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**THE DISCOURSE OF POLITICAL CONSTITUTIONALISM
IN CONTEMPORARY CHINA**

Albert H.Y. Chen

In 2013, there was a well-publicised debate in China on whether it should be permissible to advocate “constitutionalism” (*xianzheng*) in China given the nature and ideology of the “socialist” state (under the leadership of the Chinese Communist Party) in China. Some “leftist” scholars accused advocates of constitutionalism in contemporary China of attempting to substitute a Western-style liberal democracy for the existing “socialist” political system,¹ while Chinese scholars writing in defence of constitutionalism argued that constitutionalism is not antithetical to the orthodoxy and proclaimed ideals of the People’s Republic of China.² Whereas this debate was politically significant, it was largely a matter of polemics. In comparison, the discourse of “political constitutionalism” that emerged in China a few years earlier is of much greater scholarly value, and is more likely to have more impact on the development of Chinese constitutional thought in the longer term. This, then, is the subject of this article.

In the liberal constitutional democracies of the contemporary Western world, the discourse of political constitutionalism distinguishes itself from legal or judicial constitutionalism by focusing on the political foundation of and political conditions for the legal constitution, and those parts of the

constitutional system other than the judiciary and judicial interpretation of the constitution, particularly judicial review of the constitutionality of governmental and legislative acts, and judicial interpretation and enforcement of constitutional rights.³ From the perspective of comparative constitutionalism and comparative constitutional law, the discourse of political constitutionalism in contemporary China is worthy of study. Like Western political constitutionalism, Chinese political constitutionalism identifies itself by distinguishing itself from judicial constitutionalism. But unlike Western scholarship on political constitutionalism which presupposes a democratic political system and which seeks to develop or enhance further the constitutional institutions of democracy, elections, parliamentary processes, separation of powers, checks and balances, political accountability and public deliberations, the discourse of political constitutionalism in contemporary China has evolved within a one-party authoritarian communist State in the midst of rapid economic development, sweeping social changes and potential political reform. Understanding Chinese political constitutionalism enables us to understand China's predicament as she stands at a cross-roads of her modern history.

This article discusses the discourse of political constitutionalism in contemporary China by introducing and commenting on the scholarship of Professor Gao Quanxi, the leading theorist of political constitutionalism in China today. Before considering Gao's thought, it is necessary to provide readers with some basic information about modern Chinese constitutional history and the

constitutional systems that are in force in mainland China (the People's Republic of China) and Taiwan (the Republic of China) today. This article therefore consists of three parts. Part I introduces the historical and ideological contexts of the constitutions that are presently in force in mainland China and Taiwan, and describes briefly the political systems established by these constitutions. Part II describes the main features of Gao Quanxi's studies on political constitutionalism. Part III concludes this article by reflecting and commenting on Gao's scholarship.

I The contexts of and systems established by the constitutions currently in force in mainland China and Taiwan

This part of the article first introduces the historical and ideological contexts of modern Chinese constitutionalism, and then examines the political systems that are in force in mainland China and Taiwan today. Following the chronological order of the original enactments, we shall begin with the Constitution of the Republic of China (ROC) that was originally enacted in 1946 and that is still largely in force in Taiwan today. Then we shall move to the Constitution of the People's Republic of China (PRC).

The ROC Constitution

The historical origins of the ROC Constitution can only be understood in light of modern Chinese constitutional history,⁴ which begins with the collapse of the Qing Empire – the last dynasty in imperial China – in the 1911 Revolution.⁵ The establishment of the new Republic of China (ROC) was proclaimed in 1912. In

the first one and a half decade of the republican era, China was beset by warlordism and civil strife. In 1928, Chiang Kai-shek, leader of the Chinese Nationalist Party (Kuomintang or KMT) founded by Dr Sun Yat-sen, succeeded in defeating the warlords and established a national government of the ROC with its capital in Nanking. However, civil war still raged between the KMT and the Chinese Communists (of the Chinese Communist Party or CCP founded in 1921) until the “Xi’an Incident” of 1936, after which Chiang stopped his military campaigns against the Communists (who had by that time retreated to the remote town of Yanan in the Shaanxi Province) and entered into an alliance with them in order to face the threat of Japanese invasion.

The KMT’s approach to constitutional development was based on Sun Yat-sen’s three-stage programme for China’s political transformation.⁶ The first stage was military government (*junzheng*) for the purpose of ending warlordism and unifying the country. The second was preparation for constitutional democracy under the KMT’s political tutelage (*xunzheng*). The third and final stage would be constitutional government (*xianzheng*). Thus Chiang’s government promulgated a provisional constitution in 1931 known as the Constitution of the ROC in the Period of Political Tutelage (*Zhonghua minguo xunzheng shiqi yuefa*) which expressly vested political power in the KMT.⁷

After the end of the Second World War and before civil war erupted again between the KMT and the CCP, a formal Constitution of the ROC was adopted by a constituent assembly convened by the KMT in December 1946.⁸ The original

purpose of the making of this Constitution was to move China from the stage of political tutelage by the KMT to full liberal constitutional democracy with a constitutional government based on the separation of powers, elected by free multi-party election and respectful of civil liberties and human rights. Article 1 of this Constitution declares: “The Republic of China, founded on the Three Principles of the People, shall be a democratic republic of the people, to be governed by the people and for the people.” The Three Principles of the People represented the KMT’s ideology; they had been developed by Dr Sun Yat-sen. They consist of the Principle of People’s National Consciousness (*minzu*), the Principle of People’s Rights (*minquan*) and the Principle of People’s Livelihood (*minsheng*).⁹

Although the 1946 ROC Constitution contains provisions on separation of powers, checks and balances, free elections and the guarantee of human rights, the force of these provisions became largely suspended as the result of the following events.¹⁰ As China descended into a state of civil war, the KMT-led National Assembly in April 1948 introduced a constitutional amendment known as the “Temporary Provisions for the Period of National Mobilization to Suppress the Communist Rebellion” (the “Temporary Provisions”) which expanded the emergency powers of the President. *Jieyan* (which may be translated as a state of siege or martial law) was declared by the KMT government in December 1948 in mainland China and in May 1949 in Taiwan (which was recovered from the Japanese at the end of the Second World War after the island had experienced

half a century of Japanese colonial rule). After its defeat by the Communist forces in the mainland, the KMT government retreated to Taiwan in 1949.¹¹

It was not until July 1987 that the *jiéyan* (martial law) decree was finally lifted by President Chiang Ching-kuo, son of Chiang Kai-shek. A new era of liberalization and democratization was thus inaugurated in Taiwan.¹² In 1991, the National Assembly repealed the Temporary Provisions, and introduced the first of a series of constitutional amendments known as the Additional Articles to the ROC Constitution. Since then, a total of six sets of further amendments have been introduced, in 1992, 1994, 1997, 1999, 2000 and 2005 respectively,¹³ with the 1999 amendment invalidated by Taiwan's constitutional court, the Council of Grand Justices.

The PRC Constitution

After defeating the KMT forces, the CCP established the new People's Republic of China (PRC) in October 1949.¹⁴ In the first few years of the regime, China was governed by a provisional constitution known as the "Common Programme of the Chinese People's Political Consultative Conference". The first constitution of the PRC was adopted by a new National People's Congress in 1954.¹⁵ This constitution was to a considerable extent modeled on the 1936 Constitution of the U.S.S.R.,¹⁶ although the ROC Constitution was included among the reference materials compiled for some of those involved in the drafting exercise.¹⁷ The second constitution was enacted in 1975 when the PRC was under the "ultra-leftist" rule that began with the launch of the "Great Proletarian

Cultural Revolution” in 1966. The third constitution, introduced two years after Mao Zedong’s death in 1976, was a product of the period of transition between the ultra-leftist ideology and the new orientation of “socialist modernization” and “reform and opening”. The fourth constitution, which (subject to several amendments) is the one still in force today, was enacted in 1982 and has since served as the constitutional embodiment of Deng Xiaoping’s ideology of “socialism with Chinese characteristics”.

