

From the Third Cooperation to the Third Republic

A Centennial Anticipation

In late March 2023, Ma Ying-jeou (马英九) visited his hometown in mainland China and Sun Yat-sen's Mausoleum in Nanjing, the former capital of the Republic of China, for the first time as its former president. The visit rekindled hope for another cooperation between the Nationalist Party (国民党, KMT) and the Communist Party (共产党, CCP) after the previous two failed cooperations in 1924–27 and 1937–46. In fact, such expectations surfaced as early as 2008, when Ma was elected as the President of the Republic of China – essentially meaning Taiwan since the KMT retreated there following its defeat in 1949. The hope reignited as Chiang Wan-an (蒋万安), the great-grandson of Chiang Kai-shek (蒋介石) and the current mayor of Taipei, visited Shanghai in late August 2023, when he delivered a passionate speech on peaceful unification and actively engaged with the local people, fostering lively interactions on the streets.

1.1 INTRODUCTION: ANTICIPATING A THIRD COOPERATION

In 1908, China enacted its first written constitution, the Outline of the Imperial Constitution. Over the past century, China has experienced many ups and downs, undergoing numerous changes and facing various challenges. However, it is evident that the Outline was by no means a good constitution as it was filled with the traditional arrogance and tyranny of the imperial power. Hopelessly hindered by the vested interests of the Manchu minority, the Qing government failed to make significant progress in its promised reforms, particularly the reform of official system, leading to growing resentment among the Han majority. The Outline lasted for only three years, and the entire reform movement, spanning seven decades, was ultimately deemed a complete failure with the Xinhai Revolution in 1911. The root cause of the failure

was the inability of the old regime to resolve the conflict of interest between the small circle of officials dominated by the Manchu minority and the population at large. While the Outline did incorporate some Western elements, such as “parliament,” “free speech,” “freedom,” and “property,” which were unfamiliar to the Chinese at that time, it took Chinese several generations to understand and even longer to practice these imported norms. Despite undergoing two revolutions and enacting a dozen constitutions, China has not effectively implemented any of them. Even today, although most of the political natural law precepts are included in the current constitution, they remain largely superficial. Having been plagued by warlord struggles, foreign invasions, totalitarian rule, and the subsequent human catastrophes of colossal scale, China seems to be forever mired in the trap of “having a constitution without constitutionalism” (有宪法无宪政).

A century later, in March 2008, the Nationalist candidate Ma Ying-jeou won the presidential election in Taiwan. Taiwan’s success in the “second rotation” of the ruling party not only signified the maturation of its democracy but also helped to reduce – at least temporarily – the tension across the Taiwan Strait that had built up during the presidency of the Democratic Progressive Party. The call for the “Third Cooperation” (第三次合作) between the Nationalist and Communist parties has reemerged in China’s public sphere and has even been put on the official agenda for discussion.¹ For peace across the Taiwan Strait, of course, this was good news. However, mere negotiations on policies, economic and cultural cooperation, and even the reconciliation of cross-strait relations would fall far short of making sustainable progress. For decades, the two totalitarian parties had been fighting and killing each other, which had not only devastated China, but also ruined critical opportunities for its constitutional reforms. It was not until the lifting of martial law in 1987 that constitutionalism began to take root in Taiwan. On the other hand, having failed the 1989 democratic movement, the mainland remains in a state of “having a constitution without constitutionalism” to this day. The social problems, unable to be solved through regular institutional channels, are bound to pile up to the point of social collapse. If we

¹ In fact, the concept of the “third cooperation” was proposed by the Communists as early as 1955, but was rejected by the Nationalists. See Wang Lefei, “The third cooperation before the stage and behind the scene,” 人民网 (April 17, 2019), <http://zhounelai.people.cn/n1/2019/0417/c409117-31035474.html>. With the mainland initiating Reform and Opening in 1978 and Taiwan undergoing democratic transition in 1987, the two governments frequently engaged in negotiations, culminating in the 1992 Consensus, which confirms the one-China principle. However, there has been no consensus on the interpretation of this principle across the Strait.

expect the one who tied the knot to untie it, the resolution of China's constitutional deadlock may indeed require a third cooperation between the Nationalists and Communists. But this time, it cannot stop with cooperation between two previously totalitarian brothers, as was the case for the first two cooperations, which were merely temporary alliances for dealing with internal turmoil (warlord separatism) or external enemies (the Japanese invasion), with each secretly plotting to grab total power and extinguish the other. The third cooperation, if it is ever to occur, is charged with a fundamentally different historical mission: bringing to China a true republic – the Third Republic (第三共和), if there is no better name for now.

In the past century, China has experienced two “republics”: The first one overthrew the monarchy, while the second ended the Civil War. In both republics, the Nationalist and Communist parties were allies at times and enemies at others, but they shared several common characteristics. First, since both parties were revolutionary in nature, the republics they established were the result of revolutionary violence. The Xinhai Revolution, with the support of the Nationalist Party, overthrew the Qing dynasty, while the Communist Party overthrew the Nationalist rule in the 1949 revolution. Second, as a result of the two revolutions that were essentially the same in nature, both revolutionary parties implemented strict one-party rule, which inevitably failed to achieve a balance of power. Consequently, the revolutions created the third common problem: Neither republic achieved constitutionalism. Although the First Republic aimed for constitutionalism as its ultimate goal, it was not achieved until the Nationalists implemented one-party rule for thirty-eight years under martial law after retreating to Taiwan in 1949, when the Communists took over mainland China. The Second Republic has pursued “dictatorship” (专政) instead of constitutionalism from the very beginning to this day, even though strict totalitarian rule has been relaxed since 1978 until its recent resurgence. The prospect of a true republic seems to be nowhere in sight.

The first two republics have spanned over a century, during which hundreds of millions of Chinese killed each other for purposes they thought they knew without understanding the underlying reasons. Witnessing the revolutionary chaos of a century, China should learn at least one lesson: Revolution and constitutionalism are incompatible. Revolution is *not* constitutionalism, nor can it achieve it. The Nationalists and Communists have led two revolutions, which not only overturned the ancient political system and swept away traditional culture, but also permanently shelved constitutional reform. Since constitutionalism is the historical debt that both revolutionary parties owe to China, the Chinese have reason to demand that they cooperate once again to

establish a Third Republic, one with genuine constitutionalism. However, this time it should be built not through revolutionary violence,² but based on peaceful competition between the two (or multiple) parties.

1.2 FAREWELL TO REVOLUTION

The tortuous road of a century of constitutional reform need not be elaborated on here. The shock of the defeat in the Sino-Japanese War (1894), the shame of the Treaty of Shimonoseki (which ceded Taiwan to Japan in 1895),³ the passion of the scholars' Petitioning on the Royal Carriage (公车上书), the excitement of the Hundred Days' Reform (1898), the tragedy of the Six Gentlemen (the execution of whom quickly put an end to the reform), the hope and disappointment that came with the trial of constitutional government (仿行宪政) in 1908, the good fortune of the Xinhai Revolution in 1911, the travesty of the "Great President" (i.e., Yuan Shikai), the embarrassment of the "Bribed Constitution" (贿选宪法),⁴ the helpless failure of the "Provincial Self-Government" (联省自治), the delight of the Nationalist success in the Northern Expedition followed by its bloody crackdown on the Communist ally (1927–28), the ultimate fruition and hasty defeat of the Republican Constitution (1946–49), and so on. The bewildering series of past events seem to have long vanished into thin air, and yet their legacies remain.

After 1949, mainland China finally regained its unity, but unrest and repression intensified. The 1954 Constitution was soon obliterated by the tumultuous waves of the Anti-Rightist Movement and the Great Leap Forward, and the maladies of the Cultural Revolution infected the constitutions of 1975 and 1978. It was not until after the Reform and Opening (改革开放) starting in 1978 that the people were able to live a peaceful life, while constitutional reform once again became a possibility – but only a possibility. While economic reform has achieved mixed success, the constitutional reform failed within a decade in 1989. For mainland China, constitutionalism is not a reality, but remains a remote goal for a hopeless pursuit.

² "Farewell to Revolution" was made a theme among Chinese intellectuals during the 1990s after Li Zehou (李泽厚) and Liu Zaifu (刘再复) coauthored a book with that title: *Farewell to Revolution* [in Chinese] (Hong Kong: Cosmos Books, 1995).

³ For a gist, see Ma Yong, *Convulsed Changes: Opium, Guns and Canons, and China in the Progress of Civilization (1840–1915)* [in Chinese] (Beijing: Encyclopedia of China Publishing House, 2022).

⁴ It was enacted by the "bribery president" Cao Kun (曹锟) in 1923, which has ironically been the best constitution being closest to a federal constitution.

