 19<sup>th</sup> Century. Not actively participating and competing in the world can be argued to be the ultimate cause of social, political and cultural decays. This could also be the biggest lesson for China.

In the end, the court's absolutist constitutional intent clearly diverged from the public demand for a modern constitution. It also diverged from the provincial powers' interest in self governance. We have learned when such divergences were backed up by a refusal to compromise and a delaying tactic, it led to the final show down and the collapse of the state.

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## **Chapter II**

### **The War Torn Period and China's Attempt at a Liberal Constitution**

In the years between 1911 and 1949 China was a war torn country. In this period, China first disintegrated into several warlord territories, followed by unification wars, foreign invasions and finally a civil war which unified China in 1949. Concurrently, there were internal debates on national identity, values and the path forward for the future of China.<sup>126</sup> All these happened within an international environment of two world wars plus the world wide Great Depression in between. As the new Chinese nation struggled to form, it went through nine attempts at constitutional framing. Each of these attempts was a reflection of what the state at the time thought what it should be. It also showed there was constant pressure from the educated public for a constitutional government. Having a constitution became a legitimacy issue for the state and also a political tool for gaining power. However, these constitutions were all paper constitutions as the social forces for them to function were absent and the regimes behind them were short lived in the turbulences of the time.

### **The Constitutional Zero Sum Game of the Yuan Shi-kai Period**

As we have already seen, the Qing Dynasty fell apart not by the strike of a unitary force but by a good number of provinces declaring their independence. The Qing Prime Minister Yuan Shi-kai was not able to rein in these provinces by military campaigns. By early 1912, the military commanders of seventeen rebel provinces had jointly drafted an

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<sup>126</sup> China, right after the fall of the Qing Dynasty, wanted to be a nation state and a republic in the European fashion instead of forming of a new dynasty.



organic law for a revolutionary government which was presidential in design and had inaugurated the revolutionary leader, Sun Yat-sen, as the provisional president. Sun's selection was due to his long years of contribution to the revolutionary cause and his convincing vision of China as a republic. To Sun's credit he had developed in 1905 a synthesis of modern Western political theories and practices with ancient Chinese political ideals. He named his synthesis the Three Principles of the People, viz.: 1) Minzu zhuyi 民族主義 for nationalism, 2) Minquan zhuyi 民權主義 for democracy and 3) Minsheng zhuyi 民生主義 for people's livelihood. It was also a centrist-left platform that reflected the intellectual currents of the day in the West.<sup>127</sup>

But the Qing Prime Minister Yuan Shi-kai, as a former grand marshal and the founder of Qing's New Army divisions, still had loyal military supporters. His former division commanders were still in effective control of the Northern provinces. The Western powers at the time, due to market stability considerations, put pressure on the revolutionary government to yield to Yuan as Yuan had control over more military forces. Succumbing to the Western pressure, Sun resigned and offered the provisional presidency to Yuan if Yuan could get the Qing court to abdicate in peace. Yuan accepted the offer and offered in return to make Sun the head of China's national railway planning.<sup>128</sup> However, before the resignation took effect, Sun had a Provisional Constitution 中華民國臨時約法 enacted on March 11, 1912. In it, the original presidential design was changed to a prime-ministerial system with the presidential post made titular. It required the

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<sup>127</sup> Jay Taylor, *The Generalissimo, Chiang Kai-Shek and the Struggle for Modern China*, (Harvard University Press, 2011), 17 and 24.

<sup>128</sup> Chien Tuan-sheng, *The Government & Politics of China, 1912-1949*, (Stanford University Press, 1950), 58-59, and 79.

president to have all his initiatives co-signed by cabinet members and all his appointments agreed to by an Advisory Council.<sup>129</sup> These changes severely curtailed President Yuan's executive power. In effect the revolutionaries and the rebel provinces fired the first shot in a constitutional zero-sum game with Yuan.

In the winter of 1912-1913, the first general election for the two houses of parliament took place. The revolutionary party: the Nationalist or Kuomintang, (here after as KMT), won the majority of seats in the lower house by promising provincial gentries a high degree of self government.<sup>130</sup> However, on March 10, 1913, the KMT premier elect Song Jiao-ren was assassinated, before he could formed the first parliamentary government. When the parliament finally convened the next month, it set up a committee to draft a formal constitution. By October 1913 the committee delivered a constitutional text known as the Temple of Heaven Draft 天坛宪草. It was modelled after the French constitution at the time, which was relatively unstable and it required the premier and his cabinet answerable to the parliament instead of to the president. Yuan vigorously objected and demanded changes so that it could resemble the American presidential system.<sup>131</sup> The parliament rejected Yuan's demand for changes and thus forced him to appeal to the country. After Yuan had gotten sufficient support from his loyal military commanders, he proceeded to arrest KMT members of the parliament and rendered the parliament defunct. On November 4, 1913 Yuan ordered the complete dissolution of the KMT. Thus the Temple of Heaven constitution draft came to a quick end.

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<sup>129</sup> Pan Wei-tung, *The Chinese Constitution, a Study of Forty Years of Constitution-making in China*, (The Institute of Chinese Culture, Washington D.C., 1945), 14 and 16.

<sup>130</sup> John King Fairbank, *The Great Chinese Revolution, 1800-1985*, (Harper & Row, Publishers, 1987), 172-173.

<sup>131</sup> Pan, 20-21.

Sun escaped to Japan and while in exile he developed a new revolutionary program. He proposed that for China to become democratic, it needs a program of three phases. First, the revolution party must go through a phase in which it uses military force to unify the country. After that, it requires the party to enter into a political tutelage phase so to train the populace to become citizens and to prepare them for local self governance. The final phase begins when the majority of the provinces have achieved county level self governance. Then a democratic constitution will be drafted based on actual experience in self governance. Only in this final phase will China become a constitutional and democratic polity.<sup>132</sup> Sun's phased program for building a constitutional polity aims to narrow the gap between thought and reality. It is also a program that aims for popular participation in the polity. It was considered by many as sound and reasonable at the time. Today Sun's Three People's Principles still enjoys a following among Chinese some dissidents and the nationalists in Taiwan.

After the parliament became defunct, President Yuan and his State Council, which was made up of his close supporters, framed the Constitutional Compact 袁世凱新約法 on May 1, 1914. The Compact gave the president the power of absolute veto. It also allowed the president to withhold the promulgation of any bill passed by the parliament. He could convoke, prorogue, prolong or close its sessions, and he could also dissolve it. However, the intended parliament was never created and Yuan simply ruled with the Council of State as the substitute for it. In effect, Yuan's Constitutional Compact was his zero-sum

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<sup>132</sup> Taylor, 27.

riposte to the revolutionaries'. By December, 1914 Yuan changed the presidential election law to remove term limits, and thus made himself president for life.<sup>133</sup>

But, Yuan was not satisfied to be merely a president. Yuan's real aim was to form a new dynasty and he sought to back his ambition with a substantial borrowing from a four Foreign Power Consortium in April, 1913.<sup>134</sup> Finally, on December 11, 1915 Yuan declared the founding of a new dynasty with himself as the founding emperor. Earlier in the year, Japan secretly delivered the infamous Twenty-One Demands to Yuan, which essentially demanded China to become a vassal state under Japanese suzerainty and Yuan largely accepted it.<sup>135</sup> Some believed in Japan's complicity in Yuan's monarchical bid, but Japan denied this connection.<sup>136</sup> Right away, the province of Yunnan declared its independency from Yuan's Monarchy. Other provinces in the south soon followed suit. On March 22, 1916, Yuan annulled his monarchical bid and died on June 6 the same year. Thus ended Yuan's regime and his Constitutional Compact.

### **Analyses of the Yuan Shi-kai Period**

The zero-sum argument between presidential vs. parliamentary system in this period can be seen as a reflection of three phenomena: 1) China was new to the constitutional framing game; 2) the new republic faced unfamiliar choices, neither the presidential nor the parliamentary advocates had prior experience in these systems; and 3) the dynastic

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<sup>133</sup> Fairbank, 174.

<sup>134</sup> Pan, 23.

<sup>135</sup> Taylor, 29.

<sup>136</sup> Shinkichi Ito, "China's International Relations 1911-1931, Japan's Twenty-One Demands", in *The Cambridge History of China*, eds. John K. Fairbank and Albert Feuerwerker, (Cambridge University Press, Vol 13, Part 2, 1986), 98-100.

legacy of centralised power and unitary state was still the mental habit of the Chinese political class. Parliamentary bickering and division of power appeared odd to the Confucian trained elites. Even the revolutionaries, particularly its leader Sun, wanted centralised power. Although the KMT leader in parliament, Song Jiao-ren, had promised a high degree of local self government to the provincial gentries, but it did not mean federalism.

Despite the constitutional zero-sum game in the new republic, 1913 could be the fleeting moment when a two party parliamentary system might just work out for China. The KMT then was young, vibrant and had a vision for the future. Together with the other major party, the Jinbutang headed by Liang Qichao, they might evolve into a two party system, one liberal and the other conservative. The members of the parliament at the time were mostly from the gentry class. They were keen to try the parliamentary route and they were also the best educated group to try it. After this fleeting moment, subsequent turmoil and wars weakened the gentry class and made the parliamentary route ever less likely. But Yuan did not believe in the parliamentary system. His wrecking of the two major parties in 1913, dealt a major blow to China's path to parliamentary constitutionalism.

## **Constitutions of the Warlord Period**

Soon after Yuan's death, his military regime began to disintegrate. Military governors in the provinces were in favour of independence. As a result, provinces seceded from Peking one after another and thus began the warlord period of the new republic. In general, the warlords held no ideological positions, their primary concern was to maintain

themselves in power. To survive, they formed allies to battle each other for territorial gains. Some of the warlords occupied few provinces and others a part of a province and many of them were funded by either Japan, Russia or some other Western powers.<sup>137</sup>

In the years between 1919 and 1922 a movement for confederacy gained some momentum due to the warlords' interest in having exclusive control of their provinces without the interference of a central government. A case in point is the Guangdong Provincial Constitution under the warlord Chen Chiung-ming. It stipulates that the Guangdong Province shall have its own army and navy and during national crises, only a portion of Guangdong's army and navy can be used by the central government. In addition, forts, arsenals, military ports, shipyards and armoury factories are entirely under the control of the Guangdong Province.<sup>138</sup>

Warlords who happened to occupy Peking preferred a centralized constitution. When the warlord Hsu Shih-chang was in charge in Peking, he commissioned a draft constitution in August, 1919 which greatly resembled the 1912 Provisional Constitution of the revolutionary government. It was the sensitivity to regime legitimacy that made the warlord government in Peking eager to have a constitution under its own name, even though content wise there was not much difference.<sup>139</sup>

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<sup>137</sup> Robert E. Bedeski, *State Building in Modern China: The Kuomintang in the Prewar Period*, (University of California, 1981), 34, and also Eto, 107.

<sup>138</sup> Situ Yi, "The Federal Spirit in the Constitution of the Republic of China", *Huang Hua Gang Magazine*, Vol. 46, (2013 12 31).

<sup>139</sup> Andrew J. Nathan, "A Constitutional Republic: the Peking Government, 1916-28", in *The Cambridge History of China*, ed. John K. Fairbank, (Cambridge University Press, Vol 12, Part 1, 1983), 258.

## **The Best of the Warlord Constitutions**

The warlords had promulgated a total of three constitutions between 1919 and 1925.

These constitutions can be said to have moved beyond the zero-sum mode. The best among them is the Tsao Kun government draft 曹錕宪法 in 1923, which makes a real attempt to bring forth a more balanced constitution. It makes the National Assembly supreme and has some similarity to a federal system by having the central and provincial powers distinctly delineated. It features also provincial self government laws by provincial assemblies, enumerated citizen rights, a more rational limitation on presidential power, and judicial authority over central and provincial conflicts in laws. However, this constitution was never put to use as Tsao Kun's government was soon driven out of Peking in 1924.

The successor warlord in Peking was Tuan Chi-jui. He also wanted a constitution of his own and had one drafted by December 1925. But it turned out to be very similar to Tsao Kun's constitution.<sup>140</sup> Constitutions by now became emblems of legitimacy.<sup>141</sup> As the warlord regimes were all short lived, none of their constitutions was put to use.

## **Analyses of the Warlord period**

The bad effect of the warlord period was in the constant warfare and the neglect of public facilities: roads, water works, granaries, famine relief organizations and the economy.

These neglects left society unprotected and a general hopelessness and moral decay

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<sup>140</sup> Pan, 34-44.

<sup>141</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 360

followed.<sup>142</sup> However, the Warlord governments were ideologically neutral and did not try to control thought. They thus allowed a period of fast cultural change. Ports under foreign control became the safe havens for the development of industry, media, and a modern business class.<sup>143</sup> They were also fertile grounds for ideological imports and foreign infiltrations.

The international situation also added to the difficulty of the time. First there were repeated Japanese attempts to pressure the Yuan government and the subsequent warlord governments to turn China into a Japanese vassal state. These attempts were widely exposed by the media at the time and thus created public uproars and pressure on the warlord governments.

The Versailles Treaty ending WWI in 1919 handed the German occupied Shandong Province to Japan instead of returning it to China. This was done to satisfy Japan's demand, disregarding the fact that the Chinese government had contributed 140,000 war labourers to the Allied effort.<sup>144</sup> This unjust event triggered a nation wide protest including merchant closures and boycotts, labour union strikes and a student movement known as the May Fourth Movement as the event took place on May 4th 1919.<sup>145</sup> The movement accused the warlord government in Peking of selling out to imperial powers. University students in Peking sacked the home of the transportation minister and later had

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<sup>142</sup> Fairbank, 180; Bedeski, 127.

<sup>143</sup> Fairbank, 178,179.

<sup>144</sup> Anonymous, "The 140,000 Forgotten Chinese Who Help Win World War I", [<http://forum.axishistory.com/viewtopic.php?f=101&t=139363>], *Agence France Press*, November 11, 2004.

<sup>145</sup> Taylor, 33; Fairbank, 182-183.



it burned down. Under public pressure the warlord government released the students and left the Versailles Treaty unsigned by the Chinese side.<sup>146</sup>

The effect of the May Fourth movement proved to be long lasting as it moved beyond political demands on the warlord government. It turned on Chinese culture, philosophy and political tradition. Eventually, it fanned up the nation wide New Culture Movement, iconoclastic and for liberation from tradition. May Fourth also changed Chinese writing to the vernacular style and thus earned itself the epithet of Chinese Renaissance. On the other hand, the Chinese Marxists would like to characterise May Fourth differently. They called it the Chinese Enlightenment, implying that it could lead to a future revolution.<sup>147</sup> The iconoclastic public mood in the May Fourth and the New Culture Movements was sustained by subsequent conflicts with foreign powers in China, such as the British and French firing on demonstrators in May and June of 1925.<sup>148</sup> This prolonged public mood also boosted the support for the KMT and the infant Chinese Marxist movement at the time.<sup>149</sup>

The public anger during this period explains part of the shakiness of the warlord regimes and their need to be seen as a legitimate government by having a constitution. But these

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<sup>146</sup> Luo Jia-lun, "The May Fourth Movement I had Participated", [<http://chuansong.me/n/943391>], *San Lian Books*, July 29, 2014.

<sup>147</sup> Yu Ying-shi, "Neither Renaissance nor Enlightenment: A Historian's Reflection on the May Fourth Movement" in *The Appropriation of Cultural Capital, China's May Fourth Project*, ed. Milena Dolezelova-Velingerova and Oldrich Kral, (Harvard University Asia Center, 2001), 299-320.

<sup>148</sup> In 1925 a wave of patriotic fervour engulfed the Chinese public after British officered police killed 13 Shanghai demonstrators on May 30th and Anglo-French marines killed 52 demonstrators in Canton on June 23rd. The nation wide May 30th Movement included merchant boycotts of foreign goods and strikes by the many newly formed labour unions. It galvanized large numbers of students, among whom the CCP found many recruits. Anti-imperialism swept the country in 1925-26. Fairbank, 212.

<sup>149</sup> Taylor, 33.

constitutions can only be paper constitutions as the social condition for them to function did not exist. First, the parliaments of various warlord regimes can be overruled at will by the warlords. Secondly, due to the absence of a middle class, Chinese political parties in the warlord period were still based on the old official-literati class. Their number were too small to resist the warlord government. It also showed the impotency of the gentry-merchant-official class to form new political power at the national level.<sup>150</sup> At the time, the merchant and industrial classes were too weak to have much influence in the parliament and the rural masses were still largely illiterate, unorganized and unaware they have political rights.

The warlord period between 1911-1927 proved that by enacting a constitution does not make a constitutional government. The warlords' repeated use of the constitution as a political tool to gain legitimacy caused wide spread public disillusionment.<sup>151</sup> It was the nature of the warlords to think little about trampling the constitution when they thought it necessary for survival. Also, for the whole country, the urgent issue of the day was not constitution framing, unification of the country was.

Despite the warlord situation, the parties of this period were the Western parliamentary type and they all aimed to have Western liberal constitutions, whether centralized or federal, presidential or prime-ministerial. But soon this constitutional orientation and the party characteristics were to take a drastic turn.

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<sup>150</sup> Fairbank, 181.

<sup>151</sup> Andrew J. Nathan, "A Constitutional Republic: the Peking Government, 1916-28", in *The Cambridge History of China*, ed. John K. Fairbank, (Cambridge University Press, Vol 12, Part 1, 1983), 279.

## **The KMT Tutelage Constitutions**

### **The KMT Plan for a Constitutional Government**

By the early 1920s, the KMT had developed a comprehensive plan for a constitutional government. The KMT plan can be summed up by three of Sun Yat-sen's writings: 1) The Three Principles of the People 三民主义; 2) The Program of National Reconstruction 建国方略; and 3) The Fundamentals of National Reconstruction 建国大纲. Sun also advocated a division of five powers for the government institutions. This is to add to the Western division of three powers the traditional Chinese examination and censor institutions.

To Sun's great credit, he also foresaw the gap between thought and reality. In order to narrow the gap, he proposed a program of three phases: 1) military unification; 2) political tutelage; and 3) constitutional rule. For phase 2 Sun's program enumerated the detailed steps for the preparation of the people to exercise local self governance before the constitution phase.<sup>152</sup>

### **The Radicalization of the KMT**

As the warlord period wore on in the 1920s, Sun and his KMT supporters, despite their hopeful plans, languished in the south in Canton and under the wings of the Guangdong Provincial warlord Chen Chiung-ming. The lack of military capability to remove the warlords and the lethargic KMT organization made Sun searching for solutions.

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<sup>152</sup> "During the period of political tutelage, the government shall appoint trained men, who have passed the civil service examination to assist the people in the several hsien (county) in preparing for local self government. When a census of any hsien shall have been taken, the land therein surveyed, an efficient police force organized, roads built throughout the hsien, the people trained in the exercise of their political rights and accustomed to the performance of civic duties according to the principles of the revolution, and when officers shall have been elected to serve as hsien magistrates and councillors, then the hsien shall be deemed fit for full self government" Chien 133-134.

The May Fourth Movement of 1919 showed Sun the potential of the social sentiment of the time and the need to absorb the young as new blood into the party. Sun began to receive student leaders to boost the party's vitality.<sup>153</sup> The party also began to analyse the 1917 Russian Bolshevik Revolution, which provided a vivid example of how a backward country can set a new course for itself via a social revolution. Marxist-Leninism also meant an entirely different way to comprehend the world, and it claims to be a science of society more universal and promising than capitalism/imperialism. To many Chinese at the time, capitalism/imperialism could have been the main culprit of China's plight all along. The Russian rhetoric of going to the people and for class struggle all sounded very novel and promising.<sup>154</sup>

Soon the Russians came calling and their strategic courting bore fruit fast in the spawning of the Chinese Communist Party (here after as CCP) in 1921. Sun's disappointment in the parliamentary system and in his own party finally inclined him to accept Soviet funding and training. In return for the Soviet aid, Sun agreed to the Soviet demand to form a united front with the CCP.<sup>155</sup> Under the united front, Sun allowed CCP members to join the KMT as individual members and he also reorganized the KMT into a Leninist revolutionary party by 1923. Thus by the mid 1920s, China had two competing Leninist revolutionary parties: the KMT and the CCP and both were developed with advice and financing from the Communist International (the Comintern).<sup>156</sup>

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<sup>153</sup> Chien, 89.

<sup>154</sup> Fairbank, 205, 207.

<sup>155</sup> Taylor, 41-42.

<sup>156</sup> Stephen C. Angle, *Human Rights and Chinese Thought, a Cross Cultural Inquiry*, (Cambridge University Press, 2002), 203.

As part of the deal with the Soviet, the KMT adopted a new party manifesto, which affirmed Sun's Three Principles of the People, but refined them in such a way to be mildly in line with the Soviet ideology. In private, Sun considered communism unnatural for Chinese society and instead of class struggle he favoured conciliation between the classes.<sup>157</sup> For Sun the most pressing problem was to achieve national unification and to attain full independence internationally, not social restructuring.<sup>158</sup> Economically, Sun advocated equalization of land tenure, regulation of capital and state ownership of principal industries.<sup>159</sup> What Sun needed the most from the Soviet were financing and the Leninist technique in party organization.

Once reorganized along the Leninist line, the nature of the KMT took a drastic turn towards a monopolistic party based on the Soviet democratic centralism principle. Sun did not foresee what might happen once a monopolistic party begins life. Would it tolerate challenges or displacement in the future? Would it allow a true constitutional government to develop? Subsequent KMT constitutions can tell us the answer to these questions.

One puzzling question is why the Soviet laid bets on two Leninist parties simultaneously, making existential struggles between them inevitable. It appears the Soviet double bet were guided by their belief that a communist revolution can only happen after a bourgeois revolution had first cleared out the feudal impediments. Accordingly, the Soviet must help the KMT to come to power first, who in their eyes was bourgeoisie in

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<sup>157</sup> Fairbank, 210-211.

<sup>158</sup> Chien, 90.

<sup>159</sup> Chien, 115.

origin and at the same time nurturing the CCP within the KMT, waiting for the right moment to supplant its host.<sup>160</sup> The Soviet timing was for the CCP to take over after the KMT had remove all the warlords. Stalin was of the view that "When the Rights (KMT) is of no more use, Chiang Kai-shek will be squeezed out like a lemon and flung far away".<sup>161</sup> Stalin's timing was off, but the sequence for the KMT to remove the warlords first and then to be taken over by the CCP did come through as he had planned, only that it took place 20 years later in 1949.

The Soviet first funded a military cadet school in Whampoa, near Canton for the KMT in 1924.<sup>162</sup> This was to arm the KMT with a revolutionary army for the elimination of warlords to the north and so to unify China. By late 1924, shipments of rifles, machine guns, and artillery pieces arrived from Russia. By the end of the year, Moscow had about 1000 military and political personnel working in China and was providing the KMT with monthly subsidies.<sup>163</sup> From this point on until the 1960s, the Soviet Union would be the decisive foreign influence in China. Compared to the Soviet, the Western influence was largely through the missionaries and the universities. The Western liberal influence in this period appears to be non-political and non-strategic. It was not the kind of influence that could satisfy the urgent needs of the time. Whereas the Russian influence felt much more direct and timely due to the political needs of the time to build party and to fight unification wars. The two peoples' similar position as backward countries under the

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<sup>160</sup> Fairbank, 208.

<sup>161</sup> Taylor, 66.

<sup>162</sup> Bedeski, 32, and Taylor, 45.

<sup>163</sup> Taylor, 47.

pressure of the West also made cooperation between them easy to understand. However, the Western influence proved to be much more long lasting and is still ongoing.

With the help of the Soviet, Sun in effect started a new period of Chinese politics, namely the era of Leninist parties: the reorganized KMT and the CCP, both under Soviet funding and manipulation. Sun died of cancer in 1925 and left a long lasting legacy. He was recognized as the founding father of the republic. His Three Principles of the People and his phased program to achieve a constitutional democracy became the KMT bible and written into all subsequent KMT constitutions.

### **The Northern Expedition**

The Soviet trained KMT army, under the command of a young officer, Chiang Kai-shek, finally began its Northern Expedition on July 9th, 1926. Chiang was accompanied by General Blyukher and other senior Soviet military advisers in this campaign.<sup>164</sup> Within three months they had either wiped out or absorbed a number of warlord forces all the way to the city of Hankow in central China some 500 miles north. The KMT top leader at the time, Wang Jingwei, quickly moved the Canton government to Hankow with the aim to take direct control of the military campaign. Wang, of Sun Yat-sen's generation, was also the leader of the KMT left wing. He considered Chiang an upstart and a usurper of power. Wang was also suspicious of Chiang's collusion with the conservatives within the KMT. Hence he attempted a few times to remove Chiang from the military command. At Hankow, the revolutionary government's internal fissure finally came to the open. The left wing of KMT, being pro-Russia and protective of the CCP members within KMT,

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<sup>164</sup> Ibid., 62.

wanted to continue to move northward to take Peking. The conservative wing had long been seething about Soviet machinations and they saw communism as an alien radicalism that "mocked Chinese values and threatened its social order."<sup>165</sup> The conservative wing now suspected the northern move was to connect with Russia and could thus further strengthen the CCP and the left wing of KMT. The conservative wing finally came to support the mildly left Chiang and his easterly strategy. Chiang's strategy was to consolidate the KMT position in the financially powerful Jiangsu and Zhejiang Provinces and aiming particularly to capture Shanghai and Nanking. In these two cities, Chiang gained the support of rich merchants and industrialists and thus secured for the KMT its native sources of funding.<sup>166</sup> Soon, Chiang's realm included the commercial and banking cities of Shanghai, Ningbo and Nanking. Yet the capitalists were given no role in the KMT as the party and Chiang remained anti-capitalist.<sup>167</sup> Chiang also adhered to Sun's fundamental tenet that China had to be a highly centralized and a unitary state.<sup>168</sup> Accordingly Chiang saw the need to build a government less dependent on the gentry and merchants due to their limited local focus. Chiang's attitude towards the gentry and the merchants were that they should be utilized but not to be controlled by them.<sup>169</sup>

The KMT at this time also managed to have the Western powers switch their support from the warlords to the KMT as the legitimate government of China. The Western switch was partly influenced by the KMT's sudden attack on its CCP members and the Shanghai militant union organizers who had been causing concerns to the Western

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<sup>165</sup> Ibid., 53.

<sup>166</sup> Bedeski, 9-10.

<sup>167</sup> Taylor, 69.