The 1982 Constitution was drafted using the 1954 Constitution as the baseline and seeking to improve upon it. The “Four Cardinal Principles” advocated by Deng Xiaoping were often referred to as forming a key ingredient of the guiding ideology behind the 1982 Constitution.¹⁸ Deng had stated that adherence to these four principles was essential for the purpose of pursuing China’s economic modernization.¹⁹ The four principles are insisting on the socialist path, insisting on the people’s democratic dictatorship, insisting on the CCP’s leadership, and insisting on Marxism-Leninism-Mao Zedong Thought (subsequently revised to include Deng Xiaoping Theory and the idea of the “three represents”²⁰). These principles may be discerned from a passage in the Preamble to the 1982 Constitution.²¹

Article 1 of the PRC Constitution states that “The PRC is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the PRC.” “People’s democratic dictatorship” is a term coined by Mao Zedong

for the purpose of the indigenous application of the Marxist concept of “proletarian dictatorship” which is to be practiced after the socialist revolution overthrowing capitalism. The leadership of the working class mentioned in article 1 of the Constitution is an implicit reference to the leadership of the CCP, as under the Leninist theory of the communist party, this party consists of the vanguard of the proletariat (i.e. the working class) and shall exercise leadership on behalf of the proletariat in building the socialist society.

After the 1982 Constitution was enacted, four sets of amendments to it have been introduced, in 1988, 1993, 1999 and 2004 respectively. The amendments reflect the deepening and strengthening of the policy of “reform and opening”, and include, for example, the introduction of the following terms and concepts into the Constitution: the preliminary stage of socialism, socialism with Chinese characteristics, the socialist market economy, protecting the private sector of the economy, ruling the country according to law and building a socialist Rechtsstaat (*fazhiguojia* in Chinese, or a State based on the Rule of Law), and protecting human rights and private property rights.

The political systems established by the constitutions

Constitutional documents of states establish the political systems of the states concerned. At the same time, they function within and in the context of, and depend on, such political systems which determine to what extent a constitution is meaningful and significant in practice – for example, whether it is, in Loewenstein’s words, a “nominal”, “semantic” or “normative” constitution.²² A

nominal constitution does not even correspond to the reality of the political system at all and is no more than words on paper. A semantic constitution does tell us something about the political system and how it operates, but plays no significant role in controlling the behaviour of political actors. A normative constitution determines who become power holders, and truly regulates the exercise of power and the relationship between power holders; their normative force is internalized by political actors who take the rules stipulated in the constitution seriously, respect them and abide by them. In this section, we shall describe briefly the nature of the political systems established by the constitutions in Taiwan and mainland China.

Taiwan

Since the island's liberalization and democratization in the late 1980s and 1990s, Taiwan's political system has come close to systems in Western liberal constitutional democratic states.²³ There has been free electoral competition for the office of the Presidency and for seats in Parliamentary institutions among different political parties and activists. A two-party system has emerged, with the KMT and the Democratic Progressive Party (DPP) being the dominant parties. The KMT, which had ruled Taiwan since the island's return from Japan to the ROC in 1945, handed over power peacefully to the DPP after the former's defeat at the presidential election of 2000. In 2008, the KMT was back in power with its leader Ma Ying-jeou elected as President of the ROC.

The ROC Constitution of 1946 has established a constitutional court known

as the Council of Grand Justices (CGJ) of the Judicial Yuan, charged with the task of issuing authoritative interpretations of the Constitution. After the ROC government's retreat to Taiwan, the CGJ has gradually built up a record of judicial interpretations and thus also its institutional capacity and judicial authority.²⁴ Most of the early judicial interpretations dealt with technical jurisdictional issues of separation of powers rather than citizens' rights. Although the CGJ had the power of constitutional review of laws, regulations and decrees, it did not exercise this power in practice until 1980.²⁵ Before the late 1980s, the CGJ, because of its unimpressive record in dealing with several politically sensitive cases, was not perceived as a strong and independent guardian of constitutional norms and rights, but was regarded by some as an accomplice of the authoritarian regime merely adding constitutional legitimacy to it.²⁶

The image of the CGJ began to change for the better in the second half of the 1980s. The CGJ became more activist and more ready and willing to exercise its power of constitutional review of legislative and administrative acts.²⁷ In 1990, the CGJ had the opportunity to prove its importance and establish its authority when the question of the re-election of the parliamentary institutions²⁸ (the majority of whose members were still those elected in mainland China in the late 1940s, whose seats had not been subject to periodic elections because in theory the parliamentary institutions still represented the whole of China and yet it had not been possible to hold elections in the mainland since 1949) came before it. In

the famous and celebrated Interpretation No 261,²⁹ the CGJ in effect ordered fresh elections in Taiwan for the whole of the parliamentary institutions. After this interpretation, the CGJ has issued many more interpretations on questions of citizens' rights and separation of powers that have collectively established the CGJ's reputation as a credible, respected and activist constitutional court.³⁰

The PRC

Unlike the case of Taiwan, the PRC in mainland China is still a one-party state. Since the Dengist era of "reform and opening" began in the late 1970s, China has moved a long way from a totalitarian communist system in which the Party-State controlled all social and economic domains and all aspects of citizens' lives to an authoritarian political system that has committed itself to certain standards of legality³¹ and has fostered the development of a vibrant "socialist market economy" or "socialism with Chinese characteristics" (or what some outside observers have called "capitalism with Chinese characteristics"³²), which in turn has sustained the rapid growth of domains of private and economic life outside the direct control of the Party-State.

In theory, the "supreme organ of state power"³³ in the PRC is the National People's Congress, which is elected by the provincial people's congresses, which in turn are elected by municipal people's congresses. The municipal people's congresses are elected by the county-level people's congresses which are directly elected by the people. In practice, candidatures of the higher-level people's congresses are determined by CCP bodies, and the National People's Congress is

largely a rubber-stamp body under the leadership of the CCP.³⁴

In the PRC, the principal means by which the Constitution is implemented is the making and enforcement of laws in accordance with the Constitution.³⁵ In the era of “reform and opening”, the court system has developed rapidly in terms of size, caseload and the educational qualifications and professionalisation of judges,³⁶ but it has also been beset with problems of corruption, political interference in judicial decision-making and failure to enforce court judgments in civil cases.³⁷ The constitutional function of the Chinese courts is to try cases in accordance with the law.³⁸ They have no role to play in interpreting the Constitution and reviewing the constitutionality of legal norms and administrative actions.³⁹ In 2001, the Supreme People’s Court’s interpretation in the much publicized *Qi Yuling* case seemed to suggest that Chinese courts may apply constitutional provisions directly in adjudicating cases,⁴⁰ but the repeal by the Supreme People’s Court itself of this interpretation in December 2008⁴¹ has signaled that courts are no longer permitted to rely on or refer to provisions of the Constitution in their adjudicative work.

II Gao Quanxi’s Studies of Political Constitutionalism

Gao Quanxi is a Chinese scholar of Western and Chinese philosophy, particularly modern Western political thought. In recent years, political constitutionalism has been his main research interest, and he has become well-known as the leading advocate in contemporary China of the study of

political constitutionalism. This part of this article attempts to provide an outline of Gao's scholarship on political constitutionalism and to identify its most significant features.

