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ARTICLE

# THE CHINESE MODEL OF THE RULE OF LAW

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*China's project of the rule of law is destined to have its Chinese characteristics. China also needs to think about of the way of developing its own model of the rule of law so as to achieve a rule of law society that is universal in modern society. Many rule of law countries, such as England, Germany and France, started their rule of law project with their own model. China should learn from the merits of these different models. Nevertheless, China should also try to solve the key problem of the rule of law, which is the energizing of the enforcement of the Chinese Constitution.*

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## INTRODUCTION

Along with the inception of XI Jinping's era, "China under the rule of law" has recently become a catch phrase in public discussion in China. In terms of semantics, this phrase is more able to describe the common characters of the modern "rule of law" than the previously adopted term of "the rule of law under the socialism (states, ideology)" which put emphasis on "localization of the rule of law in China" and which referred to the approach to define "the rule of law" based on China's own history, culture and polity. For quite a long time, the interpretation of the term of "the rule of law under the socialism" has come to an extreme end in China, which has consequently jeopardized the conventional connotation of the modern "rule of law." In this sense, the new concept of "China under the rule of law" possesses the potential to redress this flaw. Indeed, how to

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create an understandable connotation of "the rule of law" for the modern civilized society by means of the concept of "China under the rule of law" has already become an urgent task for the Chinese legal theorists.

Despite the above understanding, I still have to point out that "China under the rule of law" cannot after all be separated from the sinolization of "the rule of law." In other words, in order for China to achieve its mission of "the rule of law" pursued and respected by the modern civilized society, it may firstly set out from the construction of its own model of "the rule of law." Taking the UK, Germany and France that are currently developed countries under "the rule of law" as examples, the establishment of the modern "rule of law" also started from the construction of their own versions of "the rule of law," which ought to be paid attention to by China. In addition, in the process of developing its own model of "the rule of law," China ought to try to learn the virtues of these equivalent models in other jurisdictions so as to help it overcome barriers encountered.

## I. IDEOLOGY OF THE CHINESE "RULE OF LAW" AND ITS ATTRIBUTES

In history, China once possessed a peculiar and sophisticated civilization of "the rule of law." But due to the influx of Western culture since the middle of the 19th century, the traditional Chinese civilization of "the rule of law" at least has drastically faded on the level of formal institutions. In the meanwhile, since the beginning of the 20th century, the assorted attempts to transplant Western-style civilization of "the rule of law" into China have also failed one after another. With the end of its more than 100 years' turbulent period as a result of the influx of Western culture, in particular after its undergoing the catastrophic 10 years' Cultural Revolution, China faced the very important task of restoring the stability of state governance by the end of the 20th century. Just in this background, the currently valid Chinese Constitution was enacted clearly providing for "governs the country according to law and makes it a socialist country under the rule of law" (Paragraph 1, Article 5), which is deemed to be the constitutional principle to establish "the rule of law" in China by a number of Chinese constitutional law scholars.[1]

However, there is a serious disagreement on the definition of "to govern according to law" or "the rule of law" in the Chinese legal academia and among official ideologists. On the one hand, some scholars have been trying to bring the idea of "the rule of law" into China from Western legally developed countries, especially the UK and the US.[2] On the other hand, official ideologists have also recently taken measures accordingly to put

[1] LI Buyun, 依法治国的理论发展与实践推进 (*Theoretical Developments and Practical Movement of the Rule of Law*), 4 法学研究 (Chinese Journal of Law), 145 (2007); HAN Dayuan, 宪法实施与中国社会治理模式的转型 (*The Enforcement of the Constitution and Transformation of the Governance Model of the Chinese Society*), 4 中国法学 (China Legal Science), 15 (2012).

[2] ZHANG Qianfan, 宪法实施的概念与路径 (*Concepts and Paths regarding Enforcement of the Constitution*), 6 清华法学 (Tsinghua University Law Journal), 19 (2012).

forth the "socialist rule of law" which has quickly penetrated into the legal academia. In terms of their explanations, the "socialist rule of law" includes governing under the rule of law, administrating for civilians, protecting fairness and justice, serving the ultimate mission and supporting the leadership of the Communist Party of China (CPC). It represents the unification of the leadership of the CPC, civilians' democracy and "the rule of law."[3]

