

What “Rule of Law”? The Traditional Chinese Concept of Good Government and Challenges of the 21st Century*

Robert Heuser**

I. The Question

Discussing challenges and expectations of China’s role in the international community we have to consider the governmental strategy which the Chinese leadership has coined in the notion of *yi fa zhi guo*, “to govern the country according to law”, which was written into the constitution in 1999 together with the intention to establish a *shehuizhuyi fazhi guojia*, “a socialist country ruled by law”, an event, which a Chinese commentator referred to as “one of the most exciting in the world today”.¹ What we are interested to know is, whether the intention to *yi fa zhi guo* might be significant as a departure towards a political culture comparable to what is called “rule of law” or “*Rechtsstaat*” (which are basically equivalent notions) in Western countries. Is China gradually creating a legal system for guaranteeing human rights, reducing arbitrariness and improving predictability of governmental action? This is a practical and urgent question not only because some China-related international frictions are attributed to shortcomings of the Chinese legal system², but also because we feel that in having political, economic and academic contacts there should be a common understanding of what constitutes the fundamentals of today’s civilization; otherwise those contacts would not be stable and satisfactory for all parties involved.³

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** Dr. *iur.*, M.A., Professor für Chinesische Rechtskultur, Institut für Moderne China-Studien, Universität zu Köln

¹ Zhang Qi, *The Dynamics from the Ideal to the Reality. The Rule of Law in China*. Social Science in China, Summer 2002, 15.

² Not only regarding human rights, but also concerning economic relations or environmental protection. During the controversy concerning the recent Chinese interest to buy a German nuclear power plant it was commented in the German press “that in applying nuclear technology it is decisive that the general public is sensitized for the risks involved and that social and governmental instruments of control are functioning” (Frankfurter Allgemeine Zeitung, 28.4.2004).

³ The Swiss paper *Neue Zürcher Zeitung* expressed this widely held expectation as follows: “Ein Land, das sich anschickt, die politische, wirtschaftliche und dereinst auch technologische Führungsmacht Asiens zu werden, kann sich beim Schutz der Menschenrechte nicht mit dem Standard einer Bananenrepublik begnügen” (Das unbewältigte Erbe von Tiananmen. Achillesferse in Chinas Modernisierungsprozess, May 18, 2004).

What “rule of law”, or more exactly, what kind of *fazhi guojia*, is going to be developed in the PRC is the topic discussed in this paper. Since the present political culture – the ways to legitimate the exercise of power – is still ingrained by patterns derived from the past, I will first recollect certain expressions found in the Chinese historical and philosophical classics on what constitutes “good government” (II.), then summarize the concepts and institutions created with a view to restructuring the relationship between the state and the individual during the past 15 years, and show that these innovations are hindered in their efficiency by unchanged constitutional structures (III.). Finally, challenges arising from the domestic and international environment and their possible impact on this constitutional structure will be considered (IV.).

II. *Yang min* or “Nourishing the People”

The present Chinese constitution can be viewed as an expression of the traditional concept of “good government” in Marxist-Leninist garment. It outlines a system of government where power is held by a group of people claiming to be qualified to rule due to their alleged knowledge about the right way to lead the people to peace and prosperity.⁴ The people being an object of the care of their leaders (as well as a resource for the aims to be attained through the actions of the leadership) does not make its appearance as subject of rights vis-à-vis the leadership. What the constitution describes as *gongmin quanli*, “rights of citizens”, remains totally at the discretion of the leadership, e.g. when defining human or citizens’ rights in terms of liberating the people from poverty. The Chinese constitution therefore seems to fit into the corpus of texts on “good government” accumulated since the *Shujing* with its early *Zhou* dynasty-documents (11th to 8th century B.C.). Ancient wisdom says that “the virtue (of the ruler) is seen in the goodness of his government (*de wei shan zheng*), and (that) the government is tested by its nourishing of the people (*zheng zai yang min*)”.⁵ Here already we have the essence of the Chinese concept of government – *yang min* or “nourishing the people”, which remained fundamental about the rest 3000 years.⁶

Yang min – concern for the people – as the only criteria for a legitimate exercise of power⁷, pervades as a leitmotif most of the classical texts dealing with governmental affairs. The *Shujing* underlined this concern when it let the king speak:

⁴ In a first big step to “modest prosperity” (*xiaokang*), an expression which can already be found in the classical *Li Ji/Li Yun*.

⁵ James Legge, *The Chinese Classics. The Shoo King*, London 1865, 55 et seq.

⁶ When Gu Hongmin (1857-1928), an European-educated scholar, a century ago had an audience with Cixi-taihou, the Dowager Empress, he noted that the book she was just reading was a newly commented edition of the *Shujing*, the book, as Gu referred to it, “which teaches how to establish good government.” Cf. Ku Hung-Ming, *Chinas Verteidigung gegen europäische Idee*, 1956, at 140.

⁷ And not the people’s will. See Joseph R. Levenson, *Confucian China and Its Modern Fate. A Trilogy*, vol. 2, Berkeley, Los Angeles 1964, at 12.