Gao traced the origins of the discourse of political constitutionalism in contemporary China to an article published in 2008 by Chen Duanhong, professor of public law and legal and political philosophy at the law school of Peking University. The article was entitled "The Constitution as the Fundamental Law and Higher Law of the State".⁴² In this article, Chen distances himself from constitutional law scholars who advocate "judicialisation" of the Chinese constitution, which means courts should start to assume an active role in interpreting the constitution and developing a jurisprudence of constitutional rights. Instead, Chen proposes that "as far as matters of principles, values, politics and ideology are concerned", China should go the path of "political constitutionalism with Chinese characteristics", although he also supports the upgrading of the capacity of the Chinese judiciary and the development of an "ordinary, concrete Rule of Law" in China.⁴³

Chen's idea of political constitutionalism is reflected in his emphasis on the fundamental importance of the constituent power and "constitutional moment" of constitution-making. He also draws a distinction between "capitalist constitutions" and "socialist constitutions". In the case of the Constitution of the PRC, Chen argues that the subject or actor that exercised the constituent power in constitution-making was "the Chinese people under the leadership of the

Chinese Communist Party”. Analysing the text of the Chinese constitution, particularly its preamble, Chen identifies what he calls the five fundamental laws of the Chinese constitution and ranks them in order of priority: (1) the Chinese people are under the leadership of the Chinese Communist Party; (2) China should practice socialism; (3) China should practice “democratic centralism”; (4) China should pursue socialist modernization; (5) basic rights and human rights shall be protected.

Gao recognizes the significance of Chen’s article in introducing into the Chinese discourse of constitutionalism and constitutional law scholarship for the first time the distinction between “political constitutionalism” on the one hand and legal or judicial constitutionalism on the other hand. Gao declares that he shares Chen’s problematique and research methodology, but does not agree with many of Chen’s views and some aspects of his approach.⁴⁴ In particular, Gao criticizes Chen for presupposing that “might is right” or “what exists must be reasonable”,⁴⁵ and for ignoring questions of legitimacy and normativity.⁴⁶ Gao describes Chen’s work as representing the “left” wing of political constitutionalism in contemporary China, and identifies his own work as belonging to the “right” wing of Chinese political constitutionalism. He also points out that the distance between him and Chen may actually be wider than that between him and advocates of judicial constitutionalism, such as scholars who engage in purely normative legal studies of the Chinese constitution and its interpretation.⁴⁷

What, then, is Gao's understanding of political constitutionalism? In his view, political constitutionalism or its study is primarily concerned with nation-state-making, constitution-making, constitutional moments, the political foundation of the constitution, and the political dynamics of constitutional evolution.⁴⁸ Drawing on the scholarship of Carl Schmitt and Bruce Ackerman,⁴⁹ Gao emphasizes the importance of the study of constitutional moments (or moments of state formation and constitution-making), and the distinction between the extraordinary time of constitutional politics⁵⁰ and the ordinary time of normal politics and routine operation of the constitution⁵¹ (such as its judicial interpretation). For Gao, the key to constitutionalism lies in the transition from extraordinary politics to ordinary politics,⁵² and from revolution to constitutionalization.⁵³

One of Gao's main theses in his scholarship on political constitutionalism is that the establishment of constitutionalism following a revolution should be understood as a counter-revolution of the revolution, or revolutionary counter-revolution,⁵⁴ which consolidates the achievements of the revolution while creating a stable political order in which the political power of the Leviathan that emerges from the revolution is constrained and tamed by constitutional doctrines, institutions and processes.⁵⁵ Thus Gao understands political constitutionalism as pursuing the goal of limited government, but cautions against a static understanding of constitutionalism as limited government. Instead, he points out that constitutionalism must be understood in

the context of revolutions, often accompanied by wars, in which new nation-states (the Leviathan) are created with a new concept of citizenship among their inhabitants, and in which the people as sovereign exercise the constituent power to create a system of government. For Gao, the secret to constitutionalism lies in the relationship between the Leviathan moment⁵⁶ (of the creation of the nation-state) and the Lockean moment⁵⁷ (of the establishment of a constitutional order that constrains or tames the Leviathan and its political power). This is the concern of political constitutionalism, not judicial constitutionalism, which in Gao's view is only relevant after the transition from extraordinary politics to ordinary politics has been achieved by political constitutionalism.

Gao contrasts the cases of England and France in terms of their experience or practice of political constitutionalism.⁵⁸ In Gao's view, the French Revolution exemplified the exercise of the people's constituent power in the creation of a modern state. However, what the Revolution unleashed was political radicalism rather than constitutionalism. According to Gao's analysis, constitutionalism could only be brought into existence by a conservatism that constrained the absolute constituent power associated with the Revolution. In the French case, the absence of such conservative forces led to continuing revolution and bloodshed, a continuous Leviathan moment with no stable political order coming into existence. Thus the French Revolution gave birth to the modern nation-state, but not constitutionalism.

In Gao's view, it was the case of 17th century England, particularly the Glorious Revolution of 1688, that supplied the paradigmatic case of political constitutionalism successfully at work. According to Gao's analysis, the Glorious Revolution was a revolution blended with conservatism, traditionalism and gradualist reformism.⁵⁹ Gao wrote: "To understand political constitutionalism, we must turn to the case of England, particularly the Glorious Revolution. There was in the Glorious Revolution a synthesis of the radicalism of modern revolutionary politics and the conservatism of constitutionalism. I consider the Glorious Revolution the most classic text of political constitutionalism. The Glorious Revolution was neither Hobbesian politics nor common law constitutionalism; it exemplified something new --- authentic political constitutionalism."⁶⁰

In Gao's view, the Glorious Revolution was a constitutional moment of extraordinary politics in which a modern state was born. But traditional forces that constrained absolutism were also at work. The struggles among the Royalists, the Whigs and the radical republicans resulted in a political compromise.⁶¹ The Leviathan moment was countered by the constitutional settlement represented by the Bill of Rights, the Act of Settlement and the Act of Toleration.⁶² These constitutional instruments, according to Gao's analysis, "embodied the core values of political constitutionalism and its conservatism, ... achieved a synthesis of revolution and anti-revolution, and realized the justice of political constitutionalism."⁶³ "It was this kind of justice that dissolved or

eliminated the politics of friend and enemy described by Carl Schmitt, prevented a repetitious cycling of moments of [constitutional] political decision-making, and created a unified political community of citizens that did not distinguish between enemy and friend.”⁶⁴

In Gao’s view, Locke was the leading theorist of political constitutionalism and of the Glorious Revolution.⁶⁵ He stresses that Locke’s *Treatises of Government* should not be taken merely as a theory of ordinary politics, but should be understood in the context of the Leviathan moment of the creation of a new sovereign state.⁶⁶ The rule of law, limited government, differentiated power structure and natural rights that Locke advocated were for the purpose of defending and preserving this new modern state.⁶⁷ According to Gao’s analysis, Locke’s theory served as the medium for the transformation of extraordinary politics into ordinary politics.⁶⁸ Thus Gao stresses that although the key elements of Locke’s theory appear to be the basic principles for the operation of ordinary politics, the theory can only be fully understood in the context of the Leviathan moment of extraordinary politics and state creation.⁶⁹ The theory has a crucial role to play as a medium for the transition from extraordinary politics to ordinary politics.