Why is China's road to constitutionalism so long and difficult? The explanation starts with the original meaning of "constitutionalism," against which the CCP issued its latest warning in February 2023. Originally, constitutionalism was a rebellious proposition advocated only by political dissidents. After a long period of silence, however, the sixteenth CCP National Congress in 2002 valued the term positively, giving much hope to many people. With the rise of public awareness of constitutional rights, "constitutionalism" has become an increasingly popular term. Once the rights are violated, the victims instinctively turn to the current constitution, which provides for these rights. Constitutionalism has become inseparable from the concepts of rights, freedom, and rule of law. Even in the eyes of the lowest rank of Chinese society, constitutionalism has become a synonym for the better future. It is something everyone can understand since it closely relates to one's basic rights and interest.

In formal terms, constitutionalism is nothing more than governing according to the constitution – any constitution, in the same sense as the rule of law is nothing more than governing according to the law, even if the laws are not so good. However, achieving the rule of bad laws is not easy because general laws, particularly the constitution, are usually presented in an appealing manner. Nakedly bad laws are rare. Unless the ruler is hopelessly ignorant or arrogant, the constitution generally will not stipulate that the ruling family is to be "eternally revered for all generations," as in the Outline of Imperial Constitution, nor will it explicitly grant the "great leader" a demigod status or simply write his name into the constitution. The 1975 Constitution was established amid the tumult of the Cultural Revolution, but even such a revolutionary "constitution" reads quite innocently – perhaps laughably today. It contains passions, ignorance, and naivety, but not overtly positive evil if one is unaware of what actually happened during the Cultural Revolution. Even the terror of "dictatorship" was carried out under the sacred name of the "people." Indeed, everything is supposedly for the "people." All written constitutions, particularly the socialist constitutions, from the 1924 Constitution of Soviet Union to the 1972 Constitution of the "Democratic People's Republic of Korea," are written in this manner. Paradoxically, the louder the slogan of "people" is proclaimed, the poorer and humbler the people actually are.

Here is the difficulty, however. The more beautifully a law is written, the more difficult it is to put it into practice. Who exactly are the "people"? Can they speak for themselves? When the interests of the "people" are infringed upon, can they stand up to protect themselves? Modern autocrats know that the "people" is merely a fictitious construct that they can manipulate at will to help maintain the legitimacy of their rule. Even if the "people" are seen as

concrete individuals, they are no more than a group of voiceless, disorganized, and unconnected strangers, who form a motley crowd, “much as potatoes in a sack form a sack of potatoes.”⁵ Without a political mechanism that unites them and enables them to express their preferences through elections, and obliges elected rulers to be accountable, they are no more than silent lambs awaiting slaughter by their owners. At the very bottom, in any given society and at any given time, since resources such as power and property are always limited, the way in which they are allocated depends on the nature of the state. While a constitution does regulate how rights and interests are distributed, and declares unequivocally that the interests of the “people” are supreme, how these interests are actually distributed hinges on the mechanism through which that the state is governed.

In an authoritarian regime, the rule makers and enforcers are not held accountable to the people, at least not to the majority of society. As a result, the actual rules are operated in their favor, while the rules supposedly “for the people” remain on paper. As Marx asserted, the law is merely an instrument of the ruling class, and a tool is always used for the benefit of its maker and user. Such is the basic requirement of instrumental rationality. Unless one is willing to believe that leaders are selfless “living Lei Feng” (活雷锋),⁶ it is only logical that they will implement their rule in their own interests. After all, if the “people” sanctified in the constitutional text cannot speak or defend themselves in real life, why not prioritize “getting rich first” by exploiting their labor?⁷ To be sure, the people’s interests are also relevant in the long run. As the great Confucian scholar Xunzi (荀子) famously said, “water can carry a boat, just as it can capsize it.”⁸ It is certainly unwise for the exploitation of the people to reach a point of open rebellion. However, for any specific leader, the force of such rational persuasion is feeble for several reasons.

⁵ Karl Marx, “Eighteenth Brumaire of Louis Bonaparte,” in Robert Tucker, ed., *The Marx–Engels Reader*, 2nd ed. (New York: W. W. Norton & Co., 1978), p. 608.

⁶ Lei Feng was a soldier who died on duty at the young age of twenty-one. After his passing in 1962, Mao Zedong advocated “to learn from Comrade Lei Feng,” initiating an idol worship movement that continues to this day. Lei Feng has since been portrayed as a model by official propaganda, symbolizing those who selflessly sacrifice themselves for the well-being of others. However, in reality, he was a rather ordinary individual with human flaws and vanity. Tao Ke, “Insider recovers a true Lei Feng,” 新华网 (March 6, 2014), https://gongyi.ifeng.com/news/detail_2014_03/05/34441619_0.shtml.

⁷ Deviating from the egalitarian Communist ideal, Deng Xiaoping’s pragmatic slogan in the early stage of reform was “to allow some people to get rich first.”

⁸ Xunzi, Ch. 31. The “boat” is a metaphor often referring to the regime (not a particular government).

First, since the term of any particular leader is limited, self-interested leaders will maximize their rent so long as the “boat” does not capsize during their own term. Such a mentality has turned the art of ruling into a game of “passing the buck.” After seventy years of Marxist education, which thoroughly secularized Communist China, and four decades of market reform, effectively rationalizing every member of the ruling group, ordinary leaders are neither deterred by moral principles nor motivated by the aspiration to leave a good name in history. It would be naive to expect that a ruling group with the mentality of “Après moi, le déluge” will truly prioritize the public interest of ordinary people based on its long-term calculations. In fact, compared to hereditary rulers, whose estate is supposed to last indefinitely as long as they keep the “boat” steady, a supposedly “elected” leader with a limited term is much less motivated to avoid the consequences of “Après moi, le déluge.”

Second, it is true that the ruling group in a large country like China is far from a single solid bloc. It is a composite group comprising various interests and personalities. Even after several decades of applying the reverse selection rule in the official circle since the crackdown in 1989, there are still reformers intending to make progress and even critics who are radically dissatisfied with the current state of affairs. However, they remain a small minority in the ruling group, whose overall behavioral pattern is determined by the dominant vested interest. In fact, in the face of such a dominant interest, even a reform-minded leader is rendered powerless. Emperor Guangxu’s fate at the end of the Hundred Days’ Reform was telling enough. Unless an enlightened monarch possesses the power and prestige of Mao Zedong during the heyday of personal worship, leaders who challenge the system will quickly find themselves fighting a losing battle.

Finally, everyone in the ruling group finds themselves caught in a Prisoner’s Dilemma. While the corruption of one individual is not enough to cause a riot, individual integrity alone is insufficient to save a corrupt system. Therefore, maintaining a clean image would simply forfeit profit in vain. Once corruption and abuse of power become the “winning strategy,” a constitution, no matter how well-written, proves to be a negligible obstacle. In fact, the constitution was *intended* to be a facade to begin with. This is why there has been a millennia-long divergence between the apparent rules and the “latent rules” (潜规则), which essentially means today “having a constitution without constitutionalism.”⁹ Ultimately, the mystery that has puzzled scholars since the Han dynasty (202 BC to AD 220) boils down to a simple

⁹ Qianfan Zhang, “A constitution without constitutionalism? The paths of constitutional developments in China,” *International Journal of Constitutional Law* 8 (2010): 950.

fact: The lawbook serves as little more than a cover-up for the naked exploitation of the ruling group, which operates the state according to the latent rules to maintain its vested interest.

It is thus plain that a despotic regime will not implement its constitution and laws except naked bad laws, which are rarely seen. While a “good law” safeguards the interest of all – at least that of the vast majority, a bad law is a law that protects the interest of a few at the expense of the vast majority. Since a rule made by a small minority of the ruling circle necessarily serves the interest of such a minority against the vast majority, to whom it is not held accountable, the typical practice of a despotic regime is to implement bad laws under the ruse of good laws. To be sure, there *are* exceptions. Someone may point to Singapore, a state that is deficient in democracy but does practice rule of law. Due to fortuitous factors such as the colonial experience of self-government and the rule of law, the presence of an educated and enlightened ruling circle, the wisdom and lasting influence of the founding fathers, certain countries may be fortunate exceptions. However, such exceptions are likely to be rare. Advocates of “authoritarian legality” can provide only a handful of examples, such as Singapore and Hong Kong.¹⁰ In any case, whether authoritarian legality is considered valid or not, China’s rugged journey towards constitutionalism over the past century has proved that, like most countries in the world, China is *not* a fortunate star specially favored by destiny.

This presents a conundrum that has vexed China’s modernization for over a century. No sooner does a society become enlightened than its people demand reform, but such reform, however necessary, is impeded by the political and social structure of the old regime. Surrounding the ruling circle, the intellectual elites, political activists, and the populace expect to gain more interest and power, but this simply starts a zero-sum game since the first consequence of such reform is inevitably the diminution of the vested interests of the ruling group, for whom all rules have hitherto been designed and maintained. Indeed, the entire purpose of the state machinery has been to maintain and implement such latent rules under its control. When reform attempts to redistribute social interests without abolishing the existing power structure, its fate is doomed.