<sup>168</sup> Ibid., 84.

<sup>169</sup> Ibid., 39.



powers. The April 1927 Shanghai massacre of CCP members and union organizers drove them underground.<sup>170</sup> In the next few years the CCP, under the directives of the Comintern, tried many times to make a come back in the big cities, but to no avail. This strategy is based on the Comintern's belief that the Chinese revolution must be led by city proletariats. However, the Chinese proletariat class was too small at the time for class struggle to be meaningful.<sup>171</sup> In contrast, the KMT goal of nation building, not social revolution, was more urgent and doable. Eventually the CCP was forced to leave the cities and to seek an existence among the peasants in remote mountainous areas. Their armed territorial bases in these remote areas were called the Soviets. Over time, Mao Zedong's leadership emerged in these Soviets. In contrast, the KMT, as the governing party after 1928, became even more of a bourgeois party. It had great difficulties reaching the peasant masses and it even had problem in collecting taxes from the country side, making it rely on trade tax and leaving land taxes to the provinces.<sup>172</sup> The country is simply too vast for the yet to be matured KMT to rule completely.

After securing the rich provinces in central and eastern China, Chiang and the KMT moved north again aiming for Peking, this time without the CCP in their midst and with a severed tie with the USSR and its funding. By working with various warlords, the KMT finally took Peking in June 1928 and Manchuria joined the KMT regime also by the end of the year.<sup>173</sup> The Northern Expedition thus came to its end and marked the beginning of a unified China, but only nominally. Earlier when on the march northward to Peking,

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<sup>170</sup> Fairbank, 216.

<sup>171</sup> Ibid., 216.

<sup>172</sup> Ibid., 218-220.

<sup>173</sup> Bedeski, 29, and Chien, 93.

Chiang's army was interdicted by Japanese troops stationed in the city of Jinan, Shandong Province. The Japanese were alarmed by the coming prospect of a unified China and wanted Chiang to understand that KMT should stay south and leave northern China and Manchuria to be the Japanese sphere of interest.<sup>174</sup> Japan at the time had plans for expanding into the Asia mainland. Hence it actively obstructed Chinese unification after 1927.<sup>175</sup> With some loss of troops, Chiang made a detour of Jinan city to avoid a premature confrontation with the Japanese and continued his march towards Peking. For this back down in front of Japanese aggression, Chiang was to paid a price as a pushover in the eyes of the Chinese public. Still, Chiang resisted the public pressure to fight the Japanese. He explained that he must first unify China and do substantial build up before his backward and agrarian country can face the industrial/military might of Japan. The Jinan incident proved to be just the beginning of Japan's aggression in China. It was soon followed by Japan's occupation of Manchuria in 1931, its attack of Shanghai in 1932, and the all out invasion of China between 1937 to 1945.

### **The KMT Tutelage Constitutions**

Back in Nanking in 1928, the KMT settled down to govern China. Once into the governing mode, the nature of the KMT began to change from a revolutionary party to a bureaucratic one. First, the party cadres turned bureaucrats were spread thin to cover the vast country instead of managing just a few provinces. What is more, the cadres' attention would now be drawn upward towards the political center in Nanking and jockeying for lucrative positions became the dominant career concern. As a result, plans for rural

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<sup>174</sup> Bedeski, 29, 116.

<sup>175</sup> Ibid., 113-114.

improvement seldom got off the ground and the party was unable to penetrate below the county level. Plans for economic development was similarly short changed.<sup>176</sup> To be fair, the early years of the KMT regime coincided with the worldwide Great Depression of 1929 which destroyed China's hope for economic development within a stable world market.<sup>177</sup> However, the party development from this point on can hardly be directed downward to penetrate deeper into society and thus make the KMT rule a rather shallow one. It was a party floating on top of the Chinese society.

What is more, the party cadres readily lost interest in seeing the masses democratically conditioned and enfranchised according to Sun's program. During the ensuing years, no political training was given to the masses and not a single county had ever reached the stage of self governance as stipulated by Sun for the tutelage period to accomplish.<sup>178</sup> In their defence, there is no doubt that the governing party had to shoulder the crushing load of military spending, for the subduing of the remaining warlords and the communist soviets and for the preparation for the biggest war to come with the Japanese. In short, the existential crisis dominated the KMT thinking at the time and all constitutional preparations had to take a back seat accordingly.

### **The Taiyuan Constitution Draft 太原約法, 1930**

In a way, Sun's Three Principles of the People: nationalism, democracy and people's livelihood, formed a big tent. The three principles can attract different crowds and make the KMT inherently fractious. In the late 1920s, the dissident factions within KMT could

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<sup>176</sup> Fairbank, 222-224.

<sup>177</sup> Bedeski, 137.

<sup>178</sup> Chien, 134.

still find militarist support somewhere in the country.<sup>179</sup> In the early months of 1930, the left wing of KMT under Wang Jing-wei attempted to build a rival government in Peking. He got the support of a few warlords in the north and called for an enlarged KMT Central Executive Committee (CEC). Wang had the enlarged CEC sanction the drafting of a liberal constitution, with full protection of citizen rights. In this move Wang was aiming to gain the support of the educated public. The western trained intelligentsia, exemplified by Professor Hu Shi, a Colombia graduate and a Dewey protégé, advocated early introduction of constitutional government. Hu Shi argued that the best training for democracy is democracy itself. To him, political tutelage by party elites, no matter how noble and inspired, could only postpone the coming of democratic politics.<sup>180</sup>

Wang's constitution draft is known as the Taiyuan Draft due to its being drafted in the city of Taiyuan. In this draft, the masses will be trained for self governance, county elections will be held, provincial assemblies and national congress are called for. It also provides for a decentralized government and allots more authority to the provinces.<sup>181</sup> But soon Wang and his warlord friends were ousted in Peking and the Taiyuan draft died with it.

The conservative wing of KMT under Hu Hanmin, who was also a contemporary of Sun, argued that this was not the time to have a constitution, instead an organic law plus Sun's writings as guide will suffice. Hu saw state institution building as the top priority.<sup>182</sup> Back

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<sup>179</sup> Bedeski, 18.

<sup>180</sup> Ibid., 89, 91, and Chien, 98.

<sup>181</sup> Bedeski, 67.

<sup>182</sup> Ibid., 161.

in 1928, Hu together with Sun Fo, the son of Sun, counselled the immediate adoption of Sun's five power system of government in an organic law.<sup>183</sup> But this move violated Sun's sequence which stipulated that the central government is to institute the five power government only at the end of political tutelage.<sup>184</sup> More, in Hu's organic law the party is to be the supreme executor of political power and the custodian of national sovereignty during the period of political tutelage.<sup>185</sup> In the document entitled "The Essentials of Tutelage," Hu spelled out his interpretation of the meaning of tutelage as party dictatorship for the KMT, instead of the role of an educator of the populace.<sup>186</sup>

Hu explained that although the country was unified from north to south at the end of the Northern Expedition, the central government's real control was limited to only four provinces: Jiangsu, Zhejiang, Jiangxi, and Anhui. As a result, the government was under severe financial strain. Its military expenses consumed close to 80% of available revenue.<sup>187</sup> Thus, having a constitution before further pacification was not the right sequence to him. Hu warned against premature democratization before proper political indoctrination, economic development, and state institutions were established.<sup>188</sup> Hu's point of full unification first, indoctrination of the population second before proceeding to the constitution phase followed Sun's sequence, except that he jumped the gun on the five power government.

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<sup>183</sup> Ibid., 82.

<sup>184</sup> Ibid., 158.

<sup>185</sup> Ibid., 82.

<sup>186</sup> Chien, 134, 137, and Bedeski, 162.

<sup>187</sup> Ibid., 81, 143.

<sup>188</sup> In this argument, Hu's position is very similar to Huntington's theory of political development before social mobilization. Samuel P. Huntington, "Political Development and Political Decay," *World Politics*, Vol. 17, No. 3, (April 1969), 386-430.

### **The Provisional Constitution of Tutelage 中華民國訓政時期約法, 1931**

To the surprise of Hu, Chiang suddenly broke off his alliance with him and advocated the need of a constitution too. Some interpreted Chiang's sudden support for a constitution as his attempt to heal the party by placating the left wing.<sup>189</sup> This interpretation was based on the thinking that Chiang's position in the party was still insecure in front of the left wing leader, Wang Jing-wei. Wang, of Sun's generation, still enjoyed a much higher seniority than Chiang. However, it is also likely that Chiang was simply aiming to boost his own legitimacy by having a constitution under his own initiative. Chiang followed through and produced what is known as the Provisional Constitution of Tutelage on June 1, 1931. Its content includes the following: the principle of popular sovereignty; the need to educate the people for self governance; all citizens are equal before the law; political rights for citizens include: election, initiative, recall and referendum; and a five power central government.<sup>190</sup> However, in the constitution's preamble, it declared the Republic of China to be built on the basis of Sun Yat-sen's Three Principles of the People.<sup>191</sup> This declaration in effect rejects any party that does not adhere to Sun's Principles in having a share in the ruling of the republic. It also had no provision for amendments to the constitution and the KMT Central Executive Committee had the power of interpretation. In so doing, it maintained the party dictatorship.<sup>192</sup> As such, Chiang's draft, despite its pro left content, actually pleased the conservatives.

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<sup>189</sup> Bedeski, 70.

<sup>190</sup> Pan, 48-50.

<sup>191</sup> Ibid., 247.

<sup>192</sup> Bedeski, 94.

More importantly, the one party dictatorship type of constitution was entirely a new kind of polity design. It marked a drastic turn from all previous constitutions, which were all based on western liberal models, whether parliamentary or presidential. But from this point on, all subsequent constitutions till today, with the exception of the 1946 one, are in this new form. Thus, China was launched onto a new path without knowing the full consequence of the path selected.

### **The Constitution Draft of May 5th 五五憲草, 1936**

When Dr. Sun Fo, the son of Sun Yat-sen, became the president of the Legislative Assembly in January 1933, he appointed a constitutional drafting committee to bring forth a permanent constitution to replace Chiang's provisional one.<sup>193</sup> Sun Fo represented the democratic wing of the party, not to be confused with the left wing or the socialist faction under Wang Jing-wei. But Sun Fo's democratic draft was heavily revised by the party core before being accepted by the government. It is known as the Double 5th Constitution Draft due to its finalization on May 5th 1936.<sup>194</sup> Its content can be summarised as follows: 1) China is to be a republic based on the Three Principles of the People;<sup>195</sup> 2) the rights and duties of citizens can only be curtailed by statute;<sup>196</sup> 3) a highly centralised structure of government; 4) the National Assembly represents the people, but it meets infrequently and without a recess committee; and 5) it can be either a cabinet or a presidential system depending on the personality involved. In sum, the draft

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<sup>193</sup> Ibid., 73.

<sup>194</sup> Qiao Baotai 喬寶泰, "The Double 5th Constitutional Draft 五五憲草", [<http://ap6.pccu.edu.tw/Encyclopedia/data.asp?id=398>], *Chinese Encyclopedia Online*, 1983.

<sup>195</sup> By now the Three Principles of the People had become a KMT exclusive brand.

<sup>196</sup> But it can be done.

constitution of 1936 fits the party core's desire for full party dictatorship.<sup>197</sup> Sun Fo got the opposite of what he wanted.

The promulgation of the 1936 constitution was postponed due to the all out Japanese invasion of China that was soon to begin. As the Japanese invasion wore on for eight long years, the 1936 constitution was never put to practice. In this war, China lost all its coastal provinces and its land routes to the open sea. Japan achieved encirclement from Manchuria in the north all the way to Burma in South Asia. Eventually, it was Japan's pacific war against the US that raised the awareness in the West of the role China played in tying down over 2 million Japanese troops in the China theatre. US aid in the form of war material began to flow to the KMT government. In the end, it was the Japanese Pacific War that brought it to its final defeat.

### **War Time Demand for Constitutional Government**

During the war years there were continual demands for constitutional government and the ending of KMT tutelage/dictatorship. These demands were further amplified by the media in the KMT controlled territory. In response, the government created the People's Political Council 国民参政会, which is an advisory body and with its 200 to 300 members nominated and appointed by the KMT. It was a group of persons who enjoyed high standing among educational or economic circles or persons widely recognized by the public. However, there were no labour or peasant representatives.<sup>198</sup> The People's Political Council did provide the KMT some level of nation wide support. Its overall

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<sup>197</sup> Chien, 304-306.

<sup>198</sup> Pan, 93.



performance can be said to be positive, although it can not claim to be truly representative. The KMT hand picked council eventually turned itself into meetings demanding a constitutional government. By 1939, the smaller parties joined in the clamour for the immediate termination of KMT tutelage.<sup>199</sup> In general, the smaller parties were more tolerated since the war began, as the governing KMT needed a united front for national resistance to Japan.<sup>200</sup> However, the smaller parties and the People's Political Council were unable to make any real headway with the KMT on the constitution issue. All had to wait until a more opportune time after the war with Japan.

### **The Constitution of the Republic of China 中華民國憲法, 1946**

The Japanese invasion provided the opportunity for the CCP to mobilize the Chinese masses in the country side. Once the rural masses were organized, it gave the CCP tremendous intelligence and logistic support while the KMT bore the crushing load of keeping the country together in the all out war with Japan. The CCP managed to have an astounding growth from some 9000 fighting men at the end of its famous Long March in 1935 to an army of more than 900,000 strong by 1945.<sup>201</sup> Even before the Japanese surrender, both parties knew a civil war between them was to come. Under American pressure, Chiang on August 27th, 1945 invited Mao Zedong to Chungking, the war time capital of China, for a negotiation to form a joint government so to head off the possibility of a civil war.<sup>202</sup> The negotiation lasted 43 days without a solution for the key

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<sup>199</sup> Chien, 307.

<sup>200</sup> Ibid., 371.

<sup>201</sup> John Dunn raised a question about this enormous growth in the exceedingly backward North West of the country. John Dunn, *Modern Revolutions, an Introduction to the Analysis of an Political Phenomenon*, (Cambridge University Press, 1972), 91, Taylor, 114, Fairbank, 237, 245.

<sup>202</sup> Chien, 309, 310.

issues on the amalgamation of the two armies and on provincial autonomy but agreed in a joint communiqué to call for a Political Consultative Conference 政治协商会议 (here after as PCC) to widen the participation to more parties and the leading intelligentsias.<sup>203</sup>

One of the task of the PCC was to draft a multi-party democratic constitution. It was the convening of the Political Consultative Conference under the supervision of the American general George Marshall in January 1946 that hastened the drafting of a multi-party democratic constitution.<sup>204</sup> For this purpose, the PCC first came up with a guidance on what principles the new constitution should follow. These include: 1) the National Assembly shall be no more than a gathering of the county representatives. This is to render the KMT controlled National Assembly to become a symbolic organ; 2) the executive branch is to function as a cabinet and answerable to an elected parliament; 3) the Censorate is to become the upper house, elected by the provincial assemblies and the Judiciary to become the supreme court; 4) the presidency is to be titular; 5) the provinces are to enjoy home rule and have their own provincial constitutions and the governors are to be elected; 6) restriction of freedom by statute is barred; 7) fundamental policies are to adhere to a democratic, egalitarian and scientific spirit; and 8) constitutional amendments are to be the joint responsibility of the legislature and the Censorate.<sup>205</sup> Clearly, these are radical departures from the KMT one party dictatorship constitution of 1936. The goal of the PCC was to have a liberal democratic constitution.

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<sup>203</sup> Anonymous, "The Double Ten Agreement between the KMT and CCP on 1945 10 10 雙十協定", [<http://cpc.people.com.cn/GB/64162/64165/70486/70496/4792383.html>], *News of the Communist Party of China*.

<sup>204</sup> Chien, 317, 375-381.

<sup>205</sup> Chien, 317-318.

In response, the KMT demanded three changes to the PCC guidelines: 1) restoration of the National Assembly as an organic body; 2) return to a presidential system; and 3) the provinces are not to have their own provincial constitutions.<sup>206</sup> The key KMT concern here was that the communist soviet areas in the provinces may become independent states within the state.

Back in 1945, based on the secret agreement of the Yalta Conference between USSR, the US and Britain, the USSR was urged to attack the Japanese troops in Manchuria and in return the Soviet was allowed to occupy it for a period.<sup>207</sup> The Soviet attack on Manchuria finally came on August 9, 1945, just six days before the Japanese emperor declared its unconditional surrender. The resultant Soviet position in Manchuria allowed the communist to establish itself there. On the other hand, the KMT had US support to move its troops to Manchuria. By May 1946, the CCP troops began to move out from Manchuria. As the CCP was winning on its way south, the KMT acquiesced to most of the CCP demands on the constitution. But by then the CCP, seeing the end of the civil war was near and in its favour, was no longer interested in a democratic multi-party constitution. The hardening of the CCP position made the review process of the multi-party constitution came to a halt. The KMT then broke off the talk and with the support of two small parties convened a Constitutional National Assembly. Its aim was to achieve a multi-party constitution with or without the CCP. The Assembly accepted a draft written by Professor Carsun Chang on December 25, 1946, which as Marshall had

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<sup>206</sup> Zhen Da-hua, "Carsun Zhang and the 1946 Constitution of the Republic of China", *Huai Yin Normal College Journal*, (2003 vol. 2): 213-219.

<sup>207</sup> Zheng Jie-ming, "The nature of Second World War, a Perspective from the Yalta Conference", [<http://www.duping.net/XHC/show.php?bbs=11&post=1311873>], 2014 07 28.

conceded was in reasonable agreement with the PCC guidelines, democratically sound and adaptable to China's situation.<sup>208</sup> The CCP refused to take part in the Constitutional National Assembly, despite the fact that the new constitution had met the major points the CCP had demanded all along.

Carsun Chang's draft was a compromise between ideal and reality. But in general it returned to the parliamentary form of constitution. The key points of the 1946 constitution are as follows: 1) it is no longer a one party dictatorship but a multi-party democracy; 2) it has a bill of right, which can not be limited by statute; 3) sovereignty of the people; 4) a limited presidency; 5) the premier and the cabinet are answerable to an elected parliament; 6) the judiciary has the power to interpret the constitution; 7) the Censorate is to be the upper house and to be elected by the provinces; 8) both the county and the provincial assemblies are to be elected; and 9) neutrality of the arm forces, i.e. without any party having its own army.<sup>209</sup>

The new constitution was promulgated by the KMT government on January 1, 1947 and the first National Assembly under the new constitution was formally opened on March 29, 1947. However, as the KMT was losing badly on the battle field, it soon entered into a crisis mode. The National Assembly on April 18, 1948 passed the "Temporary Provisions for the Duration of Mobilization to Suppress the Rebellion 動員戡亂時期臨時條款."

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<sup>208</sup> Taylor, 363, 365.

<sup>209</sup> Zheng Da-hua, "Carsun Chang and the 1946 Constitution of the Republic of China", *Huai Ying Normal College Journal*, (2003, Vol. 2), 213-219, 238.

These provisions in effect authorize the president to enter a state of martial law. Thus the newly minted democratic constitution was suspended right after its promulgation.<sup>210</sup>

The KMT had the US support, but the prospect of a prolonged civil war in a vast country like China means a heavy commitment. Such a heavy burden is hard to imagine for any democracy. As a result the US support to the KMT was wavering when compared to Stalin's massive and unreserved support to the CCP.<sup>211</sup> By 1949, the CCP with the firm support from both the USSR and its own peasantry won the civil war. The KMT and its supporters, about two million people, fled to Taiwan.

Subsequent to its total victory of the civil war, the CCP declared the 1946 constitution and the KMT law codes defunct. Carsun Chang was named by the CCP as one of the top war criminals for his effort to provide the KMT the draft for a multi-party democratic constitution. Unable to bear living under either regime, Chang left for the United States for good and focused his remaining years on the project of a free China and a reformed Neo-Confucianism.<sup>212</sup>

In Taiwan the 1946 constitution laid dormant, while the KMT was in a survival mode under a prolonged martial law. But it is the same 1946 democratic constitution, with seven amendments made to it since 1991 that form the base of today's successful democracy in Taiwan. This shows the institutional design and the human rights protection

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<sup>210</sup> Chien, 339.

<sup>211</sup> Taylor, 403.

<sup>212</sup> Xu De-fa, "A Critique of Xu Ji-Lin's: The Forever Puzzle: Huang Yan-pei, Carsun Chang and Modern China," *The 21st Century Journal*, (December, 2005, Vol. 45).

written into the 1946 constitution are sound. What was missing on the mainland was a peaceful environment for the 1946 constitution to be tried out, adjusted and improved upon.

## **Analyses of the Evolving Social Forces**

In order for us to analyse the convergence or divergence between state and society on constitution making, we need first to have an understanding of the changing social forces during this period.

### **The Peasants**

The peasants as a class did not change much in the first half of the 20th Century. As a class, they continued to be weak, political inert and unable to organize themselves. A 1942 census of a county in the southwest, the county of Kunyang in Yunnan Province, showed 64% of peasant families were still illiterate. Only 44% of boys and 9% of girls attended school although by law all children have to attend. They continued to rely on the gentry to act as their representatives as late as the 1940s and they continued to be easy targets of town's folks.<sup>213</sup>

The neglect of public facilities and water works during the warlord years made them more vulnerable to natural disasters. And the incessant wars between the warlords, between the KMT and the CCP and the Japanese invasion added to their misery. Because of all of these, their impoverishment was greatly increased during this period.

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<sup>213</sup> Chow Yung-teh, *Social Mobility in China, Status, Careers Among the Gentry in a Chinese Community*, (Atherton Press, 1966), 56.

Ultimately, the peasants' grievance was rooted in the wide spread land tenancy problem.<sup>214</sup> Chiang fully recognized land reform as "the life and death issue for the country" and the "fundamental problem of China."<sup>215</sup> Chiang's problem was how to carry out land reform without causing instability within the military and the KMT, many of their members had a gentry background and would resist any real land reform.

Failure to do land reform doomed the KMT. This was so, not because the peasants could effectively press their demands, but rather the peasants could be mobilized by a far more effective Leninist revolutionary party: the CCP. Peasant mobilization proved extremely difficult without political and military leverage.<sup>216</sup> The CCP's timing of their land reform law with their final push in the civil war with the KMT in 1946 was the crucial ingredient to obtain the support of the peasantry.<sup>217</sup> Overall, the peasants in this period were not a class that could push political or constitutional reform ideas to the state.

### **The Gentry**

Since the abolishment of the imperial examination system in 1905, there can be no further production of the Confucian degree type of gentry. However some form of gentry continued to exist till the 1940s. The new gentry can be the large land owners, retired officials, military officers, wealthy merchants, professionals, professors and others

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<sup>214</sup> Fei Hsiao-tung, *Peasant Life in China, a Field Study of Country Life in the Yangtze Valley*, (Routledge & Kegan Paul Ltd., 1939), xix, 285.

<sup>215</sup> Taylor, 100.

<sup>216</sup> Eric R. Wolf, *Peasant Wars of the Twentieth Century*, (Harper & Row Publishers, 1969), 141.

<sup>217</sup> William Hinton, *Fanshen, a Documentary of the Revolution in the Chinese Village*, (Monthly Review Press, 1966), 8.

engaged in higher education.<sup>218</sup> Thus the gentry's social mobility widened considerably in the early decades of the 20th Century.

With new diversity in their rank, the gentry's quality and interests also diverged. They became less of a national political force. The KMT would vacate seats for them in the National Assembly election, but not much more.<sup>219</sup> Over time, the gentry's roles were reduced and they began to lose the will to fight too.<sup>220</sup> In the republican period, the peasant/gentry exodus to the urban centers was more or less continuous, regardless of whether there was a good harvest or natural calamity.<sup>221</sup> Ultimately, it was the effect of modern urbanization that reduce the size of the gentry class. When the CCP began to do land reform in the late 1940s the gentry class was easily wiped out.<sup>222</sup>

Overall wise, the gentry class was weakened in this period and their political influence at the national level waned accordingly. Their impact as a class on the constitution process in this period is not visible.

### **Industrialists, Proletariats and Merchants**

Beside the declining gentry class, the nascent industrialists, proletariats and the treaty port merchants all had insignificant representation in the republican regimes. During this period, the growth of these groups were severely hampered by wars, and the world wide

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<sup>218</sup> Chow, v, vii, ix.

<sup>219</sup> Ibid., 61.

<sup>220</sup> Ibid., 91-92.

<sup>221</sup> Ibid. 158.

<sup>222</sup> Yang Nien-qun, "The Demise of the Gentry," *The Dushu Journal*, (2014, vol. 4).



Great Depression.<sup>223</sup> When they had to pull up roots in the coastal cities and move inland due to the Japanese invasion, they suffered devastating financial losses. Overall they had little impact on the constitutional process in this period.

### **The Intelligentsia**

The Western trained intelligentsia expanded very fast as all levels of school in China in this period had converted to the Western school model. The Western educated group filled the new bureaucracy in the government and also filled the academic and professional ranks. Opinion leaders in this period often came from this group due to their easy access to the outside world. But also due to their view of themselves as the rightful inheritor of the traditional shi 士 role as China's legitimate political class. It was this group who put a constant pressure on the state for a liberal constitutional government. They worked with the media to make their pressure felt by the government.

### **The Media**

In the early decade of the 20th Century a new kind of newspaper appeared in China, namely the political journal. These papers were highly popular and they became a major force in influencing the Chinese public. Their popularity was such that they attracted the attention of the warlords and foreign powers, e.g. Japan alone funded 15 such papers. Later in the 1930s and 1940s, the KMT attempted to bring in censorship of the press but not very successfully. Only in CCP territories, the press came under complete control.<sup>224</sup>

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<sup>223</sup> Alexander V. Pantsov, *Mao: The Real Story*, (Simon & Schuster, 2007), 229, and Taylor, 88.

<sup>224</sup> Andrew J. Nathan, *Chinese Democracy*, (University of California Press, 1985), 134, 138-139, 150-151.