We now turn to examine how Gao applies his theory of political constitutionalism to the case of China itself. The first point to note here is that Gao underscores the importance of historical consciousness in the Chinese study of political constitutionalism.⁷⁰ Thus one must have a broad overview covering

at least one full century of modern Chinese constitutional history. It is necessary to classify different periods in this history, to develop a sympathetic understanding of all such periods, and to evaluate them from the perspective of political constitutionalism.⁷¹

Gao identifies three periods of modern Chinese constitutional practices in terms of the “constitutionalization of the spirit of the age”⁷²: (1) the Republic of China created in 1912 and its constitutional tradition (what Gao calls “the first modern China”); (2) the party-state established by the KMT in 1928 and the party-state established by the CCP in 1949 (“the second modern China”); and (3) the Chinese state during its era of reform and opening that began in 1978 with its 1982 Constitution and the subsequent constitutional revisions (“the third modern China”).

Looking at modern Chinese constitutional history from another perspective, Gao suggests that there exist three and a half “constitutional China’s”⁷³: (1) the Republic of China founded in 1912; (2) the Republic of China established by the KMT and controlled by it until its democratization in Taiwan; (3) the PRC under the leadership of the CCP; and (3 1/2) the China that is not yet unified today, which hopefully will become unified some day as a new China that is “free, constitutional and democratic”.⁷⁴

Gao believes that the Chinese study of political constitutionalism should attempt to be both descriptive and normative; it should reveal the reality of the constitutional or political system, and also tackle questions of legitimacy,

constitutionality and justice.⁷⁵ Gao is particularly interested in uncovering and discovering the constitutional thinking and dynamics that lay behind the facts, events and texts of modern Chinese constitutional history. His book-length study of the abdication of the Qing emperor in 1912 in the midst of revolution best exemplifies the application of his approach of political constitutionalism to the study of Chinese constitutional phenomena. The book is entitled *Constitutional Moment: On the Abdication Decree of the Qing Emperor*.⁷⁶

In orthodox and existing scholarship by constitutional law scholars on the 1911 Revolution and the birth of the first Chinese republic, the usual focus has been on the provisional constitution enacted by the revolutionary government in March 1912. Little attention has been paid to the abdication of the Qing emperor and the decree of abdication promulgated by the empress dowager on behalf of the Qing Empire in February 1912. Gao points out, however, that this decree was actually highly significant in providing the constitutional foundation of and contributing to the legitimacy of the new Republic of China.

In early 1912, the success of the Revolution was by no means assured. Although many provinces had declared independence of the Qing emperor and the revolutionaries had established a new republican government in Nanking, the Qing court still reigned in Peking and Yuan Shikai, a senior minister of the Qing Empire, had under his command a powerful army which had full capacity to wage a civil war against the revolutionaries. It was in these circumstances that the Qing court was pressurized to abdicate and to hand over power to Yuan,

whom the revolutionaries in a trade-off were willing to accept as president of the new republic.

The abdication decree not only declared the abdication of the Qing emperor but also authorized Yuan Shikai to negotiate with the revolutionaries in Nanking for the purpose of forming a republican government and convening parliament.⁷⁷ It also legitimised the transfer of the loyalty of the existing multi-ethnic subjects of the Qing empire and of its entire territory to the new republic⁷⁸ – which was significant because the Revolution was led by Han Chinese and propelled by anti-Manchu sentiments. Thus Gao points out that the new republic was not only or entirely a creation of the Revolution; it was at least partly the product of a peaceful and deliberate transfer of power by the Qing court to the new republic. Gao therefore argues that the Qing abdication decree of the existing Chinese regime, together with the self-proclaimed provisional constitution of the new republic, jointly constitute the dual constitutional basis of the republic; the two constitutional instruments supplement and complement one another and collectively constitute the new Chinese state.⁷⁹ Gao also stresses that the spirit of peaceful political change embodied by the Qing abdication decree was an important antidote to the radical and violent mood of the Revolution.⁸⁰ Thus the Qing abdication decree represents the “real conservative spirit of constitutionalism” and epitomises “the Chinese version of the Glorious Revolution”.⁸¹

Although China had a “good constitutional moment”⁸² in 1912 with this

auspicious synthesis of revolutionary radicalism and peaceful political change, no constitutional state came into existence in China. For Gao, the major problem in modern Chinese constitutional history that has remained unresolved is how to move from revolution to the normal politics of constitutional democracy.⁸³ In Gao's view, there was in modern Chinese history an overdose of revolutionary radicalism and an underdose of the "conservative reformism"⁸⁴ or "revolutionary counter-revolution"⁸⁵ that is essential for the emergence of constitutionalism. For example, as Gao points out, although the Common Programme of 1949 (which served as the provisional constitution of the PRC) and the first constitution of the PRC that was enacted in 1954 seemed initially to signal a transition from extraordinary politics to ordinary politics,⁸⁶ they soon gave way to the Maoist radicalism of continuing proletarian revolution.

Gao believes that even today, China has not completed its move from extraordinary politics to ordinary politics. It is neither in a state of extraordinary politics, nor in a state of ordinary politics.⁸⁷ It is in a process of transition that has been taking place during the era of reform and opening that began in the late 1970s. At the level of constitutional law, this transition is represented by the 1982 Constitution and its subsequent revisions.⁸⁸ Insofar this transition is still ongoing and uncompleted, China's constitutional moment has not yet expired,⁸⁹ or is yet to come. Before the transition is completed, the conditions for judicial constitutionalism do not exist in China,⁹⁰ and the study of political constitutionalism is a more pressing need than the study of judicial

constitutionalism.⁹¹ Gao points out that what is more relevant to China today is the constitutional experience of the West in its early modern history⁹² (the time when it engaged in state-building and underwent its transition from extraordinary to ordinary politics), rather than the judicial constitutionalism of Western states today.

Gao hypothesises a three-stage process of constitutional development for the PRC, which includes (1) a “revolutionary constitution” initially (most typically exemplified by the 1975 Constitution that was a product of the Cultural Revolution era), followed by (2) a “reformist constitution” (as represented by the 1982 Constitution and its revisions), and finally (3) a “constitution of constitutionalism”.⁹³ This seems to echo Sun Yat-sen’s three-stage doctrine of (1) military rule, followed by (2) political tutelage, and eventually (3) constitutional government.⁹⁴ Gao suggests that in the final stage of this transition,⁹⁵ the party-state may be transformed into a constitutional democracy.⁹⁶ That would mark the completion of China’s constitutional moment.

In one of his most recent works, Gao studies the 1982 Constitution and its four revisions and ponders their significance from the perspective of the development of Chinese constitutionalism in the longer term. He interprets the 1982 Constitution as a reformist constitution (as distinguished from its predecessors, which were revolutionary constitutions),⁹⁷ and discovers a new constitutional spirit and design that is emerging from this constitution and its four revisions taken as a whole.⁹⁸ On the basis of the 1982 Constitution and its

four revisions, he expresses cautious optimism about China's constitutional evolution ultimately towards a "constitution of constitutionalism".⁹⁹

Gao applies his approach of political constitutionalism to the study of the 1982 Constitution and its revisions. He points out that the principal objective of, and a main theme behind, the 1982 Constitution was to put an end to the radical ideology and practices of the Cultural Revolution era, which included continuing proletarian revolution and class struggles.¹⁰⁰ While affirming the historical logic and achievements of Chinese revolution led by the CCP, the 1982 Constitution actually puts an end to the revolution by seeking to establish a stable social and political order and an effective legal system, to revive the state institutions that were dysfunctional during the Cultural Revolution, and to affirm the supreme authority of the Constitution itself. Thus Gao finds in this constitution a dual theme of "revolution" and "de-revolutionarisation".¹⁰¹ It marks the beginning of the PRC's transition from extraordinary politics to ordinary politics.¹⁰² It represents the logic – which Gao considers to be universal to modern states born of revolutions – of "the revolution withdrawing from the stage and the constitution coming on stage"¹⁰³, or the constitution as a fundamental law to constrain and end the revolution. Gao believes that in this process of post-revolutionary transition, the political nature of the constitution (as emphasized by Carl Schmitt) should gradually give way to its normative and legal nature.¹⁰⁴

Gao also analyses the political constitution embodied by the 1982

Constitution, basically employing the conceptual framework developed by Tian Feilong, a younger Chinese scholar of political constitutionalism.¹⁰⁵ According to Tian,¹⁰⁶ the fundamental principle of the political constitution of the PRC is the sovereignty of the people, and this is realized in the “three bodies” that exist under the 1982 Constitution – (1) the system of leadership and representation by the CCP which is “truth-based”, (2) the people’s congress system which is “procedure-based”, and (3) the system of democratic participation otherwise than through the people’s congresses. Gao analyses each of these three systems and their problems.