In this sense, absolute despotism is a ruling mechanism capable of self-healing. It not only violates every constitutional principle, but also creates the most natural anathema to constitutional reform. The formidable impediment

¹⁰ See, e.g., Tom Ginsburg and Tamir Moustafa ed., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008); Mark Tushnet, “Authoritarian constitutionalism,” *Cornell Law Review* 100 (2015): 391.

is not only due to the cultural apathy long cultivated by the absolute tradition that is at odds with constitutional democracy, but also because it fosters a vested interest group naturally opposed to any constitutional reform meant to diminish its power. In a despotic regime, leaders of all sizes are beneficiaries of the regime, each taking a share of their own authority from the authoritarian power structure. Since they control critical political, economic, and social resources, as long as they are in power, they are the major obstacle that every reform must overcome in order to succeed. To carry out any reform within the existing system, they have to be benefited, at least not harmed or threatened. Once the reform threatens to change the power structure that sustains the vested interest, it is safe to expect that they will fight back to suffocate the reform. Following the promulgation of the Outline of the Imperial Constitution, the series of retrogressive actions taken by the Qing government during its institutional reform sufficed to illustrate this point. The success of a limited reform, which keeps the existing power distribution pattern essentially unaltered, depends on whether cooperation can be obtained from the vested interest groups.

Admittedly, cooperation with the ruling regime is not always impossible. Under exceptional situations, the ruling elite may also benefit from reform and even actively promote it. The four decades of Reform and Opening in mainland China witnessed such a fortunate process, despite major defeat of political reform in 1989. The regime gave up some of its power, thereby leaving society a degree of freedom with which it is able to develop vigorously. During this process, while the people's livelihood improved, officials still maintained considerable residual power that enabled them to seek rent and become the greatest beneficiaries of economic reform. This is why economic reform has been able to proceed, despite constant obstructions from the extreme leftist factions. The "China miracle" that the world has witnessed in the past four decades is little more than an appearance that seems all the more phenomenal in contrast to the pre-reform poverty. As the rigid planned economy had made the mainland so poor, and the political movements had made the people suffer so much, almost any deregulation would release social vitality, any development would increase GDP figures, and any reform would be beneficial as long as the reformers maintained basic sanity. The result is a Pareto optimum for almost everyone, from officials and entrepreneurs to intellectuals, workers, and peasants. All walks of life benefited to various extents. Since the cake is constantly growing, everyone keeps getting a bigger piece, despite dramatic differences in the size of pieces under the existing power structure – the leaders who control the power and resources naturally get the lion's share.

The simple logic also determines the fate of political reform, which is almost bound to fail because it threatens to take away the very means by which the ruling group protects its vested interest. Just as a fisherman may be willing to give up a few fishes, but will fight with all his strength to keep his fishing gear, a despotic leader may be willing to give up certain concrete benefits, but will do everything within his power to maintain the power by which all his privileges are derived and kept. For a ruling regime without vision and confidence, political reform is nothing short of a revolution. In order to avoid agitating the vested interest, a reform must be carried out timidly, as if walking on thin ice. Without touching on the political dimension, a reform can continue along the economic axis with the least resistance, but it is uncertain how far it can proceed along this path.

The experience of Chinese reform shows that economic growth cannot constrain political power. On the contrary, it further expands the power of the party-state by contributing revenues and legitimacy to the ruling regime. Sooner or later, the ruling elites at all levels would get carried away, and unscrupulously violate the basic interests of ordinary people, causing heaps of social conflicts, from forced demolition and eviction in cities to unfair compensation for land-taking in the countryside. As recurring social conflicts and protests are inevitable, political reform is increasingly urgent. If the leaders remain stubborn to resist political reforms, as the Qing government did before 1911, social crisis will only accumulate until the last straw breaks the regime's capacity to endure social pressure. At that time, the repeatedly frustrated reform will turn into a revolution, just as repeated failures of reforms during the late Qing dynasty eventually led to the Xinhai Revolution.

The repeated failures in political reform would make it appear that only a revolution can break the existing power structure together with the vested interest groups that obstruct necessary changes. However, China's lessons in the past century, written with blood and fire, have demonstrated that revolution is *not* the solution to cure the failures of reform. First, although revolution often aims for constitutionalism at the beginning, as Sun Yat-sen's republican revolution did around 1911, it usually fails to promote constitutionalism in the end because the success of the revolution itself will quickly produce new vested interest. Not only did the KMT refuse to negotiate with the Qing government to establish a constitutional monarchy, but also persecuted its CCP ally as soon as the Northern Expedition succeeded, establishing a strict one-party rule against constitutional principles.

In fact, compared to the old vested interest, the revolutionaries, who used to be marginalized and poor, will be all the more rapacious in enriching themselves and therefore equally if not more resistant to any constitutional

reform that tends to take away their power. Moreover, in the violent process of overthrowing the old regime, the revolutionary party will inevitably pay a heavy price in terms of lives and blood, and will do everything to compensate itself, as it were, by reaping the hard-earned spoil when it comes to power. Indeed, one primary rationale that the CCP uses to justify its political monopoly is that “the blood of the revolutionary martyrs should not flow in vain,” which is another way of saying that “anyone who wants us to step down should expect to pay the same price.” Once the monopoly of power is considered as a reward or compensation for the blood sacrifice of the revolutionaries, the so-called revolution is no more than thug violence, except that it is now equipped with an attractive ideology, which will only carry its political dictatorship to an even higher level.

Second, since the success of a violent revolution typically relies on a highly centralized organizational structure, the ruling party is unlikely to relinquish its centralized power after achieving success. Instead, its governing principle necessarily opposes the constitutional separation of powers. Following the Xinhai Revolution, for instance, the KMT remained organizationally dispersed and militarily weak, relying on shifting alliances with various warlords to maintain itself. It was only after 1924, when the party reformed its organizational structure according to the Soviet model that it became a highly centralized and effective party, shortly leading to the Northern Expedition (北伐) and the reunification of China. However, this success marked the KMT’s turn towards comprehensive dictatorship. Soon after reunification, the party purged its former leftist allies, particularly the Communists, and practiced monopolistic rule both within and outside the party. The Communist victory over the KMT in 1949 was similarly achieved through massive violence. In essence, a revolution replaces the old tyranny with an even more fearsome tyranny and conquers the old violence with greater violence. To confront the vested interest controlling the state machinery, a revolutionary party must be highly centralized, organized, and militarized to survive within the political environment of the old regime before it ultimately defeats it.

Consequently, a successful revolution aligns itself diametrically against the principles and organizational structure of a liberal democracy. After the revolution, the ruling party naturally continues its accustomed style of governance from the revolutionary period. Not surprisingly, revolution as a radical form of change only results in the violent replacement of rulers, echoing the Chinese saying “change the soup but not the medicine” (换汤不换药). The constitutional predicament persists – indeed, often worsens – as the new ruling group often becomes even more tyrannical.

Indeed, a revolution presents significant risks for a society undergoing change. In a despotic system where revolutions typically occur, it is difficult if not impossible for the public to clearly understand the arguments for or against the revolution and to test its promises through normal deliberations. Revolutionary slogans are often misleading or deceitful. After a successful revolution, when the new despotic order is consolidated, the new regime will not be held accountable to the people through regular elections. As a result, it is not obligated to fulfill the promises it made during the revolution in order to gain popular support. A notable example of a revolutionary party failing to fulfill its promises is the nearly four decades of “tutelage” (训政) exercised by the KMT, during which it failed to fulfill its constitutional promise to “return power to the people” (还政于民). Similarly, the CCP gained power largely through the support of the peasants by making appealing promises such as land ownership. However, soon after seizing power, it reclaimed peasant land and implemented the People’s Commune system, which led to the devastating Great Famine of 1959–62, primarily affecting peasants. The peasants have also been deeply harmed by the discriminatory urban-rural policies implemented since the early 1950s. If the Chinese peasants had known the consequences, would they still support the Communist revolution at the beginning?

Furthermore, both the Nationalist and Communist parties once advocated federalism as part of their political promises, but abandoned those promises and practiced a centralized unitary system as soon as they gained power. The CCP, for instance, proposed federalism as early as its Second Congress in 1922. As late as October 1947, the Declaration of the Chinese People’s Liberation Army promised ethnic minorities “equal autonomy and free partnership within the Chinese territory.”¹¹ As soon as it seized power in 1949, however, it abandoned its ethnic policies. Today, “federalism” even became a forbidden topic. Revolutionary ideals can be enticing, but a society where revolution becomes necessary for change often lacks the very mechanisms to hold the revolutionary party to its promises after it achieves success.