Undoubtedly, the "socialist rule of law" displays the heavy color of the Chinese official ideology. Back to 1994, the famous Japanese comparative law scholar Professor Kazuo Hatanaka pointed out the four elements of the "socialist rule of law" as follows which are still basically applicable: (1) It aims to stabilize the socialist system and order in China and then protect the right of freedom of civilians by means of this; (2) thus obeying the law is not an obligation only for the state but also for citizens; (3) further, the "law" to be obeyed is only limited to statutory law, and "natural law" underlying statutory law is not recognized; and (4) as a result, despite judicial remedies have been designed to protect "the rule of law," "the rule of law" does not constrain absolute "legislators," but appears as to be protected by the leadership of the CPC inevitably, due to the fact that the separation of power has been rejected and the principle of democratic centralism has been established.[4]

## II. DIFFERENT MODELS OF THE RULE OF LAW: TAKING CONTEMPORARY UK, GERMANY AND FRANCE AS EXAMPLES

As a matter of fact, in contemporary times, there was not a uniform criterion about the core meaning of "the rule of law" worldwide. Western countries followed different models back to that time, such as "the rule of law" in the UK, the "*Rechtsstaat*" in Germany and the "*legalite*" in France.[5] Only after World War II, a consensus was reached worldwide, especially among Western countries, about the core meaning of "the rule of law." Based on the consensus, the British "rule of law" has become the mainstream model. In this sense, the New Delhi Declaration which illustrated "the rule of law" in 1959 has been viewed to be a milestone in this dimension.[6] Looking at the status quo of "the rule of law" in China, it is clear that it is difficult for China to completely transplant and adopt the ideology and institutions of "the rule of law" followed by

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[3] As to "the socialist theories of the rule of law," please refer to LI Long, ZHUO Zeyuan & LI Lin et al, 法学家眼中的社会主义法治理念 (*The Socialist Theories of the Rule of Law Perceived by the Jurists*), Guangming Daily, Sep. 10, 2009.

[4] Kazuo Hatanaka & T. W. Rtenberger, 现代法治国家论 (*Theory of Modern Countries under the Rule of Law*), 晃洋书房, at 264 (1994).

[5] Tosihiko Nonaka, Mutuhito Nakamura & Kazuyouki Takahasi et al, 宪法 I (*Constitution I*), 有斐阁, at 25 (1992).

[6] Ernest Angell, *The Rule of Law at the New Dehli Congress of the International Commission of Jurists*, 3(2) Section of International and Comparative Law Bulletin (1959).

developed Western countries in current days. Instead, it might be better for China to strategically adopt the differential models followed by Western countries in contemporary times and then create an interim model of "the rule of law" rooted in China.[7] Given the differential models followed by Western countries such as the UK, Germany and France were multiple, which one among them should be learnt by China still needs to be carefully analyzed. Thus, the different connotations and features of the models of "the rule of law" in the UK, Germany and France in contemporary times will be briefly examined as follows.

As a strong force in contemporary times, the model of "the rule of law" created by the UK is deemed to be classic and thus far has generated far-reaching influences in the English-speaking countries. British constitutional law scholar Dicey summarized the following three points to cover the main features of the contemporary British rule of law: First, the priority of statutory laws was established to prevent governments from enjoying unlimited administrative discretions; second, the principle of equality before law was established which required that both administrative powers and citizens ought to obey laws and receive courts adjudications when they behaved unlawfully; third, constitutional law was treated as "the result of common laws" which referred to that the British Constitution did not exist as a set of abstract declarations but ought to be applied to by courts adjudications. Therefore, constitutional rights ought to be protected by courts.[8]

As an emerging force in Western countries in contemporary times, the German model of "the rule of law," which was termed as "*Rechtsstaat*," was different from the British one. The "*Rechtsstaat*" was governed by statutory laws due to the influence of the mainstream school of legal positivism in Germany during the second half of the 19th century. In this context, law (*Recht*) was equal to statutory laws (*Gesetz*). As a result, the "*Rechtsstaat*" was deemed to be "the administration behaving in accordance with statutory laws." Regarding whether or not statutory laws ought to protect freedom, it was not viewed to be within the goals of the *Rechtsstaat*. They are the main points of the theory of "the formal *Rechtsstaat*."[9] Public law scholar Otto Mayer has provided the most authoritative explanations to "the administration behaving in accordance with statutory laws." He thinks that "the administration behaving in accordance with statutory laws" includes the following three points: (1) Statutory laws have priority. It refers to that the use of the administrative power cannot violate statutory laws. Also, administrative

[7] As to reflecting on the theories of legal transplantation and the difficulties of modernization of legal system, please refer to GAO Hongjun, 法律移植：隐喻、范式与全球化时代的新趋向 (*Legal Transplant: Metaphor, Paradigm and New Trends in the Age of Globalization*), 4 中国社会科学 (Social Sciences in China) 116, (2007).