First, as regards the system of CCP leadership and representation, Gao believes that the foremost problem of Chinese constitutional law is how to tackle the relationship between the Party and the State,¹⁰⁷ and the relationship between CCP leadership, the supremacy of the constitution and the sovereignty of the people. He notes that the 1982 Constitution is already significant in marking the transition from personal dictatorship by the Party leader to a more democratic style of Party leadership, and in requiring the Party to abide by the constitution and the law – thus introducing an important normative element into China’s political constitution.¹⁰⁸ He also considers the theory of the Party’s “three representations” significant as a further development of the theory of CCP leadership and representation. However, the ultimate problem of how to reconcile Party leadership with the popular sovereignty, democracy and rule of law that are affirmed by the Constitution is yet to be resolved.¹⁰⁹

Secondly, as regards the people's congress system, Gao points out that this system of representation is indeed the most direct manifestation of the sovereignty of the people. However, he acknowledges that unless and until Party leadership is brought under the full control of the Constitution and is no more than symbolic, the functions of the people's congress system and the principle of judicial independence are unlikely to be fully realized.¹¹⁰ Thirdly, as regards the system of democratic participation other than through the people's congresses, Gao highlights the importance of the Chinese People's Political Consultative Conference, which actually had a long history dating back to the days of KMT rule, although the system was transformed under CCP rule. How this system should develop in future, and how it relates to the principle of popular sovereignty, are major issues for the study of Chinese political constitutionalism.¹¹¹

Turning to the four revisions to the 1982 Constitution, Gao considers them highly significant, and finds in them a new constitutional spirit and design that is emerging.¹¹² Gao identifies three main features of the post-1982 constitutional revisions. First, they re-position the PRC and re-define the main tasks and challenges for the state. Secondly, they secure the release of civil society from the state, and usher in a new separation of state and society. Thirdly, they introduce into the constitution the liberal notions of the rule of law (the *Rechtsstaat*), the protection of human rights and of private property.¹¹³ As a result of these revisions, the Constitution of the PRC that is currently in force has a "triple structure" that consists of the principles of (1) mass democracy, (2) proletarian

dictatorship (under CCP leadership), and (3) rule of law and protection of human rights and private property, which are actually notions of liberal constitutionalism. Gao notes that there do exist tensions between these principles, and yet the co-existence of these principles is a primary characteristic of the contemporary Chinese constitution.¹¹⁴ Gao also points out that the emerging constitutional design that is liberal is in fact parasitic upon the framework of the existing socialist constitution¹¹⁵ – a constitution that is undergoing gradualist reform and that embodies a kind of transitional constitutionalism.¹¹⁶

Finally, Gao suggests that the movement of China's constitution since the adoption of the 1982 Constitution demonstrates that the basic principles and values of modern constitutionalism have been gradually incorporated into the Chinese constitution.¹¹⁷ From this perspective, the 1982 Constitution (with its revisions) is not merely a rejection of the leftist extremism of the Cultural Revolution era and a return to the original socialist constitution of 1954. It can rather be interpreted as a breakthrough from socialist constitutional dogma and a return to the mainstream values of the century-old quest of modern Chinese constitutionalism¹¹⁸ that began with the 1911 Revolution, the Qing abdication and the establishment of the Republic of China in 1912. As Gao sees it, China's century-old search for constitutionalism shares the same basic constitutional values¹¹⁹ and goals as those of other states and peoples in the modern world.¹²⁰

III Reflections and Comments

China is the most populous nation on earth, and one of the few remaining states ruled by an all-powerful communist party. The constitutional path that it has taken so far or is likely to take in future is thus a subject of great theoretical and practical interests in the study of modern constitutionalism. Gao Quanxi's scholarship on Chinese political constitutionalism provides a powerful conceptual framework for understanding and further researching China's constitutional path and options.

In contemporary Western states, the huge scholarly interest in legal or judicial constitutionalism as distinguished from political constitutionalism is understandable, given the established power of the judiciary in deciding crucial issues of constitutional law and constitutional rights. Although the Chinese courts, unlike their counterparts in the West, have little role to play in constitutional interpretation and no role to play in the review of the constitutionality of legislative and executive acts of the government, the recently evolving Chinese scholarship of constitutional law, perhaps influenced by scholarly trends in the West, has also shown a keen interest in the study of constitutional interpretation and constitutional rights. One of Gao's main contributions is to caution that this kind of constitutional jurisprudence actually fails to address the most critical issues and the most pressing problems that the Chinese constitutional, political and legal systems face today. These issues and problems can only be revealed, understood, and, hopefully, resolved by

scholarship oriented towards political – rather than judicial or legal --- constitutionalism.

Gao is certainly right in pointing out that the most fundamental problems of the Chinese constitution today lie in the domain of political constitutionalism, and that unless and until these problems are addressed, talk of legal or judicial constitutionalism would only be empty talk of pure academic interest and devoid of practical significance. Gao criticizes scholars of doctrinal or technical constitutional interpretation for ignoring the reality and real problems of the Chinese constitutional system. However, to be fair to these Chinese scholars of constitutional law, it would probably not be possible in the present circumstances in mainland China to confront such problems directly without venturing into the “forbidden zones” of “politically sensitive” issues. Under Chinese law,¹²¹ it would actually be a crime to attack, or advocate the abandonment of, the principle of Party leadership, to demand the termination of the CCP’s monopoly of power, or to call for an immediate transition to multi-party democracy. In such a political environment, the room for the study of some fundamental issues of political constitutionalism is rather limited.

It is perhaps in view of such constraints that Gao himself has not, in his study of Chinese political constitutionalism, engaged in any in-depth investigation of the realities of the Party’s monopoly of power and of whether it can be justified or should be critiqued. Nor has he worked out any concrete proposals for constitutional reform. His scholarship of political constitutionalism is mainly at

the levels of theory, philosophy and macro-history. We now proceed to examine his contributions in these domains.