Therefore, while constitutional reforms face various dilemmas, a simple revolution is not a solution for achieving constitutionalism. Fundamentally, as constitutionalism pertains to the interests of everyone, constitutional politics should be democratic in nature, ensuring everyone’s right to participate. The outcome of practicing constitutionalism is an equitable distribution of powers, which ensures a relatively fair distribution of interests and resources. An inequitable power structure inevitably leads to an inequitable distribution

¹¹ Mao Zedong, Chinese People’s Liberation Declaration (October 10, 1947), www.marxists.org/chinese/maozedong/marxist.org-chinese-mao-19471010.htm.

of interests. In a highly centralized system, the ruling group concentrates a disproportionate amount of social resources, creating a vested interest group that opposes any constitutional reform that threatens to diminish their power. The convoluted process of Chinese constitutionalism is attributed not so much to a misunderstanding of constitutionalism or outdated political ideologies incompatible with constitutional principles, but rather to the power structure and interest distributions under the old regime that have hindered every reform effort. Revolution may overthrow an old regime, but it cannot break the dynastic cycle and fundamentally change the nature of the regime, let alone establish and sustain a new constitutional order. Once a state becomes entrenched in absolute despotism, achieving constitutionalism becomes nearly impossible. From this perspective, the repeated failures of Chinese constitutionalism over the past century are a predictable outcome.

1.3 RECONSTRUCTING THE REPUBLIC

If constitutional reform seems hopeless and revolution is a dead end, then where is the way out? Nobody has the exact answer. Anyone claiming to have found the solution is either deceiving oneself or others, or both. Since revolution is not a viable option, reform becomes the only choice. How to reform a despotic regime depends on a series of unpredictable factors, such as the vision and courage of reformers, the level of enlightenment among the general public, the divided interests within the ruling group, the amount of tension created by social conflicts, and the impact of international political pressure. These uncertain factors make reform more of an art than a predictable science, akin to “crossing the river by feeling the stones” (摸着石头过河).¹²

Fortunately, an increasing number of Chinese people have come to realize the destination they are striving for, even though they may not yet know the precise paths to get there. While the liberals debated with the leftists whether the Chinese economy should be labeled as “socialist” or “capitalist,” and intellectuals were perplexed about the future of the nation in the early stage of Chinese reform, those capable of independent thinking today recognize constitutional democracy, rule of law, and respect for human rights as their own aspirations. The occasional resurgence of leftist ideologies is merely a

¹² The oft-quoted phrase stands for a cautious, pragmatic strategy of development dating back to the 1950s, and was reintroduced by the conservative leader Chen Yun at the CCPCC work conference in December 1980. See Xu Qingquan, “Crossing the river by feeling the stones,” *DW Chinese* (August 19, 2020), www.dw.com/zh/摸着石头过河漫话中共党史术语系列之三/a-54594439.

fading trend, as even the leftists are beginning to realize that their own future, like that of the liberals, lies in effective constitutional protection of basic freedoms.¹³ Those utopian leftists who romanticize Chairman Mao are engaging in wishful thinking born out of total ignorance of modern Chinese history due to brainwashing. Just like the small minority of radical rightists seeking violent revolution, the utopian leftists will remain mere memories of history. They may persist for some time, but they cannot dominate the mainstream because idealistic visions or radical revolution cannot solve China's practical problems. Nor is maintaining the status quo a feasible solution because the current political system, unable to address the social problems it continually creates, will eventually collapse without reform, pushing China back to the forefront of revolution. After a century of constitutional failures, China today has no way out but to continue moving forward until it finds the true path to constitutionalism. With the exception of a small and short-sighted vested interest group, people from all walks of life in China, regardless of their positions, interests, classes, identities, or social status, have no reason or interest to oppose constitutional reform that will do them good. Since neither republican nor Communist revolution brought true constitutionalism to China, nor did they create a genuine republic, what China needs today is a new republican movement. Only through this third republican movement can constitutionalism find its destiny in China.

What does "republic" mean to China? "Republic" is not a legal concept with a precise definition. Various regimes can be labeled as "republics." Strictly speaking, for example, the United Kingdom is a monarchy, but it is also called a "commonwealth," something close to a republic. Unlike the Chinese emperor, the British monarch is not the sole supreme ruler; instead, the King in the Parliament, an association of the King and the two Houses, shares supreme governing power. Since the Glorious Revolution in 1688–89, the King's powers have gradually shifted to the Parliament and its elected Cabinet. Regardless of its name or form, the primary characteristic of a true republic is popular sovereignty.

To be sure, a republic is not simply a majoritarian democracy. It is commonly understood to be more moderate than a simple democracy because

¹³ A prominent example was the labor movement in the summer of 2018, supported by the leftist students from major universities in Beijing and elsewhere. In fact, one of the student leaders, Yue Xin, was once a frequent attendee of my freshman constitutional law classes when she was an undergraduate at Peking University. The movement was quickly and harshly suppressed by the government. Ran Ran, "The rise of Chinese leftist youth and the official suppression," BBC Chinese News (December 28, 2018), www.bbc.com/zhongwen/simp/chinese-news-46616052.

pure majority rule may lead to the “tyranny of the majority,” allowing a parliament representing the interests of the bare majority to deprive minorities of their basic rights through legislation. Instead, a republic in its Chinese expression, *gonghe* (共和), means “common peace (or harmony),” advocating for the respect of every person’s basic rights, freedom, and dignity. This difference does not negate the fact that republicanism and democracy share the same foundation. To deserve the title of a “republic,” the rulers of the state must be somehow held accountable to the people, and such accountability should be more than nominal. Almost all constitutions today refer to their own statehood as “republics,” but the nature of the state ultimately depends on the actual conditions of democratic governance and human rights protection within that state. If the constitution provides for elections, yet the actual electoral process is so manipulated that officials at all levels are not held meaningfully accountable to the voters, then such a “republic” is merely a misnomer for dictatorship.

As shown above, a despotic state is trapped in the cycle of reform-revolution-tyranny. This is the very reason why such a state is prone to triggering revolutions or riots because a ruling group that is not held accountable to its people has no need to take their life and death into due consideration, and its callousness alone can create enough stupidity, misery, and anger to bring about its own downfall. The lack of democratic accountability has made it impossible to replace corrupt or inept officials through peaceful means and these officials, unrestrained by law or votes, are bound to act recklessly. Moreover, in a top-down system where the dictator has the final say, in order to maintain the facade of prosperity, stability, and harmony, the handicapped media can only report “good news” while concealing the bad. Most instances of corruption and social suffering are swept under the carpet of censorship. As a result, both leaders and ordinary people are kept in the dark about the true predicament in which they are situated. They may well be sitting on top of an imminent erupting volcano without knowing it. As social tensions build up faster than they are removed, there comes a point where massive conflicts erupt.

Worse still, a despotic regime not only hampers its own governing ability, but also hinders society from assisting and providing for itself. It exacerbates social disparities, creating a nation of strangers where the government and the governed, the rich and the poor, the elites and the grassroots, the leftists and the rightists mingle together without a common language and mutual understanding. Living with conflicting mindsets but sharing the same confined space, they inevitably generate friction, contempt, jealousy, and even hatred towards each other. While the owner of a luxury car may stigmatize bus riders

as “scums,” wage earners see their employers as “exploiters.” In a society where people are not empowered to govern themselves through free communications, divisions, hatred and, ultimately, revolution become an inevitable outcome. As Tocqueville keenly observed, despotism and the resulting social ills are the very sparks of revolution.¹⁴

In comparison, the greatest advantage of a democratic republic lies in its capacity to maintain social stability and harmony. Since the people have the right to elect representatives of their choice every few years, unqualified officials will be eliminated in due course. In such a regime, the parliament will pass laws favored by the majority and empower an accountable administration to implement those laws. To be sure, occasionally a dishonest candidate may deceive a naïve electorate and fail to fulfill extravagant promises after assuming office, but their luck will quickly run out as the electorate will not be fooled once again in the next election. Before long, like a tarnished brand, they will have to pay the heavy cost of losing their political career. The 2008 presidential election in Taiwan served as another testimony to the fact that people are not idiots, nor are they mere puppets of politicians. Elections are more than a word game or a result of money politics. After several rounds, voters have become more mature, politicians better behaved, elections more genuine, and the fate of the common people is now in their own hands.

Once the government is made accountable, social problems can be readily solved. First, officials, now under the pressure of accountability, are motivated to address social issues promptly; otherwise, they run the risk of being removed from office. Second, even if current laws fail to align with the majority's preferences, social policies can be adjusted through an elected parliament, constantly alleviating social tensions. Last and most important, liberal democracy is based on freedom of speech and the press. How else would voters know who to vote for? Unrestrained expressions constantly bring emerging social concerns to public attention, and the natural empathy towards misfortune compels the common people to urge the government to take adequate actions, thereby preventing social issues from developing into major crises. In fact, even before the government intervenes, many problems can be resolved through face-to-face debates and negotiations among the people themselves. While there may be intense clashes of interests and opinions, even raucous mutual accusations, they are far better than forced silence and indifference. And even if argumentations fail to produce a viable

¹⁴ Alexis de Tocqueville, *The Old Regime and the French Revolution*, trans. Stuart Gilbert (New York: Doubleday, 1955), pp. 107, 136.

solution, they at least provide all parties with the opportunity to air their views and vent frustration.

