

**Economic Constitutionalism in the China Circle:  
Comparative Economic Provisions in the Constitutions of  
Mainland China, Taiwan and Hong Kong**

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## Introduction

Constitution making in China dates back to the beginning of this century.<sup>1</sup> Modern constitutionalism was introduced in China in the late nineteenth century. Hereafter, the throne in the late period of Ching Dynasty, warlords in the early Republic era (1911 to 1925) and the existing ruling parties have all used constitutionalism as a means to consolidate their ruling power and to promote political and social reforms.<sup>2</sup>

With the establishment of the People's Republic of China (PRC) in 1949, mainland China has been ruled by the Chinese Communist Party (CCP). Being a socialist country, PRC's constitutional development has been heavily influenced by the Marxist-Leninist model. After being defeated in the mainland in 1949, Kuomintang (KMT) fled to Taiwan. In Taiwan, KMT has continued to adopt the Constitution of the Republic of China. Hong Kong was a British colony until 1997. During its colonial period, Hong Kong had its codified constitution promulgated by the Crown in Britain.<sup>3</sup> With the resumption of sovereignty by the Chinese government in July 1997, Hong Kong gained its own constitutional document called the Basic Law.<sup>4</sup>

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<sup>1</sup> Chien Tuan-Sheng, *The Government and Politics of China* (Massachusetts: Harvard University Press, 1950) Chapter IV and , Yan Xiaohu, *Zhangguo Xianzheng Shi* (The History of Modern Constitutionalism in China) (Shanghai: Renmin Chubanshe 1997) Chapter 3.

<sup>2</sup> See Pan Wei-tung, *The Chinese Constitution: A Study of Forty Years of Constitution-Making in China* (Wesport, Conn: Hyperion Press, 1945), Zhao Suisheng, *Power by Design: Constitution-making in Nationalist China* (Hawaii: University of Hawaii Press, 1996), Chien Tuan-Sheng, *ibid.*, Chapter 5 and Yan Xiaohu, *ibid.*, Chapter 3-8.

<sup>3</sup> Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (HK: Longman Asia Ltd. 1994) pp. 42-9.

<sup>4</sup> See Yash Ghai *Hong Kong's New Constitutional Order—the Resumption of Chinese Sovereignty and the Basic Law* (HK: Hong Kong University Press, 1997).

Traditionally, constitutionalism has been related to the notions of the separation of powers<sup>5</sup>, limited Government<sup>6</sup> and democracy<sup>7</sup>. Growing attention has been paid to the economic functions of a constitution<sup>8</sup> and on how economics might be used to study constitutions<sup>9</sup>. With the proliferation of the public choice theory, economists have been keen to use economic ideas to evaluate the constitutional order.<sup>10</sup> A constitution can no longer be seen as a purely legal document, it is also an economic document or at least a document with important economic consequences.

With the collapse of communism in the Soviet Union and the Eastern Europe, many governments are seeking ways to formulate their new constitutional orders. One of their major concerns is what kind of constitutional provisions can be used to facilitate economic changes or to act as a guarantor for the development of free market economy.<sup>11</sup> On the other side of the world, Asian countries such as South Korea, Vietnam and Laos have recently either amended their constitutions or formulated new clauses in their constitutions, so as to facilitate economic development.<sup>12</sup>

Greater China, which mainly includes China, Taiwan and Hong Kong, will serve a springboard for the Asia-Pacific region's economic development in the twenty-first century.<sup>13</sup> Frequent constitutional activities have been found in this area, many of which relate to economic matters. An analysis of economic provisions of the Constitutions of China, Taiwan and Hong Kong will not only help us to draw on experiences from their successes and failures, but also assist us to realize the ways in which the idea of constitutionalism has been institutionalised in different social and political settings. It is not possible in this short essay to provide a thorough analysis on the issue of economic constitutionalism, but it is hoped that it serves an exploratory purpose.

This paper will first trace the development of economic provisions of the constitutions in the PRC, Taiwan and Hong Kong. Emphasis will be placed on examining (1) the reasons why these economic provisions are included in the constitutions, (2) the ways in which how these economic provisions are incorporated, and (3) the roles and functions of these economic provisions.

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<sup>5</sup> M.J.C. Vile, *Constitutionalism and the Separation of Power* (Oxford: Oxford University Press, 1967).

<sup>6</sup> Carl J. Friedrich, *Limited Government: A Comparison* (New Jersey: Prentice-Hall, 1974).

<sup>7</sup> Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) and Douglas Greenberg, et al. eds., *Constitutionalism and Democracy: Transition in the Contemporary World* (New York: Oxford University Press, 1993).

<sup>8</sup> For example, Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913) and Gerald W. Scully, *Constitutional Environments and Economic Growth* (Princeton: Princeton University Press, 1992).

<sup>9</sup> Richard A. Posner, 'The Constitution as an Economic Document' Vol. 56, No. 1, *George Washington Law Review*, 1987, pp.4-38

<sup>10</sup> See James M. Buchanan, *Constitutional Economics* (Oxford: Basil Blackwell, 1991) and Dennis C. Mueller, *Constitutional Democracy* (New York: Oxford University Press, 1996).

<sup>11</sup> European Commission for Democracy through Law, *Constitutional Aspects of the Transition to a Market Economy* (Strasbourg: Council of Europe, 1994).

<sup>12</sup> See Han Dayuan, *Yazhou Lixian Shehui Yanjiu* (A Study of Asia Constitutionalism) (Beijing: Zhongguo Remin Angoung Daxue Chubashe, 1996) pp.234-7.

<sup>13</sup> For an analysis of the 'Greater China' phenomenon, see David Shambaugh, *Greater China: The New Superpower?* (Oxford: Oxford University Press, 1995).

Then, the paper will take on a comparative perspective. Specifically, the analysis will be guided by two principle questions: (a) is it appropriate to incorporate economic provisions in a constitution? and (b) what is the legality of economic provisions in a constitution? The first question will lead us to look at arguments that are in favor of and against the inclusion of economic provisions in a constitution and the ways in which the Chinese have dealt with this issue in three different social and political settings. The second question will direct us to examine whether these provisions can actually confer legal right and create legal remedies. Other countries' experiences will be drawn on in the analysis when it is appropriate.

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## **Chapter 1: PRC's Departure from Socialist Constitutionalism**

“Once [the constitution] is approved, the whole nation, once and all, should observe it.....An organization must have rules, and so must a state. A constitution is a set of general rules, it is the fundamental law.”<sup>14</sup>

Mao Tsetung

Since the establishment of the PRC in 1949, the Chinese Communist Party has gone through the establishments of five constitutions. The first was a document called the Common Program of the Chinese People's Political Consultative Conference [hereinafter the Common Program] established in 1949.<sup>15</sup> The other four were constitutions promulgated in 1954, 1975, 1978 and 1982.

In western democratic countries, constitutions usually lay down actual arrangements of political power and relationships between citizens and states. However in the PRC, constitutions have not only been used to institute political organs, but also to represent socio-economic programs at various development stages. There is nothing unusual for an inclusion of economic provisions in a communist state's constitution. According to Marxist-Leninist legal doctrine, law is a superstructure phenomenon which is a representation of a society's basic economic structure.

### **Socialist Transformation of Ownership of Means of Production**

From a socialist point of view, the essential features of every society are determined by its economic base, that is, its relationship with production. Most pertinent is the question of who owns the means of production. The ownership of the means of production has been the most significant issue that cuts across various constitutions of the PRC.<sup>16</sup>

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<sup>14</sup> Mao Tsetung, 'On the Draft Constitutional of People's Republic of China,' speech at the Thirtieth Session of the Central People's Government Council, June 14, 1954. In *Selected Works of Mao Tsetung Vol. 5* (Peking: Foreign Language Press, 1977) pp.141-7 at p.141.

<sup>15</sup> The Common Program served as the fundamental law of the PRC for a transitional period until 1954. In Albert P. Blaustein, *Fundamental Legal Documents of Communist China* (New Jersey: Rothman, 1962) pp.34-53.

<sup>16</sup> Of course, there are other aspects in various PRC constitutions that have important economic consequences such as economic management, population policy and distribution policy.

The Common Program, unlike later PRC constitutions in which economic principles were usually laid down in the “General Principles” section, contained a specific section on ‘Economic Policy’.<sup>17</sup> In the Common Program, although it stresses that all components of the social economy should be under the leadership of the state-owned economy<sup>18</sup>, it acknowledges the existence of various kinds of ownership. These were the state-owned economy<sup>19</sup>, the co-operative economy<sup>20</sup>, private capitalist economy<sup>21</sup>, the state-capitalist economy<sup>22</sup> and individual economy<sup>23</sup>. Nevertheless, the Common Program stipulates that “private capital shall be encouraged to develop in the direction of state-capitalism”.<sup>24</sup>

The CCP’s policy was very pragmatic in the early years, therefore, various kinds of ownership could still exist in the PRC. However, under the Common Program’s directives, the Party had used various tactics such as tax pressure, credit rationing, state competition and social movement<sup>25</sup> to transform private enterprises into state-capitalist enterprises and finally into state-owned enterprises<sup>26</sup>.

The 1954 Constitution was the first socialist constitution in China.<sup>27</sup> According to the Report on the Draft Constitution delivered at the National People’s Congress, the constitution “epitomizes historical experience on the question of constitutions and the constitutional movement in modern China”<sup>28</sup>.

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<sup>17</sup> The section contains not only provisions on the ownership of the means of production, but also provisions concerning other economic matters such as communications, commerce, banking and public finance, see The Common Program, Articles. 36-40.

<sup>18</sup> The Common Program, Article 26.

<sup>19</sup> *Ibid.*, Article 28.

<sup>20</sup> *Ibid.*, Article 29.

<sup>21</sup> *Ibid.*, Article 30.

<sup>22</sup> *Ibid.*, Article 31.

<sup>23</sup> *Ibid.*, Article 26.

<sup>24</sup> *Ibid.*, Article 31.

<sup>25</sup> Such as the Three-Anti Campaign (1951-52) and the Five-Anti Campaign (1952).