Perhaps influenced by the Chinese experience of revolutions which were the most fundamental forces shaping Chinese constitutional history in the 20th century, Gao's philosophy of constitutionalism emphasizes the close connection and tension between, and the interaction of, revolution and constitutionalization (in the sense of the establishment of a constitutional state in which state power is subject to constitutional restraint). A modern state (like China) is born in a revolution, but revolution is not necessarily followed by constitutionalization, as the case of China demonstrates. One of Gao's core ideas is that there is actually a tension or contradiction between revolution and constitutionalization. A revolution is a radical and, often, violent breakup of an existing social and political order by a revolutionary force or power; constitutionalization involves the establishment of a stable social and political order and constraints on the revolutionary force or power. A revolution involves the distinction between enemy and friend; constitutionalization effaces the distinction between enemy and friend.¹²²

Given such contradiction between revolution and constitutionalization, Gao points out that constitutionalization can only be achieved by a counter-revolution of the revolution, and a conservative force that is peaceful and reformist rather than violent and revolutionary. Whether this conservative force exists and comes into play during or immediately after a revolution

determines whether constitutionalization can be achieved. Thus Gao sees in the Glorious Revolution of 17th century England the paradigmatic case of constitutionalization, and in Locke's political philosophy the classic text of constitutionalization. In the case of modern China, the failure of constitutionalization was apparently due to the overwhelming power of the radical forces of revolution and the relative absence or weakness of the conservative force of constitutionalization. Thus Gao seeks to retrieve and extract from modern Chinese constitutional history the precious conservative force of peaceful reform, which he finds in the Qing abdication decree of 1912. He also finds an encouraging force of gradualist reform behind the 1982 Constitution and its revisions.

It might be instructive here to reflect on Gao's understanding of the emergence of constitutionalism in modern Western history and his observations about the relationship between the Chinese revolution and the difficulties of establishing constitutionalism in modern China. Insofar as Gao privileges the Glorious Revolution as the paradigmatic case of constitutionalization in the modern West, he seems to have under-emphasized the contribution of the American and French revolutions of the late 18th century, and the constitutions and constitutional thinking they produced, to the development of Western constitutional thought and practice. The relationship between these revolutions and constitutionalization may throw doubt on Gao's thesis that a "counter-revolution of the revolution" and a dose of conservatism are essential

for the purpose of successful constitutional practice.

Gao's explanation of the lack or slowness of development of constitutionalism in China in terms of an overdose of revolutionary radicalism and an underdose of conservatism in modern Chinese history may also be questioned, particularly since he has not sufficiently defined what he means by "revolution", a term and concept which he frequently uses and relies on heavily as an ingredient of his theory. If revolution refers to the overthrow of the Republic of China regime and the establishment of the People's Republic of China, then it occurred in 1949. Gao has not sufficiently explored how the "radical" forces behind a revolution that took place 65 years ago can account for the constitutional situation of China today, or what exactly was the nature and content of such radical forces. One possible solution would be to identify such forces as including the rejection of the Rule of Law, separation of powers, checks and balance, human rights and "constitutionalism" itself as "bourgeois" and inconsistent with or irrelevant to the "socialist" state which the Chinese Communist Party intended to construct. If this is the case, then the future of constitutionalism in China would seem to depend on the decline and repudiation of such anti-constitutional forces and ideas in China.

In this author's opinion, Gao's most important thesis and insight is that China today is neither in a state of extraordinary or constitutional politics, nor has it reached a state of ordinary politics in which political constitutionalism can or should give way to judicial constitutionalism. Instead, China is in a state of

transition, and the challenges of transition include the resolution of fundamental issues of political constitutionalism such as the relationship between the Party and the State (including the people's congresses), and the relationship between popular sovereignty and Party leadership. Although Gao has not explicitly advocated a move towards the kind of Western-style liberal-democratic constitutional systems that have been introduced in Taiwan and South Korea (as parts of the Chinese Confucian cultural sphere), his liberal inclinations may be seen in his three-stage evolutionary model of "revolutionary constitution", "reformist constitution" and "constitution of constitutionalism", and his thesis that the 1982 Constitution and its liberalizing revisions may herald a return, not to the first socialist Chinese constitution of 1954, but to the grand tradition of modern Chinese constitutionalism that is a century old.¹²³ Although Gao has not made explicit what exactly this grand tradition is, it is reasonably arguable that it is that inspired by the constitutional thought of the 1911 Revolution and of the Republic of China founded in 1912, and which contains the seeds of liberalism and democracy planted by the 1946 Constitution of the Republic of China that have born fruits in Taiwan today.

In the final analysis, it must be recognised that there exist very divergent assessments of the possibility and limits of constitutionalism within a Marxist-Leninist state like the PRC that insists on the monopoly of power by the ruling communist party. One view, for example, is that "socialist constitutions" (like the PRC constitution) do not deserve to be recognised as giving rise to any

form of constitutionalism, because their legitimating principle is a “supra-individual absolute truth” rather than based on values of individual autonomy and pluralism,¹²⁴ and the supreme position they accord to the communist party “is legitimized by superior insight in the ultimate aim of history and the true interest of the people”.¹²⁵ However, more sympathetic accounts of the relationship between constitutionalism and the PRC political and legal system also exist.¹²⁶ In this author’s opinion, Gao Quanxi’s studies of political constitutionalism provide an insightful and penetrating analysis of the problems and challenges of constitutionalism for the PRC. His scholarship excels in historical breadth and theoretical depth, and deserves to be seriously studied by students of Chinese constitutionalism.

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¹ The following articles have attracted particular attention as they appeared in publications that usually represent the official views of the Chinese Government and the Chinese Communist Party: Yang Xiaoqing (杨晓青), “宪政与人民民主制度之比较研究” (Xianzheng yu renmin minzhu zhidu zhi bijiao yanjiu) [A comparative study of constitutionalism and People’s Democracy], *Hongqi wengao* (红旗文稿), 2013, no. 10 (May 2013), available at http://www.21ccom.net/articles/zgyj/xzmj/article_2013052183896.html; Zheng Zhixue (郑志学), “认清宪政的本质”(Renqing xianzheng de benzhi) [Understanding the true nature of constitutionalism], *Dangjian* (党建), 2013, no. 6 (May 2013), available at <http://theory.people.com.cn/n/2013/0529/c83855-21652535.html>; a series of 3 articles by Ma Zhongcheng (马钟成) published in *People’s Daily (Overseas Edition)* (人民日报(海外版)) on 5-7 August 2013 with the following titles: “‘宪政’本质上是一种舆论战武器”(Xianzheng benzhi shang shi yizhong yulunzhan wuqi) [‘Constitutionalism’ is in essence a weapon of the war of public opinion], “美国宪政的名不副实”(Meiguo xianzheng de mingbufushi) [American constitutionalism is a term that does not correspond with reality], “在中国搞所谓宪政只能是缘木求鱼”(Zai Zhongguo gao suowei xianzheng zhi neng shi yuanmuqiuyu) [Doing ‘constitutionalism’ in China is like fishing in the trees]; Yin Hanning (尹汉宁), “深刻

认识意识形态工作的极端重要性”(Shenke renshi yishixingtai gongzuo de jiduan zhongyaoxing) [Understanding deeply the utmost importance of ideological work], *Qiushi* (求是), 2013, no. 18 (Sept 2013), available at http://www.qstheory.cn/zxdk/2013/201318/201309/t20130912_270588.htm; Qiu Shi (秋石), “巩固党和人民团结奋斗的共同思想基础”(Gonggu dang he renmin tuanjie fendou de gongtong sixiang jichu) [Consolidating the common ideological foundation of the united struggles of the Party and the people], *Qiushi* (求是), 2013, no. 20 (Oct 2013), available at http://www.qstheory.cn/zxdk/2013/201320/201310/t20131012_278250.htm (all websites mentioned here were last visited on 3 March 2014). The articles cited here were referred to in Zhai Xiaobo (翟小波), “To integrate the non-integrable: 2013 and the bleak future of constitutionalism in Xi’s China”, seminar at the Faculty of Law, University of Hong Kong, 22 Jan 2014.