Therefore, in a mature republic, revolutions are rarely found. Since officials dare not act lawlessly, and effectively enforced laws continue to adapt to new realities, clearing away social problems like daily waste, most people live in a reasonably comfortable and pleasant environment, and the unfortunate few are hopefully cared for by a sympathetic majority. Even if a handful of radicals lose their minds and incite riots, they remain isolated crimes rather than a sweeping revolution that is dangerous enough to threaten the regime. While democracy achieves stability through shared harmony, despotism imposes coerced stability at the expense of true peace. A despotic regime is like a dam, with troubled water constantly rising. Once the dammed water reaches the limit, it will simply collapse under the unbearable weight. On the other hand, democracy is like a floodway, continuously adjusting its direction and relieving pressure by facilitating exchanges between the government and the governed. It may sound paradoxical, but the truth is that a despotic regime is the natural ally of revolution, while a democratic republic is its nemesis, preserving social peace through continuous legislative reforms. If a nation genuinely desires political stability, then a true republic is its only choice.

Of course, the hope of constitutional reform ultimately lies not in the leaders but in the people themselves, who alone have the most direct and durable interest in rational governance and social harmony. We bid farewell to revolution today in order to move away from tyranny and towards a true republic, and jointly found a constitutional government which the previous revolutions had failed to achieve. The Third Republic will no longer follow the old path of revolutionary violence, nor does it need a revolutionary vanguard, which will only lead China towards even harsher tyranny and farther away from constitutionalism. As a shared cause for common people, constitutionalism can only succeed through the joint efforts of all. If the people have been subjected to slavery for so long and, as a result, have become accustomed to the slavish way of life, then sadly they are only suitable for tyranny and cannot adapt to a republic, where citizens are the masters of their own destiny.

To break free from slavery, the people must first learn how to govern themselves, beginning with self-associations and the lowest level of governance. Direct face-to-face negotiations and mutual understanding will solve many problems without government intervention. Even though some employers are unconscientious, if workers have the rights to organize themselves, elect their own union leaders, use collective bargaining power, or appeal to the support of public opinion, then they do not have to beg the government to

demand the wages for them, as the former Premier Wen Jiabao once did during his term for migrant workers.¹⁵ While he was conscientious enough to help the unpaid workers, how many of them could a single man approaching his seventies possibly help? Nor is it necessary for any workers to commit suicide for that purpose, even if that is no more than a show to attract public attention.¹⁶ In a republic, no one will be reduced to a totally helpless “vulnerable group” (弱势群体) due to factors beyond one’s control, such as status, gender, age, or wealth. Even the smallest minority can still count on the protection of the judiciary or the sympathy of the majority. In a self-governing community, everyone has social resources on which one can rely. The greater the number of these self-governing individuals, the stronger is the community.

To be sure, the people still need the state to serve their interests, but citizens in a republic differ fundamentally from subjects in a despotic regime, who are weak and vulnerable before the government. While the constitution may provide for a long list of rights, none on the list has been substantially enforced. In fact, the government itself is reduced to moral vulnerability due to its lack of democratic legitimacy. As the legitimacy of the regime derives entirely from economic growth, it will lose the last vestige of its authority as soon as the economy stagnates. Officials at all levels are trembling about unexpected natural and human disasters within their jurisdiction, fearing that they will become the scapegoat of the “veto by single vote” (一票否决) mechanism in a “merit system” (政绩体制).¹⁷ In contrast, in a true republic, a government will win votes, respect, and self-confidence as long as it does its own job without constantly trembling over unexpected emergencies beyond its control. Since “the eyes of the people are bright,” as often quoted in official propaganda, ordinary people can judge the local officials’ performance and responsibilities more accurately and fairly than their superiors. Without the pressure to achieve superficial “merits,” local officials have no need to act as entrepreneurs, pulling in investments and running construction projects everywhere, by hook or crook, disregarding the social consequences of recklessly boosting local GDP. As long as they can ensure the basic common good

¹⁵ Cai Chongguo, “The failure of Wen Jiabao,” *BBC Chinese* (November 9, 2005), http://news.bbc.co.uk/chinese/simp/hi/newsid_4420000/newsid_4420900/4420946.stm.

¹⁶ To be sure, some suicides were real. See “Seven peasant workers committed suicide after failing to get paid,” *新京报* (October 27, 2004), <http://news.sina.com.cn/c/2004-10-27/04164046097s.shtml>.

¹⁷ The veto system assesses an official’s qualifications based on several key criteria. Failure to meet any single criterion results in disqualification. For instance, a major security incident occurring within a mayor’s jurisdiction may lead to his disqualification. See Chapter 4 for more on the merit system.

in their jurisdiction – that eligible children have equal opportunity to go to school, the elderly have social security, and patients have medical insurance – in short, that the local people live a decent life commensurate with their dignity as humans, then they can safely expect to win at the ballot box. They will find that votes are more reliable than relationships in the official circle and that rational voters are more reasonable than unpredictable superiors.

The benefits of a republic to the ordinary people, as implied in the very nature of the polity, are self-evident. They no longer have to worry about losing their homes or land without just compensation, nor do they have to suffer from air, water, and food pollution caused by irresponsible “development.” They no longer have to pay for the rampant corruption and all sorts of public waste, from luxury government buildings and cars to exotic medical care of officials at all levels, who will enjoy the full benefits even after their retirement, all out of their pockets as taxpayers. Nor do they have to silently endure endless stories of public power abuses. All of these abuses are a high-stakes gamble made by a few with the public interest as their wager. The republic merely returns it to its rightful owners from the hands of the gamblers. In a true republic, the interests and resources will no longer be plundered by these gamblers, since their distribution and utilization will be determined by representatives held accountable to their voters. As a result, the distribution of interests will be more balanced and the utilization of resources more efficient.

The hope of constitutionalism ultimately lies in the transformation of the people themselves – from subjects of a despotic regime to citizens of a democratic republic – because the precondition to a balanced distribution of interests is a balanced distribution of powers, which are effectively supervised only by competent citizens who put them in office. True citizens not only possess republican virtues such as reason, tolerance, love of freedom, and obedience to the law, but also hold certain expectations for the state institutions. They obey legitimate authority while maintaining their own dignity, tolerate the difference in opinions among their fellow citizens while retaining the freedom to criticize the government, maintain personal independence while insisting on the right to association and assembly, never evade taxes but always demand to know how their tax money is spent. They oblige themselves to participate in elections, but insist that the election must be meaningful, implying that their vote must be an informed and free choice. To be a choice, candidates must be freely generated rather than selected behind the scenes. The choice must be free, so it cannot be subjected to coercion or instructions of the party-state, and informed, so the communication between candidates and voters must be unimpeded: Candidates must be free to fully display their

platforms, and voters have every right to obtain political information from free media. Put together, votes representing various choices must also be equally counted, ensuring “one-person, one-vote,” regardless of voter’s status as man or woman, rich or poor, urban or rural.

Representing the interests of the vast majority, the representative body thus elected will naturally be “oriented to the people,” an ideal consistently expressed in the Chinese tradition, from Mencius (孟子) two millennia ago to Hu Jintao who proposed humanistic CCP slogans in 2003. The laws an elected parliament passes will no longer serve the interests of the few in power. The officials will no longer dare to build luxurious government buildings or use public funds to indulge in lavish dining and travel because all budgets must be approved by a parliament that is responsible to the voters. The air and water qualities will be improved by regulations made according to the law, which will be effectively enforced under public supervision; officers who fail to enforce the law will be arraigned and replaced by the parliament. Buying and selling official positions, so commonplace today, will become obsolete because the superior will no longer be able to usurp the people’s power to appoint and dismiss the subordinates, thus having no position for sale, in an electoral democracy where the officials are ultimately responsible to the public rather than their superior. A citizen of a republic can thus stay far from the embarrassment of systematic scandals, corruption, pollution, and waste, and lead a peaceful life in proportion to his dignity common to all humans because the republican institutions operate for the benefit of all. Even if some social groups become minorities on particular issues, they can still uphold their constitutional rights through independent and impartial justice to counter the tyranny of the majority.

This is the type of life that a citizen can legitimately expect from a republic. It is nothing luxurious, but it is possible only in a true republic. If China is still far from achieving such a moderated condition despite two revolutions under the name of “republic,” that simply means that it needs a new civil movement to found a true republic through which the Chinese become true citizens. Citizens and republic are an inseparable symbiont: The republic is based on citizens, and citizens need the republican institutions for the recognition and preservation of their political identity. “Citizen” in Chinese signifies a “public person” (公民) – “public” because citizens expect a public life, in which the republican institutions allow them to effectively control public power. As soon as the public power is out of control, the republic ceases to exist. To maintain a republic, then, it is necessary to cultivate the new generations with the public spirit. Once the people aspire to become citizens, the state is already a republic, even if not by name.