<sup>26</sup> See Xue Muqiao, *China’s Socialist Economy* (Beijing: Foreign Language Press, 1981) pp.25-32, and Alexander Eckstein, *China’s Economic Revolution* (London: Cambridge University Press, 1977) pp.66-109.

<sup>27</sup> Constitution of the People’s Republic of China [1954 edition], adopted on September 20, 1954. In Joseph En-pao Wang, *Selected Legal Documents of the People’s Republic of China* (Virginia: University Publication of America, Inc., 1976) pp.1-59.

<sup>28</sup> Liu Shao-chi, *Report on the Draft Constitution of the People’s Republic of China* (Peking: Foreign Language Press, 1954) p. 5.

Unlike the economic section in the Common Program which had a broader perspective on economic matters, economic provisions in the 1954 Constitution only focused on the issue of ownership of the means of production. The 1954 Constitution still contains provisions allowing the existence of capitalist ownership<sup>29</sup>. Although the Constitution calls for gradually replacement of capitalist ownership with various forms of state-capitalist economy, it stipulates that “the state protects the right of capitalists to own means of production and other capital according to law”<sup>30</sup>. Four basic forms of ownership of means of production are identified in this Constitution: state ownership—ownership by the people, co-operative ownership---collective ownership by the working masses, ownership by individual and ownership by capitalist<sup>31</sup>.

From its beginning, the 1954 Constitution was not seen as a static supreme law, its main purpose was to set down in legal form the fundamental tasks that needed to be accomplished along the road of socialist transformation. In its Preamble, it clearly declares that “...the attainment of a socialist society is a period of transition. During the transition the fundamental task of the state is, step by step, to bring about the socialist industrialization of the country and step by step, to accomplish the socialist transformation of agriculture, handicrafts and capitalist industry and commerce”.

The 1954 Constitution lasted for twenty-one years and there was no amendment to it during this period.<sup>32</sup> A new constitution was promulgated in 1975.<sup>33</sup> The 1975 Constitution has been regarded as a product of the Cultural Revolution, which is very brief and is full of political slogans. A new Preamble was written and the number of articles were reduced from 106 to 30.

According to the Report on the Draft Constitution delivered at the National People’s Congress, the main reason for a revised text of the Constitution was “to sum up our new experience, consolidate our new victories and express the common desire of the people of our country to persist in continued revolution under the dictatorship of the proletariat”.<sup>34</sup> Up to 1956, the socialist transformation was basically completed in the PRC, all capitalist economy had been transformed to state-capitalist economy . In the 1975 Constitution, it stipulates that there are mainly two kinds of ownership of means of production in the PRC: which are socialist ownership by the people and socialist collective ownership by working people.<sup>35</sup>

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<sup>29</sup> The 1954 Constitution, Article 5.

<sup>30</sup> *Ibid.*, Article 10.

<sup>31</sup> *Ibid.*, Article 5.

<sup>32</sup> Actually, there was a constitution being drafted in 1970 and was distributed nationwide for discussion. However, it was later recalled because of the Lin Biao (who was officially designated as Mao’s legitimate successor) incident.

<sup>33</sup> Constitution of the People’s Republic of China [1975 edition], adopted on January 17, 1975. In Joseph En-pao Wang, *op.cit.*, pp.65-89.

<sup>34</sup> Chang Chun-chiao, *Report on the Revision of the Constitution*, delivered on January 13, 1975, In Joseph En-pao Wang, *op.cit.*, pp.91-103.

<sup>35</sup> The 1975 Constitution, Article 5.



In 1978, the CCP once again revised the constitution following the crushing of the ‘Gang of four’.<sup>36</sup> Again, the reason given to revise the constitution was “to meet the needs of the new period in socialist revolution and construction”.<sup>37</sup> In the PRC, a new constitution is needed whenever there is a critical turning point in political development or there is a big shift in party’s policy. The 1978 Constitution was a transient constitution, which only lasted for approximately four and half years.<sup>38</sup>

In terms of ownership in agriculture, the Common Program stipulated that “in area where agrarian reform has not been carried out, the peasant masses must be set in motion to establish peasant organisations and to put into effect of the policy of “land to tiller” through such measures as the elimination of local bandits and despots, the reduction of rent and interest and the distribution of land”<sup>39</sup>.

In 1952, land reform in the PRC was completed and the program of agricultural collectivization started. The 1954 Constitution urged that the state “guides and help individual peasants to increase production and encourages them to organise producer’s, supply and marketing, and credit co-operatives voluntarily”<sup>40</sup>.

In 1958, the policy of setting up the system of People’s Commune in rural areas was adopted by the CCP. This policy was written into the 1975 Constitution.<sup>41</sup>

## **Reverse Transformation of Ownership of Means of Production**

Deng Xiaoping’s revival in 1976 marked another turning point of the PRC’s political and economic development. In 1978, the Four Modernization Program<sup>42</sup> was reintroduced. In September 1980, a committee for the revision of the constitution was set up to draft a new constitution. A new constitution was promulgated in 1982.<sup>43</sup>

Although the 1982 Constitution reaffirms socialist public ownership of the means of production as the basis of economic system in the PRC, it allows the existence of two other forms of ownership. The first form is the individual economy. Article 11 of the 1982 Constitution openly acknowledges that “[t]he individual economy..... is a complement to the socialist public economy. The states protects the lawful rights and interests of individual economy”.

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<sup>36</sup> Constitution of the People’s Republic of China [1978 edition], adopted on March 5, 1978. In Joseph En-pao Wang, *Selected Legal Documents of the People’s Republic of China II* (Virginia: University Publication of America, Inc., 1979) pp.125-70.

<sup>37</sup> Yeh Chien-ying, *Report on the Revision of the Constitution*, delivered on March 1, 1978. In Joseph En-pao Wang, *op.cit.* (note 23 above) pp.171-28.

<sup>38</sup> For an analysis of the 1978 Constitution, see Jerome Alan Cohen, ‘China’s Changing Constitution,’ *The China Quarterly*, No. 76, 1978, pp.794-841.

<sup>39</sup> The Common Program, Article 27,.

<sup>40</sup> The 1954 Constitution, Article 8.

<sup>41</sup> The 1975 Constitution, Article 7.

<sup>42</sup> It represented the modernization of agriculture, industry, science-technology and national defense.

<sup>43</sup> Constitution of the People’s Republic of China, adopted at the Fifth session of the Fifth National People’s Congress on December 4, 1982. In *The Laws of the People’s Republic of China (1979-1982)*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China (Beijing: Foreign Languages Press, 1987) pp.2-32.

The second form of ownership is direct and indirect foreign investments in the PRC. Article 18 of the 1982 Constitution states that the PRC “permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organizations in accordance with the law of the People’s Republic of China”. Actually, before the change of the Constitution, four Special Economic Zones were already created in 1980, in which foreign investors were permitted to build factories and to hire Chinese workers.

With the continuation of economic reform in the 1980s, individual and private economy developed rapidly. In 1987, the Thirteenth National Congress of the CCP adopted a new political-economic theory, namely the theory of ‘primary stage of socialism’. Mr. Zhao Ziyang, the Premier of the PRC at that time, explained that in the primary stage of socialism, “ it is particularly important to develop diverse sectors of the economy, provided that public ownership remains dominant, to have diverse forms of distribution, provided that distribution according to work is the principal form...”<sup>44</sup>

In 1988, a new paragraph was added to article 11 of the 1982 Constitution, which stipulates that “[t]he state permits the *private sector* of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy.....(italic added)’. It was the first time a PRC constitution accepted the existence of private economy within the state, unlike the 1954 Constitution, in which capitalist economy was accepted as only a temporary measure.

In 1988, the 1982 Constitution was also amended to provide a constitutional base for the transfer of land use rights. Article 10 of the 1982 Constitution, which provides that “[n]o organization or individual may appropriate, buy, sell or lease land otherwise engage in the transfer of land by unlawful means” was amended to “[n]o organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law.”<sup>45</sup>

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<sup>44</sup> Zhao Ziyang, ‘Advance Along the Road of Socialism with Chinese Characteristics—Report Delivered at the Thirteenth National Congress of the CPC’ in *Documents of the Thirteenth National Congress of the Communist Party of China* (Beijing: Foreign Language Press, 1987) p.15.

<sup>45</sup> For an overview of changes in land ownership right in various PRC constitutions, see Han Dayuan & Li Lei, ‘ Lun Woguo Xianfa dui Tudi Suoyouquan de Diaozheng,’ (A Discussion on the Changes of Land Ownership Rights in the Chinese Constitution) *Faxue Jia*, No.4, 1996, pp.3-8.

In 1992, the notion of ‘socialist market economy’ was adopted by the Fourteenth Congress of the PRC. In order to reflect this change, several constitutional amendments were made in 1993.<sup>46</sup> Article 15 of the 1982 Constitution was amended from “[t]he state practises *planned economy* (italic added) on the basis of socialist public ownership.” “Disturbance of the socioeconomic order of disruption of the state economic plan by any organization or individual is prohibited.” to “[t]he state practises *socialist market economy* (italic added).” ‘The state strengthens economic legislation, improves macro-regulation and control, and prohibits in accordance with the law any organization or individual from disturbing the socioeconomic order.’”

At the same time, article 7 of the 1982 Constitution was amended from “[t]he *state economy* (italic added) is the sector of socialist economy under ownership by the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state economy.” to “[t]he *state-owned economy* (italic added), namely, the socialist economy under ownership by the whole people, is the leading force in the national economy. The state ensures the consolidation and growth of the state-owned economy.” This amendment acknowledges that there is a difference between the ownership of the means of production and the right of operation, these two can be separated. Under the state-owned principle, enterprises can adopt various kinds of operation methods.

## **The Essence of Economic Constitutionalism in the PRC**

Today’s PRC textbook of the constitutional law still argues that constitutional law is in the realm of superstructure and its nature is determined by its economic base. From a Chinese legal perspective, a constitution not only reflects society’s economic base, but also has contributory effects to the economic base. For a capitalist constitution, these contributory effects are latent. But for a communist constitution, these effects are manifest.<sup>47</sup>

Undoubtedly, constitution in the PRC is not only a supreme law of the state, it is also a social, economic and political program for socialist transformation. The belief that the major difference between a capitalist and a communist society lies in its economic base provides a major justification that economic principles should be incorporated in a communist state’s constitution.