[8] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edition), MacMillan and Corporation Limited (London), at 179–201 (1927).

[9] CHEN Xinmin, 德国公法学基础理论 (*Basic Theories of German Public Law*), Shandong People's Publishing House (Jinan), at 3–28 (2001).

regulations cannot alter or repeal statutory laws which can only be altered or repealed by themselves. (2) Only statutory laws can create "*Rechtssatz*." *Rechtssatz* means the rules to constrain citizens' rights or set up citizens' obligations. This type of rules can only be created in the form of statutory laws made by parliaments instead of administrative regulations. (3) Statutory laws have reservations. It refers to that there must be statutory grounds when administrative power constrains citizens' rights or force them to take obligations.[10]

The contemporary German theory of "*Rechtsstaat*" was based on the practice of the Constitutional Monarchy. Under the Constitutional Monarchy, on the one hand, the monarch agreed to share the legislative power with the parliament and to be regulated by the laws made by them. On the other hand, it confined legal matters to "*Rechtssatz*" to ensure that administrative power could be freely used in a broad scope. It is different from the contemporary British "rule of law" which is perceived to refrain dictatorship and "protect individuals' right granted by the British Constitution." (Said by Dicey) The resembling British model of "rule of law" was not established in Germany until it suffered from the cruel ruling of the Fascism.

After going through the civil revolution, France contributed a different model of the rule of law whose core was the principle of "*légalité*." It was different from the German "*Rechtsstaat*" and defined "law" as "expression of general consensus" because of the influence of the civil revolution at the end of the 18th century and the theory of Rousseau, which made law with extremely high authority. The contents and boundaries of freedom were defined by law which was "the expression of general consensus" and made by parliaments. Administrative power was confined to implementing the law.[11] Above were the basic dogmas of "*légalité*" established during the period of the Third Republic. But under the principle of "people's sovereignty" in France, it was very difficult for "*légalité*" to question or challenge the legitimacy of law which was defined as "expression of general consensus" or whether law itself infringed on the basic rights of human beings (That was why France did not genuinely establish constitutional review until the 1970s).[12] Fortunately, during the period of the Third Republic, France established a unique system of administrative courts which guaranteed the "*légalité*" of administration. Despite Dicey criticized French administrative courts, France was proud of them because they fully prevented administrative power from infringing on the basic rights of people as

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[10] Otto Mayer, 德国行政法 (*German Administrative Law*), translated by LIU Fei, The Commercial Press (Beijing), at 67–76 (2002).

[11] As to the French public will theory and the supremacy of the legislative power, please refer to FANG Jianzhong, 超越主权理论的宪法审查：以法国为中心的考察 (*Constitutional Review beyond the Theory of Sovereignty: Examination Based on the Practice of France*), Law Press (Beijing), at 24–44 (2010).

[12] John Bell, *A French Lesson in Judicial Review*, 2(1) Oxford Journal of Legal Studies, (1986).

successfully demonstrated during the period of the Third Republic.[13]

## III. WHAT NEEDS TO BE TRANSPLANTED BY THE CURRENT CHINESE MODEL OF "THE RULE OF LAW"?

Above we have introduced the different models of "the rule of law" of the UK, Germany and France in the contemporary age. Different from these models, even though "making it a socialist country under the rule of law" has been added into the Chinese Constitution and the development of "China under the rule of law" has been advocated by the ruling party at present, it should be noted that this type of "the rule of law" stems from "top to bottom" push instead of "bottom to top" lift and as a result its core spirit has yet to be formed. In addition, the rapid transformation of the current Chinese society not only reinforces public power but also puts more emphasis on the role played by the state in improving the living conditions of civilians (that is called *minsheng* 民生 in Chinese),[14] which has made the formation of the connotation of the Chinese "rule of law" face vigorous challenges at its initial stage. Moreover, the current Chinese reality that the CPC is the leading force for state integration fundamentally determines that the current Chinese "rule of law" cannot share the same definition with Western constitutional countries and it has to build up its own connotation along a peculiar way.