1.4 PATHS OF CONSTITUTIONAL REFORMS

Although a moderate republic outlined above is not an infeasible utopia, nor is it a free lunch that comes without effort. Particularly, the road on which a despotic regime transitions into a republic is full of blunders, constantly encountering the obstructions of vested interest, frustrations with reforms, and passions for revolution. The keen observation of a late Qing official, Zai Ze (载泽), accurately summed up China's century-long constitutional dilemma: "The implementation of constitutionalism is beneficial to the country and the people, but most detrimental to the officials."¹⁸ The ruling elites have been the greatest obstacle to China's century-long trial of constitutionalism, which threatens to diminish their power and vested interest. To be sure, from a more enlightened view, constitutionalism is *not* disadvantageous even to officials; at least it would add much to the prestige, public trust, and thus the longevity of the party-state as a whole. However, constitutional reform cannot exclusively rely on the leaders' vision or goodwill. After all, mortals are self-interested, often myopically. Especially when the future is uncertain, they are most likely narrowly self-centered. There is no reason to expect that leaders possess exceptional qualities, enabling them to transcend ordinary human limitations. Constitutionalism is apparently disadvantageous to each incumbent, at least in the short term: Once free elections are allowed, incumbents face the serious risk of defeat. Even if re-elected, a genuine election itself will create unprecedented pressures on all officials, as in the reform experiments in some localities during the 1990s, since the election results are no longer guaranteed by near "unanimous approval."

As an example of a genuine election, Ma Ying-jeou's victory over Hsieh Chang-ting in Taiwan's presidential contest in 2008 was clear enough to make his win "secure," but a candidate accustomed to nominations within the party-state must have seen it as a frightening process full of suspense. Even if successfully elected, constitutional democracy will greatly constrain the official's power to control resources. While officials may still receive a decent salary, they will lose a variety of rent-seeking opportunities and sources of illicit income. Wealth and resources, previously controlled by the officials, now flow to society; a limited government, one which "stores wealth among the people" (藏富于民), is necessarily reduced to an "office of clear water" (清水衙门), offering little opportunity for profiteering. In such a government, official positions are no longer hot trade items since the limited benefit to be gained

¹⁸ Jing Zhiren, *Constitutional History of China* [in Chinese] (Taipei: Taiwan Lianjing Press, 1984), p. 101.

from holding these positions will not compensate the cost. Candidates for villagers' committee elections in resource rich areas used to spend millions to buy votes – certainly not out of their altruistic desire to serve villagers. As soon as the power to control resources such as coal mines is regulated for the common benefit of villagers, they will immediately cease their seemingly foolish activities.¹⁹ Indeed, many resource-stricken areas can hardly find a candidate to run for the village election.

As China's ruling group is still the greatest beneficiary of the current power structure, it is certainly unwilling to abandon or change such a system. Therefore, China's constitutional reform will not happen unless the ruling group becomes exceptionally enlightened. The chance for this to happen is slight, however, given the tortuous path of constitutional reforms in the past century. Only when it faces increasing social pressure, to the point where it can hardly survive without necessary reform, can reformers like Gorbachev or Chiang Ching-kuo appear in mainland China. Even then, the condition for a successful reform is demanding since it requires the reformers to maintain the ruling power after reform, so that they can dodge attacks of the vested interest, while sustaining political credibility and popular support among the grassroots.

Ultimately, the pressure or impetus for reform comes from the people themselves. Since constitutionalism is a cause in everyone's interest, it is evident that this cause shall be promoted by all. China's road to constitutionalism will not be guided by any philosopher, nor will it be pioneered by any wise ruling party or leader, but is to be gradually built at the first place by the people themselves in the process of making a new republic together. To paraphrase Lu Xun (鲁迅), perhaps the most influential left-wing writer in modern China, having experienced the long despotic tradition, particularly the totalitarian devastation in the past century, China had no path to constitutionalism to begin with; the path is opening up only in recent decades, when more people have started to "walk" it. In the four decades since the Reform and Opening in 1978, the Chinese people have become increasingly free. They not only broke the shackles of the "People's Communes" (人民公社) and the planned economy, and succeeded in meeting the basic needs of

¹⁹ The best example was the Wukan village in Guangdong province, where the villagers voted out the villagers' committee that sold their land behind their back. Martin Patience, "China's Wukan village stands up for land rights," *BBC News* (December 15, 2011), www.bbc.co.uk/news/world-asia-china-16205654. In less than five years, however, the salutary democratic experiment was violently put to an end by the local government. Stephen McDonnell, "China's protest village of Wukan crushed," *BBC News* (September 13, 2016), www.bbc.com/news/blogs-china-blog-37351737.

subsistence, even approaching the stage of “primitive prosperity” (小康), but also came into contact with new ideas, information, and institutions. At the same time as the opportunities for government corruption, power abuses, and rights violations increase, the people become more conscious of their rights and dignity. These two opposite trends inevitably clash. Although the current constitutional framework cannot effectively resolve the conflicts of interest between the government and the governed, and the news media cannot freely report “bad news,” collisions between rights and power have still achieved some hard-won progress.

The landmark case was the Sun Zhigang (孙志刚) incident, which occurred during the SARS outbreak in 2003. The abnormal death of a university graduate in a detention center aroused national indignation, leading the State Council to abolish within a few months the Detention and Repatriation (收容遣送) system that had seriously violated personal freedom for decades.²⁰ The tragedy not only triggered massive protests, especially on the internet, but also drew the attention of the national leadership through a joint letter from three young legal scholars. Although the petition to the Standing Committee of the National People’s Congress – the highest body authorized to interpret the Constitution – failed to receive a direct response that would have broken the zero record of constitutional interpretation maintained for three decades since the Constitution was promulgated in 1982, the Detention and Repatriation system was quickly reformed through administrative intervention. Despite its limitations, the Sun Zhigang incident demonstrated the driving force of social pressure towards constitutionalism.

More important, it opened up an era of constitutional movements. From then on, successful events of rights defense (维权) have largely followed the pattern of the Sun Zhigang incident, which can be properly categorized as “Sun Zhigang model.” It starts with a local tragedy caused by a bad institution – one which has been encouraging serious abuses of public power. The report of such tragedy sparks a national protest, which ultimately succeeds in attracting the attention of the national authority. In order to maintain its public image, the ruling party directly intervenes, not only correcting certain local violations but, in some circumstances, also reforming the very institution that results in the tragedy. Both the She Xianglin (佘祥林) case (2005), which involved an eleven-year wrongful conviction caused by forced confession, and the Shanxi Brick Kiln (山西黑砖窑) case (2007), a long-standing slave labor factory allowed by the local governments, achieved limited success under

²⁰ Zhang, “A constitution without constitutionalism? The paths of constitutional developments in China,” 950–76.

limited media supervision, national pressure, and intervention from the central government.²¹

To be sure, more enlightened local governments will not wait for national instructions before correcting errors under popular pressure. For example, in June 2007, Xiamen citizens used text messages to gather in front of the city hall to “take a walk,” knowing that a normal application for a parade would always be rejected by the police. They were protesting against the local plan for a PX chemical project, which was perceived as a threat to the local environment and health. After a few rounds of confrontations, the Xiamen government was forced to “suspend” the project.

Overall, however, incidents of successful rights defense are rare, and even when they are ultimately successful, they are extremely difficult to achieve. The Xiamen incident was achieved through the bravery, deliberate strategy, and persistent struggle of local residents despite many setbacks. Shortly after the incident, the national media was forbidden from reporting. The ultimate success seemed to rely not only on bottom-up popular pressure but also on unpredictable fortuitous factors. One year after the Xiamen incident, hundreds of Chengdu citizens took to the streets for a similar “walk” to protest against a very similar petrochemical project. The protest not only failed to change the government’s plan, but also led to the arrest of six activists on various charges, such as illegal assembly, spreading rumors online, inciting riots, and even “subverting the state power.”

In a situation where the existing power structure remains unchanged, all elections are heavily manipulated. As a result, the people’s congresses at all levels essentially serve as “rubber stamps,” and officials are accountable only to their superiors. Since China’s rights movement is anti-establishment in nature, it is necessarily an uphill battle, experiencing many more failures than successes. The basic dilemma of China’s rights movement is that it is superficially “within the system” (体制内), seeking to protect constitutional and legal rights through existing institutional arrangements. In substance, however, it threatens to take away spoils of the vested interest, an effort almost doomed to failure. Although the Constitution and laws provide for many rights, the nature of the party-state inherently opposes the effectuation of any right. The entire institutional setup, from its nominal election system to the unlimited, absolute party power and the absence of judicial independence, aims to protect the vested interest. If top-down proactive reform lacks sufficient momentum, bottom-up rights movements also face the basic dilemma of reforming the system from within itself: The state machinery is controlled

²¹ Ibid.

by the very vested interest that the reform might undermine. While the chance of success in such rights movements is indeed slim, it seems to be the only safe option available for China's constitutionalism.