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<sup>46</sup> See ‘Amendment to the Constitution of the People’s Republic of China,’ adopted at the First session of the Eight National People’s Congress on March 29, 1993, in *The Laws of the People’s Republic of China 1993*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China (Beijing: Science Press, 1995) pp.5-7.

<sup>47</sup> Xu, Chongd, ed., *Zhongguo Xianfa* (The Constitution of China) (Beijing: Zhongguo Renmin Daxue Chubanshe, 1996) pp. 56-8.

Soon after the establishment of the PRC, the CCP was eager to institute a new social, economic and legal order in China. A series of socialist transformations were swiftly carried out by the CCP, prominent among which were agrarian reform and the gradual transformation of all capitalist industries into state industries. The Common Program and the 1954 Constitution not only contained a summary of guiding principles for the country, they also served the political purpose of protecting these newly established institutions. In most western countries, the constitution is mainly used for limiting governmental power. By contrast, in the PRC, the state had been conferred by constitution, a tremendous power to carry out the necessary transformation.

Over the years, economic issues have played a significant role in various PRC constitutions. In the 1954 Constitution, thirteen out of twenty articles are economically related. In the 1975 Constitution, six out of fifteen articles are economically related. In the 1982 Constitution, they are thirteen out thirty-two articles.

In the PRC, either general economic principles or specific economic policy objectives have been written into various constitutions. From a socialist point of view, a society needs to evolve before it reaches the stage of communism . When a society comes to a new development stage, there are new tasks that have to be accomplished. In order to perform this function, a socialist constitution inevitably has to be changed from time to time. This is why new constitutions in PRC usually contain a statement to the effect that a further phase in social development has been attained.<sup>48</sup>

In the PRC, the CCP leadership controls all spheres of Chinese life, including making and remarking the constitution. As a convention, all constitutional changes in the PRC have been proposed by the CCP.<sup>49</sup> Peng Zhen, the former Chairman of the Standing Committee of National People's Congress, summarized that "the party leads the people in formulating the constitution and the law, it also leads the people in observing and enforcing them."<sup>50</sup> Although for the first time since the founding of the PRC, the 1982 Constitution stipulates that all state organs have to abide by the Constitution, the Preamble of the Constitution stresses that the Chinese people of all nationalities should continue under the leadership of the CCP.

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<sup>48</sup> See Yu Xingzhong, 'Legal Pragmatism in the People's Republic of China,' *Journal of Chinese Law*, Vol. 3, No.1, 1989, pp. 29-51 at 44-45.

<sup>49</sup> Zhu Guobin, *Zhongguo Xianfa yu Zhengzhi Zhidu* (The Constitution of China and its Political Structure) (Hong Kong: Joint Publishing, 1997) p. 43.

<sup>50</sup> See Peng Zhen, *Lun Xinzhongguo de Zhengfa Gongzuo* (A Discussion on the Political and Legal Work in New China) (Beijing: Zhongyang Kexue Wenxian Chubanshe 1992) p. 425.

Before 1980s, China's economic reform was largely carried out by means of party policy. Party policy in China has always been treated like law in China. This is possible because all state organs must adhere to the principle of democratic centralism.<sup>51</sup> When new problems arise, party policy takes effect before law is available. When party policy has been considered to be accurate and effective, the state uses law to crystallize the policy. In the PRC, law is seen as an integration of party policy and people's will.<sup>52</sup>

In recent years, efforts have been made to ensure that economic reform is processed according to the constitution and the law.<sup>53</sup> Although party policy still plays a significant role in leading the country's economic reform, major new reform policies had been swiftly incorporated into constitution.<sup>54</sup> However, tensions or potential conflicts between the pace of economic reform and constitutional constraints exist. China's legal system does not yet have adequate mechanisms and the experience to adapt the constitution according to the changing environment. This question will be discussed more detail in the final chapter.

The CCP has all along adopted an instrumental approach towards law.<sup>55</sup> Law in China is viewed as a means to an end. In Mao's era, law, including constitution, was predominantly used as an instrument of class struggle. In late 1978, the CCP decided to abandon Mao's theory of class struggle, and to shift the state's focus from political struggle to economic development. Since then, the CCP has sought to redefine the relationship between the state and the economy by rolling back the state through decentralization and enhancing the role of markets and private enterprises. However, the programmatic nature of a PRC constitution remains. In the past, constitution was used to guide socialist transformation. Now, the constitution is used to direct the country towards market-oriented reform. The constitution is still used as a tool for economic engineering. The CCP still proclaims that China is a socialist country, but is now in a primary stage of socialism. At this stage, all kinds of economic measures, whether socialist or capitalist, can be made use of by socialism.

From 1982 onwards, the orthodox notion of socialist ownership of the means of production has gradually been abandoned. Through various constitutional amendments in 1988 and 1993, diverse forms of ownership of the means of production have been legitimated in the PRC. It has been argued that these amendments (1) consolidate the successful experiences of the reform process and reflect new changes in the economic system; (2) provide a guiding principle for all the people and for all the activities carry out by state organs; and (3) facilitate further legislative works, especially economic legislation.<sup>56</sup>

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<sup>51</sup> The principle provides that the People's Government of the lower levels shall obey the People's government of the higher levels and all local People's government throughout the country shall obey the Central People's Government. See The Common Program, Article 15.

<sup>52</sup> See Chen Shouyi, 'A Review of Thirty Years of Legal Studies in New China,' *Journal of Chinese Law*, Vol. 2, No. 1, 1988, pp. 181-200 at 196.

<sup>53</sup> Gan Cangshuen, 'Zenyang Baosheng Gagai de Hefaxing' (On Reform by Law) *Faxue Yanjiu* (Studies in Law), Vol. 77, 1991, pp.1-6.

<sup>54</sup> For example, the idea of 'socialist market economy' was formulated by the CCP in 1992 and was incorporated into the Constitution in 1993.

<sup>55</sup> See Yu Xingzhong, 'Legal Pragmatism in the People's Republic of China,' *Journal of Chinese Law*, Vol. 3, No.1, 1989, pp. 29-51.

<sup>56</sup> Liu Zheng, 'Wei Jianshe You Zhongguo Tese de Shehui Zhuyi Tigong Gengyouli de Xianfa

## Chapter 2: Taiwan's Struggle in Historical Constitutionalism

The promulgation of the Constitutional Principles of 1908<sup>57</sup> by the Imperial Government officially marked the beginning of era of constitutionalism in China. This document, which was based on the principle of constitutional monarchy, did not save the Ching Dynasty. In 1911, revolution broke out in China, resulting in the overthrow of the Ching Dynasty and the termination of two thousand years of monarchy system.

### Constitutional Experiments in the Republican Era

The new government of the Republic of China (ROC) was established on Jan. 1, 1911. During the period between 1911 and 1925 (the Republican era), six different versions of the constitution were promulgated which included: (1) the Provisional Constitution of the ROC of 1912; (2) the Draft Constitution of the ROC of 1913, known as the "Temple of Heaven Draft"; (3) the Provisional Constitution of the ROC of 1914, promulgated by Yuan Shiu-kai; (4) the Draft Constitution of the ROC of 1919, known as the "Aufu Draft"; (5) the Constitution of the ROC of 1923, promulgated by Tsao Kun and (6) the Draft Constitution of the ROC of 1925.<sup>58</sup> That means one constitution about every two years.

Three major constitutional controversies which surfaced during the Republican era had tremendous effects on future constitutional development in China. They included (1) the struggle between a republic and a monarchy form of state; (2) the comparative merits of a presidential and a cabinet system of government and (3) the issue of a unitary versus a federal state.

In the mid-1920s, two failed attempts were made to restore the monarchy system.<sup>59</sup> This ended the dispute whether China should be a republic or a monarchy state. The alternation between the presidential and the cabinet system of government and the failures of both during this period resulted in a different system---the collegiate system which was adopted by the Nationalist Government in the 1940s.<sup>60</sup> Also, the failure of a provincial constitutional movement, unfortunately led by local warlords, undermined the possibility of federalism in China.<sup>61</sup>

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Baozhang,' ('Constitutional Protection of Socialism with Chinese Character') *Zhongguo Faxue* (Chinese Legal Sciences) Vol. 2, 1993, pp. 5-10 at p.6.

<sup>57</sup> For an English translation, see Pan Wei-tung, *The Chinese Constitution: A Study of Forty Years of Constitution-Making in China* (Wesport, Conn: Hyperion Press, 1945) pp.145-7.

<sup>58</sup> For a complete list of constitutions, provisional constitutions, and constitutional drafts in 1908-1946 in China, see Chien Tuan-Sheng, *The Government and Politics of China* (Massachusetts: Harvard University Press, 1950) Appendix B.. For English translations, see Pan Wei-tung, *ibid.*, Appendices C, D, E, F, G, I.

<sup>59</sup> The first attempt was led by Yuan Shiu-kai in 1915, the second one was led by Chang Hsun in 1917.

<sup>60</sup> Zhao Suisheng, *Power by Design: Constitution-making in Nationalist China* (Hawaii: University of Hawaii Press, 1996)

<sup>61</sup> Yang Yu-Chiung, rev. ed. *Jindaii Zhanguo Lifa Shi* (A History of Modern Chinese Legislation) (Taipei: Shangwu, 1966) pp.285-95.

All the constitution drafts in this period had focused on political issues. The only part that related to economic matters was the “Budget Section” in various drafts. All the constitution drafts had a section on government budget, which basically laid down the budget-making process and distribution of budgetary powers between the executive and legislature.<sup>62</sup> At that time, it was commonly believed that constitution-making in western countries, especially in America and Britain<sup>63</sup>, had been caused by public finance disputes within these countries.<sup>64</sup>

In the draft version of the Constitution of the ROC of 1923, there was a section on “People’s Livelihood” and a section on “Education”.<sup>65</sup> This was the first time matters concerning social and economic policies were included in a Chinese constitutional framework. According to a report explaining the draft, the principal reason for adding these two sections in the constitution was to try to damper potential conflicts between the rich and the poor.<sup>66</sup> It was also a response to the communist movement within China and around the world.<sup>67</sup> Most of the provisions in these two sections were inspired by the similar provisions in the Weimar Constitution of Germany (1919).<sup>68</sup> The German Constitution was seen as an appropriate expressions of government commitment to erasing various social problems caused by the industrial revolution and capitalism.<sup>69</sup> However, because of time constraints, these two sections were abandoned at the final voting stage.