In this process, China ought to remount to the foundation stone of the traditional culture of the rule of law and digs out its graceful, noble and reasonable elements. Especially it should pay attention to the modern implications of the self-constraint idea of public power in Chinese traditional culture while it should also actively absorb the dogma of the rule of law adopted by the leading Western constitutional countries, especially from the contemporary models of the rule of law of the UK, Germany and France, to develop an open and forward-looking idea of "the rule of law." Below are the brief evaluations on and suggestions from "the rule of law" models of the UK, Germany and France.

With regard to the British "rule of law," it is the ideal one with great contemporary significance. But due to the fact that this model was formed during a long period of history, it is difficult to horizontally transplant it. Even so, it should be sufficiently noticed that this model focuses on refraining the abuse of power and protecting the legitimate freedom of individuals.

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[13] As to the criticism of French administrative courts from Dicey, please see fn. 5, at 380–401; regarding the development of French administrative courts and their pros and cons, please refer to ZHANG Li, 独具特色的法国行政法院制度 (*Peculiar French Administrative Courts*), in ZHANG Li, 当代法国公法——制度、学说与判例 (*Contemporary French Public Law — Institutions, Theories and Cases*), China University of Political Science and Law Press (Beijing), at 255 (2013).

[14] Since Mr. Sun Yat-sen put forth the Three Principles of the People, *minsheng* (民生) has been the key point of Chinese legal and political issues. Please refer to ZHANG Yuanruo, 现代宪政论 (*On Modern Constitutionalism*), Zhonghua Book Company (Shanghai), (1934); ZHANG Yuanruo, 现代法制概论 (*Introduction to the Modern Legal System*), The Commercial Press (Shanghai), (1934).

As to the contemporary German model of "*Rechtsstaat*," it grew from an immature civil society. But it is worth for China learning a valuable point of the model that it contains the wisdom that the legitimacy of ruling could be conferred via the rule of law and its techniques and the rulers themselves could be constrained by law. Surely this model also has its own drawbacks. For example, it once established the principle that only law could restrain the rights of people, but the principle was changed to that people's rights can be restrained when it complies with the law.

Regarding the contemporary French model of "*légalité*," it has been long ignored by the Chinese legal academia. The dilemma encountered by it to establish constitutional review should be noticed by Chinese legal scholars. Also, it offers an approach that the setting-up of administrative courts could guarantee the legitimacy of administrative power and protect the legitimate rights of people when there is lack of an institutional framework to question or review the legitimacy of legislation. Indeed, it is impossible to achieve British or American "judicial independence" in China overnight but we can easily find self-constraint ideas and institutions of public powers in Chinese traditional political and legal culture as well as internal "checks and balances" practice existed in Chinese administrations. In this sense, it is equally important for us to learn the French "rule of law" experience.

## IV. A KEY ELEMENT FOR THE DEVELOPMENT OF THE CURRENT CHINESE MODEL OF "THE RULE OF LAW"

A key and weathervane element for the development of the current Chinese model of "the rule of law" is how Chinese leaders enforce the Chinese Constitution. It is not even a problem to facilitate the enforcement of Chinese civil law and commercial law which govern the relationships among private parties in China. The reason for the occurrence of the national debate of "to govern according to law" at the end of the 1990s which contributed to the words of "to govern according to law" being added into Article 5 of the Chinese Constitution during its 1999 amendments was that Chinese leaders recognized the proposition that "market-oriented economy needs to be regulated under the rule of law" proposed by the Chinese academia.[15] But the question of how Chinese leaders facilitate the enforcement of the Chinese Constitution greatly differs because it touches the allocation of political powers in reality to a large degree and therefore becomes a bottleneck for the current development of the Chinese "rule of law" and a thorny issue for Chinese leaders.

In this background, the enforcement of the Chinese Constitution has not been satisfactory and negatively assessed by the academia since 1980s when the legal order

[15] LI Heren, "市场经济就是法制经济"的研讨略述 (*Brief Summary of the Seminar with the Topic of "Market Economy Is Legally Regulated Economy"*), 2 人民检察 (People's Procuratorial Semimonthly), (1994).

which was seriously destroyed during the Cultural Revolution was restored.[16] This situation could be summarized as follows: Given the Constitution itself is by nature "a certificate of the legitimacy of the regime," it is therefore highly emphasized when a new regime is just founded, the political order is restored or the upheaval is occurring, and especially the importance of its parts regarding the general structure of the regime is more noticeable and substantially promulgated and enforced. But when these "constitutional moments" pass, to be frank, the Constitution is always withdrawn from the center of politics despite it is still being "treated seriously," as the metaphor explains that at this time the Constitution is treated as an important certificate which is carefully framed, hung on the wall and becomes a symbolic "magic instrument of a country."[17]