Together with the intelligentsia, the media put constant pressure on the state to bring in a liberal constitution. But their influence was more apparent than real as it was not backed up by major social forces. The state's top priority was clearly in fighting various wars. Nevertheless the state yielded to this pressure by promulgating constitutions which they were either unable or unwilling to deliver.<sup>225</sup>

## **The Final Analyses**

### **Social Mobilization before Political Development**

The constitutional attempts in this period cannot be said to be an outright divergence between the state and the public. Neither the warlords, nor the KMT factions could resist the public demand on the subject. The question here is whether the public pressure represents a form of social mobilization well ahead of political capacity and its development. Samuel Huntington argued for the need of controlling the pace of social mobilization so that it does not outstrip the political development, lest political decay and ineffective government would followed.<sup>226</sup>

Indeed, the Chinese situation can be seen as a case of social mobilization before political development. But this social mobilization was largely an unintended kind. As long as the public is exposed to the outside world, the government comes under the pressure of comparison. The public inevitably notice the huge gap between the outside world and the condition China was in. For these pressures, the government lacked capacity to respond

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<sup>225</sup> Ibid., xi.

<sup>226</sup> Samuel P. Huntington, "Political Development and Political Decay," *World Politics*, Vol. 17, No. 3, (April 1969), 386-430.

to other than to offer paper constitutions while at the same time trying to survive internal and external crises.

### **Divergence between Thought and Reality**

The divergence between constitutional intent and the social condition on the ground can also be understood as the gap between thought and reality. However, there was no real government effort to narrow this gap. Chiang recognized the key issue for social improvement was land reform, education and law and order for the rural masses but the KMT effort in the rural areas wane as soon as CCP was driven out of an area.<sup>227</sup> Sun had prescribed that the population at the county level must be organized and trained in how to do local self government before a national constitutional government can be organized. Yet, till the end of the KMT rule, not one county was prepared for election and self government.<sup>228</sup> It is evident, the KMT as a political party was not able to make changes to society or the political system towards a constitutional polity.

### **Constitution Framing under the Context of Revolutions**

The constitution framing of the entire period between 1911-1949, can also be analysed under the context of revolutions. The 1911 revolution is known as a national revolution as its aim was to form a new nation to be independent of the Manchu and the foreign powers. It does not qualify as a social revolution as there was no conscious intent at the time to change the social structure of the Chinese society. The 1949 overthrow of the KMT by the CCP is deemed a social revolution as peasants were given land in the land reform and

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<sup>227</sup> Taylor 107-108.

<sup>228</sup> Bedeski, 88.

the gentry class was entirely eliminated in the process. However it does not qualified as a peasant revolution due to the fact peasants were not the prime mover in this struggle.<sup>229</sup>

At best it can be considered as a peasant assisted social revolution.

In both revolutions, the state and its competitors were the main protagonists. As such, Theda Skocpol's theory of state as autonomous actor engaging in internal political struggles and at the same time responding to international pressure due to world historical development is particularly fitting for our analysis.<sup>230</sup> She used the Marxist class struggle theory and the political conflict theory to analyse the Chinese social revolution in 1949. But she also chose to downplay the Aggregate-Psychological Theory and the System Value and Consensus Theory for the Chinese social revolution. Her ignoring the psychological and value theories is the weak point of her analysis. This is because value renewal and national identity form the basic motives for China's quest for modernity.<sup>231</sup> Her emphasis on the Marxist class struggle theory needs further analysis, as the peasant class was not the autonomous actor in the struggle. As well, the weakening of the gentry class and its final demise was partly due to the process of urbanization. It is true there was land reform for the peasants before the final war between the CCP and the KMT, but it was more of a shrewed political manoeuvre by the state actor than for class revolution as later development in the rural sector reveals.

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<sup>229</sup> Dunn, 86.

<sup>230</sup> Theda Skocpol, *States & Social Revolutions, A Comparative Analysis of France, Russia and China*, (Cambridge University Press, 1979), 6-14.

<sup>231</sup> Two issues that are very relevant to the Chinese quest for modernity: 1) the profound cultural crisis requiring a fundamental transformation of Chinese values; and 2) the psychological need to uphold a specific Chinese identity of its cultural past. Dunn, 74-75.

The constitution struggle as a political tool for the state actors fits well in Skocpol's political conflict theory. In truth, there were little involvement by the gentry, merchant, industrial, and artisan classes, let alone the inert peasant class at this time on the constitution issue.

The most active in constitution thinking were the politicians and the intelligentsia. The former did it for reasons related to the political conflict theory. The latter did it due to their assumed shi ± orientation and their learning from the West. However they represent no substantial social forces.

### **Constitution Framing from the State Perspective**

Andrew Nathan observed that all Chinese constitutions assumed a harmony of interests between state and citizen.<sup>232</sup> The millennium old political ideal of the Great harmony is the source of this tendency. But more immediately it is due to the fact that all Chinese constitutional attempts were orchestrated by the state, with little participation by the public. The counter example is in the American constitution making, its insistence to check state power did not come from the state itself. As all Chinese constitutional attempts in this period were orchestrated by the state, the state's perspective explains the forms the constitutions took. As we have seen, the regimes mostly used the constitution to shore up their particular political goals, e.g. warlords want provincial autonomy and the revolutionary parties want dictatorship. The state also used constitution framing as a tool to gain legitimacy, evidenced by every warlord wanted one under his own name, and the KMT factions competed against each other to be the first to bring out a constitution.

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<sup>232</sup> Nathan, 113.

But were the states really ready for a constitutional government? Were the social empowerments, from the freedoms granted under the bill of rights, ahead of political development as Huntington would put it? Certainly the KMT government was far from complete when it came to power in the late 1920s.

From a state perspective, Robert E. Bedeski cites the Italian thinker A.P. d'Entre'ves' three stage theory of the state: 1) the state as force; 2) as power; and 3) as authority. A state as force relies on coercion to establish the state; with the passage of time, the state become power. Its force is no longer absolute but is restricted by law and constitution. Finally the state becomes authority when it acts in ways more congruent with the expectations and beliefs of its citizens.<sup>233</sup> Applying this theory to the period, it is clear neither the warlords nor the KMT could pass the stage of state as force. As such, it has no base to make law and constitution to function as intended which is the essence of state as power. With the second stage missing, the KMT quest for legitimacy can hardly get off the ground. Based on this theory, it would appear the KMT should have focused all its effort in the unification of the country by force and ignore the public pressure for constitution framing till much later. To demand the checking of state power when the state is struggling to form and to survive does not make sense.<sup>234</sup> To do so before the unification of the country is also the wrong sequence. What actually happened was the fact that politicians were not immune to public pressure and especially when it came from the best educated group among the Chinese.

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<sup>233</sup> Bedeski, 2.

<sup>234</sup> Ibid., 78.

However all these paper exercises on constitutional framing are not totally for naught. Constitutional expertise accumulated in the process. People like Carsun Zhang and Chien Tuan-sheng exemplified the deep knowledge gained among the Chinese intelligentsia. Their contributions are still respected in today's China. With the passing of the KMT from the scene, China ushered in yet again a one party regime. Its dictatorial constitutions without the pretence of tutelage will be the subject of our next chapter.

In sum, all the constitutions in this war torn period were drafted by the state. The public demand for a liberal democratic constitution largely came from the new, Western trained intelligentsia formed after the old examination system was terminated. The gentry as a class was weakened considerably in this period. They began to drift towards the urban centers and were not visibly involved in the constitutional process. The peasants, artisans and the merchant classes were all weakened in this period due to incessant wars and the deepening society wide poverty. They also were not participating in pressuring the state on the constitution issue. The rural masses did not change much despite the changes that had taken place in the upper classes. China remained largely agrarian at the end of 1949. The only constitution in this period that can be seen as responding to the demands of the intelligentsia for human rights and democracy was the 1946 multi-party democratic constitution. But it was never put into practice. The one party dictatorship type of constitution started by the KMT in the 1930s continued to be used by the new CCP regime after 1949. All the regimes in this period, the KMT regime included, were incomplete states as none of them had full control of the country due to internal and

external wars. Thus their constitutions can only be paper constitutions as they were not in a position strong enough to deliver their promises.

## **Lessons Learned from this Period**

In this period we have observed the dynastic legacy of centralised power and unitary state continues as the mental habit of the Chinese political class. Parliamentary bickering and division of power feel odd. Even the revolutionary parties, the KMT and the CCP, want to build centralised unitary state. The lesson learned here is that China's future is likely a unitary state.<sup>235</sup> China's huge internal market and its near monolithic Han culture can support this unitary tendency for a long time to come. However, the complexity of a large modern state is likely to move China towards a more rationalized center vs. periphery power sharing arrangement in the future.

The Warlord governments' neutral stance on ideology allowed treaty ports to become the fertile grounds for the Chinese public to interact with the West. Unlike their elders, the young elites in this period welcomed Western philosophies and political ideas, making China to abandon its denial phase towards the West. Western schools and universities in China flourished as a result. The lesson learned here is that a free environment is the necessary condition for the speeding up of China's learning and its transformation towards modernity.

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<sup>235</sup> Francis Fukuyama expressed a similar view in:  
Francis Fukuyama *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 356-357



The Versailles Treaty triggered May Fourth movement proved to have a long lasting effect. Desires for change extended beyond political demands on the warlord government and instead turned on Chinese culture, philosophy and political tradition. Eventually, it fanned up the nation wide New Culture Movement, iconoclastic and for liberation from tradition. The lesson learned here is that a cultural renaissance needs strong external stimulants to get it started. China's problem ultimately is rooted in its lack of interaction with the outside world.

The period between 1911-1949 proved that by enacting a constitution does not make a constitutional government. The Chinese situation in this period can be seen as a case of social mobilization before political development. But this social mobilization was largely an unintended kind. As long as the public is exposed to the outside world, the government comes under the pressure of comparison. In this period, the regimes lacked capacity to respond to these pressures other than to offer paper constitutions while at the same time trying to survive internal and external crises. The lesson learned here is that this is a gap problem between thought and reality. This gap can only be narrowed over time and it also requires a peaceful environment for China's development to begin in earnest.

The public anger during this period explains part of the shakiness of the regimes and their need to be seen as a legitimate government by having a constitution. But these constitutions can only be paper constitutions as the social condition for them to function did not exist, due to the absence of a middle class. The most active people in the constitution thinking of this period were the politicians and the intelligentsia. The former

did it for political reasons. The latter did it due to their assumed shi 士 orientation and their learning from the West. However they represent no substantial social forces, even though their voice appeared louder when amplified by the new political media. The lesson learned here is that for a functioning constitution to happen, it requires social forces putting demands on the state and the state must also be a complete state, capable of enforcing its laws and constitution. China's social forces were too weak and too stricken in poverty in this period. China needs to rebuild its middle class after all the wars ceased.

Andrew Nathan observed that all Chinese constitutions assumed a harmony of interests between state and citizen. The millennium old political ideal of the Great harmony is the source of this tendency. But more immediately it is due to the fact that all Chinese constitutional attempts were orchestrated by the state, with little participation by the public. The lesson learned here is that one can hardly expect constitutionalism coming out of a state directed constitutional framing. As Liang Qichao had pointed out back in 1910, a constitution framing without the participation of the people cannot amount to much.

Neither the warlords nor the KMT had gone beyond the stage of state as force. As such, they had no base to make law and constitution to function as intended which is the essence of state as power. To demand the checking of state power when the state is struggling to form and to survive does not make sense. To do so before the unification of the country is also the wrong sequence. What actually happened was the fact that politicians were not immune of public pressure and especially when it came from the best

educated group among the Chinese. The lesson learned here is that the state needs to be able to set its priority and resist the public pressure for constitution framing till much later.

The one party dictatorship type of constitution, started by the KMT in the 1930s, continues to be used by the new CCP regime since 1949. The lesson learned here is that the one party dictatorship type of constitution has a strong exclusivity nature, blocking any attempt for a broadly based political participation. This type of constitution can only harm China's move towards a modern constitutional polity.

## **Chapter III**

### **Constitutions of the People's Republic of China**

#### **The Mao Period**

On October 1 1949, Chairman Mao standing on top of the Tiananmen gate, proclaimed to the world the founding of the People's Republic of China (PRC). A few days earlier he declared: "The Chinese People has stood up." Mao was referring to the rise finally of the Chinese people from foreign subjugations of the past one hundred years. Indeed, the massive Japanese invasion of China was over a mere four years before; the last foreign gunboat, the British HMS Amethyst, was fired on and driven out of China on July 30 1949 and the final victory of the CCP over the KMT came swiftly and resoundingly. There were no more armed factions within China competing for power with the CCP, and the building of a new China could thus begin in earnest.

For the CCP, the task of building a new China was enormous and complex. Externally, it faced a hostile West and its dependence on the Soviet Union was total. Consequently, an independent international stance was thought to be out of the question. Mao soon declared his Leaning to One Side Foreign Policy. However, this only led to further pressure from Stalin for China to enter the Korean War on October 1950, a mere one year after the new regime was formed. This act of entering the Korean War resulted in an UN embargo of China. However, China's isolation was easier to bear at the time as there was no longer any armed internal competitors colluding with outside forces. A condition

neither the late Qing nor the KMT enjoyed. The isolation also help Mao to achieve another goal that is the complete removal of foreign economic domination from China.<sup>236</sup>

China's development path forward from this point on was a combination of the Soviet developmental model, emphasizing heavy industry building at the expense of the agrarian sector, and China's own self reliance approach. China's isolation from the UN and the West lasted till the 1970s when its relationship with the Soviet Union finally broke.

Internally, the CCP was facing the daunting task of building a new nation out of a ruined economy due to previous wars. Most of the CCP cadres had gained their administrative experience in the communist rural bases before the civil war. They were particularly inexperienced in managing city-sized economies, especially the big metropolises like Beijing, Tianjin, Shanghai, Ningbo, and Guangzhou.<sup>237</sup> The CCP had about 700 thousand cadres at its disposal when the final victory came, but to run China it needed at least 2 million bureaucrats as the KMT experience had shown.<sup>238</sup> This situation forced the CCP to put off its ambitious goal of socialist transformation for the time being. Instead, it allowed former KMT bureaucrats to continue in their posts. It also tolerated the continued existence of capitalists, industrialists and petty bourgeoisies. However, Western firms and KMT capitalists were not allowed to continue to exist.

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<sup>236</sup> June Teufel Dryer, *China's political System, Modernization and Tradition*, (Longman, 2000), 144.

<sup>237</sup> Zhang Ming, "The Hidden Story Behind the Shift from the Common Program to the 1954 Constitution" [<http://www.aisixiang.com/data/13970.html>], 2007 04 16.

<sup>238</sup> John King Fairbank, *The Great Chinese Revolution, 1800-1985*, (Harper & Row, Publishers, 1987), 278.

Politically, the new CCP regime used the political consultative format to gain a wider political support. The political consultative body was originally a KMT invention to create the image of a united front so to pressure the CCP into accepting the 1946 multi-party democratic constitution. The KMT tactic backfired as the political consultative body splintered under pressure from both the KMT and CCP. The parties that supported the CCP were regrouped to form the new consultative body after 1949. In the new regime this body was consulted on major state affairs. But the CCP's relationship with the consultative body was based on the Soviet principle of democratic centralism. This means the CCP had the sole decision making power after consultations. Nevertheless, a few leaders of the smaller parties in the political consultative body were given ministerial positions. The new political consultative body, under the leadership of the CCP, produced on September 29 1949, the guiding political document for the new regime, namely the "Common Program 共同綱領."<sup>239</sup> The name of this document suggests it was a common program between the parties on how to build and run the new nation. As such, it was considered the de facto constitution for the new China.<sup>240</sup> In order to discern the nature of the new nation, we need to examine the Common Program as the de facto constitution first.

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<sup>239</sup> The Chinese People's Political Consultative Conference, *The Common Program of the Chinese People's Political Consultative Conference 共同綱領*, [<http://e-chaupak.net/database/chicon/1949/1949bilingual.htm>], September 29, 1949.

<sup>240</sup> Liu Shaoqi, "A Report on the Drafting of the PRC Constitution", [<http://cpc.people.com.cn/GB/69112/73583/73601/73624/5069195.html>], September 15, 1954.

## Analyses of the Common Program (共同綱領)

The Common Program's first article declares: "The People's Republic of China is a New Democratic or a People's Democratic state. It carries out the people's democratic dictatorship led by the working class, based on the alliance of workers and peasants, and uniting all democratic classes and all nationalities in China." According to Mao, this joint dictatorship is against all reactionary elements in society.<sup>241</sup> What is included in the people are workers, farmers, petty bourgeoisie and national capitalists. The excluded non-people are the KMT bureaucrat-capitalists and the feudal landlords, i.e. the gentry class.<sup>242</sup> Mao further explained that the working class must take the lead as it is the true proletariat while the peasant class has a natural tendency to want to own properties and thus is harder to reform into a socialized productive force.<sup>243</sup> In addition, the working class must exercise its leadership role via its vanguard party, the CCP.<sup>244</sup> Mao also explained that the remaining classes are to be reformed into the proletariat class later when China become fully socialist.

The common program's third article states: "The People's Republic of China must abolish all the prerogatives of imperialist countries in China. It must confiscate bureaucratic

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<sup>241</sup> Mao Zedong, "New Democracy Constitutionalism", [<https://www.marxists.org/chinese/maozedong/marxist.org-chinese-mao-19400220.htm>], February 20 1940, "什么是新民主主义的宪政呢？就是几个革命阶级联合起来对于汉奸反动派的专政".

<sup>242</sup> June Teufel Dryer, *China's Political System, Modernization and Tradition*, (Addison Wesley Longman, 2000), 82.

<sup>243</sup> The term proletariat is translated into Chinese as "wu chan jie ji 无产阶级", i.e. those who own no property, instead of the Western sense of wage earners in a capitalist system. The Chinese meaning of the term allows landless peasants or anyone without ownership of any kind to be considered as proletariat.

<sup>244</sup> Mao Zedong, "On People's Democratic Dictatorship", [<http://cpc.people.com.cn/GB/64184/64185/66618/4488978.html>], June 30, 1949.

capital and put it into the possession of the people's state.<sup>245</sup> It must systematically transform the feudal and semi-feudal land ownership system into a system of peasant land ownership." This article foretells the coming land reform program for the rest of China and the CCP's policy towards foreign interests in China.

On the economic front, as shown in articles 26-39, the Common Program encourages the recovery of the private business sector, but it also makes it clear that in the long run the state sector will be emphasized and over time the private sector is to be merged into the state sector. The Common Program also singles out the financial and external trade sectors to come under strict state control.

In sum, the Common Program as the de facto constitution reads more like a government program instead of a constitution with constitutionalism in mind. The CCP, with the support of the smaller parties, was the main drafter of the common program, with no participation to speak of from the general public. Nevertheless, the Common Program proved its worth in the crucial first five years in the life of the new republic. The private sector and the indigenous industries recovered well alongside newly invested heavy industries. An average annual growth rate of 8.9% was achieved between 1953-57.<sup>246</sup> It appears the CCP benefited from the fifty or more positions at the central government level given to the non-party elites and the smaller parties.<sup>247</sup>

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<sup>245</sup> The term "bureaucratic capitalists" in CCP jargon means erstwhile KMT state funded bureaucrat/capitalists.

<sup>246</sup> Fairbank, 285.

<sup>247</sup> Zhang Ming, "The Hidden Story Behind the Shift from the Common Program to the 1954 Constitution" [<http://www.aisixiang.com/data/13970.html>], 2007 04 16.



## **The Consolidation**

One of the urgent task for the new regime was to consolidate its grip on power. This was to mop up former KMT agents and other subversives. In this regard, purges and executions were counted on by the CCP. Despite the CCP weakness in personnel coverage of such a vast country, its security was ensured by having the only military force left in China and the CCP had a tight control over it. The country was first divided into six military regions, with each administered by one of the six CCP field armies. The military rule was to be phased out over time to civilian rule. The CCP approach in the consolidation task was not via the judicial route to discover, prosecute and try each case of counter revolution act. Instead the approach adopted in 1950 was a mass campaign of suppression called the Zhen Fan (鎮反). Typically for each mass campaign, a quota was set for each location. The lower party and state organs then identified who to include in the quota, had them seized and tried in mass rallies. This crude way of handling the counter revolutionaries by quotas often resulted in wrongful accusations and executions. But it achieved the psychological goal of suppression. The entire technique of suppression was developed during the land reform campaigns in Northern China before the CCP came to power. In these land reform campaigns, peasants in each village were first graded into six categories. The landlord and rich peasant labels were then assigned to individual families according to quota and the mass rallies then followed for the removal of the landlord/gentry class and their properties. This land reform technique proved crucial to the CCP success in gaining support and winning the final victory over the KMT. The CCP campaigns in the new regime were not limited to political suppressions. It was also used for economic and social transformation purposes. It was the preferred tool of

the CCP to achieve fast results. Not even rule by law was emphasized, let alone rule of law, evidenced by their tossing the KMT law codes and without a replacement for it until 1979.<sup>248</sup>

The new era thus began with the Suppression Campaign of 1950. Closely followed were the Three Anti and the Five Anti Campaigns in 1951, with the former targeting corrupt officials and the latter attacking the capitalist class.<sup>249</sup>

### **The Reluctant Constitution Framers**

While the consolidation was ongoing, the CCP came under repeated pressure from the Soviet Union to legitimise its rule with a formal constitution.<sup>250</sup> Stalin's concern was that the new Chinese state may appear to the wider world as unconstitutional. Stalin also raised a security question concerning Soviet state secrets which could be compromised by non-CCP ministers who had past acquaintance with the US. Stalin preferred a true one party state for China instead of the united front format with the Political Consultative Conference members sharing power with the CCP.<sup>251</sup> Liu Shaoqi, as the vice chairman of the Central People's Government at the time, wrote to Stalin inquiring the possibility of forgoing the formality of having a constitution, but to no avail. Liu went to Moscow in

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<sup>248</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 361-362, and Chinese Communism Subject Archive, "Resolution on certain questions in the history of our party since the founding of the People's Republic of China", 中共中央通过"关于建国以来党的若干历史问题的决议" (*Adopted by the Sixth Plenary Session of the Eleventh Central Committee of the Communist Party of China on June 27, 1981*), [<https://www.marxists.org/subject/china/documents/cpc/history/01.htm>], 16.

<sup>249</sup> Fairbank, 279.

<sup>250</sup> Liu Shanying, "The 1954 Constitution Reconsidered," [<http://www.aisixiang.com/data/58441.html>], *Exploration*, 2011, vol. 6.

<sup>251</sup> Zhang Ming, "The Hidden Story Behind the Shift from the Common Program to the 1954 Constitution" [<http://www.aisixiang.com/data/13970.html>], 2007 04 16.

1952 to personally explain to Stalin that they were satisfied with the current power sharing arrangement with the smaller parties. The Chinese side also felt they may achieve their plan for socialist transformation not far down the road. It would be better to have a constitution then to reflect the new social condition. Stalin insisted that even a temporary one, a non socialist constitution, was better than none. Stalin further suggested that by launching China's first people's congress election, the current united front members can be voted out and thus the CCP can get rid of the smaller parties. The CCP should then appoint the smaller parties to honorary posts to gain their lasting gratitude. Stalin prevailed in the end.

Once the CCP had succumbed to Stalin's pressure, Mao and three of his top aids, took up the constitution drafting task. It was largely an exercise to adapt the Soviet constitution to Mao's people's democratic dictatorship set up. Mao also incorporated into the draft the concept of socialist transformation in both the preamble and the articles. Thus the new constitution also served as the guiding document for the coming socialist transformation programs.<sup>252</sup> Mao's personal involvement in the drafting shows it is yet another Chinese constitution coming from the top. As far as the drafting is concerned there was no seeking of input from society, although the final draft was widely circulated for comments with the party deciding which comments were relevant. On September 15 1954 the first elected National People's Congress (NPC) met and passed Mao's draft as the first formal constitution of the PRC.

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<sup>252</sup> Liu Shanying, "The 1954 Constitution Reconsidered," [http://www.aisixiang.com/data/58441.html], *Exploration*, 2011, vol. 6.

### **Analyses of the 1954 Constitution<sup>253</sup>**

The 1954 constitution is made up of a preamble and 106 articles. Among the 106 articles, a large portion is devoted to the organic principles of the People's Congress, the government and the judiciary. There is also a section on citizens' political, social and economic rights, very similar to the bill of rights in Western constitutions. The preamble makes it clear that this is a transitional constitution. Also in the preamble is a mentioning of the united front: "This people's democratic united front will continue to play its part in mobilizing and rallying the whole people..." However in the articles, the term united front is nowhere to be found. This difference between the preamble and the main text foretells the coming easing out of the united front. In fact by 1954 most united front members were voted out by the first people's congress election. Subsequently they were given honorary roles as Stalin had suggested. The smaller parties from 1954 onward were known to the general public as decorative flower vase parties. Below are some of the more salient articles of the 1954 constitution:

**Article 1:** "The People's Republic of China is a people's democratic state led by the working class and based on the alliance of workers and peasants." This article is a continuation of the same article in the Common Program. At this point in time, the people's democracy is still a broadly based concept, unlike the later development in the

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<sup>253</sup> The National People's Congress of the People's Republic of China, *Constitution of The People's Republic of China*, (Foreign Languages Press, 1954); Liu Shaoqi, "A Report on the Drafting of the PRC Constitution," [<http://cpc.people.com.cn/GB/69112/73583/73601/73624/5069195.html>]; and Liu Shanying, "The 1954 Constitution Reconsidered," [<http://www.aisixiang.com/data/58441.html>], *Exploration*, 2011, vol. 6.

1970s when the people's democratic dictatorship is replaced by a much narrower proletarian dictatorship.

**Article 4:** "...by means of socialist industrialization and socialist transformation, ensures the gradual abolition of systems of exploitation and the building of a socialist society."

From a Marxist perspective, to industrialise is to fundamentally change China's productive force and the socialist transformation is to change the social relations of production in anticipation of productive force changes.

**Article 8-12:** The state allows the petty bourgeoisie and the national capitalist classes to continue to exist. But over time, the rich peasant economy will be eliminated and the cooperatives and private businesses will have to make the final transformation towards collective ownership. But for the time being, the state continues to protect the rights of citizens to own private properties and for their inheritance.

**Article 15:** "By economic planning, the state directs the growth and transformation of the national economy..." The economic planning here means the Soviet style central planning. China's first five year plan was already under way since 1953.

**-Article 19:** "...The state deprives feudal landlords and bureaucrat-capitalists of political rights for a specific period of time according to law..." Article 19, in effect, excludes landlords and bureaucrat-capitalists from the definition of the people.

From the preamble and the articles, it is clear that the 1954 constitution's main purpose was to be the guiding document for the socialist transformation to come. There was no arrangement for checks and balances of government powers as constitutionalism requires. There were also no corresponding government programs or statutes to realize judicial or prosecutory independency or to deliver the promises on citizen rights.