The Republican era was full of chaos and unrest, with warlords fighting against each other for power and private interest. During this period, there was a constant change of government in Peking, a new government was set up after an old one collapsed. The governments only used constitutions and constitution-making process to legitimate their power.

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<sup>62</sup> For example, there was a section on State Finance in the Temple of Heaven Draft (1913), see Pan Wei-tung, *op. cit.* (note 1 above) Appendix D at pp.167-8.

<sup>63</sup> The Magna Charta (1215)

<sup>64</sup> Zhang Kun-mai, *Zhanghau Minguo Mingzhu Xianfa Shi* (Ten Lectures on The Constitution of the ROC) (Shanghai: Shangwu, 1947) pp.109-23.

<sup>65</sup> Wu Tseng-tze, *Zhonghau Minguo Xianfa Shi* (History of the Constitutions of the Republic) Facsimile of the edition of 1924 (Taipei: Xinwenhua, 1973) Chapter 15, pp. 451-3.

<sup>66</sup> Wu Tseng-tze, *ibid.*, Chapter 15, pp.454-69.

<sup>67</sup> The Chinese Community Party was established in 1917.

<sup>68</sup> Wu Tseng-tze, *op.cit.* (note 9 above) Chapter 15, pp.457-67.

<sup>69</sup> Luo Zhi-yuan, *Zhangguo Xianfa Shi* (A History of Chinese Constitution) (Taipei: Shangwu, 1967) pp.317-29

## Constitutionalism of the Three Principles of the People

In April 1927, the Nationalist Government led by Kuomintang (KMT) was established in Nanking. China was united again, and marked a new phase of constitutionalism in China.<sup>70</sup> In 1933, a constitutional-drafting committee was appointed by the presidency of the legislature. A preliminary draft constitution of 214 articles was published in newspapers for public consultation. After various revisions, a draft constitution was published on May 5, 1936, as a document of 8 chapters and 148 articles (popularly known as May Five Draft Constitution).<sup>71</sup> The 8 chapters were (1) General Provisions; (2) National Assembly; (3) Rights and Duties of the Citizen; (4) Central Government; (5) Local Government; (6) National Economy; (7) Education; and (8) the Enforcement and Amendment of the Constitution.

The draft underwent various revisions, and the final constitution was adopted by a National Assembly on December 25, 1946. It was a document of 14 chapters with 175 articles, with National Policies forming a separate chapter--Chapter XIII.<sup>72</sup> The chapter on National Policies contained sections on national defense, foreign affairs, national economy, social security, education and culture, and the special welfare of boarder regions.

The Constitution of the ROC of 1946 [hereinafter the Constitution of the ROC or the ROC Constitution] was largely based on Dr. Sun Yat Sun's 'Three Principles of the People'-- the Principle of Nationalism--People's National Consciousness; the Principle of Democracy --People's Rights; and the Principle of Socialism--People's Livelihood.<sup>73</sup> Out of 175 articles of the Constitution, 8 articles related to the Principle of Nationalism, 144 articles related to the Principle of Democracy and 25 articles related to the Principle of Socialism.<sup>74</sup>

The Principle of People's Livelihood (Socialism) represented Dr. Sun's idea of economic reform in China. Dr. Sun envisioned a social revolution to equalize the land rights and to prevent the evils of capitalism. Specifically, Dr. Sun proposed that the state should collect the unearned increments of land value and the state should control ownership of principal industries and important utilities. Dr. Sun also called for a restriction on private capital in China, and instead, a fully utilization of capital from advanced countries.<sup>75</sup>

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<sup>70</sup> For a summary of constitutional development in this period, see Chien Tuan-Sheng, *op. cit.* (note 2 above) Chapter XXI.

<sup>71</sup> Pan Wei-tung, *op. cit.* (note 1 above) Appendix O.

<sup>72</sup> The Constitution of the ROC, reprinted in Chiu Hungdah, *Constitutional Development and Reform in the Republic of China on Taiwan* (Baltimore, Md: Occasional Papers/Reprints Series in Contemporary Asian Studies, 1993) pp.42-50.

<sup>73</sup> See Sun Yat Sun, 'The Fundamentals of National Reconstruction (1924)' in Pan Wei-tung, *op. cit.*, (note 1 above) Appendix H.

<sup>74</sup> Fu Su-liang, *Zhongguo Wianfa Lun* (A Study on Chinese Constitution) (Taipei: Sanming, 1985) p.71.

<sup>75</sup> Sun Yat Sun, *op.cit.* (note 17 above)



In Chapter XIII of the Constitution of ROC, section 3 deals with the issue of national economy, in which Dr. Sun's idea of the Principle of People's Livelihood was fully integrated. These manifested in :--

Article 142. National economy should be based on the Principle of the People's Livelihood and shall seek to effect equalization of land ownership and restriction of private capital in order to attain a well-balanced sufficiency in national wealth and people's livelihood.

Article 143. All land within the territory of the Republic of Land shall belong to the whole body of citizens. Private ownership of land, acquired by the people in accordance with law, shall be protected and restricted by law. Privately-owned land shall liable to taxation according to its value, and the Government may buy such land according to its value.(first paragraph)

Article 144. Public utilities and other enterprises of a monopolistic nature shall, in principle, be under public operation. In cases permitted by law, they may be operated by private citizens.

Article 145. With respect to private wealth and privately-operated enterprises, the State shall restrict them by law if they are deemed detrimental to a balanced development of national wealth of people's livelihood.(first paragraph)

The remaining provisions in Section 3 dealt with state support for agricultural development<sup>76</sup>, keeping a balanced economic development among provinces<sup>77</sup>, freedom of goods<sup>78</sup>, state control of financial institutions<sup>79</sup>, state assistance to the unemployed<sup>80</sup> and fostering economic enterprise run by Chinese citizens residing abroad<sup>81</sup>.

Besides the section on National Economy, there are other provisions in the Constitution that have direct relevance to economic matters. Article 15 protected the right of property. Article 107 divided legislative and administrative power between the central and local governments, in which the central government is responsible for all major transportation and telecommunication services, state-operated economic enterprises, currency and banking system, foreign trade policies and international economic matters. The Provincial and Hsien governments had the power to manage their local economic matters<sup>82</sup> and could obtain legislative and administrative power from the central government to manage certain economic matters<sup>83</sup>.

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<sup>76</sup> The Constitution of the ROC, Article 146.

<sup>77</sup> *Ibid.*, Article 147.

<sup>78</sup> *Ibid.*, Article 148.

<sup>79</sup> *Ibid.*, Article 149.

<sup>80</sup> *Ibid.*, Article 150.

<sup>81</sup> *Ibid.*, Article 151.

<sup>82</sup> *Ibid.*, Article 109 and 110.

<sup>83</sup> *Ibid.*, Article 108.

The Constitution of the ROC took effect on December 25, 1947. Moreover, in April 1948, because of a full scale civil war between the Nationalist Government and the Chinese Communist Party, the National Assembly adopted the ‘Temporary Provisions for Duration of Mobilization to Suppress the Rebellion’ (Temporary Provisions).<sup>84</sup> Basically, these provisions extended Presidential Power to take any emergency measures needed to prevent the state or the people from facing immediate dangers or to cope with financial or economic crises.

The Nationalist Government was defeated in 1949 and fled to Taiwan on December 8. Since then, the ROC Constitution has only been in force in Taiwan. Subsequently, there were four amendments to the Temporary Provisions.<sup>85</sup> All these amendments further extended the Presidential Power allowed in the Constitution.<sup>86</sup> The section on National Economy had been intact even since the Constitution was promulgated.

The Temporary Provisions was terminated three years later after Lee Teng-hui assumed Taiwan’s presidency in 1988. Since then, new articles had been added to the ROC Constitution in 1991, 1992 and 1994.<sup>87</sup> These amendments represented a series of constitutional reforms which aimed at democratization of various political institutions in Taiwan, including the National Assembly, the Legislature Yuen, the Governor of Taiwan and the Presidency. Also, certain new items concerning economic matters were added to the National Policies Section. Among these items are state support for science and economic development, environment protection of economic development, and managing government-run financial organization in line with the principles of business administration.<sup>88</sup> Most of these items were adopted in response to pressure from the opposition party (Democratic Progressive Party) and civilian groups.<sup>89</sup>

In July 1997, the Constitution was amended again. This time, the amendments included measures to trim the Taiwan provincial government, changes to the existing primer approval process and the presidential impeachment process, ways to empower the Legislative Yuan and the protection of the Judicial Yuan’s budget from executive interference.

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<sup>84</sup> Fu Su-liang, *op.cit.* (note 18 above) p.690

<sup>85</sup> See Fu Su-liang, *op.cit.* (note 18 above) pp.690-94. For an English translation of the ‘Temporary Provisions’ see Chiu Hungdah, *op.cit.*, (note 16 above) pp.50-1.

<sup>86</sup> Chiu Hungdah, *op.cit.* (note 16 above) pp.20-21

<sup>87</sup> Chiu Hungdah, *op. cit.* (note 16 above) p.25-36, Hung-mao Tien & Yun-han Chu, ‘Building Democracy in Taiwan,’ *The China Quarterly*, No. 148, 1996, pp.1141-70, Lin Teng-yau, *Zhonghau Minguo Xianfa* (The ROC Constitution) (Taipei: Sanming, 1995) pp.24-38 and Chien-Yuan Tseng, ‘On the Constitutional Reform in Taiwan in the 1990s under the Guidance and Initiative of the KMT,’ *The Constitutional Review*, Vol. 22, No.3, 1997, pp.97-110.