Specifically speaking, the enforcement of the Constitution of the PRC has the following two characteristics:

Firstly, in terms of the distribution structure of articles of the Chinese Constitution, it is never without being enforced in practice. Instead, the majority of its articles have been well enforced and only a small part of its articles are waiting for effective enforcement. Statistically, these 32 under-enforced articles (The 13th Paragraph of the Preamble plus the other 31 articles) out of the total 145 articles (7 paragraphs of the Preamble plus 138 articles) roughly accounts for 22% of the Chinese Constitution.[18]

However, if we further analyze the distribution structure of articles of the Chinese

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[16] As to the representative scholarly positions, please refer to FAN Jinxue, 宪法在中国实施何以艰难? (*Difficulties to Enforce the Chinese Constitution*), 7 政法论丛 (Journal of Political Science and Law), 12 (2012); ZHANG, fn. 2 at 19. The ruling party also admits this point to some degree. President XI Jinping once pointed out in 在首都各界纪念现行宪法公布实施 30 周年大会上的讲话 (*Speech in the Conference to Celebrate the 30-Year Enactment of the Chinese Constitution Attended by People from All Walks of Life of Beijing*) on Dec. 4, 2012, that "While recognizing our achievements, we ought to also see our shortcomings. They are mainly shown as follows: the monitoring system and specific institutions to guarantee the enforcement of the Chinese Constitution are still not complete; violating law, loose law enforcement and ignoring unlawful conducts still exist in some places and agencies; issues of law enforcement and judiciary regarding the basic interests of ordinary people are still not well solved; some governmental officials abuse their powers, conduct dereliction of duty, break laws or even bend law for selfish ends, which seriously harm the authority of law; the constitutional consciousness of citizens including leaders still need to be further improved. "

[17] The late constitutional scholar Professor XU Chongde revealed an anecdote regarding the setting-up of the Research Association of the Chinese Constitutional Law in a speech in the annual conference of the Research Association of the Chinese Constitutional Law organized by the School of Law of Shanghai Jiao Tong University on Nov. 2003: Soon after the enactment of the 1982 Chinese Constitution, ZHANG Youyu, WANG Shuwen, XIAO Weiyun and XU Chongde who are senior constitutional law scholars planned to set up the Research Association of the Chinese Constitutional Law and then reported this plan to Mr. PENG Zhen who was the then chairman of the National People's Congress Standing Committee and the actual presider for the amendments of the Chinese Constitution in 1982. Mr. PENG was surprised after listening to the report by asking why we still need to set up the Research Association of the Chinese Constitutional Law since the Constitution had been passed. This case typically illustrates the function of constitution in the mind of "constitution legislators for permanent benefits."

[18] LIN Laifan, 转型期宪法的实施形态 (*The Mode of Constitutional Implementation in Transitional Era*), 4 比较法研究 (Journal of Comparative Law), (2014).

Constitution, we may find out that it takes on a regular inclination. Specifically speaking, the generally provisions regarding the guiding principles of the order of the whole state (Chapter One, General Principle), the provisions regarding the general structure of the state (Chapter Three, the Structure of the State) and the articles regarding the basic obligations of citizens have been well enforced thus far, but the articles regarding protection of the basic rights of citizens, the provisions regarding the functions and powers of the organs of state power and the articles regarding the competence of judicial organs are still in the category of "constitutional articles that need to be effectively enforced."

If we move one more step further, it is not difficult to find that the structural inclination about the enforcement of the Chinese Constitution also presents the structural inclination of the values emphasized by the Chinese Constitution. As a product rooting in a transitional period, the current Chinese Constitution has a very complicated internal order of values which displays both the nationalism and the constitutionalism and makes them co-exist in a complex way.[19] Based on the aforementioned structural inclination about the enforcement of the Chinese Constitution, although the number of the articles which need to be effectively enforced is not big, most of them are closely related to the Constitutionalism by carrying its core spirits. In this sense, the aforementioned structural inclination about the enforcement of the Chinese Constitution itself reflects the nationalism to some degree regardless of how much it is reflected by those well-enforced constitutional articles.