² See, e.g., the symposiums of articles on “constitutionalism” (*xianzheng*) in *Yueshu qianyan* (学术前沿), 2013, no. 8, issue 1, and *Caijing Magazine* (财经), 14 Oct 2013.

³ See generally Richard Bellamy, *Political Constitutionalism* (Cambridge: Cambridge University Press, 2007).

⁴ See generally Pan Wei-tung, *The Chinese Constitution: A Study of Forty Years of Constitution-Making in China* (Westport, Conn.: Hyperion Press, 1983); Ch’ien Tuan-sheng, *The Government and Politics of China 1912-1949* (Cambridge, Mass.: Harvard University Press, 1950).

⁵ On modern Chinese history, see, e.g., John K. Fairbank, *The Great Chinese Revolution 1800-1985* (New York: Harper & Row, 1987); Immanuel C.Y. Hsü, *The Rise of Modern China* (Oxford: Oxford University Press, 2000).

⁶ See, e.g., E.C.Y. Tseng, *Democratic and Authoritarian Elements in Twentieth-Century Chinese Political Thought* (unpublished Ph.D. thesis, New York University, 1968), pp. 72ff; C. C. Tan, *Chinese Political Thought in the Twentieth Century* (Newton Abbot, Devon: David & Charles, 1972).

⁷ See Pan (note 4 above). For the original Chinese text of this constitution and other 20th-century Chinese constitutions up to 1978, see Chen Hefu (ed), *Zhongguo xianfa leibian* (*Collection of Chinese Constitutions*) (Beijing: Chinese Academy of Social Sciences Press, 1980).

⁸ See generally Jing Jiren, *Zhongguo lixian shi* (*History of Chinese Constitutionalism*) (Taipei: Lianjing, 1984), chap. 16; Chen Xinmin, *Xianfaxue shilun* (*Constitutional Law*) (Taipei: Sanmin, 5th ed. 2005), chap. 1.

⁹ See the works cited in note 6 above, and Hsü (note 5 above), p. 459.

¹⁰ See generally Hungdah Chiu, ‘Constitutional Development in the Republic of China in Taiwan’, in Steve Tsang (ed), *In the Shadow of China: Political Developments in Taiwan Since 1949* (Hong Kong: Hong Kong University Press, 1993), chap. 1; Chi-tung Lin and Herbert H.P. Ma, ‘The Republic of China (Taiwan)’, in Lawrence W. Beer (ed), *Constitutional Systems in Late Twentieth Century Asia* (Seattle: University of Washington Press, 1992), pp. 88ff; Chen (note 8 above), chap. 14.

¹¹ On the history of Taiwan, see generally Murray A. Rubinstein (ed), *Taiwan: A New History* (Armonk, New York: M.E. Sharpe, 1999); John F. Copper, *Taiwan: Nation-State or Province?* (Boulder: Westview Press, 3rd ed. 1999); Denny Roy, *Taiwan: A Political History* (Ithaca: Cornell University Press, 2003).

¹² See the works cited in note 11 above, and Linda Chao and Ramon H. Myers, *The First Chinese Democracy: Political Life in the Republic of China on Taiwan* (Baltimore: Johns Hopkins University Press, 1998).

¹³ See generally Chen (note 8 above), chap. 14; Xie Zhengdao, *Zhonghua minguo xiuxian shi* (*The History of Constitutional Revisions in the Republic of China*) (Taipei: Yangzhi wenhua, 2nd ed. 2007).

¹⁴ On the history of the PRC, see generally the works cited in note 5 above, and Jonathan

Fenby, *The Penguin History of Modern China: The Fall and Rise of a Great Power, 1850-2008* (London: Allen Lane, 2008).

¹⁵ On the constitutional history of the PRC, see Xu Chongde, *Zhonghua renmin gongheguo xianfa shi (Constitutional History of the People's Republic of China)* (Fuzhou: Fujian People's Press, 2003).

¹⁶ Albert H.Y. Chen, 'Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law', in J.M. Otto et al. (eds), *Law-Making in the People's Republic of China* (The Hague: Kluwer Law International, 2000), p. 55, at p. 57.

¹⁷ Cai Dingjian, *Xianfa jingjie (Commentary on the Constitution)* (Beijing: Law Press, 2nd ed. 2006), p. 33.

¹⁸ Cai (note 17 above), pp. 73, 81, 84, 99; Xu (note 15 above), p. 878 (citing Peng Zhen's speech to the National People's Congress when the draft constitution was presented to it).

¹⁹ Cai (note 17 above), p. 73.

²⁰ Albert H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: LexisNexis, 4th ed. 2011), pp. 57-58.

²¹ See the 7th paragraph of the Preamble.

²² Karl Loewenstein, *Political Power and the Government Process* (Chicago: University of Chicago Press, 1957), pp. 147-153.

²³ See note 12 above.

²⁴ See generally Chang Wen-chen, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* (unpublished SJD dissertation, Yale University, 2001).

²⁵ See Albert H.Y. Chen, 'A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan' (2007) 37 *Hong Kong Law Journal* 647, at p. 676.

²⁶ See, e.g., Jau-yuan Hwang and Jiunn-rong Yeh, 'Taiwan', in Cheryl Saunders and Graham Hassall (eds), *Asia-Pacific Constitutional Yearbook 1995* (Melbourne: Centre for Comparative Constitutional Studies, University of Melbourne, 1997), p. 279 at pp. 282-286; Tsung-fu Chen, 'The Role of Law in Taiwan: Culture, Ideology, and Social Change', in C. Stephen Hsu (ed), *Understanding China's Legal System* (New York: New York University Press, 2003), p. 374 at pp. 383-384.

²⁷ See generally Lawrence Shao-liang Liu, 'Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan' (1991) 39 *American Journal of Comparative Law* 509; Jyh-pin Fa, 'Constitutional Developments in Taiwan: The Role of the Council of Grand Justices' (1991) 40 *International and Comparative Law Quarterly* 198.

²⁸ The major parliamentary institutions included the National Assembly and the Legislative Yuan.

²⁹ For the CGJ's interpretations, see its website www.judicial.gov.tw/constitutionalcourt.

³⁰ See generally Chen (note 25 above); Thomas Weishing Huang, 'Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan' (2005) 19 *Temple International and Comparative Law Journal* 1; Wen-chen Chang, 'The Role of Judicial Review in Consolidating Democracies: The Case of Taiwan' (2005) 2 *Asia Law Review* 73; Sean Conney, 'A Community Changes: Taiwan's Council of Grand Justices and Liberal Democratic Reform', in Kanishka Jayasuriya (ed), *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1999), chap. 11; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), chap. 5.

³¹ See, e.g., Albert H.Y. Chen, 'Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law' (1999) 17 *UCLA Pacific Basin Law Journal* 125; Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002).

³² Yasheng Huang, *Capitalism with Chinese Characteristics: Entrepreneurship and the State* (Cambridge: Cambridge University Press, 2008).

³³ Constitution of the PRC (1982), art. 57.

³⁴ See generally Jiang Jinsong, *The National People's Congress of China* (Beijing: Foreign

Languages Press, 2003), esp. chap. 7; Li Fan (ed), *Renda daibiao xuanju caozong neimu* (*Insider Story of Manipulation of Elections of Deputies to People's Congresses*) (Hong Kong: Xiafei'er Press, 2009); Yang Guangbin and Li Yuejun, *Dangdai Zhongguo zhengzhi zhidu daolun* (*Introduction to the Contemporary Chinese Political System*) (Beijing: China Renmin University Press, 2007), esp. chap. 4.