<sup>88</sup> All items are in Article 9, ‘Additional Articles of the Constitution of the Republic of China’. In Gisbert H. Flanz, *Constitutions of the Countries of the World*, Vol. XIX, Taiwan Republic of China Booklet I, (New York: Oceana Publishing Co.) pp.41-9 at pp.47-8.

<sup>89</sup> Chien-Yuan Tseng, *op.cit.* (note 31 above)pp.107-8.

## The Essence of Economic Constitutionalism in Taiwan

Taiwan's textbooks on the ROC Constitution regard highly the 'Three Principles of People' as the guiding principle of the constitution, and the inclusion of social and economic provisions is considered as one of the major characteristics of the Constitution.<sup>90</sup> The ROC Constitution was based on the May Five Draft Constitution, which was drafted before the Second War World. At that time, many western countries had experienced growing social problems and unrest caused by capitalism. There was great demand for government to take a positive role to protect ordinary people's livelihood. The idea of an economic constitution was developed in Germany after the First War World<sup>91</sup>, and it became a model for Chinese constitution.<sup>92</sup>

The ROC Constitution calls for an interventionist state. Although private property is protected by the Constitution, the state is expected to play a dominant role in controlling and regulating economic activities. The Constitution provides that the state should not only control major public utilities and financial institutions, but also keep a balanced development towards an equitable society.

Taiwan's economic development started with agricultural reform in late 1940s, followed by a short period of import substitution development in 1950s, then went through an export-led economy in 1960s and 1970s, and experienced a period of industrial upgrading and infrastructure development in 1970s and early 1980s.<sup>93</sup> In last two decades, Taiwan's GNP grew at an average of around 9 percent. In 1990s, it has been over 6 percent. Although Taiwan has enjoyed sustained economic growth for more than 45 years, it is questionable whether the provisions related to the National Economy in the Constitution have ever been fully implemented or have been a blueprint for Taiwan's economic development.

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<sup>90</sup> See, for example, Fu Su-liang, *op. cit.* (note 18 above) pp.66-72.

<sup>91</sup> For a historical review, see David J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition and the "New" Europe,' *The American Journal of Comparative Law*, Vol. 42, 1994, pp. 25-84.

<sup>92</sup> Luo Zhi-yuan, *op. cit.* (note 13 above) pp.317-23. The Weimar Constitution of 1919 was considered to have great influence to many other Basic Law, such as the Spanish Constitution of 1931, the Italian Constitution of 1947, and the Portuguese Constitution of 1976. See Jorge Mirada, 'The Constitutional Basis of the Economic Order,' in European Commission for Democracy through Law, *Constitutional Aspects of the Transition to a Market Economy* (Strasbourg: Council of Europe, 1994) pp.25-41 at pp. 34-5.

<sup>93</sup> See Shirley W. Y. Kuo, *The Taiwan Economy in Transition* (Boulder, Colorado: Westview Press, 1983) and Kuo-Ting Li, 2<sup>nd</sup> ed. *The Evolution of Policy Behind Taiwan's Development Success* (Singapore: World Scientific, 1995)

Although Dr. Sun's economic ideas were fully integrated into the ROC Constitution, many of them were vague, ambiguous and difficult to implement. Scholars had long criticized that the Principle of People's Livelihood was the most ill-explained of the Three Principles.<sup>94</sup> Since these ideas are subjected to various interpretations<sup>95</sup>, it is impossible to evaluate whether subsequent economic policies in Taiwan have direct bearing to them. However, there is no denying that legal system has played an important role in economic development in Taiwan. The Taiwan government has used a variety of statutory instruments to encourage economic growth and development, prominent among which are the Statue for Investment by Foreign Nationals, the Statue for the Encouragement of Investment and the Statue for Upgrading Industries.<sup>96</sup>

Dr. Sun's economic transformation plan was originally geared towards mainland China, where has the geographical characteristics and social composition differed greatly to that of Taiwan. Of course, one may argue that Dr. Sun's ideas on international economic relations and the state's role in economy management and equalisation of land rights, led Taiwan from being a traditional agrarian economy into a modern and industrialized one.<sup>97</sup> However, one should ask whether those development strategies were adopted because of economic and political necessity<sup>98</sup> or were derived from Dr. Sun's ideas, given that other industrialized countries had been using similar development strategies.

There is a common understanding among academics that the provisions in the National Economy section are not enforceable by the judiciary. The Government's failure to implement policies stipulated in the National Economy section have not been considered unconstitutional.<sup>99</sup> Economic provisions in the constitution are more like social objectives than rules that are binding.

Taiwan badly needs a new constitution to guide its political and economic developments. However, an enactment of a new constitution would cause high suspicion from the PRC. The PRC Government would consider it as an act to seek independence by the Taiwan Government. It seems that in the near future, Taiwan still has to struggle within its age-old constitutional framework.

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<sup>94</sup> Chien Tuan-Sheng, *op. cit.*(note 2 above) p.303.

<sup>95</sup> See John C. H. Fei, 'A Bird Eye View of policy Evolution in Taiwan: An Introduction Essay,' Kuo-Ting Li, *op.cit.* (note 37 above) and Chen-Kuo Hsu, 'Ideological Reflections and the Inception of Economic Development in Taiwan,' in Joel D. Aberbach *et al.*, eds., *The State Role in Taiwan's Development* (New York: M. E. Sharpe, 1994)

<sup>96</sup> See Neil L. Meyers, *Statutory Encouragement of Investment and Economic Development in the Republic of China on Taiwan* (Baltimore, Md: Occasional Papers/Reprints Series in Contemporary Asian Studies, 1994).

<sup>97</sup> See A. James Gregor and Maria Hsia Chang, *Essays on Sun Yat-Sen and the Economic Development of Taiwan* (Baltimore, Md: Occasional Papers/Reprints Series in Contemporary Asian Studies, 1983).

<sup>98</sup> Stephan Haggard & Chien-kuo Pang, 'The Transition to Export-Led Growth in Taiwan,' in Joel D. Aberbach *op.cit.* (note 39 above) It was argued that KMT's defeat in the mainland and other external political factors had led KMT to rethink its commitment towards a state-dominated economic system.

<sup>99</sup> Fu Su-liang, *op. cit.* (note 18 above) pp.628-9.

### Chapter 3: Hong Kong's Experiment on Free Market Constitutionalism

Before 1997, Hong Kong had its own codified constitution promulgated by the Crown in Britain. The constitution was actually two short documents, namely the Letters Patent and the Royal Instructions<sup>100</sup>, which laid down the major institutions of government in Hong Kong and conferred them with certain powers, rights, and duties. Both documents could only be amended by the Queen and the UK Parliament and not by Hong Kong government or legislature.<sup>101</sup>

In these two documents, provisions relating to economy were minimal. Article XIII of the Letters Patent dealt with the Governor's power to dispose of land. Article XXVI of the Royal Instructions restricted the Governor's power to assent to certain bills which included bills related to the currency of the colony and banking associations.

The lack of social and economic provisions in these documents fit the nature of a colonial constitution. A colonial constitution was "the instrument of demand management and not the articulation of values or the forum for arguing in public the claims of different parts of society."<sup>102</sup>

Hong Kong's sovereignty issue was resolved through signing the Joint Declaration on the Question of Hong Kong<sup>103</sup> (hereinafter Joint Declaration) by the British Government and the PRC Government in 1984. The Joint Declaration promised to preserve the capitalist economic system in Hong Kong for 50 years. Annex 1 of the Joint Declaration stipulated that the PRC shall establish the Hong Kong Special Administration Region (SAR) and a Basic Law would be promulgated to reflect the PRC's basic policies regarding Hong Kong. Annex 1 was a detailed elaboration of these policies, in which, sections relating to economy such as Finance, Economic System, Monetary System, Shipping and Civil Aviation were included.

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<sup>100</sup> Both documents are in Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (HK: Longman Asia Ltd. 1994), Appendix I and 2, pp.406-426

<sup>101</sup> *Ibid.*, pp. 42-49.

<sup>102</sup> Yash Ghai, 'The Past and the Future of Hong Kong's Constitution,' *The China Quarterly*, Vol. 128, 1991, pp.794-813 at p.803.

<sup>103</sup> Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, reprinted in *The Basic Law of the Hong Kong Special Administrative Region Administrative Region of the People's Republic of China* (HK: One Country Two Systems Economic Research Institute Ltd., 1992) pp.89-116.

## The Emergence of a Free Market Constitutionalism

China initiated the Basic Law drafting process in 1985 by appointing a Basic Law Drafting Committee<sup>104</sup> and a Basic Law Consultative Committee<sup>105</sup>. The first draft of the Basic Law was published in April 1988 for public consultation. The final version was adopted on 4 April 1990. The Basic Law contains 160 articles and three annexes.<sup>106</sup> Chapter 5 of the Basic Law deals with the issue of Economy, which consists of 4 sections and 31 articles.

In the drafting process, great efforts were made to ensure that the economic provisions in the Basic Law were specific and clear and that they contained all the important ingredients that were needed for the preservation of a free market system in Hong Kong. Provisions ranging from broad economic policies like tax, trade, and commerce to specific economic arrangements like shipping registration and airline permits were included.

Turning to the specific economic provisions of the Basic Law, private property and inheritance of property are protected<sup>107</sup>, the SAR shall have an independence finance system<sup>108</sup> and taxation system<sup>109</sup>. It has its own monetary and financial policies<sup>110</sup>, and currency<sup>111</sup>. It shall maintain the status of a free port<sup>112</sup>, and pursue the policy of free trade<sup>113</sup>. All leases of land granted by the Hong Kong government which extend beyond the transfer of sovereignty shall continue to be recognized<sup>114</sup>. Also, the SAR shall maintain Hong Kong's previous system of shipping management and shipping regulation<sup>115</sup> and shall continue the previous system of civil aviation management<sup>116</sup>.

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<sup>104</sup> With a membership of 59, of whom 23 were from Hong Kong (included numerous representatives of business interests) the rest were from China.

<sup>105</sup> With a membership of 180, it was drawn from various sectors and strata in Hong Kong.