### **The Socialist Transformation**

Before 1954, there were some estimates within the party that the socialist transformation may take ten to fifteen years to complete. These cautious estimates were based on the Soviet experience in their difficulty in collectivizing the farmers. But by 1954, Mao and the CCP leadership felt they could speed up the process of socialist transformation. They had a good understanding of what the previous political campaigns had done to the society. The massive nationwide Suppression Campaign of 1950, the Three Anti and the Five Anti Campaigns of 1951-52 had caused many deaths and suicides and had thus prepared the population well ahead of the transformation. By the time the socialist transformation was launched in 1953, many business owners readily surrendered their properties. Some even forwent the government interest payment in the hope to have their names deleted from the government's list of capitalists.<sup>254</sup> By 1956 the socialist transformation was declared complete ahead of schedule.<sup>255</sup> This means farmers were all organized into collectives, and the cooperatives of the petty bourgeoisie and private businesses were all absorbed into the state sector. The entire society became truly

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<sup>254</sup> June Teufel Dreyer, 142.

<sup>255</sup> Liu Shanying, "The 1954 Constitution Reconsidered," [<http://www.aisixiang.com/data/58441.html>], *Exploration*, 2011, vol. 6.

flattened with the exception of the cadres as a separate social stratum and there were no private ownership of any business or enterprise.

### **The Great Leap Forward Campaign**

However, the enormous achievement of the socialist transformation fanned further ambition within the CCP. With the society totally flattened and under complete control, the leadership was about to launch its ambitious task to overtake the West, i.e. to overtake Britain in steel production in 15 years and the US in 20-30 years. This was Mao's Great Leap Forward Campaign between 1958-61. But to overtake the West required enormous investment. And for China, with its population still over 80% rural, this meant the only source of capital accumulation had to come from extremely high extractions from the peasant economy. The unbearable high extractions and the environment damaging countrywide backyard steel mill experimentation ultimately precipitated a massive man made famine in the early 1960s causing 20 million deaths or more according to official figures.<sup>256</sup>

The disaster of the Great Leap Forward triggered a chain reaction within the party. First, a dispute erupted between Mao and Marshal Peng Dehuai on Mao's responsibility for the failures of the Great Leap Forward. The next was a dispute between Mao and Liu Shaoqi who was state chairman at the time on the necessity of continual revolutions and the dictatorship of the proletariat instead of the people's dictatorship. The dispute between Mao and Liu eventually led to the Cultural Revolution. And finally a life and death

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<sup>256</sup> Tony Saich, *China: Politics and Government*, (Macmillan International College editions, 1981), 37, and Jean-Louis Margolin, "China: A Long March into Night", in *The Black Book of Communism*, Stephane Coutois et al, (Harvard University Press, 1999), 495.

struggle between Marshal Lin Biao and Mao resulting in Lin's death. The socialist transformation and the Great Leap Forward can be seen as the fountain heads of this unravelling at the top.

### **The Great Proletarian Cultural Revolution**

Not long after the disaster of the Great Leap Forward, China was subjected to yet another major upheaval known as the Great Proletarian Cultural Revolution, initiated by Chairman Mao on May 16, 1966.<sup>257</sup> It ended on September 7th, 1968.<sup>258</sup> This is known as the three year version of the Cultural Revolution (hereafter as CR). The current government of China holds the view that the ramification of the CR continued until the arrest of Madam Mao and her gang in 1976. This longer period is known as the ten year version of the CR.<sup>259</sup> For this study, the three year version is used.

The reason given by Mao for the CR was that the direction of the Chinese revolution was in danger of being derailed by some high ranking party officials. He called them revisionists and capitalist roaders. His concern was that China might veer off its proletarian dictatorship direction and become more capitalistic. His method was to call for a mass mobilization to purge the party.

The first group to respond to Mao was from Beijing University. The party elite's counter move was to send teams to universities to deflect the movement from themselves and

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<sup>257</sup> Mao stepped down from the chairman position of the state a few years earlier. At this time in 1966 he was only the chairman of the party and the military commission.

<sup>258</sup> Liu Guokai, "Cultural Revolution Explained", In *History Can Not be Wiped Out*, edited by Liu Guokai, (Publisher Liu Shanqing, 1996), 297-463.

<sup>259</sup> Roderick MacFarquhar, Michael Schoenhals, *Mao's Last Revolution*, (Harvard University Press, 2006).



focus it on class struggle. They targeted the five black classes.<sup>260</sup> These were students from families of bad origins: former landlords, rich peasants, counter-revolutionaries, bad elements, and rightists. Clearly this was not what Mao wanted and he put a stop to this. The party elite then instigated their children in universities and high schools to organize for the CR. These students called themselves the Red Guards. Their goal and the party elite's goal were to appear to respond to Mao but in truth to redirect the CR as another round of anti-rightist movement. This resulted in the first phase of the Red Guard's rampages of burning books and cultural artefacts, beatings and even killing some of the undesirable class members.<sup>261</sup> This is known as the Red Terror phase of the CR. These red guards are later called the conservative red guards. In response, students from the bad classes organized themselves into Rebel Red Guards. They called for the purge of the capitalist roaders in the party as Mao wanted. They were repeatedly suppressed by conservative red guards and conservative workers.

Unsatisfied, Mao called on the workers, peasants and the military to support the rebel red guards. The party elite began to fracture. Mao then ordered the military and government offices to destroy files on the rebel students. With encouragements like this, the rebel red guard organizations expanded like wild fire. Massive rallies of million strong took place and the cult of Mao reached a feverish state.<sup>262</sup> Rebel worker organizations began to appear. Within 1966, nationwide fighting between the conservative and the rebel red guards erupted many times. These fighting ended by the end of 1966 when the

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<sup>260</sup> Lee Hong Yung, "Historical Reflections on the Cultural Revolution as a Political Movement", in *The Chinese Cultural Revolution Reconsidered*, edited by Kam-Yee Law, (Palgrave MacMillan, 2003), 108.

<sup>261</sup> MacFaquhar, 124.

<sup>262</sup> Liu Guokai, 311.

conservative Red Guard leaders were arrested. This set the stage for the purge of the party elite to come in early 1967.

In January 1967, Mao ordered the rebel red guards and rebel workers to rush the party offices in all levels of government and institutions, with the backing of the military. The military backing proved to be crucial to crush the resistance of the party elite. In their place, new revolution committees were installed. The newly installed revolution committees were to be made up of three kinds of people: the military, party officials loyal to Mao, and the representatives from the masses, with the military in charge. Where such committees could not be formed, direct military rule would be used. However in many places the military and the party elite created fake rebel groups. Fighting erupted again and became bloody when both sides used military supplies including guns, grenades and even tanks. Mao intervened and arrested one high ranking general in July 1967.

Continuous conflicts between the rebels and the military eventually made Mao switch side to the military. Mao demanded the rebel groups and the conservative groups to merge. Both sides resisted and the CR entered into a phase of stalemate from Oct 1967 to June 1968. But with the party elite purged and the revolution committees in place, Mao no longer needed the rebels. Thus the CR entered into its final phase of demobilization. Mao then turned on the rebel groups. In July 1968, the military surrounded the rebel groups and fired on them. The rebel groups crumbled. With the rebel groups gone, the party began a new round of large scale class cleansing.<sup>263</sup> Mob trials and execution of the five black classes took place all over the country. In August 1968, the party finally expelled the Chairman of the People's Republic of China, Liu Shao Qi. In November

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<sup>263</sup> MacFarquhar, 253-272.

1968, Mao ordered the purged cadres and 14 million students to leave the cities and dispersed them into remote rural areas, thus ending the Cultural Revolution.<sup>264</sup>

In a very authoritative sociological study, using 1500 county gazetteers, it is estimated, in the countryside alone, 36 million people were persecuted; between 0.75 to 1.5 million were killed during the CR.<sup>265</sup> The toll in the urban centers is still unknown today. In the end, the party was purged from top to bottom but the party organs remained intact. Also remaining intact was the proletarian dictatorship nature of China, which means party dictatorship continues. Mao succeeded in purging his rivals but he had to pay the price to have the military in charge of every level of government and institutions.

From a definition of revolution perspective, one can not say the CR is a classical Marxist revolution which aims to be a class based movement to change production relations. One cannot say it changed the culture of the Chinese society either, other than the burning of cultural artefacts and books in the early part of 1966.<sup>266</sup> The CR also does not fit the systems/value consensus model of revolution because both sides have the same ideological goal of proletarian dictatorship. The CR does fit the aggregate psychological theory of revolution somewhat because of the resentment built up within the masses, even though the masses did not initiate the CR. The CR fits the political conflict theory of revolution the best. Overall, the CR's impact on the constitutional evolution was negative and it was soon denounced after Mao's death in 1976.

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<sup>264</sup> Fairbank, *The Great Chinese Revolution*, 341.

<sup>265</sup> Andrew Walder, Su, Yang, "Cultural Revolution in the Countryside: Scope, Timing and Human Impact," (China Quarterly, Cambridge Journal, no. 173), 95-96.

<sup>266</sup> Theda Skocpol, 7-9.

## **Constitution as a Legacy Device**

By 1956, the 1954 constitution was already outdated as the socialist transformation had brought in a new social structure. All the articles in the 1954 constitution about various social classes and their protection and the need of the united front have no further meaning after 1956. From this point on, China continued without a proper constitution for the next 19 years.

By 1969, Mao wanted a new constitution to enshrine his Cultural Revolution onto paper. Specifically he wanted to legitimize two main concepts of the Cultural Revolution as his legacy: 1) the theory of continual revolutions; and 2) the dictatorship of the proletariat instead of the people's democratic dictatorship. In addition, the new constitution was to satisfy Mao's determination to eliminate the position of the chairman of the state.<sup>267</sup> One of Mao's directives was to make the new constitution extremely short and simple. A discussion followed accordingly about the possibility of abolishing the judiciary and the prosecutory altogether, claiming the country can be operated by police and public security alone.<sup>268</sup> This consideration was based on the CCP experience in their base areas during the war years. This is also in line with Mao's thinking in his later years that all he needed was the party and an administrative organ to carry out the party's orders. The wish to eliminate the court system was eventually abandoned for concern of a bad image internationally, but the prosecutory was eliminated. Mao also allowed the constitution to

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<sup>267</sup> Mao considered Liu Shaoqi's position as the chairman of state the source of conflict between two centers. He was willing to hold the chairmanship of the party but not the chairmanship of the state. But at the same time he did not want anyone else to hold that position either. Thus he sought to remove the state chairman position in the new constitution. This shows Mao's private interest can over rule institutional needs.

<sup>268</sup> Yu Yuxin, "An Interpretation of the 1970 Constitutional Draft," [http://www.cnd.org/CR/ZK09/cr524.gb.html], 2009 03 09.

mention specific names, with Marshal Lin Biao's name written into the constitution as his designated successor. This act made the constitution a temporal document for a very short time frame. Indeed, shortly after the draft, Marshal Lin Biao fell out of Mao's grace. Lin and his family fled for life on a midnight flight towards Russia and crashed to death in Mongolia on September 13, 1971. Due to this event, the originally planned People's Congress to rectify the 1970 draft was put off. The National Peoples' Congress was finally convened in 1975, after a recess of eight years, to rectify the 1970 draft resulting in the 1975 constitution. However, the ratified 1975 constitution had no more mention of specific names and the judicial system was still allowed to stand, but the prosecutory was absorbed into the public security organ.

### **Analyses of the 1975 Constitution of Proletariat Dictatorship<sup>269</sup>**

The 1975 constitution is made up of a preamble and 30 articles. The preamble makes it clear that the constitution was written under the context of the Great Proletariat Cultural Revolution. As such, China is claimed to have entered the phase of proletariat dictatorship in contradistinction with the previous people's democratic dictatorship. The preamble further explains that due to the early phase nature of China's socialism, it will continue to face struggles coming from class contradictions, from revisionists (the Liu-Deng bureaucratic faction within the CCP), from capitalist imperialism (the West) and from socialist imperialism (the USSR). Thus, China must persevere in its dictatorship of the proletariat in continual revolutions. This is Mao's rationalization why the CCP must continue to concentrate power and to rule dictatorially.

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<sup>269</sup> The National People's Congress of the People's Republic of China, "The Constitution of The People's Republic of China," [<http://www.e-chaupak.net/database/chicon/1975/1975e.htm>], 1975 01 17.

Below are the salient articles of this constitution that reflect Mao's intent on the proletariat dictatorship and its continual revolutions.

**Article 1:** "The PRC is a socialist state of the dictatorship of the proletariat led by the working class and based on the alliance of workers and peasants". The proletariat dictatorship is a narrowing of the subject body from the 1954 people's democratic dictatorship. The new proletariat dictatorship is to exclude what Mao considered the revisionists and capital roaders who can be included in the people by definition. Most of them were urbanite cadres as opposed to the revolutionary cadres known derisively by the public as the earthly communists or 土共.<sup>270</sup> Mao wanted to destroy the tainted bureaucracy and party organs and to rebuild them anew.

**Article 2:** "The Communist Party of China is the core of leadership of the whole Chinese people. The working class exercises leadership over the state through its vanguard, the Communist Party of China. Marxism-Leninism-Mao Tsetung Thought is the theoretical basis guiding the thinking of our nation." This mentioning of the communist party as the core of leadership of the whole Chinese people and the Mao Tsetung Thought in the constitutional text did not happen in the 1954 constitution. All the institutions mentioned in the 1954 text were state institutions such as the Peoples' Congress, the judiciary and other government organs as a constitution should. The 1975 constitution's emphasis on the CCP as the core leadership of the whole people could very well be a sign of insecurity among the leadership after so much suffering had taken place during the Great Leap

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<sup>270</sup> June Teufel Dreyer, 92.

Forward and the Cultural Revolution. The text on Mao Tsetung Thought satisfies the desire to elevate Mao to the socialist pantheon, next to Marx and Lenin.

**Articles 5 and 7:** There should be only two kinds of ownership of means of production: the collective ownership by the workers involved and ownership by the whole people and that the rural people's commune is to be a joint social and political unit based on collective ownership. This is a clear narrowing of ownership categories when compared to the 1954 constitution's articles 5, 8 and 10, which allowed ownership by individual working people, capitalist ownership and the right of peasants to own land and other means of production. Thus the 1975 constitution allows no private ownership of any means of production.

**Article 12:** "The proletariat must exercise all-round dictatorship over the bourgeoisie in the superstructure, including all spheres of culture...." This is a specific Cultural Revolution statement. It spells out the underlying reason for the Cultural Revolution.

**Article 14:** "The state deprives the landlords, rich peasants, reactionary capitalists and other bad elements of political rights for specified periods of time according to law." This is a greatly widened target for denying political rights. The 1954 constitution, in its article 19, only deprives the political rights of landlords and the bureaucrat-capitalist. But by 1954, landlords, rich peasants, reactionary capitalists had long been eliminated. This article could only mean the state wants to widen and continue its dictatorial power.

**Article 17:** "...the functions and power of the National People's Congress are: to amend the constitution, make laws, appoint and remove the Premier of the State Council ...on the proposal of the Central Committee of the Communist party of China." This article is a first to openly position the CCP above the Chinese sovereign body: the National People's Congress and as such the CCP is above the constitution.

**Article 22:** "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." As a result of this arrangement, the legislative and executive power were melded into one under the local revolutionary committees.

**Article 25:** "...The people's courts are responsible and accountable to the people's congresses and their permanent organs...The functions and powers of procuratorial organs are exercised by the organs of public security...The mass line must be applied in procuratorial work and in trying cases. In major counter-revolutionary criminal cases the masses should be mobilized for discussion and criticism."<sup>271</sup> Since the permanent organ of the local people's congress is the local revolutionary committee, this means the courts are under the control of the local revolutionary committee too. What is more, each revolutionary committee was headed by a regional military personnel.<sup>272</sup> In effect, regional military organizations were in charge of all three branches of local governments.

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<sup>271</sup>The word procuratorial is used in the original text of the 1975 constitution instead of prosecutorial.

<sup>272</sup> The revolutionary committee was a newly created organization in the latter half of the Cultural Revolution when local government offices were taken over by the Red Guards. But the Red Guards were a motley crowd, fractious and unable to govern. Instead the revolutionary committee was created to run the local government offices. It was stipulated that the revolutionary committee must be constituted by local military representatives, non-Liu aligned former bureaucrats and Red Guards and other mass organizations with the military in charge. The military took control of the scene by using force and caused many deaths. This was the price Mao had to pay for Marshall Lin Biao's people to step in to save the situation.



The prosecutory organ being eliminated only expands the arbitrary power of the security forces. The mass line approach to major cases only adds to the difficulty of building a functioning judiciary.

**Article 28:** "Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike, and enjoy freedom to believe in religion and freedom not to believe in religion and to propagate atheism." As the courts were under the revolutionary committees and the prosecutory power was taken over by the security forces, citizen rights protection becomes highly questionable. Article 28 on citizen rights exemplifies the meaning of a semantic constitution.<sup>273</sup>

From these articles we have a clear picture of what Mao wanted enshrined in the 1975 constitution. Again, the debate for this constitution was conducted within the CCP leadership with no participation from the general public. As it is clear, the legislative, judicial and administrative powers were all under the control of the revolutionary committees, any consideration for constitutionalism becomes a moot point. Of all the Chinese constitutions, this one can be seen as the most un-constitutional constitution.

### **Analyses of the Class Situation**

Before a summary review of the Mao era, an understanding of the class situation is in order. First, after the completion of land reform in the spring of 1953, the landlord class, i.e. the gentry class was completely eliminated from Chinese society. After the completion of the socialist transformation in 1956, the petty bourgeoisie, the business and

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<sup>273</sup> This term is coined by Karl Loewenstein, a German political scientist specialised in constitutional law.

industrial classes were also eliminated. After 1956 China had only the peasant and worker classes. During the Great Leap Forward period (1958-1961), peasants lost their land again. They had to pool land, animal and farming equipment into communes without any recognition of differences in contribution.

## **The Peasants**

Before 1949, the peasant's support of the civil war was secured by the CCP's promise of land redistribution. But in truth, the CCP's real goal was regime change, mobilization of the peasants with a promise of land reform was but a tool to an end.<sup>274</sup> After 1949, the CCP continued to use mobilization to govern. The population was treated as a huge pool of manpower, to be mobilized for industrialization and other government programs.

During the Great Leap Forward period between 1958 and 1961, the state took back land from the peasants and organized them into communes.<sup>275</sup> Towards the end of the Mao era, the per capita income of the peasants dropped to the level of abject poverty and this was after 30 years under the new regime.<sup>276</sup> All these were the results of the high extraction policy in support of heavy industry building, obligating the peasants to surrender grain to the state at very low prices.<sup>277</sup> Today, Chinese peasants still do not enjoy equality in citizenship. Due to the lack of education and a 1:4 differential in income compared to city

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<sup>274</sup> Lucien Bianco, "Peasants and Communists: the Unequal Alliance", in *The Cambridge History of China*, eds. John K. Fairbank and Albert Feuerwerker, (Cambridge University Press, Vol.13, Part 2, 1986), 305-328.

<sup>275</sup> William Hinton, *The Great Reversal, the Privatization of China*, (Monthly Review Press, 1990), 110, and his other work, *Fanshen, a Documentary of the Revolution in a Chinese Village*, (Monthly Review Press, 1966), 12-13.

<sup>276</sup> Wan Li, Anhui Provincial Party Secretary, reported in 1977: 67% of individual commune member's annual income was less than 60 RMB, 25% of the members made less than 40 RMB annually. Wang Weiqun, "The Great First Step: The Beginning of Rural Reform", [[http://opinion.caixin.com/2015-07-17/100829805\\_all.html#page2](http://opinion.caixin.com/2015-07-17/100829805_all.html#page2)], July 17, 2015, and Hinton, *The Great Reversal*, 143.

<sup>277</sup> Theda Skocpol, *States and Social Revolutions, A Comparative Analysis of France, Russia & China*, (Cambridge University Press, 1979), 270.

folks, peasants are widely downtrodden and have a second class citizen status.<sup>278</sup> Their household registry identifies them as rural population which disallows them to take up legal residence in the cities or their children to attend city schools when they work in the cities as migrant workers. The migrant workers formed a new sub-class in Chinese society.<sup>279</sup> And there are significant differences in education, health care and other social services between the city and rural areas. This true condition of the peasants belies the CCP's class revolution rhetoric. It is ironic that the erstwhile Chinese small farmers become true peasants under the CCP regime.

### **The Workers**

The workers in the CCP system is touted as the leading proletariat class. In all CCP constitutions, the first article always states: "The People's Republic of China is...led by the working class and based on the alliance of workers and peasants." But the truth is very few workers were accepted into the membership of the CCP. For those few that became CCP members, the general rule was to exclude them from becoming cadres and they would soon reach the glass ceiling as team leaders on shop floors. The factory leadership positions were beyond their reach. On the other hand workers were known to play cards, wash and amend clothes and do other unrelated activities during working hours. They took long sick leaves and even not bother to show up for work and their bosses were afraid to discipline them. Quality of work or product marketability was not

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<sup>278</sup> John Wong, *China's Political and Economic Trends in 2001*, (Singapore University Press, 2001) 39-40, and Myron L. Cohen, *Kinship, Contract, Community, and State, Anthropological Perspectives on China*, (Stanford University Press, 2005), 67.

<sup>279</sup> Prem Shankar Jha, *The Perilous road to the market: the political economy of reform in Russia, India and China*, (London, Pluto Press, 2002) ,147.

even the factory's concern.<sup>280</sup> This was the situation under the Mao era. Under Deng's Reform and Open-up Policy, there was no more need of them to form the base in mass campaigns as mass campaigns fell to disuse. Their small chance to become CCP members and shop floor leaders began to disappear. They are now simply labours which is abundant and cheap in China. Thus there is no more need to praise them as the leading proletariat.<sup>281</sup> Worker's right to strike is removed from the 1982 constitution. The role of trade unions in China is to organize the workers to support the party.<sup>282</sup>

### **The Intellectuals**

During the Mao era, the nation wide ethos was anti intellectual. This was so because most of the CCP cadres at the time were lowly educated. They felt the urge to despise the highly educated intellectuals. The CCP did not consider the intellectuals as a separate class.<sup>283</sup> They were seen as attachable to other classes, e.g. the capitalist class or foreign interests. As such, they were under constant suspicion, especially those who had a Western degree. The Western trained scientists were treated differently for their irreplaceable contribution in technology development. However, the intellectuals' inputs for the new regime were valued and yet resented at the same time. Mao invited the intellectuals to air their views in the Hundred Flower Campaign of 1957 and later used their inputs as evidence for persecution in the Anti-Rightist Campaign from 1957 to

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<sup>280</sup> June Teufel Dreyer, 143-144.

<sup>281</sup> Liu Guo Kai, *Cicada Shrills in the Grass*, (America International Publisher, 2003 November, ISBN 0-2810443-33-8), 350-354.

<sup>282</sup> Cai Chongguo, "The Crisis of All-China Federation of Trade Unions", [news.bbc.co.uk/chinese/trad/hi/newsid\_4390000/newsid\_4393200/4393233.stm], 2005 03 30.

<sup>283</sup> Liu Shaoqi, "A Report on the Drafting of the PRC Constitution," [http://cpc.people.com.cn/GB/69112/73583/73601/73624/5069195.html], September 15, 1954.

59.<sup>284</sup> In this campaign, the intellectuals suffered a devastating purge which affected more than half a million intellectuals.<sup>285</sup> Many died during the persecution and many others committed suicide. Afterwards, the intellectuals were known in society as the stinking ninth category and they lived on with their heads bowed and without self confidence.

### **The Cadre as a New Class**

As the victor of the civil war, the CCP came to have total control of society. Its Leninist organizational technique enabled it to extend its control all the way down to the village level. This is a feat not possible in dynastic time or under the KMT regime, making the CCP cadre-officials far more powerful than past officials.<sup>286</sup> With such unchallengeable power, the new regime began to take on many attributes of the traditional central bureaucracy.<sup>287</sup> Bureaucratic power became so encompassing, many cadre-officials behaved like feudal lords at the provincial and county level.<sup>288</sup> As such, they became the new ruling class, instead of being civil servants, but a far more powerful ruling class than before.<sup>289</sup> It appears the elimination of the gentry, the traditional base of the elite-official class, had no effect on the tendency to revert back to the old central bureaucratic culture.<sup>290</sup> What is more, the revolutionaries turned high cadres wanted to have their privileges passed on to their children, so that they can occupy the high bureaucracy

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<sup>284</sup> Jean-Louis Margolin, "China: A Long March into Night", in *The Black Book of Communism*, Stephane Coutois et al, (Harvard University Press, 1999), 485.

<sup>285</sup> Du Guang, "Cries for Democracy within the Party in the 1950s," [<http://www.canyu.org/n86388c6.aspx>], *Canyu Magazine* 參與雜誌, March 26, 2014.

<sup>286</sup> Skocpol, *States & Social Revolutions*, 264, and Hinton, *The Great Reversal*, 168.

<sup>287</sup> Alan P. Liu, *How China is Ruled*, (prentice Hall Inc., 1986), 10-11, 13, and Hinton, *Shenfan*, (Random House, 1983), xxiii.

<sup>288</sup> Hinton, *The Great Reversal*, 146, 148.

<sup>289</sup> Hinton *Shenfan*, xxii.

<sup>290</sup> *Ibid.*, xxii.

too.<sup>291</sup> It thus created a new kind of patrimonial bureaucracy, worst than the examination produced dynastic bureaucracy.

### **Analyses of the Mao Period**

The Mao era began with great promises as it is the most peaceful period in the past hundred years since the 1840s. However the victory plus the success in rebuilding seem to have created a sense of invincibility that made the leadership fearless in attempting wholesale social restructuring. By 1956 the socialist transformation was considered complete, well ahead of the CCP estimation. By then all peasants were organized into collectives and all artisans and private business merged into the state sector. In addition, the intellectuals, as the source of serious critique, were silenced in the 1957-59 Anti-Rightist Campaign. The entire Chinese society was thus under complete control.

The completion of the socialist transformation turned out to be the high point of the CCP's organizational power. But this high point was fleeting, for high extractions from the rural sector were soon to cause a man made famine in the middle of the Great Leap Forward, killing tens of millions. Internal recrimination soon followed among the top leadership. Fights between Mao and Marshall Peng Dehuai, and later between Mao and Liu Shaoqi/Deng Xiaoping and Marshall Lin Biao, led to the final show down in the Cultural Revolution which brought China almost to the brink of collapse.