Secondly, if we analyze the enforcement of the Chinese Constitution through a historical perspective, it is not difficult to find that the status quo of the enforcement of the Chinese Constitution is more similar to the contemporary German or French Constitutions than the modern constitution. The main characteristic of the enforcement of the Chinese Constitution is that the Chinese legislature actively uses legislations to implement the Constitutionalism, especially focusing on the enforcement of the Constitutional provisions regarding basic rights. In the meanwhile, the Chinese legislature and the Chinese judicial organ work together to set up the principles of legal priority and legal reservation to constrain the administrative power growing out of monarchial power, which was also practiced by Germany and France back to the 19th century.

Looking at the present China, the National People's Congress (NPC) stands in the

[19] The nationalism here mainly refers to varieties of inclinations to privilege of the state, centralism of the state or supremacy of the state. Based on the 100-year miserable history of weakness and as a semi-colony country as well as facing the historical projection of national unity, the valid Chinese Constitution inevitably encompasses the value of the nationalism in many aspects to some degree. But on the other hand, it also includes the spirit of the Constitutionalism. For example, the Paragraph 13 of its Preamble clearly states that "the people of all ethnic groups, all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct." Article 5 further states that "all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law"; "no organization or individual is privileged to be beyond the Constitution or the law."

center of the national power structure set up by the Chinese Constitution. Especially based on the organization and the principle of democratic centralism, the NPC and its Standing Committee enjoy broad and influential powers including but not limited to the national legislative power, as well as the power to amend, interpret and enforce the Chinese Constitution. In other words, similar to the contemporary constitutions in many countries, the Chinese Constitution also grants the interpretation powers to the highest organ of state power and denies any scrutiny by any other organs on laws made by the national legislature. Under such circumstances, the concrete ways to enforce the Chinese Constitution indeed are dependent on the concrete laws which are passed by the national legislature. Therefore, the mainstream opinion of the Chinese constitutional scholars is that China has adopted the way of enforcing other concrete laws to enforce the Chinese Constitution.[20] Likewise, the Chinese ruling party and the leaders of organs of public power also hold the same opinion that the Chinese Constitution was mainly enforced "through making well-conceived and complete laws."[21] In practice, the Chinese judicial organs also hold a very passive attitude toward the enforcement of the Chinese Constitution. Especially after the "judicialization of constitution" movement which was jointly launched by some elites within the judicial system and constitutional scholars and aimed at modeling the US-style constitutional review was foiled,[22] Chinese courts on all levels tried their best to avoid touching the hot issues of the judicial application of constitutional articles and constitutional review.

In comparison with China, the enforcement of the German Constitution or the French Constitution follows a very different way. In both countries, the enforcement of their constitutions, on the one hand, mainly relies on their legislatures making laws to implement the principle of the Constitutionalism and to protect the basic rights of

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[20] Constitutional Law Textbook Drafting Team, 宪法学 (*Constitutional Law*), Higher Education Press (Beijing) & People's Press (Beijing), at 296–297 (2011); LIN Yan, 通过立法发展宪法——兼论宪法发展程序间的制度竞争 (*Developing the Constitution through Legislation and Simultaneously Discussing Institution Competition in the Developmental Procedure of the Constitution*), 2 清华法学 (Tsinghua University Law Journal), (2013).

[21] See XI Jinping, 在首都各界纪念现行宪法公布实施 30 周年大会上的讲话 (*Speech in the Conference to Celebrate the 30-Year Enactment of the Chinese Constitution Attended by People from All Walks of* Life of Beijing), Dec. 4, 2012; ZHANG Dejiang, 在全国人大常委会立法工作会议上的讲话 (*Speech in the Legislation Meeting of the Standing Committee of the NPC*), Oct. 30, 2013.

[22] This movement stemmed from Case of QI Yuling in 2001. In this case, the Supreme People's Court of China issued a judicial interpretation supporting that courts could rely on constitutional provisions to adjudicating specific cases. But this judicial motion came to a failure due to that the Supreme People's Court did not promptly distinguish the judicial interpretation from the US-style constitutional review. In 2008, the Supreme People's Court abolished the judicial interpretation. At that time, there were a lot of discussion about "judicialization of constitution," including but not limited WANG Lei, 宪法的司法化 (*Judicialization of Constitution*), China University of Political Science and Law Press (Beijing), (2000); CAI Dingjian, 中国宪法司法化路径探索 (*Exploring the Path about Judcialization of the Chinese Constitution*), 5 法学研究 (Chinese Journal of Law), 110–124 (2005).