<sup>106</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, in *The Laws of the People's Republic of China 1990-1992*, compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (Beijing: Science Press, 1993) pp.17-49.

<sup>107</sup> The Basic Law, Articles 6 and 105.

<sup>108</sup> *Ibid.*, Article 106.

<sup>109</sup> *Ibid.*, Article 108.

<sup>110</sup> *Ibid.*, Article 110.

<sup>111</sup> *Ibid.*, Article 111.

<sup>112</sup> *Ibid.*, Article 114.

<sup>113</sup> *Ibid.*, Article 115.

<sup>114</sup> *Ibid.*, Article 120.

<sup>115</sup> *Ibid.*, Article 124.

<sup>116</sup> *Ibid.*, Article 129.

One of the major characteristics of the economic provisions of the Basic Law was the incorporation of the idea of a fiscal constitution. Article 107 and Article 108, the ‘balanced budget’ article and the ‘low tax policy’ article, are the two most controversial articles on the Economy chapter.<sup>117</sup> Article 107 stipulates that the SAR “shall follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.” Article 108 stipulates the SAR “shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.”

The inclusion of the balanced budget article and the low tax policy article were justified in term of the constitutional economic theories put forward by James Buchanan.<sup>118</sup> Buchanan’s solution for both budgetary deficits and the government monopoly of tax revenue was to establish constitutional rules to restrain democracy.<sup>119</sup> The balanced budget article and the low tax policy article were specially designed not only to restrain the demands of politicians<sup>120</sup>, but also to prevent the continuous expansion of the public sector.

## The Essence of Economic Constitutionalism in Hong Kong

Although the Basic Law is mainly used to preserve the capitalist system in Hong Kong, Chinese legal scholars argued that it is a piece of socialist legislation for two main reasons. Firstly, it was enacted by the National People’s Congress (NPC), which is the highest law-making organ representing the whole nation’s socialist will and interest. Secondly, its propose was to primary serve the interests of the PRC in developing socialism.<sup>121</sup>

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<sup>117</sup> Tang Shu-hung, *Fiscal Constitution and the Basic Law (Draft) of Hong Kong* (Hong Kong: Hong Kong Baptist College, 1989)

<sup>118</sup> See The Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, *The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Draft) Consultation Report*, Vol. 2, 1989, pp.253-67.

<sup>119</sup> He even called for constitutional constrains to protect free trade policy. See James M. Buchanan, *Constitutional Economics* (Oxford: Basil Blackwell, 1991) pp.12-3.

<sup>120</sup> cf. the case in Singapore. In 1991, Singapore amended the constitution for an elected president scheme in order to protect Singapore’s financial assets. See Lee Tan Yew, ‘The Elected Presidency in Singapore: Constitution of the Republic of Singapore (Amendment) Act 1991,’ *Singapore Journal of Legal Studies*, 1991, pp.179-194.

<sup>121</sup> Xiao Weiyun ed., *Yiguo Liangzhi yu Xianggand Tebie Xingzhengqu Jibenfa* (One Country, Two Systems and the Basic Law of the Hong Kong Special Administrative Region) (Hong Kong: Wenhui Chupanshe, 1990), pp. 72-4.

According to Professor Ghai , the economic provisions of the Basic Law serve four principal purposes<sup>122</sup>:

1. separate the economic system for the HKSAR from the economic system of the mainland;
2. provide a framework for the operation of a capitalist market;
3. maintain Hong Kong's status and role as an international trade and financial centre; and
4. establish key elements of constitutional economics.

The economic provisions of the Basic Law are largely based on ideas derived from the liberal economic paradigm. Free market, free trade, free flow of capital and protection of private property are highly regarded as prerequisites for preserving the capitalist system and for promoting further economic growth in Hong Kong. In order to protect economic liberty, government power, especially its taxation power, needs to be constrained.

It is commonly believed that government intervention should be kept to a minimum in a market economy, therefore, a constitution in such economy should contain few restrictions on economic matters. However, a large number of economic provisions can be found in the Basic Law. The Government is also bound to being actively involved in various economic areas. The Government of SAR shall “provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre”<sup>123</sup>, “safeguard the free flow of capital within, into and out of the region”<sup>124</sup>, “provide and economic and legal environment for encouraging investment, technological progress and the development of new industries”<sup>125</sup>, and “formulate appropriate policies to promote and co-ordinate the development of various trades such as manufacturing, commerce, tourism, real estate, transport, public utilities, services, agriculture and fisheries, and pay regard to the protection of the environment”<sup>126</sup>.

Most economic provisions of the Basic Law were derived from annex 1 of the Joint Declaration. They are more like economic principles and directives than rules that can be enforced by court. The drafters were eager to offer assurances to the local business community and foreign investors that Hong Kong's economic system would be preserved after 1997. Thus, the Basic Law was so drafted.

Critics argue that the economic provisions in the Basic Law run the risk of restraining the government and the economy too much, leaving too little room for self-regulation and self-adjustment.<sup>127</sup>

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<sup>122</sup> Yash Ghai, *Hong Kong's New Constitutional Order—the Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997) p.154.

<sup>123</sup> The Basic Law, Article art.109)

<sup>124</sup> *Ibid.*, Article112.

<sup>125</sup> *Ibid.*, Article 118.

<sup>126</sup> *Ibid.*, Article 119.

<sup>127</sup> Nihal Jayawickrama, ‘Economic, Social, and Cultural Aspects,’ in Peter Welsey-Smith & Albert H. Y. Chen eds., *The Basic Law and Hong Kong's Future* (HK: Butterworths, 1988) pp. 231-47.



## Chapter 4: A Comparison of Economic Constitutionalism in the PRC, Taiwan and Hong Kong

This chapter compares the notion of economic constitutionalism in the PRC, Taiwan and Hong Kong, the analysis is guided by two principle questions: (a) is it appropriate to incorporate economic provisions in a constitution? and (b) what is the legality of economic provisions in a constitution?

### The Appropriateness of Economic Provisions in a Constitution

Of course, the fundamental question of economic constitutionalism is whether economic provisions should be in a constitution. According to Professor Wheare, if a constitution is to be regarded as supreme law, it should confine itself “to stating rules of law, not opinions, aspirations, directives and policies.”<sup>128</sup> He argued that:

It may be doubted whether there is any gain, on balance, from introducing these paragraphs of generalities into a Constitution anywhere at all, if it is intended that the Constitution should command the respect as well as the affection of the people. If the Constitution is to be taken seriously, the interpretation and fulfillment of these general objects of policy will raise great difficulties for Courts and for Legislatures, and these difficulties will bring the Constitution, the Courts and the Legislatures into conflict and disrepute. If these declaration are, however, to be neglected, if they are to be treated as “words”, they will bring discredit upon the Constitution also.<sup>129</sup>

But in reality, a constitution is more than a piece of legal document, it often represents a social and political charter of a country. For example, constitutions in Ireland, India, Pakistan and Nigeria all contain general guidelines or directives for state policies. Indian legal scholars even considered the “fundamental rights” and “directive principles” provisions as conscience of their constitution.<sup>130</sup> Developing countries also used constitutions as a means of securing social justice.<sup>131</sup> Even in liberal constitutions, such as the American Constitution, there are provisions which have a direct or indirect effect on the economic order.<sup>132</sup>

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<sup>128</sup> K. C. Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1966) p.50.

<sup>129</sup> *Ibid.*, p.47

<sup>130</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, quote in Paramjit S. Jaswal, *Directive Principles Jurisprudence and Social-Economic Justice in India* (New Delhi: APH Publishing Corp. 1996) pp.3-4.

<sup>131</sup> B. O. Nwabueze, *Ideas and Facts in Constitutional Making* (Idadan, Nigeria: Spectrum Bk. Ltd., 1993) pp.135-63.

<sup>132</sup> See Michael Conant, *The Constitution and the Economy: Objective Theory and Critical Commentary* (Norman: University of Oklahoma Press, 1991)

The Constitutions of the PRC, Taiwan and Hong Kong all serve important political functions. It has been argued that the function of a socialist constitution is not so much the stating of rules of law, its real functions are the function of ideology and propaganda, the information function and the normative function of order-maintenance.<sup>133</sup> Although the PRC has begun to emphasize the Constitution as supreme law since 1982, the ideology and signaling functions of its Constitution are still largely retained.<sup>134</sup> The Taiwan Constitution, and its guiding principle---the Three People's Principles, has long been used by Kuomintang as an ideological weapon to fight against communism on the mainland China.<sup>135</sup> The Basic Law was so written as to ensure a smooth transition when China resumed Hong Kong's sovereignty in 1997.

The PRC Constitution, the Taiwan's ROC Constitution and even the Hong Kong Basic Law contain a significant amount of provisions relating to economic matters. Moreover, the inclusion of economic provisions in these constitutions have been justified by different reasons. Basically, the PRC has adopted the principle of socialist legality, therefore, its constitution should reflect a society's economic base. The National Policies section of the Taiwan's ROC Constitution represents the Principle of Livelihood of the Three Principles of People. The economic provisions of the Basic Law are primarily used to provide an assurance that the free market system in Hong Kong would be preserved.

Another argument against the inclusion of economic provisions may lie in the belief that a constitutional government is basically a limited one. From a Liberal tradition, a constitution is to constrain state power. The inclusion of economic provisions in a constitution violates this fundamental principle of constitutionalism, it expands the state's duty and power in economic area, which might finally interfere with the market economy. The notion of government as a "necessary evil" is one of the guiding principles of Anglo-American constitutionalism.<sup>136</sup> However, this kind of strained relationship between the government and people is less prevalent in Chinese politics. Professor Andrew Nathan noted that Americans see government as an adversary of the individual while the Chinese assume harmony of interest between the people and ruler.<sup>137</sup> He argued that in Chinese culture, the relation between the people and a legitimate could be not fundamentally adversarial. The executive branch of the government usually holds dominant power in Chinese society, which happens in the PRC, Taiwan and even Hong Kong<sup>138</sup>. Comparatively, the Chinese are showing greater tolerance to Government's actions.

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<sup>133</sup> Georg Brunner, 'The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments,' *Review of Socialist Law*, Vol. 3, 1977, pp.121-53.