It is a puzzle how Mao's unimpeded endeavour to build China into a modern industrial state can turn out to be so disastrous. The CCP's utopian restructuring of society can be

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<sup>291</sup> He Qinglian, *China's Pitfall*, (Taiwan News Inc. 2003), 463-464.

seen as the will of the leadership dressed up as the will of the state and the general will.<sup>292</sup> Unexpected by Mao and the CCP, that general will in the end came face to face with something it cannot overcome, namely each individual's basic instinct for survival and for self interest. Mao found it necessary to launch a separate campaign in the middle of the Cultural Revolution to fight against si (dou si 鬥私).<sup>293</sup> The Chinese word for self interest: si (私) can also be read as selfishness. It appears Mao as the embodiment of the general will did come face to face with this last unconquerable and hence his reasoning of the need of continual revolutions to overcome men's capitalistic instinct. It is unfortunate that Mao's reasoning did not go one step further to realize that even continual revolutions can not erase this self interested nature of men.

When the lands the peasant got from the land reform period were taken away and pooled into the commune, the peasants lost all interest to toil. Peasants considered themselves now as tenant farmers (長工) working for the government. They began to invent all sorts of passive resistance and sabotages and did so often with the collusion of the village cadres.<sup>294</sup> Likewise, the city petty bourgeoisie and former private business owners saw themselves as government employees, not to mention the industrial workers. All these government employees felt no urge to work with any seriousness.

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<sup>292</sup> Su Xiaokang, *On the Alter of Utopia*, (Fengyun Shidai Publisher, 1991), 2.

<sup>293</sup> Nan Xiang, "The Truth about Dou Si Pi Xiu during the Cultural Revolution," [http://news.ifeng.com/history/shixueyuan/detail\_2012\_06/26/15562924\_0.shtml?\_from\_ralated], *Fenghuang Net* 鳳凰網.

<sup>294</sup> Gao Wang Ning, "A Research on Peasants Passive Resistance", [http://www.aisixiang.com/data/66895.html], March 20, 2014.

For the purpose of political campaigns, the CCP graded the Chinese population into five black categories and five red categories, with the five black categories to suffer in every political campaign.<sup>295</sup> As these black and red designations were to be passed on from parents to children and to grandchildren, the CCP had created in effect a caste system which had never happened before in Chinese history.<sup>296</sup> It is ironic that the pursuit of a progressive ideology could turn out a caste system, making dynastic China look more modern than the PRC. But the question of which social stratum is on top was a life and death issue. The caste effect came to its full bloom in the Cultural Revolution when the children of high cadres formed the militant Red Guards to protect their parents and their class privileges. They were the ones doing most of the home sackings and killings. The long oppressed children of the five black categories also took advantage of the Cultural Revolution by forming the revolutionary Red Guards or the Rebel Red Guards. They were joined by workers who did not have permanent status in state enterprises. These two groups were the ones who smashed local government offices and took over the government in what was called the "People's" Cultural Revolution as opposed to Mao's Proletariat Cultural Revolution.<sup>297</sup> The bloody stalemate between the two Red Guard camps paralyzed the state. In effect, Mao's Cultural Revolution inadvertently set off the social explosion between the five black categories and the five red categories. Mao could only regain control by calling out the troops which resulted in subsequent massacres.<sup>298</sup> In November 1968, Mao ordered the purged cadres and 14 million students to leave the

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<sup>295</sup> The five black categories: landlords, rich peasants, anti-revolutionaries, rightists and bad elements. The five red categories: soldiers, cadres, workers, poor peasants and the middle to lower peasants.

<sup>296</sup> Fairbank, 341.

<sup>297</sup> Liu Guo Kai, *On The People's Cultural Revolution*, (Boda Publisher, vol. 4, 2006).

<sup>298</sup> Jean-Louis Margolin, "China: A Long March into Night", in *The Black Book of Communism*, Stephane Coutois et al, (Harvard University Press, 1999), 534.



cities and dispersed them into remote rural areas, thus ending the Cultural Revolution. Part of the CCP's reason to banish the Red Guards to the countryside by the millions was the concern of a large unemployed youth population in the cities. After the elimination of all private business in society, the CCP regime became the sole employer of everyone and for every new generation reaching employment age. It is clear by now that social restructuring by fiat can produce an unbearable load and a totalitarian state is also totally responsible for every problem in society. It is also China's great misfortune to have imported an untested foreign ideology and had its social body drastically changed according to it.

The CCP's ruling by political campaigns was a habit formed during the revolutionary years. They carried this habit well into the nation building period. Within the first six years of the CCP rule, i.e. the period of 1949-56, there were more than 40 political campaigns.<sup>299</sup> This habit of the CCP makes it easier for us to understand why law was not so relevant to them. The CCP leadership did not see this period as the necessary phase for institution building or constitution building. Rule by will felt natural to the revolutionaries. As the devouring revolutionary habit continued, it proved it can devour itself in the form of the Cultural Revolution whereby Mao's aroused teenage Red Guards decimated the CCP bureaucracy and the party organization itself.

After Marshall Lin Biao's failed attempt to succeed Mao and his death in a plane crash in Mongolia in September 1971, Mao was a shaken man. With Lin gone and with every

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<sup>299</sup> Song Yongyi, "A Note on the Database of Political Campaigns in Contemporary China, 1949-1976," [<http://www.mingjingnews.com/MIB/news/news.aspx?ID=N000067179>], December 18, 2014.

local revolutionary committee in the hands of regional military power, Mao was no longer backed by any single center of military power. His remaining grip on power was largely due to his cult like persona. He now needed to carefully balance the power between three factions, his own faction headed by his wife Jiang Qing, the regional military interests tied to local provincial interests, and the re-emerging bureaucratic power under Zhou Enlai and Deng Xiaoping.

Mao's dilemma was that there is no possibility to avoid his collaborators having their own judgements or agendas. First it was Liu-Deng's judgement that China should follow a rational economic path instead of Mao's continual revolutions. Mao brought in the Red Guards to destroy the Liu-Deng faction only to find out that even the young Red Guards had their own agendas. The conservative Red Guards wanted to enshrine their so called blood line privileges (血統論) while the rebel Red Guards wanted to remove the privileged cadre-official class. Mao's last ally, the military, brought in to banish the Red Guards to the countryside, turned out to have their interest aligned with the local bureaucrats.<sup>300</sup> Mao appeared not to be conscious of the need of institutional arrangements to let ambition and power to contend in an open and level playing field as the American founding fathers were. Like emperors of old, Mao tried to overpower one group with the help of another, only to find out the need of yet another group on top of the previous ones and so on. Each time he faced a different hidden agenda. Mao was entangled in such endless power struggles till the very end of his life. In the end what he was really fighting against turns out to be the boundary of human nature of self interest and will.

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<sup>300</sup> Yang Xiaokai, "Whither China?", [[http://blog.boxun.com/hero/yangxk/56\\_1.shtml](http://blog.boxun.com/hero/yangxk/56_1.shtml)], 1968 01 06.

On April 4th 1976, people ignored the party's warning not to show grief in public for Premier Zhou Enlai's death. Instead, they congregated in hundreds of thousands in Tiananmen Square. The public anger against Mao and his faction had finally come into the open.<sup>301</sup> Deng Xiaoping was suspected for orchestrating the Tiananmen demonstration and was stripped of all his posts.

In the final analysis, Mao and the CCP leadership appeared truly believing in the classless and propertyless utopia. They were daring enough and ruthless enough to pursue it to the end, only to find out there was something in their way even when all property ownerships were removed. That something is the particular will of each person which is not purgeable to make way for the general will by fiat.<sup>302</sup> What is more, the classless society they built at the end of 1956 still had a stratum above the masses, made up of cadre-officials. The dilemma the CCP faced was that it could not do away with this stratum and still survive. Needless to say each bureaucrat, each CCP faction, including Mao's own faction had its own self interest. Mao as an individual had his own self interest, judging from his actions in the factional fights. The CCP leadership did not appear to be reflective enough at the time for what they had created or for what they had gone through.

The difficulty the CCP faced was that for China to industrialize it must extract from the only source available to it: the agrarian sector. But by 1953, as the result of land reform, each family farm got a very small plot.<sup>303</sup> Under such a situation agrarian modernization

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<sup>301</sup> George Black, Robin Munro, *Black Hands of Beijing, Lives of Defiance in China's Democracy Movement*, (John Wiley & Sons, Inc., 1993), 23.

<sup>302</sup> Tom Darby, *The Feast, Meditations on Politics and Time*, (University of Toronto Press, 1982), 57.

<sup>303</sup> One estimate has the average plot size per family at around 2 acres after the Chinese land reform in 1953.

and capital accumulation were difficult. The CCP was advised even before they came to power, that China's problem in the agrarian sector was not due to big plantations. Rather it was due to over population and too little arable land to go around.<sup>304</sup> The suggested solution was to reduce the farming population via diversification of China's economy and to bring in modern farming techniques. According to this view, land redistribution can only tie the farmers to their small plots and harm both rural reinvestment for mechanization and China's goal of industrialization. Nevertheless, the quick power that derived from the promise of land redistribution was too tempting for the CCP to forgo. By the late 1950s, the central planner's solution to the agrarian problem was to do large scale collectivization so to allow mechanization. However the large communes created in the Great Leap Forward period proved the opposite. It showed the larger the collective the less efficient it became.<sup>305</sup> Mechanization was tried but unsuccessful and it remained at a very low level.<sup>306</sup> The dilemma the CCP faced was real, the methods they adopted can be justified to an extent, except that they should perhaps stick to their earlier and more realistic estimation for industrialization in ten to fifteen years. However, this difficulty they faced can not be the justification for their rush into the classless and propertyless utopia.

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Li Dali, "Comparing KMT and CCP Land Reform Programs,"

[<http://tw.aboluowang.com/2014/0612/405636.html>], *Aboluowang* 阿波羅網, 2013 12 26.

<sup>304</sup> This advice was given to Mao in 1949 by Dr. Dong Shijing, a Cornell PhD in agriculture. Dong's advice on reduction of the population and the need to diversify China's economy came to fruition only after Mao's death, and under Deng's Reform and Open-up policy.

Chen Shimei, "The Shocking Prediction Against Land Reform,"

[<http://www.21ccom.net/articles/history/xiandai/20140903112471.html>], *Gongshi Net* 共識網, 2014 09 03.

<sup>305</sup> Li Honglin showed in the Chinese rural transformation the larger the collective the lower the productivity.

Li Honglin, "To Seek Truth and Change in the Midst of Turmoil"

[<http://www.duping.net/XHC/show.php?bbs=11&post=1271872>], 2013 07 23.

<sup>306</sup> Wei Li, Dennis Tao Yang, "The Great Leap Forward: Anatomy of a Central Planning Disaster", [<http://faculty.darden.virginia.edu/liw/papers/jpe-final2.pdf>], March 2005.

Also apparent is that Mao was not an institution builder. Given his unchallenged power, he could if he had the consciousness and the will to push for it. It is indeed an opportunity lost for Mao to be China's George Washington. Also, the CCP's preferred tool of political campaign stunted the growth of the judiciary. In fact, before 1978, there was no legal profession in China and there were only two laws: the constitution and the marriage law.<sup>307</sup> Citizens basically had no protection from the abuses of the state, when constitutionalism was not even considered and when the judiciary was not independent of the party.

In his youth Mao admired liberal figures like Liang Qichao, Sun Yatsen and others. During the 1919 May Fourth Movement, Mao was in his mid twenties. He joined Professor Chen Duxiu's iconoclastic and anti Confucian New Youth Group. CCP leaders from that era understood Chinese tradition as feudal and as Marxists they were against anything feudal. For example, during the Cultural Revolution, Red Guards were sent out in rampages to destroy traditional artefacts. However we cannot say Mao was entirely untraditional. Most of his later years' reading was on Chinese statecraft and history. In his mature years, he liked to compare himself with the founding or conquering emperors in Chinese history: the first emperor of Qin, the conquering emperor of Han, Genghis Khan, and the founding emperor of Ming. Mao thus showed a leaning towards the draconian

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<sup>307</sup> Feng Chongyi, "The Rights Defence Movement, Rights Defence Lawyers and Prospects for Constitutional Democracy in China", *Cosmopolitan Civil Societies Journal*, Vol.1, No.3, (2009), [<http://epress.lib.uts.edu.au/journals/index.php/mcs/article/viewFile/1076/1364>], 151.

Legalist tradition of ancient China.<sup>308</sup> The PRC maintained its anti-Confucian stance till the last decade of the 20th Century.

In sum, the three constitutions in Mao's era were all drafted by the state with no meaningful participation from the public. They were all programs of the state serving the leadership's vision instead of being concerned with constitutionalism. There was no evidence the state tried to respond to public grievances in the form of constitutional adjustments. As such, we cannot speak of convergence between state and society. Unlike previous periods when the gentry or the new intelligentsia could voice their demands on the constitution, there was no possibility for people to raise such questions under the Mao period. To demand rule of law, constitutionalism, rights and democracy may get one at least the charge of being a pro-West rightist, if not an outright counter-revolutionary. There was no independent media to air such issues as was still possible under the KMT. Many of the constitutional promises on citizen rights had no corresponding statute to realize them, making all three constitutions of this period semantic. The state power under Mao was near omnipotent unlike the warlord and the KMT regimes who were incomplete states. What hampered the Mao state was its limited political knowledge and world view.

### **Lessons Learned from the Mao Period**

Mao and the CCP leadership appeared truly believing in the classless and propertyless utopia. They were daring enough and ruthless enough to pursue wholesale social restructuring to the end. However, when all property ownerships were removed, they

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<sup>308</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 361

found there was still something in their way, namely each individual's basic instinct for survival and for self interest. Undaunted, Mao called for continual revolutions to overcome men's capitalistic instinct. It is unfortunate that Mao's reasoning did not go one step further to realize that even continual revolutions can not erase this self interest nature of men. The lesson learned here is that the particular will of each person is not purgeable to make way for the will of the state. In addition, society as a whole is not a mechanical object with so many parts to be changed out or re-engineered at will. Ideology driven wholesale social restructuring is most likely a disaster. This is because ideological understanding of society tend to be partial. The futility of ideologically driven social restructuring is evidenced by the necessity of Deng's great reversal of Mao's socialist transformation.

After the elimination of all private business in society, the CCP regime became the sole employer of everyone and for every new generation reaching employment age. The CCP came to realize that social restructuring by fiat can produce unbearable loads. The lesson learned here is that totalism also means total responsibility for every problem in society.

After so much suffering that had taken place during the Great Leap Forward and the Cultural Revolution, the 1975 constitution widened CCP's dictatorship, and had the party positioned above the NPC and the constitution. This could very well be a sign of insecurity among the leadership. The lesson learned here is that dictatorship begets more dictatorship in a vicious circle and especially when it is failing. The dictating party's tendency is to see all its problem in terms of lack of power, not in terms of the need of

power contending with power in the open. What hampered the Mao state was its limited political knowledge and world view.

## **The Great Reversal**

Mao died on September 9 1976. His designated successor, Hua Guofeng took over power as planned. But barely a month later, Hua with the support of the military and Mao's personal guards arrested Madame Mao and the rest of Mao's faction on October 11th. However, Hua avowed to continue Mao's policies in his Two Whatever pronouncement.<sup>309</sup> Hua was also reluctant to allow Deng to return to office. But pressure began to mount in support of Deng and by July 1977 Hua finally relented and returned to Deng all his former posts.

By early 1978, Hua brought forth a new constitution. But the 1978 constitution looks very similar to the 1975 one. The need of a similar one a mere three years after 1975 can be understood as Hua's need to put his own stamp on the post Mao period and at the same time to show his loyalty to Mao's policies. Deng's influence at this time was limited.

## **Analyses of the 1978 Constitution<sup>310</sup>**

The 1978 constitution's preamble continues with the Cultural Revolution language on the need of continual revolutions under the dictatorship of the proletariat. This is to guard

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<sup>309</sup> Hua's continuance of Mao's policies was announced in a joint editorial on February 7, 1977 between the People's Daily, the Red Flag Magazine and the Liberation Army Daily as the Two Whatevers: "We will resolutely uphold whatever policy decisions Chairman Mao made, and unswervingly follow whatever instructions Chairman Mao gave."

<sup>310</sup> The National People's Congress of the People's Republic of China, *The Constitution of the People's Republic of China as adopted on March 5, 1978*, (Foreign Languages Press, 1978).



against class contradictions, revisionism, capitalist imperialism and socialist imperialism. The local revolutionary committee, a product of the Cultural Revolution, continues to exist in the new constitution. However, Premier Zhou Enlai's old idea of four modernization was incorporated in the preamble as the goal going forward which has nothing to do with continual revolutions under the proletariat dictatorship.<sup>311</sup>

Within the constitutional text, Article 14 continues to have the state "...punishes new born bourgeois elements" and "deprives of political rights,...those landlords, rich peasants and reactionary capitalists." However there is a minor but significant structural change appearing in Article 43 for the restoration of the prosecutory as a separate organ. In the 1975 constitution the prosecutory was eliminated and its functions were taken up by the Public Security. Also in Article 16 of the 1978 constitution, a jarring phrase appears: that the state personnel should endeavour to "perfect their professional competence...seek the truth from facts." Together with the four modernization goals, the idea of professionalism and seeking truth from facts instead of from ideological correctness, these were the first signs of Deng's reform intention.

The 1978 constitution is thus a continuance of the 1975 Cultural Revolution constitution, but with an attempt by the reform faction to slip in some new ideas for the coming reform. But largely the 1978 constitution is a government position document, not meant to be responsive to the needs of society.

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<sup>311</sup> The four modernization goals: modern agriculture; industry; national defence; science and technology.

## **The New Paramount Leader**

Hua's staunch pro Mao policy was unpopular among the high cadres. With their support, Deng mounted a challenge to Hua and was able to displace him by late 1978. Once in power as the new paramount leader, Deng announced his reform program. What followed in the next 30 years is a rebuilding of China from a near bankrupt and flattened society due to 30 years of Mao's rule. The second 30 years proved to be just as earth shaking as the first 30 years, except that it is in the reverse direction. Deng's Reform and Open-up program, in essence, is to bring China back to a more organic and natural society and to bring it back to the world community. William Hinton, an American who had experienced both periods since the 1940s, called Deng's reform the Great Reversal and the Privatization of China.<sup>312</sup> To Hinton, Mao appeared to be prescient after all about Deng as a capitalist roader. But the problem Mao faced was that he was fighting against everyone's capitalistic tendency. By 1982, Deng brought forth a new constitution to reflect a new attitude in constitution framing, namely to respond to the needs of society in the Reform and Open-up era.

## **Analyses of the 1982 Constitutions and its Four Revisions<sup>313</sup>**

In broad terms, the 1982 constitution is a refutation of the 1975 and 1978 constitutions of the Cultural Revolution period. It rejects Mao's position on the need of continual revolutions under the proletariat dictatorship. Instead, it reverts back to the Common Program and the 1954 constitution's position of people's democratic dictatorship under a

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<sup>312</sup> William Hinton, *The Great Reversal, the Privatization of China*, (Monthly Review Press, 1990).

<sup>313</sup> The National People's Congress of the PRC, "Constitution of the People's Republic of China", [[http://www.npc.gov.cn/englishnpc/Constitution/node\\_2825.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm)], 2015 10 22, and Chen Jianfu, "The Revision of the Constitution in the PRC, a great leap forward or a symbolic gesture?" *China Perspectives*, (May-June 2004).

united front, uniting beyond the workers and peasant classes. What is new is that it is the first CCP constitution that attempts to respond to people's needs. It all began in a small village, the Xiaogang Village in Anhui Province. The village's entire 18 households, including the village cadre, signed a life and death contract, dated December 18 1978. The contract stated their determination to divide the commune land among themselves regardless of the law and should any one of them be executed for this brazen act, the rest of the families were obligated to take care of the martyred family until their children reach the age of 18.<sup>314</sup> The villagers acted out of desperation for fear of a sure man-made famine to come should they continue to work under the commune system. This act was soon copied by surrounding villages and it spread like wild fire across a dozen provinces within a year. The peasants proved to be far more powerful than the city proletariat in their determined resistance. Under Deng's leadership, the state finally yielded to the peasants demand and turned around to incorporate the changes in the new constitution and the reform program and thus claimed credit for it too.

The 1982 constitution was revised four times in 1988, 1993, 1999 and 2004, each time it tried to respond to new demands of society as the Reform and Open-up Policy unfolded. Deng died on February 19 1997. The 1999 and 2004 revisions were done under President Jiang Zemin and bore his stamp on reform. In the original version of the 1982 constitution and in its four revisions, there is no longer any mention of the CCP within the constitution text or the requirement that the people must support the CCP.

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<sup>314</sup> Anonymous, "The Xiaogang Village Story," [http://www.china.org.cn/china/features/content\_11778487.htm], *CHINA.ORG.CN*.

In the final preamble after 2004, the Deng Xiaoping Theory and Jiang Zemin Three Represents Theory are positioned right after Mao Zedong Thought, indicating the new guiding principles.<sup>315</sup> The preamble then claims China is in the early phase of socialism and China's is to develop a socialism with Chinese characteristics. According to the Deng Xiaoping theory, this means China must turn back and to regain a capitalist experience before further socialist development.<sup>316</sup> The preamble then spells out the new elements in the new constitution: Deng's "Reform and Open-up to the World," "develop the socialist market economy" and the four modernization goals of industry, agriculture, defence and science and technology. Further, the preamble affirms the past positive roles of the united front under the Chinese People's Political Consultative Conference and that it "will exist and develop for a long time to come." But the Chinese people needs to continue its guard against class contradictions, internal and external enemies, implying the CCP needs to continue its concentration of power and to maintain its dictatorship.

Within the main Text, one can find the key differences of this constitution from the previous ones in the following articles:

**Article 1:** The People's Republic of China is a socialist state under the people's democratic dictatorship... The "people's democratic dictatorship" is an important reversal from "the proletariat dictatorship" position in the Cultural Revolution Constitutions of 1975 and 1978.

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<sup>315</sup> The Three Represents is President Jiang Zemin's signature theory, namely the CCP is to represent the advanced productive forces, the advanced culture and the fundamental interests of the overwhelming majority of the Chinese people.

<sup>316</sup> Chen Jianfu, "The Revision of the Constitution in the PRC, a great leap forward or a symbolic gesture?", *China Perspectives*, (May-June 2004), paragraph 9.

**Article 5:** The state upholds the uniformity and dignity of the socialist legal system... No organization or individual may enjoy the privilege of being above the Constitution and the law... This is a response to society's need of a functioning judiciary.

**Article 6:** Diverse forms of ownership in addition to state and collective ownership... This is to allow the return of private business and enterprises.

**Article 8:** The rural people's commune is to be replaced by a family based joint contracting system... This is a response to the peasants' vehement resistance to the commune system.

**Article 11:** The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy...

**Article 13:** The State, in accordance with law, protects the rights of citizens to private property and to its inheritance...

**Article 14:** The State continuously develops the productive forces, raising the level of technical skill, disseminating advanced science and technology...

**Article 15:** The State practises socialist market economy... The first was to allow the return of rural markets.<sup>317</sup>

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<sup>317</sup> Chinese Communism Subject Archive, "Resolution on certain questions in the history of our party since the founding of the People's Republic of China", 中共中央通过“关于建国以来党的若干历

**Article 18:** The PRC permits foreign enterprises and individuals to invest in China...

**Article 23:** The State trains and expands the ranks and roles of intellectuals...This means they are no longer the stinking ninth category.

**Article 33:** All persons holding the nationality of the PRC are citizens of the PRC. All citizens of the People's Republic of China are equal before the law. The State respects and preserves human rights. Every citizen is entitled to the rights... These statements are at odds with the People's Democratic "dictatorship" statement in Article 1. Also human rights as opposed to citizen rights are mentioned for the first time. The significance here is that human rights can not be withdrawn by the state to citizens as well as to foreigners.

**Article 79, 87 and 124:** Two consecutive terms only for the president, vice-President, premier, vice-Premiers, state Councillors, president of the Supreme People's Court and the president of National People's Congress... Deng thus ended the Mao era life term practice for the top leadership positions. Not mentioned in this article is also the age limit of 67 years, beyond which one is not considered for these leadership positions.

**Article 126:** The people's courts exercise judicial power independently, and not subject to interference by any administrative organ, public organization or individual... There is no more requirement of the masses to be drawn in in major cases as required in the 1978 constitution.

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史问题的决议”，(Adopted by the Sixth Plenary Session of the Eleventh Central Committee of the Communist Party of China on June 27, 1981),  
[<https://www.marxists.org/subject/china/documents/cpc/history/01.htm>],16.

**Article 131:** The people's procuratorates exercise procuratorial power independently, and not subject to interference by any administrative organ, public organization or individual...

The above articles may appear common place to an outside observer, but they are significant due to their shifting away from the previous illiberal positions in the 1975 and 1978 constitutions. The new attempts to respond to society can also be understood as the result of a hard learning from China's suffering in the socialist transformation, the Great Leap Forward, the Cultural Revolution and many other political mass campaigns.<sup>318</sup> It is not a complete learning yet, as the internal contradictions of the 1982 constitution are also obvious. First, Article 1's people's democratic dictatorship contradicts Articles 33's all citizens are equal before the law and all enjoys human rights protection, which implies that no one should be dictated to by any class. Under Jiang's Three Represents Theory, the CCP aims now to represent the advanced productive forces, the advanced culture and the fundamental interests of the overwhelming majority of the Chinese people. Thus positioned, the CCP's vanguard claim for the proletariat can no longer stand. Besides, the dictatorship of the proletariat can hardly co-exist with even the socialist market economy. Jiang's acceptance of capitalists into party membership, in effect, makes the CCP a communist party in name only.<sup>319</sup> However, the one party dictatorship remains as guaranteed by Deng's four cardinal principles in the preamble of the 1982 constitution.<sup>320</sup>

Thus the phrase "dictatorship led by the working class and based on the alliance of

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<sup>318</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 362

<sup>319</sup> Charles Wolf JR., "China's Capitalists Join the Party",  
[<http://www.nytimes.com/2001/08/13/opinion/13WOLF.html>], 2001 08 13.