To succeed in constitutional reform, organizational resources are critical. How can people from outside the system (体制外) exert pressures on those within the system to make decisions that are unfavorable to the vested interest? The way in which the question is posed makes it hard to answer, but it is not entirely hopeless because the Chinese rights movements are *not* completely without resources. First, social justice is on their side simply because they are fighting for the legitimate interests of the vast majority. The rights and interests of the people are not only morally just, but also explicitly stipulated in the Constitution and laws. To be sure, the Constitution is currently a useless facade, but if Chinese society has not completely degenerated into a jungle of brute force and if Confucius was right to an extent when he said that "if the cause is not upright, the speech will not be convincing; if the speech is not convincing, the thing will not get done,"²² then even a facade is not completely insignificant.

For instance, when a sixty-year-old man stood in front of a developer's bulldozer holding the Constitution, he was undoubtedly physically weak. Even the compensation clause amended to the Constitution (in 2004) cannot add any weight to his property right.²³ However, without the seemingly "useless" Constitution he was holding in his hand, he would have been no more than one of thousands of feeble men and women whose property was taken away by their governments. Nevertheless, he could still cause a great emotional stir across the nation simply because the Constitution endowed him with moral power. In fact, the current Constitution is more than a mere collection of political slogans that have never been taken seriously; it also contains many provisions that can be activated in daily life. Since the ruling party itself emphasizes governing the state according to the Constitution and laws, at least constitutional arguments can be made from time to time. Although an effective implementation mechanism is conspicuously lacking despite recent efforts at establishing the filing and review (备案审查) procedure, the government has bowed to the rise of citizens' rights consciousness, as evidenced by constitutional amendments such as "the state respects and protects human rights," "private property is inviolable" and "compensation shall be given for expropriation" (all enacted in 2004). Despite the lack of constitutional implementation, the textual progress itself is the result of the

²² *Analects*, 13: 3.

²³ "The strongest holdout sticks to the isolated house," 《新京报》 (23 March 2007).

citizens' rights movement. At the very least, the party-state is obliged to pay lip service to these clauses. Even though "constitutionalism" has become a sensitive word in recent years, the government has never been daring enough to openly assail the Constitution itself. The sentiment of the majority carries moral strength, which incites public opinion and exerts public pressure. Once the abuse of power exceeds the extent that the public is willing to tolerate, nationwide anger will generate mounting pressure on the government.

Second, the media in diverse forms contributes to the citizen's right to know despite tight state control. In a constitutional democracy where press freedom is protected, major events can never escape media coverage and public scrutiny. Although press freedom in China is severely restricted, more often than not, "paper cannot hold burning fire" (纸包不住火) after all. Incidents such as the Sun Zhigang tragedy, She Xianglin case, the Shanxi Brick Kiln scandal, the Xiamen chemical project and the chained woman in Xuzhou were all exposed one after another. As a vast nation, China has not only many local governments but also numerous media outlets with different positions, aspirations, and courage. Despite strict government regulations, it is difficult to keep all media outlets silent at every moment. In order to maximize news value, public attraction, and private profit, the Chinese media was becoming increasingly more diverse. Many media outlets hired "pseudo reporters," who claimed and acted as reporters without formal qualifications. In a regime where media is tightly regulated, however, the news they uncovered often turned out to be even more accurate than that of true reporters. With the increasingly developed internet and the growing number of netizens, controlling information exchange became an even more formidable task. Despite constant attempts of government control, online speech proved to be more elusive than traditional media. As the cost of media control rises with the increase of media diversity, the role of media in expressing public opinion and exerting public pressure is expected to become more significant. As a result, even though press freedom was extremely limited, greatly diminishing the power of public opinion, public opinion is something that the government cannot simply ignore once expressed.

A related consideration is the voices of Chinese intellectuals from various camps. As Liang Qichao observed in the late Qing dynasty, a despotic regime is characterized by a considerable gap between the government and the governed, resulting in mutual mistrust and a lack of affection.²⁴ The role of

²⁴ Liang Qichao, *On New People* [in Chinese] (Beijing: Chinese Literature and History Press, 2013), ch. 2.

constitutional democracy is precisely to bridge such a gap, in which intellectuals, situated somewhere between the government and the governed, are expected to play a unique role. Depending on their distance from the regime, some are “court-hired literati” (御用文人) who thrive within the system by defending the government, while others are reformers within the system, and still others are public intellectuals who survive on the fringes of the system, acting as advocates for the public interest and critics of governments. In an ideal situation, both reformers and public intellectuals can contribute to constitutional reform in their own ways: While public intellectuals can mobilize the people, reformers can advise the government. It should be noted that several progressive constitutional amendments, including liberal concepts such as the “rule of law,” “human rights” and “private property,” were passed with the advocacy of reformers within the system.

In fact, the ideological distribution among China’s active intellectuals today, whether within academia or not, is astonishingly uniform with respect to constitutional reform despite apparent disparities in other issues. Unlike ordinary people who may have been thoroughly brainwashed, intellectuals with experience and knowledge of Western civilization hardly believe in the official propaganda. The “official literati” sound anti-Western not because they genuinely believe in what they say, but because they say it to please the government and promote their own interests. In fact, it is often said that their legs move more sincerely than their lips since they, along with the officials they flatter, are eager to send their money and families, particularly their offspring, to advanced Western countries. Hardly any intellectuals born from the 1950s to the 1970s are oblivious to past tragedies such as the Anti-Rightist Campaign, the Great Famine, or the Cultural Revolution. Nor does anyone seriously dispute today’s rampant corruption, abuse of power, and human rights violations. Almost everyone agrees that these abuses and violations are illegitimate, and change is necessary.

Although camps with different ideological orientations may advocate different strategies, the debates primarily revolve around prioritization rather than overall goals. Both political and economic systems are in need of reform, but which should take precedence at present? Similarly, both democracy and the rule of law are deemed necessary, but which should be implemented first? The debates over values between liberals and the so-called New Left are natural in an increasingly pluralistic society, so long as the latter refrains from aligning with the totalitarian regime. The people themselves will decide the future winner of these debates based on the utility of particular schools of thought for China’s social and political development, just as they did in the 1978 debate over the standards of truth (真理标准), which paved the way for

market reform in the subsequent decades.²⁵ Overall, as mediators between the government and the people, Chinese intellectuals will contribute to China's constitutional reform in their own ways.

Finally, unlike a revolution, constitutional reform is impossible without the support of the government. A consistent reformer can be highly critical of the government without intending to demolish it, let alone criminalize the vast majority of ordinary civil servants or public employees who possess limited decision-making power and therefore limited opportunities for corruption. Despite decades of reverse selection since 1989, there still *are* “good people” (好人) within the system. Particularly in situations where personal interests are not involved, these people may actively promote institutional reform. Regions such as Shenzhen and provinces like Sichuan, Yunnan and Shanxi had previously broken through the constitutional framework by implementing direct elections of township and county chiefs.²⁶ Cities or districts like Wenling in Zhejiang, Minhang in Shanghai, and Wuxi in Jiangsu had taken the lead in carrying out administrative democratization experiments under the active promotion of enlightened local leaders.²⁷ In fact, in a residential self-governance experiment in Hebei, in which I am personally involved, many senior Communist members and cadres actively participated in elections and volunteer works. It is important to recognize the potential for reform within the ruling group while avoiding reliance solely on a few enlightened leaders to single-handedly drive reform forward.

The key question then is how to effectively integrate all available resources for constitutional reform. For instance, how can local experiments be promoted in the right direction, staying away from the superficial “merit system” and a perfunctory bureaucratic culture? Moreover, how can China end the historical cycles of “thriving when good people are there and dying when they pass away” (人存政举、人亡政息)? In essence, what kind of support can China's constitutional reform expect to find within the system? While the space for internal reform is diminishing in the absence of effective external pressure, there may still be some room for progress.

²⁵ The article, drafted by a philosophy lecturer at Nanjing University, was published and propagated by the major party newspaper. It featured a prelude to cleansing the leftist ideology and leader worship, paving the road to pragmatic reform. For the official description of the event, see “Practice is the sole standard for testing truth,” www.12371.cn/2021/05/11/VIDE1620688440356938.shtml.

²⁶ For a constitutional analysis, see Zhang Qianfan, “Constitutional flexibility and local experimentation,” *《法学研究》*, no. 1 (2007), 63–73.

²⁷ For a book-length treatment of the “Wenling model,” see Li Fan, *The Wenling Experiment and the Public Budgetary Reform of Chinese Local Government* [in Chinese] (Beijing: Intellectual Property Publishing House, 2009).

To begin with, the ruling group is not a homogeneous entity. Officials have varying personalities, interests and aspirations, and institutional reforms hold different implications for officials at different levels. For lower-level officials, promoting grassroots elections is tantamount to a revolution taking away their own power, leading to staunch resistance. However, higher-level officials may hear complaints and feel pressured, but are not directly affected by grassroots reforms, and thus may not necessarily oppose these reforms. In fact, direct elections of township leaders in provinces like Yunnan and Sichuan had been promoted by higher-level governments or party committees. Therefore, it is not impossible to gradually implement democratic elections at lower-level governments, where the deputies of people's congresses are constitutionally required to be directly elected by voters.