<sup>134</sup> Chih-yu Shih, 'The Style of Chinese Constitutional Development: China and Taiwan,' *International Journal of the Sociology of Law*, Vol. 23, 1995, pp.371-93.

<sup>135</sup> Chan Yilin, 'Cong Zhanhou Taiwan Chuantong Wenhua de Jiangou Kan Xiandia Guojia de Diaogui' (The Paradox of Modern State: Looking from Post-war Taiwan Cultural Construction) in Luo Jinxi & Wang Zhangwei, *Qi Ji Beihou* (Behind the Miracle) (Hong Kong: Oxford University Press, 1997) pp. 249-78.

<sup>136</sup> Roger Pilon, 'On the First Principles of Constitutionalism: Liberty, then Democracy,' *The American Journal of International Law & Policy*, Vol. 8, 1993, pp.531-49 at 536.

<sup>137</sup> See Andrew J. Nathan, *Chinese Democracy* (London: I. B. Tauris & Co. Ltd., 1986) p.128.

<sup>138</sup> Colonial history is also a major factor conducive to a strong executive government in Hong Kong.

Both the PRC Constitution and the Taiwan Constitution allows extensive government power in the economic area. Even though the PRC's economy tends to develop in the direction of the market economy, the government still maintains a strong regulatory role. The PRC Constitution still assumes the state's primary obligation to organize the economy.<sup>139</sup> Taiwan's capitalist system has long been characterized as one having a strong state planning role.<sup>140</sup> The same characteristic can be found in the Basic Law. One writer argued that Hong Kong Government's role in economy would increase after 1997 because Chinese People in Hong Kong would play a larger role in its own governance.<sup>141</sup> Actually, freedom of economic activities should mean "freedom under the law, not the absence of all government action".<sup>142</sup>

Even though the inclusion of economic provisions in a constitution may be permissible, there is still the question of what type of economic provisions should be included. One way to answer this question may be to look at examples from other advanced countries—America and Germany. Only a few economic provisions can be found in the American Constitution<sup>143</sup>, which usually refer as The Commerce Clause<sup>144</sup>; The Contract Clause<sup>145</sup>; and the Due Process Clause of the Fifth Amendment<sup>146</sup>. A number of economic provisions can be found in the German Constitution<sup>147</sup>, particular in Section I: The Basic Rights section<sup>148</sup>; Section II: The Federation and the State<sup>149</sup>; and Section VII: Legislative Powers of the Federation<sup>150</sup>. It seems that whatever basic economic principles should be incorporated into constitution is a matter of political choice. However, one writer argues that provisions such as the right to property, freedom of trade and industry and freedom of contract are considered as fundamental core, especially in a market economy.<sup>151</sup>

<sup>139</sup> Although provisions on state planning was removed from the PRC Constitution, provisions that strengthening the state's role of macro-economic control were added in the 1993 constitutional amendments. See discussion on the 1993 amendments to the PRC Constitution in Chapter 1.

<sup>140</sup> Chien-kuo Pang, *The State and Economic Transformation: The Taiwan Case* (New York: Garland Publishing Inc., 1992).

<sup>141</sup> Lawrence Lau, 'The Role of Government in Economic Development: Some Observations from the Experience of China, Hong Kong and Taiwan,' in Masahiko Aoki, *et al.*, *The Role of Government in East Asian Economic Development: Comparative Institutional Analysis* (Oxford: Clarendon Press, 1997) pp.41-73.

<sup>142</sup> F. A. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1976) p. 220.

<sup>143</sup> See See Michael Conant, *op.cit.*, (note 5 above).

<sup>144</sup> The Constitution of the United States, reprinted in S. E. Finer *et al.*, *Comparing Constitutions* (Oxford: Clarendon Press, 1995) p.102-6. Article I, Section 8, Clause 3: "The Congress shall have power.....to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." at p. 106.

<sup>145</sup> *Ibid.*, p.108. Article I, Section 10: "No state shall.....pass law impairing the Obligation of Contracts..."

<sup>146</sup> *Ibid.*, p.117.the Due Process Clause of The Fifth Amendment: "No Person shall be..... deprived of life, liberty, or property, without due process of law."

<sup>147</sup> See Ulrich Karpen, 'The Constitution in the Face of Economic and Social Process,' in Christian Starch, ed., *New Challenges to the German Basic Law* (Nomos Verlagsgesellschaft Baden-Baden, 1991) pp. 87-110 at pp. 90-2.

<sup>148</sup> Basic Law for the Federal Republic of Germany, reprinted in S. E. Finer *et al.*, *op. cit.*, (note 17 above) pp.127-207. Article 2—the right of contract, Article .9—the freedom of association, Article 12—the right to choose trade, occupation or profession, Article.. 14—the property right. at pp.128-34.

<sup>149</sup> *Ibid.*, p.137, Articles 20 and 28 bind the state to the goal of a "Social State".

<sup>150</sup> *Ibid.*, pp.157-62, Articles 71—75 list a whole set of laws concerning economy, labour, and social security.

<sup>151</sup> Michel Herbeit, 'The Legal Foundations of the Economic Suystem During a Period of Transition

In the PRC Constitution, economic provisions are mainly focused on the issue of ownership of means of production. There are no provisions relating to freedom of trade and freedom of contract, but the right to property is protected in the Constitution<sup>152</sup>. The Taiwan's ROC Constitution contains provisions on the right of property<sup>153</sup> and on protection of free flow of goods within the territory<sup>154</sup>. The Basic Law of Hong Kong contains a wide range of economic provisions, together with the core fundamentals such as the right to property<sup>155</sup> and protection of free trade<sup>156</sup>.

Constitutions are generally confined to principles that are relatively immune to change. The inclusion of economic provisions will inevitably affect the rigidity of a constitution. Economic principle is likely to alter frequently subject to changes in market and political conditions. Numerous alternations of the PRC constitutions have been triggered by changes in economic arrangements. By looking at the history of the PRC, when some major policy decisions were made by the CCP, they actually contravened the constitution which was still in force.<sup>157</sup> One Chinese legal scholar argues that these violations should be allowed because they were "Good Faith Violations".<sup>158</sup> But the problems are how could we define "good faith" and who is going to decide which violation is in "good faith"?

One way to keep a constitution in pace with social development is through constitutional interpretation. The American Constitution is such an example. However, the PRC legal system does not have adequate mechanisms and the experience in keeping a constitution alive. Although the Standing Committee of the NPC as the power to interpret the Constitution, it has not yet explicitly exercised this power.<sup>159</sup> Chinese legal scholars suggest that the PRC should use various means, such as making constitutional interpretation and developing constitutional convention, to enhance the evolution of its Constitution.<sup>160</sup>

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from a Planed to A Market Economy,' in European Commission for Democracy through Law, *Constitutional Aspects of the Transition to a Market Economy* (Strasbourg: Council of Europe, 1994) pp.11-20 at p.15.

<sup>152</sup> Constitution of the People's Republic of China, Article 13.

<sup>153</sup> The Constitution of the ROC, Article 15.

<sup>154</sup> *Ibid.*, Article 148.

<sup>155</sup> The Basic Law, Article 105.

<sup>156</sup> The Basic Law, Article 115.

<sup>157</sup> For example, the setting up of the Four Special Economic Zones in 1980 to allow foreign ownership of means of production was in breach of the 1978 Constitution.

<sup>158</sup> Hao Tiechuan, 'Lun Liangxing Weixian,' ('On Good Faith Violations of the Constitution') *Zhongguo Faxue* (CASS Journal of Law) No. 4, 1996, pp.89-91.

<sup>159</sup> Cai Dingjian, 'Constitutional Supervision and Interpretation in the People's Republic of China,' *Journal of Chinese Law*, No. 2, 1995, pp. 219-45 at pp. 235-8.

<sup>160</sup> See, for example, Wang Ruijia & Wei Dingren, 'Biangai Zhengzhi Shehui Zhong de Xianfa Bianqian hui Xianfa Baozhang' ('Constitutional Change and Protection in Social Reform Process') *Zhongwai Faxue*, Vol. 1993, pp.10-14.

Economic provisions in the Taiwan Constitution seem to be very robust. The reason is not because they are immune to change, the real reason is partly that they are not applicable to Taiwan's situation and partly they only serve an ideological purpose. The Basic Law only came into force for eight months and there has been little discussion on the change of its economic provisions. There is a provision in the Basic Law to restrict further changes to it, no amendment to the Basic Law "shall contravene the established basic policies of the People's Republic of China regarding Hong Kong."<sup>161</sup> This is similar to the Doctrine of Basic Structure, which means certain provisions in a constitution are unalterable.

## **The Legality of Economic Provisions in Constitution**

Although many countries' constitutions contain social and economic provisions, these provisions usually confer no legal right and create no legal remedies. In part IV of the Indian Constitution under the heading "Directive Principles of State Policy", it is expressly stated at the beginning of this section that "provisions contained in this part shall not be enforceable by any court".<sup>162</sup> Similar provision can be found in Pakistan Constitution.<sup>163</sup> No similar provision can be found in the PRC Constitution, the Taiwan Constitution and the Hong Kong Basic Law.

In the PRC, there is no such question as to whether economic provisions are enforceable by the court. The National People's Congress, a representative body which is omnipotent, and its Standing Committee of the NPC, has been authorised by the constitution to exercise the power of constitutional review.<sup>164</sup> Courts are not allowed to rely on constitutional provisions in deciding cases.<sup>165</sup> Although the NPC Standing Committee is authorised to stick down any law that contravenes with the constitution<sup>166</sup>, it has never exercised this power.

However, it does not mean that the PRC Constitution has no legal effect. It just means the legal authority of the Constitution does not derive from the PRC courts system. The PRC Constitution is the codification of the party's fundamental principles and specific policies. Party organizations at all levels has the responsibility to enforce the Constitution, and the party's leadership in all state organs guarantees the enforcement of the Constitution.

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<sup>161</sup> The Basic Law, Article 159.

<sup>162</sup> The Constitution of India. Article 37.