<sup>320</sup> The four cardinal principles: The PRC is to persist in: 1) the socialist path; 2) people's democratic dictatorship; 3) the upholding of the leadership of CCP; and 4) the upholding of Marxism-Leninism and Mao Zedong Thought.

workers and peasants" has no real meaning other than being an euphemism for the dictatorship of the CCP.

These contradictions are not merely textual problems. At stake is the party's legitimacy claim as a vanguard party, particularly in the wake of its disastrous record in the Mao era. The party is well aware of this legitimacy crisis and aims to use its economic performance under the Reform and Open-up Policy to redeem itself and thus to regain its legitimacy. The economic performance based legitimacy is also the only choice the CCP can make, as it is unwilling to try the electoral legitimacy route.<sup>321</sup> The resultant pursuit of GDP growth at high speed has a high environmental cost, namely the cost of crossing the boundary of nature itself.

### **Analyses of the Deng Xiaoping Theory<sup>322</sup>**

To better understand the 1982 constitution and its revisions, it is necessary to understand Deng's thinking and motive in his Reform and Open-up drive. Deng's various speeches and writings were later collected and distilled into the Deng Xiaoping Theory. In this theory, Deng creatively declared the Chinese society is in the very beginning of a socialist transformation which may take hundreds of years to complete. In this early phase of the socialist transformation, the development of productive force is the primary task. As such, China needs to turn back and to go through a capitalist phase first. Deng's theory appears to align with Marxist historical materialism better, i.e. after feudalism is

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<sup>321</sup> Gary H. Jefferson, "China's Evolving Economic Constitution", *China Economic Review*, (2002 09 30), 5.

<sup>322</sup> Anonymous, "The Deng Xiaoping Theory," [[http://news.xinhuanet.com/ziliao/2004-10/27/content\\_2145152.htm](http://news.xinhuanet.com/ziliao/2004-10/27/content_2145152.htm)], *Xinhua Net*.



capitalism which should come before socialism.<sup>323</sup> If so, a question arise as to why China must do capitalism under a communist party. Deng called this arrangement, i.e. doing capitalism under the CCP, "socialism with a Chinese characteristic." To reassure the conservatives in the party, Deng guaranteed that he will proceed only under the four cardinal principles. As for how China can develop its productive force first, Deng again showed more creativity than his predecessors. Instead of the Soviet model of high extraction from the agricultural sector, Deng open up China to attract foreign capital and technologies. This option was not available to Mao as Mao would see it as inviting foreign capitals back. In retrospect, Deng's creativity was largely inspired by the vivid examples of the special export zones of the four little Asian dragons: Korea, Taiwan, Hong Kong and Singapore. Still, Deng deserved to be admired for his bold move for a capitalistic socialism. As to the possible contradiction within such an approach it is to be explained away by the all inclusive phrase: "with a Chinese characteristic." Thus Deng's socialism for China contains within it a capitalist phase. Deng's historical sequencing is at once more creative and closer to the original Marxist theory of historical materialism than Mao's.

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<sup>323</sup> When the Marxist historical materialism was introduced to China, European historical periods were used to interpret Chinese history. Thus the European feudal period before capitalism is seen as equivalent to the Chinese dynastic period. To the CCP this means all past Chinese periods are feudal as long as there is private land ownership for rent or lease. Landlords and gentry are therefore feudal. This interpretation ignores the fact that the Chinese feudal period had ended in 220 BC and after that was a 2000 year long centrally administered dynastic period. It also makes the Chinese period of capitalism either a mere few decades long between 1911-49 or non-existent at all. This allows Deng to claim the importance of going back to develop new the missing capitalist period, hence Deng's capitalistic socialism. Also the Chinese proletariat was too small back in the 1920s to shoulder the leadership role of revolution. The Chinese translation for the word proletariat as the propertyless class allowed the CCP to include destitute peasants into the Chinese proletariat revolution.

## **The Reform and Open-up Program**

To appreciate the fuller extent of Deng's Reform and Open-up policy, a recount of the major events in this great reversal is in order:

-1977: Deng reinstated university entrance examinations so to return the colleges and universities back to normal operation. Nearly all schools and universities were closed for four or more years during the Cultural Revolution.

-1978: Intellectuals were redefined to be part of the working class and thus remove their stinking ninth category status.<sup>324</sup>

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-1978 December 16: U.S. and China resumed their formal relationship.

-1979 July: Rural reform, a concession to the peasants' demand to get out of the collective ownership arrangement under the commune system and to begin the rural household responsibility system for private production and business. On the opening-up front, China was to begin experimenting with special export zones in southern cities: Shenzhen, Zhuhai, Shantou and Xiamen.

-1981: A formal verdict on Mao was announced, deification of any top leader is to be denounced, and a new policy for a two terms limit for top leadership was established.

-1982: The termination of life term in office for the revolutionary cadres, clearing the path for younger cadres with more education and more professional training.

-1982: A new constitution to reflect the changes in the reform era and it is also the first CCP constitution attempting to respond to public demands.

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<sup>324</sup> During the Mao era, intellectuals were referred to as the stinking ninth category, i.e. the very bottom of society.

- 1984: Open up more cities to the global economy, allowing foreign direct investment in China, to attract both capital and technology transfers and to send students abroad in large numbers.
- 1987: Finalizing the overall plan for the Reform and Opening-up policy, aiming for China to achieve a mid-level development status by 2050, in three phases.
- 1988: Revision to the 1982 Constitution to legitimise the private economy and the commercial sale and transfer of land use rights, but not private land ownership.
- 1993: Revision to the 1982 Constitution to ensure the development of a socialist market system to replace the planned economy; to ensure the long term existence of the political consultative conference; to strengthen economic legislation and macro-economic control.
- 1997: The incorporation of the Deng Xiaoping Theory into the 1982 Constitution.
- 1999: Revision to the 1982 Constitution to further elevate the priority of private economy; to remove from statute the counter-revolutionary category and to administer the country according to law.
- 2001: Capitalists are allowed to join the CCP.
- 2004: Revision to the 1982 Constitution to incorporate Jian Zemin's Three Represents Theory so that the vanguard party of the proletariat can now represent the advance productive force, the advance culture and the interests of the great majority. This revision also includes the explicit statement that the state respects and protects human rights, instead of the previous citizen's rights which can be withdrawn by the state at will and can be denied to foreigners; further protection of private properties and a civilian approach to state emergencies as opposed to the bloody 1989 way of handling public protest.

-China joined the IMF and the World Bank in April 1980. By the late 1980s China had joined several hundred international and regional organizations.<sup>325</sup> On December 11 2001, China joined the WTO, after 15 years of hard negotiation with the US, signifying China's full integration into the global economy.

### **The One sided Reform**

Deng's reform is limited to the economic front only. But Deng had wanted reform in both the economic and political fronts. He had stressed the necessity to back up the economic reform with political reform.<sup>326</sup> One of the great difficulty Deng faced was the confusing situation caused by the inseparability of party and state. As the party is above the NPC and the constitution, it is in a commanding position. But at the same time every important position in the state is held by a party cadre making division of state power impossible.<sup>327</sup> This also results in the party cadre's action being shielded from the scrutiny of the NPC or the judiciary. It is not only a source of confusion, but also a source of widespread corruption. Deng's call for political reform met stiff resistance from the bureaucrats and the conservative faction in the party. To maintain support for his economic reform, Deng had to buy off the party insiders by allowing them to get rich first via corruption.<sup>328</sup> He had to tolerate the continuous existence of the centrally planned pricing system alongside the market pricing system. The difficulty involved in working between a planned pricing structure and a market pricing structure was enormous. Such a situation spawned rampant

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<sup>325</sup> Worden, Robert L. et al, "China's Role in International Organizations", [<http://countrystudies.us/china/134.htm>], *U.S. Library of Congress*, 1987.

<sup>326</sup> Deng Xiaoping, *Collected Works of Deng Xiaoping*, (The People's Publisher, 1993), vol. 3, 176, 177.

<sup>327</sup> Tom Ginsburg, Alberto Simpser, eds., *Constitutions in Authoritarian Regimes*, (Cambridge University Press 2014), 245.

<sup>328</sup> Leong Liew, "China's Engagement with Neo-liberalism: Path Dependencies, Geography and Party Self-Reinvention", *The Journal of Developmental Studies*, vol. 41, No2, (Feb 2005), 331.

arbitraging and corruption in between the two pricing systems. Due to their connections and proximity to opportunities, cadres-officials could get state priced material at low cost and flip them in the market for a quick profit. Their position for various licence review and approval is another revenue for rent seeking. Bogus exports and imports allow them to launder money into private accounts in overseas tax havens. Many of them became millionaire or even billionaire. Deng's own children came under scrutiny for possible influence peddling.<sup>329</sup> This situation led to a runaway inflation rate of 18.8% by 1988, a 50% rise in food price and a 25% inflation rate by early 1989, causing panic buying and bank runs.<sup>330</sup> The lack of democratic participation and the polarization between rich and poor caused a great sense of injustice in society that ultimately led to the massive 1989 Tiananmen protest involving both students and citizens in the millions. The subsequent military crackdown on Tiananmen Square brought worldwide condemnation.

After the Tiananmen Massacre, Jiang Zemin was elevated to premiership replacing the reform minded Premier Zhao Ziyang. In the aftermath, the government began to clamp down on corruption hard particularly on state enterprises and on children of high officials, forbidding them to participate in the business sector. Also a new arrangement was made to have all future NPC presidents to be selected from the standing committee members of the politburo. This is to head off any potential constitutional challenge from the NPC in future crisis.<sup>331</sup> But this move further aggravated the party-state inseparability problem.

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<sup>329</sup> Patrick E. Tyler, "China's First Family Comes under Growing Scrutiny", [<http://www.nytimes.com/1995/06/02/world/china-s-first-family-comes-under-growing-scrutiny.html>], 1995 06 02.

<sup>330</sup> David T. Mason, "Modernization and its discontents revisited: The Political Economy of Urban Unrest in the People's Republic of China", *The Journal of Politics*, vol. 56, No. 2, (May 1994), 400, and June Teufel Dryer, *China's political System, Modernization and Tradition*, (Addison Wesley Longman, 2000), 152.

<sup>331</sup> Wan Runnan, "My Two Contributions to the 1989 June 4th Event", [<http://history.dwnnews.com/news/2015-10-11/59687242.html>], 2006 06 04.

The conservative faction and advocates of central planning wanted to revert back to political mass campaigns to solve social instability problems brought forth by Deng's reform. Deng could have lost his reform momentum should the conservative succeeded in taking over control of the 14th Party Congress in the fall of 1992. To head off this danger, Deng went south for the now famous Southern Tour of 1992. In this tour, Deng shored up support for his reform program from the provinces that had benefited from the open-up policy to the outside world. By October 1992, when the 14th Party Congress convened, Deng was able to overcome the conservatives and had his reform policy written into the party constitution. By the 15th Party Congress in 1997, the Deng Xiaoping Theory was entered into the party constitution posthumously and from that point on no further challenge to Deng's theory or program is possible.

## **Methods and Results**

In the reform period, class struggle has no place in Deng's program. Political mass campaigns fell to disuse. The proletariat becomes simply labour. Deng wanted his program to be guided by fact based truth instead of by ideology. He encouraged bureaucrats to "go down to the sea 下海", i.e. to enter the sea of business and to make a living independent of the state. He also refused to be dragged into debates on whether the socialist market system necessarily lead to pure capitalism. To him whether it is "a black cat or a white cat" it does not matter so long it catches mice. When he was not guided by any theory he advocated "feeling for stones under feet while wading across a stream". His signature attitude was: "practice is the only yardstick to measure truth," and thus he rejected ideological arguments. Deng's effort to kick start the economy by allowing some

to get rich first had led to the polarization between rich and poor and to rampant corruption. These can not be eradicated without serious political reforms which he was unable to push for.

Since Deng's reform began in 1978, China's nominal annual GDP has grown from \$216.8 billion US in 1978 to 10.36 trillion US in 2014, making China the world's second largest economy and one of the world's most polluted country at the same time. Its annual per capita GDP in the same period grew from \$62 US to \$7,600 US, making China still a mid level developing country.<sup>332</sup> In the same period, China has lifted 500 millions of its people out of poverty, but still has 80 some millions under the poverty line.<sup>333</sup> As the Chinese middle class began to rise, their demand for rights protection swelled into a nationwide Rights Defence Movement.<sup>334</sup>

In the reform period, the rural problem of overpopulation and lack of modernization has found a solution. By allowing the rural population to flow into cities to become the world's assembly line workers, large scale agrarian mechanization can finally begin. The CCP's current way of mitigating the stability problem is to co-opt the economic and

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<sup>332</sup> China Statistical Yearbook 2015, "1-2 Principle Aggregate indicators on National Economic and Social Development and Growth Rates", [<http://www.stats.gov.cn/tjsj/ndsj/2015/html/EN0102.jpg>].

<sup>333</sup> Anonymous, "China Overview", [<http://www.worldbank.org/en/country/china/overview>], *World Bank*, 2015 09 18, and Anonymous, "China's economy, Poverty elucidation day", [<http://www.economist.com/blogs/freeexchange/2014/10/chinas-economy>], *The Economist*, 2014 10 20.

<sup>334</sup> Anonymous, "China's middle class overtakes US as largest in the world," [<http://www.telegraph.co.uk/finance/china-business/11929794/Chinas-middle-class-overtakes-US-as-largest-in-the-world.html>], *The Telegraph*, 2015 10 14, and Feng Chongyi, "The Rights Defence Movement, Rights Defence Lawyers and Prospects for Constitutional Democracy in China," *Cosmopolitan Civil Societies Journal*, Vol.1, No.3, (2009), [<http://epress.lib.uts.edu.au/journals/index.php/mcs/article/viewFile/1076/1364>].

cultural elites into the party.<sup>335</sup> With this approach, China appears to revert back to the dynastic tendency of absorbing most of the elites into the state. Despite the fact that Deng is responsible for the overt persecution in the Anti-Rightist Campaign and the Tiananmen Massacre, he is remembered for his reversing of Mao's socialist transformation, for the difficult shift from central planning to market economy, and above all for his Reform and Open-up Policy for China.

### **Analyses of Convergence/Divergence of the Reform and Open-up period**

The reading of PRC constitutions presents particular challenges. Not least is the need to grapple with the special meaning of terms, such as "people's democratic state" which is to be carried out by "people's democratic dictatorship," "proletariat dictatorship" does not mean the proletariat is in charge, "the alliance of workers and peasants" has a hidden meaning that they are not equally valued, "feudal" means everything before 1949 and "Chinese characteristics" has nothing to do with Chinese culture. Also, the meaning of some terms can shift from constitution to constitution, e.g. the 1982 preamble declares the people's democratic dictatorship is essentially the proletariat dictatorship in previous constitutions. The challenge is to track when there were corresponding efforts to implement some parts of the constitution. In the 30 years since 1982, with the exception of economic measures, the actual realization of the constitution is not very satisfactory. First, the extrication of the party from government operations proved to be very difficult for a single party state. The human rights protection remains on paper due to the lack of corresponding statutes. The NPC election is still controlled by the party and thus making

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<sup>335</sup> Leong Liew, "China's Engagement with Neo-liberalism: Path Dependencies, Geography and Party Self-Reinvention", *The Journal of Developmental Studies*, vol. 41, No2, (Feb 2005), 331.



its constitutional roles highly questionable. Abuse of power is still rampant, particularly in lower levels of government, due to the lack of division of power and the lack of constitutional prosecutions. The court proceedings are often interfered with by the party in sensitive cases and the constitution itself lacks authority due to the missing of a constitutional court. In sum, many of the articles in the 1982 Constitution remain unfulfilled 30 years later.

Nevertheless, the 1982 constitution, together with its four revisions, can be considered the best among all the PRC constitutions. It is a comprehensive and modern document showing that good constitutional scholarship has returned to China. For one thing it no longer mentions any specific leaders or specific party at least in the main text of the constitution, making the constitution more like an impartial document.<sup>336</sup> The four revisions of the 1982 constitution showed a continuous convergence between what the state was willing to respond to and what people wanted. They also showed signs of convergence between Chinese constitutional thinking and the Western law based constitution theory. Some Chinese scholars argued that after China's WTO entry in 2001 and the 2004 revision of the 1982 constitution, the Chinese resistance to the global economic system and the Western law-centered constitutional theory is over, at least from a conceptual debate perspective.<sup>337</sup> The gap between what the constitution promises and

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<sup>336</sup> For example, the 1978 constitution, article 2: The Communist Party of China is the core of leadership of the whole Chinese people; article 14: the state upholds the leading position of Marxism-Leninism-Mao Tsetung Thought in all spheres of ideology and culture; article 56: Citizens must support the leadership of the Communist Party of China.

<sup>337</sup> Fan Yafeng, "Political Rights Defence", [<http://www.aisixiang.com/data/8111-7.html>], 2005 03 05, and Yuan Weishi, "What Value Systems Should China Choose", [<http://blog.ifeng.com/article/9797395-2.html>], 2011 01 24.

the reality is due to the resistance to implementation, not due to a divergence in constitutional thinking.

In sum, the 1982 constitution and its four revisions represents a new attitude of the state. It is the first CCP constitution attempting to respond to public grievances. However, the party can only be seen as responsive, as there is no clear mechanism of accountability yet.<sup>338</sup> The state is still the sole constitution framer as there was no public participation and even academic discussions on the subject were discouraged at times.<sup>339</sup> Nevertheless, there is a broad agreement within the leadership and the public at large that the urgent tasks ahead are to solve the corruption, nepotism, and inefficiency problems due to incomplete market reforms.<sup>340</sup> Among the rising middle class, demands for rights, democracy and constitutionalism have also returned. Unlike the Mao period, the current state is less omnipotent but still the dominant force in a single party system. The reform period state has also far more understanding of society and the wider world, due to its deepening involvement in the world. Despite the one sided nature of Deng's reform, it is highly successful in solving people's livelihood problem. This can be seen as a return to Sun Yat-sen's Principle of People's Livelihood 民生主義 or even a return to the ancient minben sixiang 民本思想, i.e. the people as foundation ideal. Along this line, the current Chinese state remains at the "for the people" stage. It is no surprise then that its constitution framing also remains to be not "by the people".

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<sup>338</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 381

<sup>339</sup> Chen Jianfu, "The Revision of the Constitution in the PRC, a great leap forward or a symbolic gesture?", *China Perspectives*, (May-June, 2004), paragraphs 4, 5.

<sup>340</sup> June Teufel Dreyer, 116 and 119.

## **Lessons Learned from Deng's Reform and Open-up Period**

What is new in attitude in the 1982 constitution is that it is the first CCP constitution that attempts to respond to people's needs. The new attempt to respond to society can also be understood as the result of a hard learning from China's suffering in the socialist transformation, the Great Leap Forward, the Cultural Revolution and many other political mass campaigns. In the reform period, class struggle had no place in Deng's program. Political mass campaigns fell to disuse. The lesson learned here is that political mass campaign is not the normal way to govern in peaceful times. What is needed is institution/constitution building and the rule of law. These are the rightful source of a regime's legitimacy.

Deng's reform is limited to the economic front only. But Deng had wanted reform in both the economic and political fronts. He had stressed the necessity to back up the economic reform with political reform, but to no avail. The lesson learned here is that constitution changes as a gesture of responsiveness to the people is not enough. Constitutionalism must be supported by statutes and political reforms.

The four revisions of the 1982 constitution showed a continuous convergence towards what people wanted. They also showed signs of convergence between Chinese constitutional thinking and the Western law based constitution theory. The lesson learned here is that the origin of a good political idea does not matter. The important thing is whether China truly needs it, not whether it is a Western idea or not.

## Chapter IV

### Contemporary Social Responses and the State's Plan Going Forward

With the analyses of all the modern Chinese constitutions behind us, a question remains. What does this account tell us about China's need for further development going forward? Clearly more reform is needed in both the social and the political fronts. To get a glimpse of the coming interaction between state and society, we need to widen our understanding of the contemporary social responses, the current debate on constitutionalism and the government's deep reform programs going forward.

#### Popular Activism

Colossal state programs, such as the socialist transformation, the Great Leap Forward, and the Great Proletariat Cultural Revolution, raise a question of whether the Chinese people were too docile to allow such events to take place. But historically the Chinese peasants were known to be prone to banditry and revolt.<sup>341</sup> Banditry was known to exist till the first few years of the CCP regime. Facing modern weaponry and the Leninist organizational superiority, serious revolts are no longer possible. The general poverty of the Chinese population in modern times has no doubt sapped the robustness of the people. After the socialist transformation, when everyone depended on the state for a living, open revolt became near impossible.

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<sup>341</sup> Barrington Moore, Jr., *Social Origins of Dictatorship and Democracy, Lord and Peasant in the making of the Modern World*, (Beacon Press, 1966), 199 and 208.

Yet, there were still brave souls speaking up. We have seen, as early as the mid 1950s, intellectuals' pointed critiques of the regime had triggered Mao's Anti Rightist purge. During the purge, to the CCP's surprise, it found not a few among its star quality cadres, i.e. those in the party schools waiting for promotions, held very critical views of the regime.<sup>342</sup> In the peasants' resistance to the commune system, the party also found provincial leaders supporting the peasants. The famous cases were Wan Li who later became president of the NPC and Zhao Ziyang who later became premier of the PRC. The Guangdong provincial party secretary, Xi Zhongxun, the father of the current president Xi Jinping, not only acted as the patron saint for the province's bold moves in the open-up to the world, he had also secretly protected dissidents in jail. Also from within the system, the high court had attempted to establish a constitutional interpretation precedence, but was disallowed by the party.<sup>343</sup> At the lower courts where the party scrutiny is light, judges were known to have invoked the spirit of the constitution in their rulings.<sup>344</sup> In 2003, a group of legal scholars petitioned the NPC and was able to force the government to discontinue its extra legal administrative detention practice.<sup>345</sup>

Dissidents were known to exist during the Cultural Revolution years, posting big character posters in public places denouncing the system. The famous cases were Yang Xiaokai's 1968 poster: "Whiter China?" and Li Yizhe's 1974 poster: "Concerning Socialist Democracy and the Rule of Law." This trend continued into the Deng era in the

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<sup>342</sup> Du Guang, "Cries for Democracy within the Party in the 1950s," [<http://www.canyu.org/n86388c6.aspx>], *Canyu Magazine* 參與雜誌, March 26, 2014.

<sup>343</sup> Robert J. Morris, "China's Marbury: Qi Yuling v. Chen Xiaoqi-The Once and Future Trial of Both Education & Constitutionalization," [[http://tsinghuachinalawreview.org/articles/PDF/TCLR\\_0202\\_Morris.pdf](http://tsinghuachinalawreview.org/articles/PDF/TCLR_0202_Morris.pdf)], 2012 04 19.

<sup>344</sup> Stephanie Balme and Michael W. Dowdle, eds. *Building Constitutionalism in China* (Palgrave MacMillan, 2009), 179-197.

<sup>345</sup> Stephanie Balme and Michael W. Dowdle, eds., 221-242.

form of the Democracy Wall in Beijing and later into every Tiananmen protests. The famous dissidents and their magazines in the Deng era include Wei Jingsheng's Explorations; Wang Juntao's Beijing Spring, Ren Wandong's China Human Rights, and Huang Xiang's Enlightenment.<sup>346</sup> Wei wanted Deng to add to his four modernizations a fifth modernization, namely democratization. Wei was sentenced to 15 years in prison for his writings on the fifth modernization. Likewise, Nobel Peace prize winner Liu Xiaobo went to jail for his "08 Charter" petition for a democratic constitution which had collected over ten thousand signatures from Chinese elites in 2008. In the first decade of the 21st Century, a nation wide Rights Defence Movement arose with lawyers involved in helping the rights defenders. Rights defence protests of all forms began to appear in large numbers and rising: 60,000 in 2003; 74,000 in 2004; 87,000 in 2005 and after 2005 the state refused to release these figures.<sup>347</sup> However, Francis Fukuyama found the figure of 180,000 protests in the year 2010 from Christian Göbel and Lynette Ong's book: *Social Unrest in China*.<sup>348</sup>

From a careful read of the dissident writings, one can distil out of them the common demands of the public: anti-corruption, anti-privileges, the need of justice via a functioning and independent judiciary, rights protection and democratic participations. The CCP can not deny any of these demands as legitimate. It tries to echo these political demands in semantics but stalling for their implementation. However, as we have seen, at least in the economic front, the CCP in the reform era tries to respond to the public needs.

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<sup>346</sup> Andrew J. Nathan, *Chinese Democracy*, (University of California Press, 1985), 3-30.

<sup>347</sup> Feng Chongyi, "The Rights Defence Movement, Rights Defence Lawyers and Prospects for Constitutional Democracy in China", *Cosmopolitan Civil Societies Journal*, Vol.1, No.3, (2009), [<http://epress.lib.uts.edu.au/journals/index.php/mcs/article/viewFile/1076/1364>], 151.

<sup>348</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 381, 587

The question is what will be the regime's coming moves in response to citizen's political demands. In short, it is erroneous to see the Chinese public as docile. With the rise of the middle class, the voice of the people will become stronger still. Back in 1981, an important resolution was reached within the CCP on the major blunders the party had caused since 1949. The resolution focused particularly on the Great Leap Forward and the Cultural Revolution and concluded such events could not have happened had China's institution building on law and constitution been completed. It further concluded that the task of political reform going forward must include institution building in law and constitution so that they become highly respected and inviolable and thus better protect people's rights.<sup>349</sup> The CCP's belated understanding of the need of rule of law and institution/constitution building is not only the result of a hard learning but also a sign of convergence between the Chinese thinking and the Western law based constitutional theory.

## **The Debate on Constitutionalism**

On November 29 2012, two weeks after his appointment to the posts of the party general secretary and the military commander-in-chief, Xi Jinping together with his politburo standing committee colleagues, announced to the nation: "The greatest Chinese dream is the great revival of the Chinese nation." In response, the Southern Weekend Magazine, a liberal bastion, issued a New Year editorial on January 6 2013, titled: "the Chinese

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<sup>349</sup> Chinese Communism Subject Archive, "Resolution on certain questions in the history of our party since the founding of the People's Republic of China", 中共中央通过: "关于建国以来党的若干历史问题的决议", (*Adopted by the Sixth Plenary Session of the Eleventh Central Committee of the Communist Party of China on June 27, 1981*), [<https://www.marxists.org/subject/china/documents/cpc/history/01.htm>].