citizens[23] and on the other hand relies on the collaboration of their legislatures and their judicial organs to curb the administrative power.[24] But different from this way, in the current political context of China, the NPC and its Standing Committee who, as "the defender of the Chinese Constitution," legally possess broad and important powers adopts a passive attitude towards the enforcement of the Chinese Constitution so that some constitutional articles regarding their own powers still belong to "constitutional articles that need to be effectively enforced." It is also worth noting that despite within the recent decade, the legislation review institution (that is the aforementioned constitutional enforcement monitoring institution) which is led by the Standing Committee of the NPC has developed to some degree and therefore has been tactically analogized to the sophisticated Western "constitutional review" by Chinese constitutional scholars, but it is still far from satisfying the expectations of the whole society given that in practice the NPC and its Standing Committee has not actively used the constitutional interpretation power or the constitutional monitoring power granted by the Chinese Constitution. Lacking the effective institution of constitutional review is the "Achilles' Heel" of the Chinese Constitution.[25]

The reasons for the status quo of the enforcement of the Chinese Constitution are complicated. Among them, one direct reason is that in the real political life, the NPC and its Standing Committee who possess both the national legislative power and the constitutional enforcement monitoring power and thus legally are "the first obligator" to enforce the Chinese Constitution despite other national agencies and the ruling party are obligated to enforce the Chinese Constitution as well have been passive about this duty

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[23] For example, in contemporary France, despite there was not a legal notion that constitution is above other laws and constitutional review was not possible there, a mainstream trend was that the constitutional provisions regarding basic rights were enforced through legislation. Although laws that coincide with constitution is achieved by the self-inspection of the legislature, in most cases the legislature still tries its best to make laws literally and spiritually consistent with the constitution. Duguit, 宪法学教程 (*Textbook of Constitutional Law*), translated by WANG Wenli et al, Liaohai Publishing House (Shenyang) & Chunfeng Wenyi Press (Shenyang), at 190, 199, 206–210 and 229–233 (1999).

[24] In terms of constraining administrative power, both contemporary French administrative law and German administrative law distinguished laws from administrative regulations. Although laws could not be reviewed, administrative regulations fell into the scope of judicial review. In contemporary France, even administrative regulations being authorized to make with the authority of laws still fell in the scope of judicial review. In the meanwhile, because of the progress of legality of administration, the concept of political acts and the concept of discretionary acts have been decreased in the realm of French public law. Duguit, 公法的变迁 (*Change of Public Law*), China Legal Publishing House (Beijing), at 69–73 and 147–157 (2010); with regard to the differentiation of statutes and regulation in German law, the formation of "privilege of law" and "reservation of law" in German notion of "rule of law" and the efforts made by the German administrative law to judicalization of administrative acts, please refer to Mayer, fn. 10 at 64–76.

[25] As to the development and shortcomings of the constitution enforcement monitoring system in the past decade, please refer to LIN Laifan, 中国的"违宪审查"：特色及生成实态——从三个有关用语的变化策略来看 (*"Constitutional Review" in China: Characteristics and Actuality of Generating — From the Perspective of the Tactics for Change of Three Related Terms*), 5 浙江社会科学 (Zhejiang Social Sciences), (2010).

for a long time as mentioned above. In terms of the democratic impetus mechanism of the enforcement of the Chinese Constitution, it is also very difficult for the NPC and its Standing Committee, which are the people's representative bodies generated through multiple-tier indirect elections, to substantively obtain the impetus to push the thorough and effective enforcement of the Chinese Constitution, which is more fundamentally determined by the current allocation of political power and the basic model of national governance in China. On the basis of this understanding, within the present Chinese institutional framework, it is indeed necessary to launch a substantive but politically controllable political and democratic reform in order to effectuate the Chinese constitutional review, energize the enforcement of the Chinese Constitution and promote the further development of the Chinese model of "the rule of law."