<sup>163</sup> The Constitution of the Islamic Republic of Pakistan, Article 30(2).

<sup>164</sup> Constitution of the People's Republic of China, Article 62: NPC has the power to supervise and enforcement of the Constitution. Article 67: NPC Standing Committee has the power to interpret the Constitution and supervise its enforcement.

<sup>165</sup> Xu Xiuyi, *Xianfa Xue yu Zhengquan Jianshe Lilun Zongshu* (A Summary on Constitutional Study and State Building) (Beijing: Beijing Ligong Daxue Chubanshe, 1990) pp.63-4.

<sup>166</sup> Constitution of the People's Republic of China, Article 67 (7), (8).

There is a growing consensus among Chinese legal scholars that the PRC needs to establish a constitutional supervisory organ to improve the system of constitutional supervision.<sup>167</sup> Recently, there have been reports that a special committee is going to set up under the NPC to exercise constitutional review power.<sup>168</sup>

As noted in chapter 2, there is a common understanding in the academic and judiciary field that the economic provisions of the Taiwan Constitution are not enforceable by judiciary. Government's failure to implement policies designed in the National Economy section will not be considered as unconstitutional. According to the ROC Constitution, only the Council of Grand Justices within the Judicial Yuan has the power to interpret the Constitution and renders a unified interpretation of laws, statutes and regulations.<sup>169</sup> The function of interpreting the Constitution includes the power of judicial review, that is to review the constitutionality of laws and regulations.<sup>170</sup> The Council can interpret the Constitution in the following situations: (1) when a question arises in applying the Constitution, (2) when a question arises as to whether laws or ordinances are in conflict with the Constitution, and (3) when a question arise as to whether local laws and regulations are in conflict with the Constitution.<sup>171</sup>

Critics have argued that until recently the judicial review power processed by the Grand Justices has not been effectively exercised.<sup>172</sup> The term of each Grand Justice is nine years, and the Council is now in its sixth term. From its first to fourth term, the Council had all together rendered 199 interpretations, of which 35 related to constitutionality of statutes and regulations and only 6 were considered to be inconsistent with the Constitution.<sup>173</sup> One writer points out that even though in an interpretation the Council held that a statute or regulation was inconsistent with the Constitution, the Council would not explicitly proclaim it to be unconstitutional.<sup>174</sup>

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<sup>167</sup> See Cai Dingjian, *op. cit.*, (note 32 above) and Wen Songran, 'Lun Xianfa Shishide Baozhang ('A Discussion on Protection of Constitutional Implementation') *Zhongguo Faxue* (CASS Journal of Law) Vol. 6, 1992, pp. 15-22.

<sup>168</sup> See *Hong Kong Economic Journal*, Hong Kong, September 16, 1997.

<sup>169</sup> The Constitution of the ROC, Article 78 and 79

<sup>170</sup> *Ibid.*, Article 171, 172 and 173.

<sup>171</sup> Law Governing the Council of Grand Justices of the Judicial Yuan, Article 3.

<sup>172</sup> See Juh-pin Fa, *A Comparative Study of Judicial Review under Nationalist Chinese and American Constitutional Law* (Baltimore, Md: Occasional Papers/Reprints Series in Contemporary Asian Studies, 1980) and Lawrence Shao-Liang Liu, 'Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan,' *American Journal of Comparative Law*, Vol. 39, 1991, pp.509-58.

<sup>173</sup> Lin Jieyi, *Quanli Fenli yu Xianzheng Fazhan* (Division of Power and Constitutional Development) (Taiwan: Yuedan, 1993) p.31.

<sup>174</sup> Lawrence Shao-Liang Liu, *op. cit.* (note 45 above).

However, starting from the Fifth Council, the Council has taken a more proactive orientation. The Council is willing to render unambiguous judgments in striking down unconstitutional laws and regulations, some of them, such as Interpretation No. 210, 218, 224, relate to economic matters such as taxation. There has been a small number of interpretations concerning the economic provisions of the Constitution. The Council has rendered three interpretations in relation to Article 143,<sup>175</sup> which all involves questions to whether taxation measures in various land laws conformed with Art. 15, Art 16. and Art. 143 of the Constitution.

Before June 30, 1997, courts in Hong Kong had the power of judicial review of legislation. Although the Basic Law does not expressly mention whether the courts in the HKSAR can exercise the power of judicial review, legal commentators generally agree that the power is implied in the Basic Law.<sup>176</sup> Under the Basic Law, the power of interpretation is vested in the Standing Committee of the NPC. While the Courts of the HKSAR was delegated the power to interpret, in adjudicating cases, provisions within the autonomy of the Region.<sup>177</sup>

Since China resumed the exercise of sovereignty over Hong Kong on July 1, 1997, no case has been heard before the courts in relation to the economic provisions of the Basic Law. However, the courts may have difficulties in interpreting these provisions for the following reasons. Firstly, there is the question of whether all the economic provisions of the Basic Law are considered as regional matters. If they are, they should be under the HKSAR courts' jurisdiction. Since almost all the economic provisions were formulated with the words 'The HKSAR shall' and the meaning of 'matters within the autonomy of the region' is not clearly defined in the Basic Law, these economic provisions could be interpreted as legal obligations to be carried out by the HKSAR Government.<sup>178</sup> If this is the case, this would mean that these provisions fall into the catalogue of 'Relationship between the Central and Region', which under the Basic Law, the HKSAR courts have no final interpretation power.<sup>179</sup>

Secondly, most of the economic provisions in the Basic Law are stipulated in a way which is general and vague. They are more like policy statements. The Courts will have difficulties in determining the precise meaning of these economic provisions. For example, what is the meaning of 'policy previously pursued in Hong Kong' in Article 108 ?

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<sup>175</sup> Yang Minhua, *Zhanghau Minguo Xianfa Lun* (A Study on ROC Constitution) (Taiwan: Wunan 1996) pp.327-8.

<sup>176</sup> See Michael C. Davis, *Constitutional Confrontation in Hong Kong* (London: Macmillan 1989) p.17. and Yash Ghai, *Hong Kong's New Constitutional Order—the Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997) pp.283-5.

<sup>177</sup> The Basic Law, Article 158.

<sup>178</sup> See Trevor M Morris, 'Some Problems Regarding the Power of Constitutional Interpretation Under Article 158 of the Basic Law of the Hong Kong Special Administrative Region,' *Hong Kong Law Journal*, Vol. 21 No. 1, pp.87-99 at 91.

<sup>179</sup> The Basic Law, Article 158.

Thirdly, some economic provisions impose legal obligations on the HKSAR Government to carry out certain policies, such as formulating “ appropriate policies to promote and co-ordinate the development of various trades such as manufacturing, commerce, tourism, real estate.....’ It is not clear whether the Government’s failure to implement these economic policies are to be considered violations of the Basic Law.

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## Conclusion

At the end of the last century, the western concept of constitutionalism was introduced in China. Intellectuals and revolutionaries had high hope believing that a constitution could guarantee order, democracy and prosperity.<sup>180</sup> However, history has shown that the belief “constitutionalism is a way to save China” is only a misunderstanding.<sup>181</sup> Democracy has not come with a constitution. Also, there is no clear evidence that constitutionalism has brought economic well-being in China. Economic miracles in Hong Kong and Taiwan can hardly be attributed to economic provisions in their constitutions.<sup>182</sup> Hong Kong’s two constitutional documents before 1997 lacked of any provisions specially designed for economy.

The purpose of this essay is not to evaluate whether the idea of economic constitution can facilitate economic growth, instead it is to examine the reasons why economic provisions have been incorporated in the Constitutions of PRC, Taiwan and Hong Kong. After the revolution of 1911, the old political and economic systems collapsed, leaving a desperate need to build a new political and economic framework in China. China badly needed a rapid economic development not only to survive, but to regain its national independence. At that time, the Soviet Constitution of 1918 and the German Weimar Constitution of 1919 provided timely constitutional models for the Chinese people. The CPC followed the Russian model and the KMT, the German Model. Both models, because of different reasons, have the characteristic of containing a quite comprehensive list of rules concerning economic matters.

Moreover, the idea that a state needs a constitution is a western idea. The concept of the constitution being the supreme law and the subjection of all state actions to the law are alien to Chinese culture. Traditionally, law in China had only been used to maintain social order. For Chinese people, a constitution is not so much a law to restrict state power, but a programmatic document which lays down, besides the organising principles of political organizations, state directives and objectives in social, economic and cultural matters. Thus the constitution is seen as not only a legal document, but also a political charter of the government.

The inclusion of economic provisions in a constitution creates some major difficulties. There is the problem of how to ensure that economic provisions meet social change. Frequent changes to a constitution will undoubtedly affect its legitimacy. It certainly attributed to the problem of constitutional nihilism in the PRC during 60s and 70s. If the economic provisions are not changed in according to reality, they will become political slogans with only semantic value.

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<sup>180</sup> See Hsu C Y, *The Rise of Modern China*, fifth ed., (New York: Oxford University Press, 1995) pp. 408-17.

<sup>181</sup> Xiao Gongqian, ‘Jindia Zhingyouren dui LixianZhengshi de Wenhua Wudou Jiai Lishi Houguo,’ (‘Cultural Misunderstanding of Constitutional Politics by Modern Chinese and its Historical Consequences’) *Zhanlue yu Guanli* No.4, 1997, pp. 27-35.

The interpretation of these economic provisions also poses some serious problems for the judiciary. Economic provisions are usually broad and vague, and they are not written in a language that can be easily subjected to judicial interpretation. Of course, the major issue is whether the judiciary should be involved in general policy matters. Under the Taiwanese Constitution and the Hong Kong Basic Law, questions of economic policies, fiscal policies, industrial policies, and trade policies can be constitutional questions. Although the economic provisions of the Taiwan Constitution are not enforceable by the judiciary, the Council of Grand Justices in recent years, through its judicial review power, has been more willing to adjudicate on a wide range of constitutional issues, especially issues relate to economic matters. For the situation in Hong Kong, it is not clear whether economic provisions of the Basic law are justifiable. The HKSAR courts may adopt the political question doctrine to avoid involvement in sensitive or controversial policy issues.

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