Dream, the Dream of Constitutionalism." The local provincial party organ acted swiftly and had the magazine take down the editorial and replace it with another one. Thus began a year long, nationwide debate on China's need of constitutionalism.

On the opposing side were conservatives who attacked constitutionalism as a subversive device for outright Westernization and for overthrowing the Chinese communist system by peaceful means.<sup>350</sup> For unknown reasons, not many of the conservative authors used their real names and at times their arguments appeared belaboured and convoluted.

Indeed, to defend the inherent right to monopolize power by one specific party proved to be just as impossible as the Manchus wanting to have their rule turned perpetual.

Nevertheless, the conservative papers were widely distributed by party newspapers and magazines. On the defending side were renowned economists and academics from major universities and also from government funded research institutes. Their papers were not carried by any party outlet. However, the government did not ban them either and allowed both sides of the argument to be aired fully on the internet. It is on the internet the pro-constitutionalism side got a wide following from the public. Also strange is the fact that the authoritative People's Daily and the Red Flag Magazine did not carry the conservative papers either.<sup>351</sup> This could be a sign that the top leadership welcomed the debate and could have treated it as a source of valuable input from the public.

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<sup>350</sup> Ma Zhongcheng, "Constitutionalism is Fundamentally a Weapon of Media War," [[http://paper.people.com.cn/rmrhwb/html/2013-08/05/content\\_1278294.htm](http://paper.people.com.cn/rmrhwb/html/2013-08/05/content_1278294.htm)], August 5, 2013.

<sup>351</sup> Qian Gang, "The Fate of Constitutionalism is still undetermined", [[http://www.21ccom.net/articles/zgyj/xzmj/article\\_2013090591317.html](http://www.21ccom.net/articles/zgyj/xzmj/article_2013090591317.html)], 2013 09 05.



Depending on the method of counting, there were three or four waves of back and forth debates throughout 2013 between the conservatives and the pro-constitutionalists. The attacking side backed up their Western subversion argument by citing the fall of the Soviet Union and the Eastern European communist countries as evidence of Western scheming. Their solution for the constitution can be exemplified by the writings of Professor Ke Huaqing of China University of Political Science and Law. Professor Ke named his scheme as: "Party Directed Constitutionalism 黨治立憲."<sup>352</sup> In this scheme, he proposes to first consecrate the CCP in a constitution giver position, which is not subjectable to any challenge. For the leaders of government, they must be elected within the party first, before facing the NPC vote. This means the NPC can only vote for a slate offered by a single party. Professor Ke did not explain how he can justify the consecrating of one specific party to be the sole framer of constitution, but noted that this is the current reality in China. The conservatives describe their party directed constitutionalism as "constitutionalism with a Chinese characteristics" or as "political constitutionalism." Under their scheme, the judicial, the government and the People's Congress cannot block the party's initiatives in constitutional interpretation and amendment, in policy and legislative initiatives, and in personnel nominations for key state institutions.<sup>353</sup>

An even stronger argument for the conservative side comes from Professor Qiang Shigong, a law professor of Beijing University. Professor Qiang argues that the Chinese

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<sup>352</sup> Ke Huaqing, "To Make known the Concept of Party Directed Constitutionalism", [<http://blog.dwnews.com/post-840785.html>], 2015-08-21.

<sup>353</sup> Chen Yunliang, Jiang Qinghua, "On the Leadership of the CCP", [<http://www.aisixiang.com/data/90517.html>], 2015 07 17.

constitution must be understood in the context of a single party constitutional state.<sup>354</sup>

The single party in such a state is the sole provider of political values, and the state is the executing tool for the values given. Thus, the Chinese constitution is merely to spell out the rules for how the state should behave, not the party. The party as the source of political values is outside, i.e. above the state constitution, although individual party member needs to operate under the state constitution. Professor Qiang quoted American legal scholar Larry Catá Backer to stress the point that the party can still be seen as lawful as it operates according to its own bylaws in the party constitution.<sup>355</sup> Therefore to understand the totality of the Chinese constitution, one must read both the state constitution and the party constitution.<sup>356</sup> In another article, Professor Backer explains: the CCP alone forms the entire political polity and the party members are political citizens.<sup>357</sup> This makes the 88 million CCP members, which is less than 7% of the total Chinese population, the only political citizens. This also means the rest of the citizens, i.e. 93% of the population, are merely social and economic citizens. This division of citizens into political and non-political citizens reminds us of the old Chinese elites vs. the masses situation. The problem of such an argument is that it violates the current constitution's article on equality of the citizens in rights. It also ignores the current rise of the middle class. In today's China, the population has a literacy rate of over 95% and the middle class is increasingly professionalized. It is highly doubtful that its members would accept

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<sup>354</sup> Qiang Shigong, "The Real Problem with Constitutionalism with Chinese Characteristics", [<http://www.aisixiang.com/data/73808.html>], 2014 04 10.

<sup>355</sup> The CCP makes this claim of being lawful in contradistinction with its former self which ruled by political campaigns during the Mao era.

<sup>356</sup> Larry Catá Backer, "Party, People, Government and State: on Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System ", *Boston University International Journal*, (May 7, 2012, Vol. 30), 387 and 397-398,

<sup>357</sup> Larry Catá Backer, "The Party as Polity, The Communist Party, and the Chinese Constitutional State: A Theory of State-Party Constitutionalism", *Journal of Chinese and Comparative Law*, (Vol. 16), 101-168.

the social and economic citizen status only and thus enjoy no political rights. The ongoing Rights Defence Movement in China is a good indication that such an argument is ungrounded. The party alone constituting the entire political polity is patently indefensible.

Professor Backer likens the Chinese constitution to the Iranian constitution. In both cases, there is a supreme body that is outside and above the constitution. These supreme bodies have the sole right to interpret and amend the state constitutions.<sup>358</sup> The Chinese supreme body is the CCP whereas in the Iranian case it is the religious Guardian Counsel. However, as the Iranian Guardian Counsel is backed by a transcendental religion with a permanent set of tenets and it enjoys a following of the majority of the Iranians and as such is much harder to challenge. The Chinese party has no such transcendental backing or constancy in its tenets. In fact, the Chinese party proved highly fallible. As such it can be questioned why a proven fallible entity should have the sole right to decree political values and the constitution for the nation.

The defending side points out that constitutionalism, understood as the need to check state power, is what China needs and as such its origin does not matter. In other words, the need to check power is not a specific Western or capitalist requirement, a one party system needs it even more, judging from its past abuses.<sup>359</sup> This is in addition to the

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<sup>358</sup> According to the constitutional text, the Chinese People's Congress is the sovereign body and has the power to interpret and amend the constitution. But it is only in semantics.

<sup>359</sup> Zhang Qianfan, "What is Constitutionalism with Chinese Characteristic?" [<http://opinion.dwnews.com/news/2013-11-04/59343855.html>], 2013 11 04.

tendency in East Asia of having strong states and weak rule of law institutions.<sup>360</sup> Further, the defenders take the view that for reform to go forward it needs to be put under a constitutional framework to give it a structure and a clear direction. Failing to do so may allow the reform to veer off to an unconstitutional direction. But the constitution itself must be reformed first. Thus the government's new policy platform for reform should start with a constitutional reform towards constitutionalism.<sup>361</sup>

Within the defending camp, there are those who see constitution as primarily a power checking arrangement and as such, division of power and the rule of law are essential elements. In this subgroup, democratization is seen as a separate issue not essential in constitutionalism.<sup>362</sup> But there are also those who define constitutionalism more broadly, as exemplify by Professor Li Buyun and Professor Cai Xia. Professor Li, of the Chinese Academy of Social Science, sees constitutionalism as inclusive of four elements: democracy, rule of law, human rights and constitutional authority.<sup>363</sup> Professor Cai Xia teaches at the Central Party School in Beijing. Back in 2009 she penned an article naming the party as the chief obstacle to constitutional reform. Her accusation of the party as the chief obstacle was made explicit right on the title of her paper.<sup>364</sup> Coming from a party

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<sup>360</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 395

<sup>361</sup> Shao Jian, "This is the Moment for China to Move towards Constitutionalism," [http://shaojian.blogchina.com/1511748.html], 2013 02 12.

<sup>362</sup> Qin Qianhong, Ye Haibo, "On Socialist Constitutionalism", [http://www.21ccom.net/articles/zgyj/xzmj/article\_2012032756296.html], 2012 03 27.

<sup>363</sup> Anonymous, "Li Buyun on Constitutionalism Debate", [http://china.dwnews.com/news/2014-10-23/59614920.html], *Duo Wei News*, 2014 10 23.

<sup>364</sup> Cai Xia, "The Pivotal as Well as the Obstructive Roles of the Party in the Push for a Democratic Constitutionalism", [http://www.21ccom.net/articles/zgyj/xzmj/article\_2013062085977\_7.html], 2013 06 20, Cai Xia, "The Leadership of the Party and to Rule According to Law", [http://www.21ccom.net/articles/china/ggzl/20150107118665\_all.html], 2015 01 07, and Du Qiang, "Cai Xia, The Party School Professor in the Open," [http://www.21ccom.net/articles/rwcq/article\_2013112695962.html], *Gongshi Net 共識網*, 2013 11 26.

school professor, this is indeed bold and shocking. Yet the party continues to tolerate her outspoken way in the debate. Professor Cai takes the view that constitutional rights of the people cannot be guaranteed if there is no democratic election or no check on power. She traces the revolutionary lineage of the CCP, through Lenin and Marx, to the French Revolution and ultimately to Rousseau's concept of the general will. Cai's lineage tracing explains the CCP's habit of claiming to represent the general will and of class struggle and democratic centralism to assert the will thus claimed. Since coming to power, the CCP continuously concentrates power into its own hands to the point where it is no longer a vanguard party but a true dictator over the people. With the CCP's roles thus changed, Professor Cai concluded, it could not but be the main obstacle to constitutional reform. It is therefore the responsibility of the CCP to awaken itself to the meaning of its experience in the past decades and lead the way in constitutional reform. Her writings on constitutionalism are among the best in this genre.

The year long debate came to a halt before the third plenum of the 18th party congress in November, 2013. Both sides of the debate were hoping to influence the decision makers of the 18th party congress. There are two arguments that are particularly influential to the third plenum.

The first one is from the conservative side. This argument is not a direct attack on constitutionalism, rather it tries to explain why many of the newly democratized developing countries failed.<sup>365</sup> It argues that for developing countries,

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<sup>365</sup> Han Zhu, "Why Importing Western Democracy Often Means Running into Quagmire",

democracy as a political system cannot help them solve many of their social infrastructural problems, e.g. the lack of a functioning market and the legal supports it needs. It claims Western democracies work well within a stable and slowly evolving social infrastructure. As such, the West has no real experience to teach the developing world on how to do simultaneous political and social changes. Before the social sphere can shoulder the heavy load of day-to-day social interactions, the state must step in and strongly direct the build-up of social infrastructures. And before these are achieved, the state cannot shed its vanguard and directive role. Democracy is thus not the right choice for a state going through its developmental stages. This argument is similar to Huntington's advice to developing countries that they should build a strong party organization first, because political development should come before rapid modernization.<sup>366</sup> However, this argument argues only against the premature launch of democracy. It does not address the need of a law based constitutionalism.

The second influential argument is from the reform side. Professor Hu Xingdou of the Beijing Institute of Technology put forth a Constitutional Economics argument. Professor Hu builds from the public choice theory of American economist James McGill Buchanan, Jr.<sup>367</sup> Professor Hu's theory argues that the best condition for economic growth is when both the government and the market observe their respective boundaries. Due to the unrealized Chinese constitution, the sustainability of China's economic growth is highly doubted. China's previous fast growth is due to its starting from a very low base. Now

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[[http://www.guancha.cn/han-zhu/2014\\_04\\_04\\_219471\\_s.shtml](http://www.guancha.cn/han-zhu/2014_04_04_219471_s.shtml)].

<sup>366</sup> Huntington, "Political Development and Political Decay", *World Politics*, 17, 3, (1965), 386, 425.

<sup>367</sup> Hu Xingdou, "Constitutional Economics and the Chinese Model", [[http://blog.sina.com.cn/s/blog\\_49045c5b0101f2h9.html](http://blog.sina.com.cn/s/blog_49045c5b0101f2h9.html)], 2013 09 08.

that China is the world's second largest economy, continual growth at a high rate is no longer a sure thing. Should China continues to want to grow its economy, it must speed up its building of a stable constitutional environment. Constitutional Economics argues that only when human rights and market freedom are both guaranteed, then we can think of sustainable economic growth. Constitutionalism is considered a must, by Professor Hu, for taming the political Leviathan. Hence, the Chinese constitution reform going forward must delineate the boundary between the state and the market and let the transparent and rule based market to have a decisive role in resource allocation.

The top leadership appears to be responding to some of the suggestions in these two opposing arguments. The Third Plenum of the 18th Party Congress issued its communiqué on November 12, 2013. It announced there will be deep reforms according to the requirements of the 1982 constitution; China will be a rule by law country; "power will be put into the cage of the constitution", but the one party dictatorship remains.

## **The Chinese Dream**

Since coming to power on November 15, 2012, Xi Jinping has pursued an unrelenting anti-corruption program. At the same time he tries to rally the country for a Chinese Dream and has it adopted by the party as its goal for the next few decades.<sup>368</sup>

The Dream is to make China, by 2049, a strong and wealthy country with a thriving and happy people, but still under the CCP one party rule. According to Xi, this great revival

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<sup>368</sup> Du Zhifu, "The Century Old Chinese Dream, from Yan Fu to Xi Jinping," [http://www.duping.net/XHC/show.php?bbs=11&post=1265286], *Dulipinglun Net 獨立評論網* 2013 06 04.

of the Chinese nation is first to revive the Chinese culture. The phrase Xi used was: "to bring order out of chaos" of the traditional culture.<sup>369</sup> However, from Xi's writing, it is not apparent why a revived Chinese culture necessarily form the right base for the future China.<sup>370</sup> If the Chinese culture is to support a modern China, it cannot simply be a revival via "order out of chaos." It is more likely for the traditional culture to form the basis for an evolving culture from which a modern China can be built.

Nevertheless, Xi's building of the Chinese Dream via a reordered traditional culture signals a clear break with the anti-traditionalist culture history of the CCP. Since its inception in the early 1920s, the CCP was adamant that the Chinese culture is a hindrance to progress and it must go. The CCP's anti Chinese culture stance, peaking during Mao's Cultural Revolution, resulted in a few generations of Chinese knowing little of their cultural heritage and a cultural chasm between the old and young was palpable. Under Deng and Jiang in the mid 1990s, there had been quiet efforts to rehabilitate some Confucian values as a defence for rejecting Western values on human rights and democracy.<sup>371</sup> In this regard, the CCP has invoked the nomenclature of Asian Values to defend its approach giving priority to socio-economic rights over civil political rights.<sup>372</sup> However, as long as Marxism-Leninism is on the book, Xi needs to explain how his

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<sup>369</sup> "to bring order out of chaos" is a rendering of the Chinese phrase: 拨乱反正 in:

Wang Xin, "The Revival of the Nation Must be Based on the Return of Its Cultural Order", [<http://china.dwnnews.com/news/2014-10-01/59611399.html>].

<sup>370</sup> Chris Buckley, "Leader Taps into Chinese Classics in Seeking to Cement Power" [[http://www.nytimes.com/2014/10/12/world/leader-taps-into-chinese-classics-in-seeking-to-cement-power.html?\\_r=0](http://www.nytimes.com/2014/10/12/world/leader-taps-into-chinese-classics-in-seeking-to-cement-power.html?_r=0)], and Didi Kirsten Tatlow, "Xi Jinping on Exceptionalism With Chinese Characteristics", [<http://sinosphere.blogs.nytimes.com/2014/10/14/xi-jinping-on-exceptionalism-with-chinese-characteristics/>].

<sup>371</sup> Wm. Theodore de Bary, *Asian Values and Human Rights, a Confucian Communitarian Perspective*, (Harvard University Press, 1998), 5.

<sup>372</sup> M. Ulric Killion, "China's Amended Constitution: Quest for Liberty and Independent Judicial Review", *Washington University Global Studies Law Review*, (vol. 4:43, 2005): 66.



reordered Chinese culture is not an antithesis to Marxism-Leninism. Or, this could be Xi's way to point out, however obliquely, the fact that Marxism-Leninism is no longer practiced in China, ever since Jiang Zeming's acceptance of capitalists into party membership and Jiang's Three Represents Policy. If so, Xi's revival of the Chinese culture is readily comprehensible as the replacement values for the vanquished Marxism-Leninism. The old Chinese culture thus fill the value vacuum and at the same time it revives the Chinese desire to have their own cultural identity and pride. This is not to say Xi is not sincere in his belief in the old Chinese values. The fact that many of the Chinese values are secular or even modern in character makes Xi's argument credible. From a number of his writings one can discern a broadly based classical understanding.<sup>373</sup> Yet, as the party has not abandoned the Marxism-Leninism stance openly, Xi may have a difficult task to explain how the erstwhile "feudal" Chinese values can work under the Marxist principle of class struggle or vice versa.

In the Chinese Dream, Xi may have touched a deeply felt need of cultural revival and as such he could gain wide support for his program. Marxism-Leninism does appear short in values when compared to the rich Chinese value tradition. There are also views that Confucianism is not incompatible with Western notions of human rights and it may even form the base for accepting Western constitutionalism, rule of law and independent

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<sup>373</sup> Anonymous, "Xi Jinping on joining Rule by Law and Rule by Rites, with Ethics as Core and Penal Codes as Secondary," [<http://china.dwnews.com/news/2014-10-13/59613074.html>], *Duo Wei News*; Anonymous, "A list of President Xi's Classic Quotes," [<http://cpc.people.com.cn/n/2014/0529/c164113-25080175.html>], *People's Daily*, 2014 05 29, and Anonymous, "The Source of Xi Jinping's Classical Quotes on Governance," [[http://news.163.com/14/1015/07/A8J5IBER00014JB6\\_all.html#p1](http://news.163.com/14/1015/07/A8J5IBER00014JB6_all.html#p1)], *People's Net*, 2014 10 15.

judicial review.<sup>374</sup> However, Xi can only point out the cultural direction of revival. There is no further description about how this cultural revival should unfold. On the other hand, should Xi's Chinese Dream comes true and resulted in a revived Chinese culture, it may make the communist period seem a short and unnecessary aberration in the long history of China. As such, it may bring the party's legitimacy question into the open again.

## **The Comprehensive Deep Reform**

The party's long term goal for the Chinese Dream is to achieve by 2049 the four comprehensives: 1) Comprehensively build a moderately prosperous (小康)<sup>375</sup> society; 2) Comprehensively deepen reform; 3) Comprehensively govern the nation according to law; and 4) comprehensively strictly govern the Party.<sup>376</sup> On November 12, 2013, the Third Plenum of the 18th CCP Congress announced the party's policy platform going forward in a communiqué.<sup>377</sup> This policy platform is largely about the second comprehensive, namely the "Comprehensively deepen reform". As Xi's Chinese Dream depends on the success of the deep reform, he felt the need to write an additional article to further explain it. According to Xi's further explanation, the deep reform is to modernize China's government system, to put the market in a decisive role in resource allocation, to liberate

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<sup>374</sup> M. Ulric Killion, "China's Amended Constitution,...", 79, 80.

<sup>375</sup> The CCP term for moderate prosperity uses the Confucian term 小康 as expressed in the Great Harmony ideal (大同與小康) from the Book of Rites.

<sup>376</sup> Anonymous, "China's Xi Jinping unveils new 'four comprehensives' slogans," [<http://www.bbc.com/news/world-asia-china-31622571>], *BBC*, 2015 02 25.

<sup>377</sup> The Communiqué of the Third Plenum of the 18th Party Congress of the CCP, [[http://www.bbc.com/zhongwen/trad/china/2013/11/131112\\_183rdannualplenum](http://www.bbc.com/zhongwen/trad/china/2013/11/131112_183rdannualplenum)], 2013 11 12, and Chris Buckley, "Chinese Leader Gets More Sway on the Economy and Security", [<http://www.nytimes.com/2013/11/13/world/asia/chinese-leader-gets-more-sway-on-the-economy-and-security.html>].

its productive force and to achieve social justice at the same time.<sup>378</sup> Xi's deep reforms include the following:

### **Market Reform**

This is to legislate for fair and open rules for the market and to give the market a decisive role in the allocation of resources. Previously, the party's position was to allow the market only a basic role. The shift to “decisive” role was significant because it suggests that a new consensus has been reached about deepening market-driven reforms. Thus, the government's role, in relation to the market, is reduced to regulate it at a macro level. However, the state's macro regulatory role on the market was well recognized in Article 15 of the 1982 constitution. This is an indication that what is written in the constitution may not be carried out until much later when the situation on the ground makes it inevitable.

### **Unified Rural and Urban Development**

This is to better integrate urban and rural societies and to break down barriers excluding millions of rural migrants from access to schools, welfare and housing in cities. These changes may require the government to allow farmers to sub-lease their land usage more easily, to use it to raise loans and perhaps sell their leasehold rights if they decide to move permanently to towns and cities. The more fundamental issue here is the inequality between citizens caused by the household registration system which identifies peasants as

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<sup>378</sup> Xi Jinping, "An Explanation of the Key Issues in the Government's Deep Reform Plan", [[http://news.xinhuanet.com/politics/2013-11/15/c\\_118164294.htm](http://news.xinhuanet.com/politics/2013-11/15/c_118164294.htm) ], 2013 11 15, and Xi Jinping, "To Firmly Align Our Thoughts Behind the Spirit of the Third Plenum of the 18th Party Congress", [<http://cpc.people.com.cn/n/2013/1231/c64094-23993888.html>], 2013 12 31.

rural residents and thus disallow them to move freely to cities. This new development implies the abolishment of the household registration system.

### **New Roles for the Political Consultative Conference (PCC)**

Xi intends to develop the PCC into a form of consultative democracy and aims to make it the core of his political deep reform.<sup>379</sup> Traditionally, the areas for consultation with the PCC were limited to social and economic issues. Xi's new proposal is to give the PCC an added role of supervision of the administration and the legislation, similar to the censory role in KMT time. The PCC will also act as the voice of the public in future debates on reform. In addition, the PCC's consultative frequency with the government will be increased to a bi-weekly format. However, its legitimacy in carrying out these roles needs to be clarified in a constitutional amendment. As it stands now, the PCC is only mentioned in the preamble of the 1982 constitution. Also for it to be truly representative its members need to be elected by the public.

### **Reform of the Judiciary**

Xi's guiding thought on judicial reform is to refocus the judicial system on social justice. He considers the previous focus of the judicial system as an overt emphasis on order and stability due to the class struggle perspective. He wants to re-emphasize the value aspect of the judiciary and to make the rule "by" law the key element in governance.<sup>380</sup> The

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<sup>379</sup> Anonymous, "Xi Jinping's Version of Political Reform: To Give the Consultative Conference the Censory Role Over the NPC," [http://news.creaders.net/headline/newsViewer.php?nid=608754&id=1352716#sthash.pTBSDONf.dpuf], *Ming Pao*, 2014 03 06.

<sup>380</sup> Anonymous, "Xi Jinping's View on Rule of Law Can be Traced to the Philosophy of Guan Zhong (circa 720-645 BC)," *Duo Wei News*,

party's new plan is: 1) to extricate the lower courts from local government control; 2) to strictly exclude illegally collected evidences in trials; 3) to discontinue the extra-legal practice of Reform Through Labour system, namely the notorious Laogai system; 4) to include human rights protection in the portfolio of a reformed judiciary; and 5) to uphold the authority of the constitution and the law.<sup>381</sup>

All these measures, if carried out, can be seen as belated fulfillment of the 1982 constitution. Articles 123 to 135 of the 1982 constitution give detailed specifications for judicial and prosecutory independence. Articles 33 to 56 are focused on human rights provisions. The independence thus planned for the judiciary still has to answer one key question, i.e. how can the judiciary system be independent of the party cells within each court. Nevertheless, Xi's exhortation to rule according to law; to rule according to constitution; to put power in the cage of the constitution is a sign of that the CCP is converging towards the Western law based constitutional thinking.

### **Anti-corruption Leadership and Mechanism**

Xi sees endemic corruption as a serious threat to the regime's long-term survival. Thus fighting corruption becomes one of the main pillars of his domestic strategy.<sup>382</sup> Xi's seriousness on the corruption issue is evidenced by the sustained nature of his anti-corruption campaign, with hundreds of officials prosecuted, including one high official in

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[<http://news.creaders.net/headline/newsViewer.php?nid=611127&id=1357932#sthash.dDV1Gakx.dpuf>], 2014-03-19.

<sup>381</sup> Xi Jinping, "On Key Issues Related to the CCP Decision on Comprehensive Rule According to Law", [[http://news.xinhuanet.com/politics/2014-10/28/c\\_1113015372.htm](http://news.xinhuanet.com/politics/2014-10/28/c_1113015372.htm)].

<sup>382</sup> Pei Minxin, "Crony Communism in China" [[http://www.nytimes.com/2014/10/18/opinion/crony-communism-in-china.html?\\_r=0](http://www.nytimes.com/2014/10/18/opinion/crony-communism-in-china.html?_r=0)].

the standing committee of the politburo. In terms of the anti-corruption leadership and mechanism, Xi's plan is to use the party disciplinary organ to perfect a top down approach. Each level of the party is responsible for the maintenance of discipline below. This top down approach is also aided by periodic inspection tours from the central government. The points to note about this top down approach are: 1) it is a party internal system and as such the anti-corruption campaign is largely conducted outside the judiciary system. Xi thus misses an opportunity to build judiciary authority, and 2) it is very similar to dynastic China's inspection system which suffered from lost of reliability over time and necessitated layers upon layers of additional supervisory bodies.<sup>383</sup> Xi seems to recognize this possibility when he mentioned the need to restrict state power, to let the people monitor abuses from below and to fight corruption via systemic reform. However, the anti-corruption campaign so far has focused on uncovering individual cases and not on systemic prevention of corruption. Some even question Xi's anti-corruption cases on whether they avoid looking into the real big families or they are overtly focused on potential competitors in the party.<sup>384</sup>

### **New Leadership Groups**

In addition to the above reform programs, the party created two new supreme agencies: 1) The National Security Committee; and 2) The Party Leadership Group on Economic Policy to oversee the introduction of market-oriented changes. Through these two new agencies, it is hoped that Xi can circumvent the bureaucracies and overcome resistance from vested

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<sup>383</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 382

<sup>384</sup> Wang Dan, "Is Xi Jinping's Anti-corruption for Real?", [http://www.duping.net/XHC/show.php?bbs=11&post=1291283], 2014 02 01.

interests. With these two supreme agencies under him, Xi's total power is considered by some to exceed even Mao's power.<sup>385</sup>

### **The One Party Rule Continues**

However, Xi also makes clear his adherence to the one party rule, perhaps to assure the conservatives in the party, like Deng did before. This can be seen in his statement on the party's being endangered by talks on the need of Western universal values, civil society, press freedom, elite capitalism and the party's past history.<sup>386</sup> To strengthen the party cells at the base, Xi's program calls for the sending of up to 20 thousand young cadres to the country's poorest villages. They will play the leading role in these poor areas as the party's first secretaries.<sup>387</sup> This is seen by some as the party's effort to regain control from democratically elected village committees.<sup>388</sup>

In sum, the signals Xi gives out on the Chinese Dream, can be understood to mean deep reforms under the CCP dictatorship as long as the party can manage it. This is in line with a strategy first mentioned in 1988 by Wang Huning.<sup>389</sup> Wang has been the top advisor for Jiang Zemin, Hu Jintao and now for Xi too. Wang, based on his study of failed democracies, advocated the strategy of fast development under a one party dictatorship as

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<sup>385</sup> Xia Ming, "The Third Plenum Decision Subverts the 1982 Constitution," [http://www.chinainperspective.com/ArtShow.aspx?AID=23935], 2013 12 20.