³⁵ Zhang Qianfan (ed), *Xianfa* (*Constitutional Law*) (Beijing: Peking University Press, 2008), chap. 3.

³⁶ See, e.g., Bin Liang, *The Changing Chinese Legal System, 1978 – Present* (New York: Routledge, 2008), chap. 3; Zhu Jingwen (ed), *Zhongguo falü fazhan baogao* (*Chinese Legal Development Report*) (Beijing: China Renmin University Press, 2007), chaps. 1, 4.

³⁷ See, e.g., Chen (note 20 above), chap. 7; Hualing Fu, 'Putting China's Judiciary into Perspective: Is It Independent, Competent, and Fair?' in Erik G. Jensen and Thomas C. Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press, 2003), chap. 6; Benjamin L. Liebman, 'China's Courts: Restricted Reform' (2007) 191 *China Quarterly* 620; Xin He, 'The Recent Decline in Economic Caseloads in Chinese Courts: Exploration of a Surprising Puzzle' (2007) 190 *China Quarterly* 352.

³⁸ See art. 126 of the PRC Constitution (1982).

³⁹ Tong Zhiwei, 'The Constitution Should be Applied in Accordance with the Provisions of the Constitution Itself' [2008] 6 *Zhongguo faxue* (*Chinese Legal Science*), p. 22; Zhang (note 35 above), pp. 464-466; Hu Jinguang and Han Dayuan, *Zhongguo xianfa* (*Chinese Constitutional Law*) (Beijing: Law Press, 2nd ed. 2007), pp. 162-166.

⁴⁰ See Kui Shen, 'Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case"' (2003) 12 *Pacific Rim Law and Policy Journal* 199; Qianfan Zhang, 'From Administrative Rule of Law to Constitutionalism? The Changing Perspectives of the Chinese Public Law' (2006) 3 *Asia Law Review* 47, esp. pp. 70-73.

⁴¹ See the forum on this subject in [2009] 3 *Faxue* (*Legal Science Monthly*) 3-35. For discussion in English, see Thomas E. Kellogg, 'The Constitution in the Courtroom', in Margaret Y.K. Woo and Mary Gallagher (eds), *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge: Cambridge University Press, 2011), chap. 11.

⁴² [2008] 4 *Zhongwai faxue* (*Peking University Law Journal*), p. 485.

⁴³ *Ibid*, p. 486.

⁴⁴ Gao Quanxi, 'The Rise and Transformation of Political Constitutionalism' [2012] 1 *Jiaoda faxue* (*Shanghai Jiaotong University (SJTU) Law Review*), p. 22.

⁴⁵ Gao Quanxi, *Cong feichang zhengzhi dao richang zhengzhi* (*From Extraordinary Politics to Ordinary Politics*) (Beijing: Zhongguo fazhi chubanshe, 2009), p. 50.

⁴⁶ Gao (note 44 above), p. 32.

⁴⁷ Gao (note 44 above), p. 25.

⁴⁸ Gao (note 44 above), p. 24.

⁴⁹ Gao Quanxi, *Lixian shike: Lun Qingdi xunwei zhaoshu* (*Constitutional Moment: On the Abdication Decree of the Qing Emperor*) (Guilin: Guangxi Normal University Press, 2011), pp. 6-7; Gao (note 45 above), p. 25.

⁵⁰ Gao (note 44 above), p. 31.

⁵¹ *Ibid*.

⁵² Gao (note 44 above), pp. 24-25; Gao (note 45 above).

⁵³ Gao (note 44 above), p. 26.

⁵⁴ Gao (note 44 above), p. 27; Gao (note 49 above), p. 21; Gao (note 45 above), p. 29.

⁵⁵ Gao (note 45 above), p. 18.

⁵⁶ *Ibid*.

⁵⁷ Gao (note 45 above), pp. 30-37.

⁵⁸ Gao (note 45 above), pp. 22-39.

⁵⁹ Gao (note 45 above), p. 27.

⁶⁰ Gao (note 45 above), p. 24.

⁶¹ Gao (note 45 above), p. 27.

⁶² Gao (note 45 above), p. 28.

⁶³ Gao (note 45 above), pp. 28-29.

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- 64 Gao (note 45 above), p. 29.
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- 66 Gao (note 45 above), p. 32.
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- 70 Gao (note 45 above), pp. 27-28.
- 71 Gao (note 44 above), pp. 27-28, 36-37.
- 72 Gao (note 44 above), p. 27.
- 73 Gao (note 44 above), p. 42.
- 74 Gao (note 44 above), p. 42.
- 75 Gao (note 44 above), pp. 32-36.
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- 82 Ma Guochuan, *Meiyou huangdi de Zhongguo: Xinhai bainian fangtanlu* (China Without an Emperor: Interviews a Century After the 1911 Revolution) (Hong Kong: Oxford University Press, 2011), p. 208.
- 83 Gao Quanxi and Tian Feilung, 'The Problem, Position and Method of Political Constitutionalism' [2011] 3 Suzhou daxue xuebao (Journal of Suzhou University), p. 72 at 74.
- 84 Gao (note 44 above), p. 25.
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- 90 Gao (note 44 above), p. 29.
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- 95 Gao (note 44 above), p. 40.
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- 99 Gao (note 98 above), p. 926.
- 100 Gao (note 98 above), p. 911.
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- 104 Gao (note 98 above), p. 916.
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- ¹⁰⁶ Tian Feilong, *Zhengzhi xianzheng zhuyi – Zhongguo xianzheng zhuanxing de ling yi zhong jinlu* (Political Constitutionalism – An Alternative Approach to China’s Constitutional Transformation) (unpublished Ph.D. thesis, Peking University, 2012).
- ¹⁰⁷ Gao (note 98 above), p. 917.
- ¹⁰⁸ Gao (note 98 above), pp. 917-918.
- ¹⁰⁹ Gao (note 98 above), p. 918.
- ¹¹⁰ Gao (note 98 above), p. 920.
- ¹¹¹ Gao (note 98 above), pp. 921-922.
- ¹¹² Gao (note 98 above), p. 923.
- ¹¹³ Gao (note 98 above), p. 924.
- ¹¹⁴ Gao (note 98 above), p. 924.
- ¹¹⁵ Gao (note 98 above), p. 925.
- ¹¹⁶ Gao (note 98 above), p. 925.
- ¹¹⁷ Gao (note 98 above), pp. 925-926.
- ¹¹⁸ Gao (note 98 above), p. 925.
- ¹¹⁹ Gao (note 98 above), p. 925.
- ¹²⁰ Gao (note 98 above), pp. 925-926.
- ¹²¹ See, e.g., article 105 of the Criminal Code of the PRC, which deals with subversion and sedition, and criminalises “incitement of subversion of the regime or overthrow of the socialist system” “by circulating rumours, defamation or other means”.
- ¹²² See Gao’s discussion and critique of Schmitt’s view that politics is about distinguishing between enemy and friend: Gao (note 45 above), pp. 25-26.
- ¹²³ See note 118 above.
- ¹²⁴ Dieter Grimm, “Types of constitutions”, in Michel Rosenfeld and András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), p. 98 at 114.
- ¹²⁵ *Ibid.*, p. 128.
- ¹²⁶ See, e.g., Randall Peerenboom, “Social Foundations of China’s Living Constitution”, in Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012), chapter 6; 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, no. 1 (2009), pp. 101-168; Jiang Shigong, “Chinese-style Constitutionalism: On Backer’s Chinese Party-State Constitutionalism”, *Modern China*, vol. 40, no. 2 (March 2014), pp. 133-167; Stéphanie Balme and Michael W. Dowdle, *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009).