## CONCLUSION

To conclude, the current Chinese political reality, especially its allocation of political powers and the general trend of history, basically determines that in the foreseeable future China can only adopt a peculiar model of "the rule of law" that is obviously different from but also duly learnt from the model of "the rule of law" generated by Western legally developed countries and mainly pushed by the CPC as the permanent Chinese ruling party based on its own subjective position. With regard to the characteristics of the Chinese model of "the rule of law," it seems to be fair to give the following judgments:

First, the primary goal of the Chinese model of "the rule of law" is more to maintain a so-called "political order of socialism with Chinese characters" which matches the present situation in China with the bottom line as stabilizing the political leading role of the CPC, which serves as the leading force for state integration and the driving force of the Chinese model of "the rule of law," than to constrain the abuse of public power and protect the basic rights of individuals. Under such circumstances, the freedom rights of individuals and the ideology of nationalism plus political power inevitably fiercely clash with each other and to a large degree the former is restricted and suppressed by the latter. But without being in a fundamental conflict with the aforementioned political order, basic rights of individuals are still likely to be protected and even individuals may enjoy *de facto* "natural rights" stemming from the fact that public power cannot effectively control individuals due to the large scope of the country and the complicated structure of the society.

Second, the above argument never means that the Chinese model of "the rule of law" does not care about constraining the abuse of pubic power at all. Instead, it accepts this principle to some degree. Especially when it is at the stage of good development (such as recently after the 4th Plenary Session of the 18th Central Committee of the CPC), it usually turns its focus on public power and applies "the rule of law" to "governing governmental officials." At this point, the ideology of self-constraint of public power in Chinese traditional political and legal culture could play a very important role. In other words, the ideal result of the Chinese model of "the rule of law" is to achieve the self-constraint of public power.

It is worth noting that "governing the officials" and "governing the common people" can be compared to the two sides of a clock in the Chinese model of "the rule of law" and the phenomenon still clearly exists that "obeying law is not only an obligation for the state but mainly also an obligation for citizens." More importantly, no matter how "the rule of law" constrains public power, it is at most constraining the specific enforcers of the public power instead of the leadership of the CPC. At this point, the "judicial independence" of Western legally developed countries cannot be fully transplanted and realized in present China. It is predictable that it is at most to eliminate the intervention of some of the lower organizations of the CPC or some low-ranking leaders of the CPC into some judicial cases than to "eliminate the appearance of the CPC" in the Chinese judicial system when dealing with the relationship between the judicial power and the leadership of the CPC in the developmental process of the Chinese model of "the rule of law" in the future. Therefore, this type of internal tension within the Chinese model of "the rule of law" still needs to be solved in its self-development.

Third, the Chinese model of "the rule of law" also possibly has the internal tension between the unquestionable power of the legislature and the compromisable principle of law supremacy. It could be reflected in the following two aspects. On the one hand, due to the fact that the newly-born regime of the PRC completely abolished the legal system of the Republic of China in the middle of the 20th century and as a result it subsequently entered a "legal vacuum," the PRC has had to launched a "great leap" to make hundreds of thousands of laws since the 1980s, which under such circumstances has caused the decentralization of the national legislative power and further led to the diverse and messy sources of law in China including a lot of low-ranking and unreasonable local regulations and governmental ordinances, present as statutes (statutory laws) though, harming the authority, legitimacy and reasonableness of laws. On the other hand, because of the intellectual influences of Rousseau and the Marxism, law is perceived to "the reflection of the will of people" (the will of the state) and the "legislators" are not reviewed or constrained by any other authorities. In this case, the system of judicial review, in particular the constitutional review, is confronted with many difficulties impeding its development. The important way to solve the conflict between the unquestionable status of legislators and the compromisable principle of law supremacy is to set up the effective constitutional review in China. Correspondingly, how to make use of the idea of harmonization of law and ethical norms in the Chinese traditional culture has become an important project for the development of the Chinese model of "the rule of law."[26]

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[26] As to the close relationship between law and ethical norms in the Chinese traditional culture and its influences on the present, please refer to HUO Cunfu, 中国传统法文化的文化性状与文化追寻——情理法的发生、发展及其命运 (*Cultural Characters and Pursuit of Chinese Traditional Culture — Growth, Development and Future of Ethical Norms*), 3 法制与社会发展 (*Law and Social Development*), (2001); HUO Cunfu, "合情合理，即是好法"——谢觉哉"情理法"观研究 (*Good Law Coincides with Ethical Norms: Research on XIE Juezai's Theory of "Ethical Norms"*), 11 社会科学战线 (Social Science Front), (2008); LING Bin, 法律与情理：法治进程的情法矛盾与伦理选择 (*Law and Ethical Norms: Conflict between Them in the Development of Rule of Law and Ethical Choice*), 1 中外法学 (Peking University Law Journal), (2012).