<sup>386</sup> Anonymous, "Xi Jinping's Seven Prohibitions and Sixteen Rules," [http://www.bbc.com/zhongwen/trad/china/2013/05/130528\_china\_thought\_control\_youth], *BBC Chinese Net* and Anonymous, "The CCP's Internal Ninth Memorandum," [http://www.laqingdan.net/?p=2993], *The Mirror Monthly*, 2013 08 20

<sup>387</sup> Anonymous, "Twenty Thousand First Secretaries for the Poorest Villages," [http://www.mingpaocanada.com/van/htm/News/20150502/tcae1\_r.htm], *Ming Pao*, 2015-05-02.

<sup>388</sup> Li Fan, *Grassroots Democracy in China-2004*, 5.

<sup>389</sup> Anonymous, "Xi Jinping/Wang Qishan's Warning of Instability and Wang Huning's Timing for Political Reform," [http://china.dwnews.com/news/2015-10-08/59686590.html], *Duo Wei News*.

long as possible.<sup>390</sup> This also means to delay political reform as long as possible.

However, Wang points out such a system has difficulty to allow popular participation and as such may miss signals of political instability. Wang's advice is that as economic development takes off, there will be a point when demands for political reform must be attended to, to head off instability. Xi's reform appears to heed Wang's strategic advice. As such, Xi and the party must judge when political reforms become inevitable. But for the near future, Xi seems to offer a degree of liberty under the CCP's rule by law.<sup>391</sup>

## **What to Watch for and What the State Needs to do**

There are both positive and negative signs appearing after the announcement of Xi's Comprehensive Deep Reform. On the positive side are the steps the state took towards the rule by law promise. This can be seen in the latest change to the swearing in ceremony for new judges and provincial premiers. The text for their swearing in clearly stated the allegiance to the constitution, not to the party.<sup>392</sup> Although this may only be a symbolic gesture, it is nevertheless positive. On the negative side, the state continues to arrest rights defence lawyers.<sup>393</sup> These acts put seriously into question the state's sincerity in its judicial reform.

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<sup>390</sup> Wang's strategy is perhaps influenced by a similar position of Samuel Huntington in: Samuel Huntington, "Political Development and Political Decay", *World Politics*, 17, 3 (1965), 380-430.

<sup>391</sup> Wu Junfei, "The Third Plenum Decision, a Balance between Freedom and Order", [<http://www.scmpchinese.com/sc/opinion/16633/san-zhong-quan-hui-jue-ding-zi-you-yu-zhi-xu-de-gao-du-ping-heng>], 2013 11 21.

<sup>392</sup> Anonymous, "China's First, the New Premier of Fujian Province Swear Allegiance to the Constitution," [<http://news.creaders.net/china/2016/01/15/1629022.html>], *Creader.net*.  
and Anonymous, "New Judges Swear Allegiance to the Constitution for the First Time," [[http://m.thepaper.cn/newsDetail\\_forward\\_1420209](http://m.thepaper.cn/newsDetail_forward_1420209)], *China News Net*, 2016 01 13.

<sup>393</sup> Andrew Jacobs, Chris Buckley, The New York Times, "China Targeting Rights Lawyers in a Crackdown", [[http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html?\\_r=0](http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html?_r=0)], 2015 07 22.



As Xi's administration is still young, it is too early for us to render any definitive judgement about its commitment to the deep reform as he had elucidated. However, deeds not words should be our guide for the coming judgement.

From the key lessons learned, what the state needs to do going forward is also clear. They can be summarized as follows:

To further develop China towards a modern polity, the state must open up its constitutional process to the people. Obstructing political participation can only lead to apathy and eventually to instability. Specifically this requires the CCP to allow the National People's Congress to become truly representing the people and to allow it to exercise its constitutional power in legislation and in constitutional interpretation.

For China to actively participate and compete in the world, it needs to liberalize its population. Ideologically constricting its people can only harm China's vitality. A vanguard party sticking to a specific view of the political future can only be a partial view. Specifically this requires the CCP to shed its vanguard pretence.

The dictatorial one party rule proved to be the ultimate source of corruption and abuse of power. The corruption and abuse of power problem is simply not solvable under a single party polity. Going forward, Xi's anti-corruption campaign must move towards a systemic solution. Specifically it requires the constitution to incorporate a division of

power, a separation of state and party, and the state to allow the media and the public to get involved in the anti-corruption campaign.

The current Chinese constitution is a reasonable document in semantics. It can be considered as a good base to build up the judiciary and the rule of law.<sup>394</sup> The state's urgent task is to operationalize it. To make the constitution truly functional, the state must bring forth supporting statutes and institutional reforms.

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<sup>394</sup> Francis Fukuyama, *Political Order and Political Decay*, (Farrar, Straus and Giroux, 2014), 385

## **Conclusion**

In this concluding chapter, the original research question is to be revisited first. The key lessons learned from this study then follows. The lessons learned are then summarised to show how they support the research argument and what the state needs do in its next phase of development. A concluding reflection section forms the last part of this chapter.

### **The Original Research Question Revisited**

China's quest for a modern constitutional polity in the past one hundred years is still an unfinished business. It is this research's argument that for China to become a modern polity, it needs further social and political development, so that the Chinese people will have a stake in its polity and its constitutional framing. The research question of this thesis asks what lessons can we learn to support this argument from the analyses of the divergence/convergence between constitutional intents and the social and political needs of the past one hundred years. Structural, cultural, and institutional perspectives should be considered in these analyses. It should also be the interest of this research to find what the state needs do in its next phase of development.

### **Key Lessons Learned from the Qing Period**

The social condition China faced in the 1800s was over population and scarcity. The traditional Chinese response to scarcity was frugality, i.e. to accept a subsistence level of existence, to tolerate under development and a lowering of government vitality. The lesson learned here is that the traditional response to scarcity can only work for a very

large agrarian empire, when it is unthreatened by surrounding countries. But the new reality China faced was a world of competing nation states. Underdevelopment in state institutions and social participatory capacity in the newly industrialised world has serious consequences.

The first generation reformers in the 1860s argued all that was needed was to import Western technologies and military equipment. But by the late 19th Century, Chinese elites came to understand that more fundamental changes were needed. The old institutional design had to be substantially modified or even changed out completely in the modern era.

As a result the 1300 years old imperial examination institution was terminated, due to the fact that its curriculum had no modern content. But the termination of the old examination institution also ended the upward mobility path of the classically trained elites and their allegiance to the state, leading to state instability. The lesson learned here is that functional/institutional changes without regard to political participation can lead to state collapse.

For the Qing failure to modernize, we can safely say that when an ossified autocratic dynastic system came face to face with modern industrial nation states, the condition was sufficient to cause a total collapse. The lesson learned here is that the root problem was the dynastic form of polity, not Confucianism. On the contrary, the mid 20th Century rise of the Asian countries are seen by many as rooted in Confucian values. The dynastic

problem is foundational as it causes an apathetic population and at the same time the vitality of the ruling house can not be sustained. These are all fatal problems in the modern industrialised world.

The Confucian' political ideal, being fixed in antiquity, first in the sage king era for universal harmony, then settled for the feudal local harmony, can be seen as a sign of poverty of ideas. The lesson learned here is that the source of this poverty could very well be the fact that China's interaction with the world's other major civilizations was infrequent enough before the 19<sup>th</sup> Century. Not actively participating and competing in the world can be argued to be the ultimate cause of social, political and cultural decay. This could also be the biggest lesson for China.

### **Key Lessons Learned from the War Torn Period**

The public anger during this period explains part of the shakiness of the regimes and their need to be seen as a legitimate government by having a constitution. But these constitutions can only be paper constitutions as the social condition for them to function did not exist, due to the absence of a middle class. The lesson learned here is that for a functioning constitution to happen, it requires social forces putting demands on the state and the state must also be a complete state, capable of enforcing its laws and constitution. China's social forces were too weak and too stricken in poverty in this period. China needs to rebuild its middle class after all the wars ceased.

Andrew Nathan observed that all Chinese constitutions assumed a harmony of interests between state and citizen. The millennium old political ideal of the Great harmony is the source of this tendency. But more immediately it is due to the fact that all Chinese constitutional attempts are orchestrated by the state, with little participation by the public. The lesson learned here is that one can hardly expect constitutionalism coming out of a state directed constitutional framing. As Liang Qichao had pointed out back in 1910, a constitution framing without the participation of the people can not amount to much.

The one party dictatorship type of constitution, started by the KMT in the 1930s, continues to be used by the new CCP regime since 1949. The lesson learned here is that the one party dictatorship type of constitution has a strong exclusivist nature, blocking any attempt for a broadly based political participation. This type of constitution can only harm China's move towards a modern constitutional polity.

### **Key Lessons Learned from the Mao Period**

Mao and the CCP leadership appeared truly believing in the classless and propertyless utopia. They were daring enough and ruthless enough to pursue wholesale social restructuring to the end. However, when all property ownerships were removed, they found there was something in their way, namely each individual's basic instinct for survival and for self interest. Undaunted, Mao called for continual revolutions to overcome men's capitalistic instinct. It is unfortunate that Mao's reasoning did not go one step further to realize that even continual revolutions can not erase this self interest nature of men. The lesson learned here is that the particular will of each person is not purgeable

to make way for the will of the state. In addition, society as a whole is not a mechanical object with so many parts to be changed out or re-engineered at will. Ideology driven wholesale social restructuring is most likely a disaster. This is because ideological understandings of society tend to be partial. The futility of ideologically driven social restructuring is evidenced by the necessity of Deng's great reversal of Mao's socialist transformation.

After the elimination of all private business in society, the CCP regime became the sole employer of everyone and for every new generation reaching employment age. The CCP came to realize that social restructuring by fiat can produce unbearable loads. The lesson learned here is that totalism also means total responsibility for every problem in society.

After so much suffering had taken place during the Great Leap Forward and the Cultural Revolution, the 1975 constitution widened CCP's dictatorship, and had itself positioned above the NPC and the constitution. This could very well be a sign of insecurity among the leadership. The lesson learned here is that dictatorship begets more dictatorship in a vicious circle and especially when it is failing. The dictating party's tendency is to see all its problem in terms of lack of power, not in terms of the need of power contending with power in the open. What hampered the Mao state was its limited political knowledge and world view.

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## **Key Lessons Learned from Deng's Reform and Open-up Period**

What is new in attitude in the 1982 constitutions is that it is the first CCP constitution that attempts to respond to people's needs. The new attempt to respond to society can also be understood as the result of a hard learning from China's suffering in the socialist transformation, the Great Leap Forward, the Cultural Revolution and many other political mass campaigns. In the reform period, class struggle had no place in Deng's program. Political mass campaigns fell to disuse. The lesson learned here is that political mass campaign is not the normal way to govern in peaceful times. What is needed is institution/constitution building and the rule of law. These are the rightful source of a regime's legitimacy.

Deng's reform is limited to the economic front only. But Deng had wanted reform in both the economic and political fronts. He had stressed the necessity to back up the economic reform with political reform, but to no avail. The lesson learned here is that constitution changes as a gesture of responsiveness to the people is not enough. Constitutionalism must be supported by statutes and political reforms.

The four revisions of the 1982 constitution showed a continuous convergence between what the state was willing to respond to and what people wanted. They also showed signs of convergence between Chinese constitutional thinking and the Western law based constitution theory. The lesson learned here is that the origin of a good political idea does not matter. The important thing is whether China truly needs it, not whether it is a Western idea or not.



## **From Lessons Learned to Government Action**

From the lessons learned, we can pinpoint the key ingredients that support the research argument as follows:

- The traditional Chinese response to scarcity caused its underdevelopment.
- Underdevelopment in modern time is not an option as it has serious consequences.
- Not actively competing in the world was the ultimate source of China's past decays.
- Functional/institutional designs harming political participation can cause instability.
- Ideology driven social restructuring can be disastrous due to its partiality.
- State directed constitutional framing can hardly be expected to produce constitutionalism.
- Constitutionalism requires social forces putting demands on the state.
- Constitutionalism must be supported by statutes and political reforms.
- The origin of a constitutional idea does not matter as long as it is truly needed in China.

Based on these lessons, it is clear what the state needs to do. The state needs to liberalize its population if China truly wants a modern constitutional polity. The low hanging fruits to be picked first are to bring forth judiciary independence and to allow the National People's Congress to carry out its constitutional roles. These can be done by operationalizing the current constitution. In addition, China's deep rooted corruption and abuse of power problem needs to be addressed at the systemic level. The current leaders' recognition of the need to put state power under the constitution is a sign of new convergence towards people's demand for rights, rule of law and opposition to corruption and abuse of power.

## Concluding Reflections

In this dissertation, we have observed how the Chinese society changed in the past one hundred years. It has gone through a dynastic collapse, followed by a war torn period under the warlords and the KMT, a social revolution and a socialist transformation under Mao and a recovery from it under Deng. In the same period China has gone through 11 constitutions under various regimes, all framed by the state. The Chinese constitution history started with a reasonable level of gentry or intelligentsia inputs but public participation dwindled to almost non-existent in the Mao era. However, the last of the 11 constitutions, i.e. Deng's 1982 constitution, represents a change in state attitude. It is the first Chinese constitution that tries to respond to social demands. This willingness to make adjustments in response to society's needs continues in the four revisions to the 1982 constitution. It also continues in Xi Jinping's deep reform program as stated in the communiqué of the third plenum of the 18th party congress.

This change in state attitude can be seen as the direct result of a hard lesson from the experience of Mao's socialist transformation. This hard lesson leads to a convergence in constitution thinking towards Western law centered constitutionalism. The one party dictatorship remains for now, but going forward it can only be the source of contradictions for the Chinese polity. However, as long as China is in the world, a virtuous circle of reform, open-up, competition, learning, shift in attitude and more reform can be expected in the long run.<sup>395</sup>

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<sup>395</sup> Gary H. Jefferson, "China's Evolving Economic Constitution", *China Economic Review*, (2002 09 30), 6.

But beyond the constitutional consideration, what can we learn from the Chinese experience? The Chinese experience in the past one hundred years can be seen as a rich vein for us to mine. Below are a few reflections on the Chinese experience. They are not meant to be exhaustive, as this dissertation can only make a start in mining this rich vein.

### **The Chinese Political Culture**

Behind the CCP communist façade, one can find political ideas which persist in the Chinese political culture. The first that comes to mind is Chinese political leaders' insistence on a unitary state. This is true in dynastic time as well as in modern time. All modern leaders, including Sun, Chiang, Mao, Deng, all the way to Xi insist on a unitary China. This is necessary to avoid incessant wars between different parts of the country as was the case during the Warring States period in China's distant past or more recently during the warlord period in the 1920s. The problem of traditional China is not due to its unitary character, but rather due to its dynastic form. The dynastic rule caused a general apathy in the people and at the same time there was no way to guaranteed a sustained vitality of the ruling family. The question for the present is whether the CCP is repeating the dynastic problem due to its insistence on monopoly of rule and at the same time its leading families are exhibiting patrimonial tendencies.

The next one that comes to mind is the Chinese meritocratic/bureaucratic tendency. Bureaucratization, in itself, is a necessity and a sign of state development. However, the Chinese states, past and present, suffer from over centralization of the bureaucracy causing under development of local governance. It also created a highly privileged

official-elite class. Elites exists in all societies, the problem is when they become overtly domineering they could be the hindrance to society's further development as was the case in China's past.

The more positive Chinese political culture can be found in the Confucian political ideal for compassionate rule (Ren 仁), for social justice (Yi 義) and for political integrity (Xin 信). The problem in traditional society was there were no institutional arrangements to prevent the opposite of these ideals to happen. The traditional way was to exhort the ruler to be benevolent, moral and just. Such exhortations in China's past proved unreliable. Fortunately, these normative political ideals are still alive in people's mind and in their daily sayings, evidenced by Xi's need to referencing them often. The question for the present is how to build institutions so that these Confucian ideals can be realised more assuredly. Constitutionalism should be part of such institution building. In addition, Confucian ethics by themselves appear to have no obvious contradiction with modernity.

In the reform period, the CCP reverses Mao's political and social policies. In the process, it carries out one traditional political ideal very well. That is the minben sixiang 民本思想 or people as the foundation ideal of ancient China. The minben sixiang has its modern versions in Sun Yat-sen's People's livelihood Principle, in Deng Xiaoping's economic reform and now in Xi Jinping's speeches, including the one he delivered to the British parliament.<sup>396</sup> In that speech, Xi specifically cited the Song of Five Brothers 五子之歌 (circa 2043 BC) in the Book of History 尚書, 夏書: "...the people is the basis of a country,

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<sup>396</sup> Anonymous, "Xi Jinpin's Speech to the British Parliament," [http://politics.people.com.cn/BIG5/n/2015/1021/c1024-27721033.html], *People's Net*, 2015 10 21.

when the basis is secured, the country is tranquil 民惟邦本，本固邦寧." However, the limitation of the ancient Minben Sixiang is in its "for the people" nature. It did not require active participation of the people. Xi's deep reform promises are also largely for the people, not by the people. As Liang Qichao had asserted back in 1902, that for China to be a healthy modern state, it needs to have an active population. As such, the modern version of Minben Sixiang needs to be the participatory kind.

### **The Chinese Elites**

In general, the wider the gap in literacy and knowledge between the elites and the masses, the more dominant the elites and the state become. However, the largely bureaucratic nature of the Chinese elites can also be the source of China's underdevelopment.<sup>397</sup> The Chinese elites tend to identify themselves with the state. This is caused by the situation that the great majority of elites are linked to the state, as was the case in dynastic times. During the warlord and the KMT period this situation remained intact, although more opportunity for employment outside of the state began to appear. Under Mao, the elites as cadres were entirely inside the state. The absorption of the elites into the state situation can explain why Chinese constitution thinking tends to take the state perspective. The elites' tendency is to defend the state's desire to concentrate power. For China to develop a full fledged constitutionalism, its elites must come to represent major social forces, wanting to limit state power. Under Deng's reform period, the Chinese elites began to diversify into various professions in society. As the middle class and the social sectors continue to expand, the balance of power between state and society will continue to tilt

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<sup>397</sup> Li Fan, ed., *Grassroots Democracy in China-2004*, (Intellectual Property Rights Publisher 2005), 8, 23.

towards society.<sup>398</sup> At the lower level of bureaucracy, there is a consensus emerging that reform and democratic development are better ways to solve social conflicts.<sup>399</sup> As this trend matures over time, the demand for constitutionalism will become more forceful. The constitutionalism issue as well as the one party problem will have to be solved in that future when the Chinese elites are further diversified and representing major social forces.

### **The Boundary of Nature and Human Nature**

China's productive force was in transition in the mid 20th Century, as the CCP regime pushed for fast industrialization. Mao's socialist transformation can be interpreted as an attempt to collectivise ahead of time in anticipation of the coming productive force changes. However, its understanding of productive force change is limited. What could come from a wider world in terms of productive force innovations and experience was not available to the CCP. More importantly, in its elimination of all private business and property ownership it crossed the boundary of human nature, resulting in disasters for Mao's socialist transformation. On the other hand, the fast GDP growth under Deng's Reform and Open-up Policy comes close to the boundary of nature. The environmental cost will have to be paid down the road for the relentless GDP pursuit today.

### **On Social Engineering**

Social engineering based on large ideological categories is akin to seeing society as made up of a number of mechanical parts. The CCP's socialist transformation, treating classes as objects to be reformed or removed, is a good example of such ideological and

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<sup>398</sup> Yang Jisheng, *Analysis of Chinese Contemporary Social Strata*, (Jiangxi College Publisher, 2011), 34, 358.

<sup>399</sup> Li Fan, ed., *Grassroots Democracy in China-2004*, 16.

mechanical thinking. The CCP's ideological perspective saw society mainly as two opposing camps: the proletariat and the capitalists, ignoring the in between social groups and the necessary institutions for society to function properly. But the elimination of the gentry, merchant, industrial and capitalist classes resulted in the proletariat not any closer to the control of the productive means. Instead, the state became the new exploitive capitalist, or more accurately the cadre-bureaucrats became the new exploitive capitalist class. Under Mao's commune system, the peasants were even alienated from their human nature by forcing them into communal living. The CCP's categorizing the Chinese society into five red (good) kinds and five black (bad) kinds is another example of such large ideological thinking that resulted in a society-wide of all against all struggle during the Cultural Revolution. This is not to say society can not change, but the change should not be guided by a crude mechanical understanding of society. Society can be better understood as an evolving and living organism. Changes to society can be carried out in evolutionary ways via interaction and competition in an open world. Deng's Open-up Policy does just that for China. It is an effective antidote to the CCP's earlier social engineering tendency.

### **The One Party Integument**

Deng's Reform and Open-up Policy has brought to China new productive forces and new productive relations. But at the same time it continues its insistence on one party rule. The party attempts to broaden its base by allowing capitalists into the party membership and by co-opting the economic and cultural elites. However, in Marxist terms, it is a matter of time when the new productive force and its productive relations will burst

asunder the one party integument that fetters. Perhaps Xi and his colleagues are following Wang Huning's advice to continue the one party rule as long as they can manage, and are prepared to yield to the demand for political change at the last minute when it becomes inevitable.

### **The Path of No Return**

Looking back, we can say, ever since the late Qing when China was thrown into the world, China was on a path of no return. China is in the world for good and there is no possible way to return to its earlier self isolated existence. Admittedly, on the path of integration into the world, China has made many costly blunders. But as it stands now, its integration into the world can only deepen as time progresses. In the process, China's learning in the world will also deepen over time. It took 15 years of hard negotiation with the US on WTO entry to give China a deep understanding of the world trading system. Premier Zhu Rongji used that learning and the WTO entry to back pressure internal resistance to yield to the world system. China is now involved in a few hundred international and regional organizations. The interactions with all these organizations will inform China of its future development in the world.

### **Not All in Vain**

Although one is justified to question whether all that suffering under the CCP regime is necessary, one must also admit there are positive changes made to the Chinese culture and society under the CCP. For one thing, it is almost impossible to think of invading China today. China's existential crisis is over, unless it is the internal kind. Its isolation



from the world in the 1950s and 1960s may have had a hidden blessing. It forced China onto a different developmental path, avoiding the usual dependency on the world system. When Deng re-invites the world back in, it is under a full sovereignty both internally and externally. Besides the impressive GDP growth, China's literacy rate today has exceeded 95%. The most impressive achievement of the CCP can be seen in its effort to liberate women. Chinese women's rights today may still be lacking compare to the situation in advanced nations. But the CCP achievement must be seen in context, i.e. from the previous oppressive condition for women in China. Using World Bank figures, the Chinese employment rate ratio between men and women has dropped to the level of 1.22 by 2013.<sup>400</sup> This figure far surpasses Japan's 1.42 and Korea's 1.44 and is very comparable to the US figure of 1.23. And schools are open to all girls since the CCP came to power.

### **Deng's Confidence about the Future**

If China continues to learn from the world and is rational about its plans and programs, utopian social projects should not be on its agenda again. This is because learning by experiencing the world is far safer than headlong ideological emulation. Deng Xiaoping was confident about the future. He believed that if China works "under a united leadership, and continues the Reform and Open-up Policy for a few decades, it would bring fundamental changes to China."<sup>401</sup> That is as long as China is in the world, time and competition will do the rest.

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<sup>400</sup> Anonymous, [<http://data.worldbank.org/indicator/SL.TLF.CACT.MA.ZS>], [<http://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS>], *World Bank Data*.

<sup>401</sup> On May 31st, 1989, just a few days before the Tiananmen Massacre, Deng had a talk with the top leadership, explaining that the leadership must be changed out completely to give the population hope for

Despite Deng's confidence, the Chinese state needs to be mindful going forward. In addition to Confucius' observation: "...rulers are like boats, the multitude like water, water can carry boats, water can overturn boats...", the modern multitude can create waves with far more energy and force. As Liang Qichao had pointed out back in 1910, a constitution framing without the participation of the people cannot amount to much.<sup>402</sup> Sun Yatsen's prophetic advice back in 1916 is appropriate for the current Chinese state to contemplate on its continual quest for of a modern constitutional polity. Sun thus advised: "The world tide (of freedom and democracy) is wide and deep, those who go along with it will prosper, those who oppose it will perish".<sup>403</sup>

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the path ahead. He added at the end that: "只要这个领导集体是团结的，坚持改革开放的，即使是平平稳稳地发展几十年，中国也会发生根本的变化"

Deng Xiaoping, "To Form a Promising Collective Leadership for Reform", [http://zg.people.com.cn/GB/33839/34943/34944/34947/2617568.html], 1989 05 31.

<sup>402</sup> Liang Qichao, *Collected Works and Essays of the Ice-Drinkers' Studio*, (Shanghai Zhonghua Book Co., 1936 ), vol. 19, 12-13 (然而立宪之动机起于政府，而不起于人民，则其结果必无可观者).

<sup>403</sup> Sun Yatsen: "世界潮流，浩浩荡荡，顺之者昌，逆之者亡."

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