Of course, the bottom-up political process will inevitably clash with the top-down control of the party-state, just as village committee elections quickly encountered interference from township authorities. However, the differentiation of interests among officials at various levels has made it possible to promote grassroots reform. Particularly during the decade when Hu Jintao served as the CCP General Secretary, the central government introduced policies that were favorable to grassroots populations, such as peasants. However, these good policies, similar to the Constitution itself, were often hindered by local vested interest groups. As a result, the central government's orders were mocked for their inability to move beyond the confines of the Central South Sea (中南海), the highest power center of China's party-state. If the central government genuinely desires to adopt certain beneficial policies but is limited by its implementation capacity, it should support institutional reforms that make local governments more accountable to the local people, since the supervisory capacity of the central government is necessarily limited in a vast state like China. Therefore, a limited political reform can emulate the pattern of economic reform, which started from more liberal and daring jurisdictions like Guangdong, where brave local experiments were sustained by the central government and eventually spread nationwide under its auspices.

Indeed, grassroots elections can also be implemented within the ruling party itself. In the 1990s, some local party organizations in China conducted trials of "intra-party democracy" (党内民主), which reportedly yielded salutary results.²⁸ Competitive intra-party elections can promote the transformation of the ruling party's governing functions, rationalize its relationship with the

²⁸ Deng Ke, "The Yangji experiment: Electing candidates for town chief and party secretary," *《南方周末》* (September 19, 2002).

government, strengthen its legislative leadership capacity, and help it gradually withdraw from its administrative and judicial functions that undermine the rule of law, a constitutional principle it purports to respect as expressed in the 2004 amendment.

Undeniably, in the absence of sufficient external and internal social pressure, these speculations may sound optimistic. If a ruling group lacks foresight and confidence, like the late Qing rulers, obstinate resistance to constitutional reform is a natural reaction. Such a trend had already appeared near Hu Jintao's second term when grassroots elections witnessed the worst central–local collusion: In order to maintain stability (维稳), the central government severely restricted press freedom, thereby granting local governments unlimited power to suppress campaign activities of independent candidates, the very soul of competitive elections. In the absence of rival competitors, the ruling party lacks sufficient pressure or motivation to initiate progressive institutional reform on its own. Since constitutional reform, *qua* reform, cannot be achieved without the cooperation of the ruling party, it is still necessary to tap into the potential for reform within the regime and promote the transformation of the ruling mechanism.

1.5 THE PROSPECT OF CHINESE CONSTITUTIONALISM THROUGH REUNIFICATION

The future of constitutionalism in contemporary China is just as uncertain as it was a century ago. It is neither doomed to fail nor destined to succeed. Every successful fight for rights requires enormous effort and optimal utilization of resources both inside and outside the system. Ultimately, the outcome still depends on the delicate balance of various factors. The success of individual local experiments relies on the vision and courage of a small minority of enlightened local leaders, and cannot solely depend on the sporadic support and instructions of the central government. While social awareness of rights is growing stronger, it is not yet powerful enough to compel officials at all levels to moderate their behavior and respect constitutional rights. It remains an uncharted territory as to whether the government and the governed, the central and local governments, the state, and the party, as well as different factions within the ruling party, will reconcile and establish stable institutional arrangements favorable to constitutional reform, such as term limits for the General Secretary and the separation of the Party and government.

This brings us to the issue of future political development across the Taiwan Strait. While civil society in mainland China remains weak and international support is undermined by nationalist rhetoric such as “patriotism” and

“supremacy of sovereignty,” it is important to remember that China still has three “satellites” – Hong Kong, Macao, and Taiwan – each enjoying varying degrees of autonomy. The future of China lies not in assimilating these institutional and cultural “exceptions” into the mainland’s “mainstream,” but in allowing the institutions of these “satellites” to develop and eventually influence the mainland. Obviously, China would benefit much more from having Hong Kong assimilate the mainland, rather than the other way around. However, the autonomy of Hong Kong and Macao was limited during their colonial periods, and their political democratization since their return to Chinese sovereignty is constrained by the shackles of the Basic Law, which was enacted *for* them by the National People’s Congress, making them inappropriate to serve as a political model for the mainland. The prospect of the Hong Kong’s influence is further diminished by the crackdown of the 2019 civilian protests and the amendment of its Basic Law incorporating the National Security Law enacted by the mainland’s NPC Standing Committee, seriously undermining the “one country, two system” principle.

In contrast, Taiwan has been an independent jurisdiction and an equal competitor vis-à-vis the mainland to the claim of China’s sovereignty since 1949. Despite the KMT governance under martial law for thirty-eight years, Taiwan ultimately broke free from one-party rule and achieved political transition in 1987. Judging from the presidential election in the following decades, Taiwan has emerged as a mature democracy. The electoral victory of the Nationalist candidate Ma Ying-jeou in 2008 marked the success of the second party rotation in Taiwan, not only signifying its democratic consolidation, but also alleviating concerns about the peace across the Taiwan Strait. The election convincingly demonstrated to people on both sides of the Strait that electoral democracy can be rational and trustworthy. With time and experience, people will acquire the wisdom and ability to discern extralegal factors such as disinformation, defamation and deception, and choose leaders who best represent their true interests. It is democracy that defends peace; it is the despotic regime that poses the greatest threat to the peace across the Taiwan Strait. The democratic success in Taiwan effectively shatters the myth that Chinese people are “unsuited” for democracy. It not only provides a viable constitutional framework for the peaceful reunification of China, but also exerts pressure on the mainland to undertake constitutional reform.

China’s constitutional reform would receive a significant boost if, one day, the KMT in Taiwan and the CCP in the mainland could join hands for the third time and move beyond past “cooperation” to jointly establish a Third Republic. The two revolutionary parties would need to set aside past grievances, bid farewell to revolution and engage in peaceful competition with

each other. Despite Taiwan's much smaller size and population compared to the mainland, its influence on the mainland is disproportionate. The mainland needs cooperation from Taiwan not only in areas such as cross-strait relations, international diplomacy, and economic and trade cooperation but, most importantly, in the prospect of sovereign reunification. These aspects can be leveraged by Taiwan to propose political cooperation for mutual benefits. Political cooperation is not only beneficial for constitutional reform in the mainland but also for Taiwan's crucial interests. Taiwan's future development, whether domestic or international, hinges critically on its relationship with the mainland. If the people of Taiwan desire peaceful coexistence with the mainland, the safest path is to help the mainland establish a government accountable to its people. Therefore, making a positive contribution to the mainland's constitutionalism is not an excessive demand on Taiwan, but aligns with Taiwan's basic interests as well as the basic interests of the world. Only through the third cooperation between the Nationalist and the Communist parties, leading to the establishment of the Third Republic, can lasting peace be achieved across the Strait.

Of course, such thinking is currently nothing more than wishful, especially in an era marked by rapid retrogression on the mainland's own reform. The political future across the Taiwan Strait will be the result of joint efforts by the people on both sides under favorable conditions, which cannot be predicted at the moment. To be sure, the third cooperation between the two parties is just one possible path, albeit perhaps the least costly one, for China's constitutional reform. If the two parties have the opportunity to "exchange swords for treasures" (化干戈为玉帛), confronting and competing with each other through the ballot box rather than on the battlefield, they can truly repay the past debts owed to China's constitutionalism. However, this is certainly not the only way. Just as Taiwan's constitutional reform succeeded without assistance from the mainland, constitutional reform in mainland China will ultimately rely on its own strength. Whether the KMT returns to the mainland in future, China's constitutional reform will continue to move forward, and the new republican movement will unfold with an irresistible momentum.

To paraphrase Sun Yat-sen, since constitutionalism has not yet succeeded, comrades still need to make efforts. Although Sun sincerely pursued a republican government, his relentless insistence on revolution and the seizure of absolute power, particularly through the adoption of the Soviet model, destroyed the seed of republican constitutionalism in China. Political developments after his death quickly proved that revolution could not bring about true constitutionalism. China today seems to have returned to the starting point of a century ago, facing the challenge of founding a republic once again. This

time, however, it should not repeat the past mistakes as it did in 1911 or 1949. The new republican movement abandons gunpowder, bloodshed, and assassinations, but it requires no less wisdom, foresight, courage, and bravery than a war does. It has defendants but not enemies. It recognizes that talents, diligence, and opportunities are distributed unevenly across the population and encourages free competition. However, it does not recognize inherent superiority of any individuals, classes, or political parties, nor does it allow any faction to monopolize political power based on self-proclaimed legitimacy. It may never have its own name, but it is taking place and will continue. Unlike its predecessors, the Third Republic is to be created by the people themselves and thus truly belongs to them. It is not merely a dream cherished in their hearts, but a lasting, down-to-earth movement, through which China's constitutionalism will finally complete its unfinished journey of the past century.

The key to a true republic is the successful establishment of a social contract as its underlying constitutional foundation. As explained in this and the next chapters, however, China's First Republic had failed this mission, leading to a Second Republic that strayed to the very opposite end of constitutionalism.