“Heaven hears and sees as our people hear and see” (*tian cong ming zi wo min cong ming*).⁸ This is quoted in Mencius,⁹ the major work on what may be called the *yang min* approach to governance. Mencius (4th century B.C.) is specific, insofar as he looks to the people as an end, and not as a resource or an instrument of the government. Therefore, he says that “the people is most precious and the ruler only less important” (*min wei gui ... jun wei qing*)¹⁰ and for him, “to win the state means to win the heart of the people.”

For Confucianists *yang min* includes and requires the people’s confidence in the government. This was already strongly emphasized in the *Lunyu* (Analects): “The prince having obtained their confidence, may then impose obligations (burden) on his people” (*Junzi xin, erhou lao qi min*).¹¹ And in hardly surpassable insistence Confucius answered the question of his student Zigong who had asked about (good) government: “The requisites of government are that there is sufficient food, sufficient military equipment (for defence) and the confidence of the people in their ruler.” If unavoidable, the *Lunyu* goes on, one can dispense with military equipment, and even food, because “death has been the lot of all men. But if the people have no faith in their rulers, there is no existence whatsoever” (*min wu xin, bu li*).¹² Good government is – in Mencius’ words – where *minben* is practiced, where care for the people is taken as the aim and purpose of government. And this is achieved, when the people obtains what it wants and when nothing unwanted is forced upon it. To decide what are the real wishes of the people, what is good for the people, is of course the competence of the benevolent government. The responsibility of the ruler is emphasized by Mencius in sharp words: “There are people dying from famine on the roads and you (king) do not issue the stores of your granaries for them ... Is there any difference between doing it with a sword and with (the style) of government?” (*ren yu zheng*).¹³

One hundred years later Xunzi (3rd century B.C.), the other main figure in Confucianism, explained *minben* with the famous metaphor, that “the prince is the boat, the people the water” and that “the water can make the boat overturn”.¹⁴ And he says that “the relationship between the government and the subject is like protecting a newborn baby” (*ru bao chizi*).¹⁵ Another 200 years later the Confucianists in the debate on “Salt and Iron” (*yan tie lun*) (in the year 81 B.C.) argued as usual that “agriculture should be the fundamental (concern of the state), clothes and food

⁸ Legge (note 5), 74. The Abdication Edict of February 1912 refers to the will of Heaven as the will of the People. See Harley F. MacNair, *Modern Chinese History. Selected Readings*, Shanghai 1927, 722 et seq.

⁹ James Legge, *The Four Books*, London 1892, 357.

¹⁰ *Ibid.*, 483.

¹¹ *Ibid.*, at 342.

¹² *Ibid.*, at 254. Legge: “... there is no standing for the State.”

¹³ *Ibid.*, 132 et seq.

¹⁴ *Xunzi jinzhu jinyi* (Annotated edition with translation in modern Chinese), Taipei 1975, chapter IX, 145.

¹⁵ *Ibid.*, Chapter XI, 221.

being of primary necessity for the people". But also the officials in this debate (strongly influenced by legalism) made it clear that their policies are primarily "to assist the distressed people ... for the relief of the needy". Trades and crafts had to be promoted, so that "the people enjoy abundance".¹⁶ The whole debate was in the last analysis about how to organise politics so that the people can live peacefully.

Yang min is thus the gist of Chinese state-philosophy, pervading political thinking throughout the ages. Responsibility for ensuring that subjects are properly looked after has generally been regarded as one of the duties of government. That subjects should choose for themselves what their best interests are (and who should lead them) has not been part of the tradition.¹⁷

Whereas it is obvious that this tradition continued after the establishment of both the Republic in 1911 and the People's Republic in 1949, it is also apparent that the traditional concept of government by benevolent leaders has met resistance on the part of intellectuals since the first half of the 20th century. The traditional concept of government is far from able to meet the needs and expectations of the more politically conscious individual of the 21st century, as well as of the domestic and international economic community. In the 1930s, Lin Yutang made the following bitter statement:

"The most striking characteristic in our political life as a nation is the absence of a constitution and of the idea of civil rights ... A 'constitution' presupposes that our rulers might be crooks who might abuse their power and violate our 'rights', which we use the constitution as a weapon to defend. The Chinese conception of government is the direct opposite of this supposition. It is known as a 'parental government' or 'government by gentlemen', who are supposed to look after the people's interests as parents look after their children's interests, and to whom we give a free hand and in whom we place an unbound confidence. In these people's hand we place millions without asking for a report of expenditure and to these people we give unlimited official power without the thought of safeguarding ourselves. We treat them like gentlemen."¹⁸

¹⁶ Huan Kuan, *Discourses on Salt and Iron. A Debate on State Control of Commerce and Industry in Ancient China*. Translated by Esson M. Gale, Leyden 1931, at 13 et seq.

¹⁷ See also William J.F. Jenner, *The Tyranny of History. The Roots of China's Crisis*, London 1992, 181. In the 12th century the Song-philosopher Zhu Xi was asked by one of his students: "Since the formation of state under Qin Shihuang all rulers of the later generations did not produce any considerable change. How could this be?" Zhu Xi answered: "The Qin governmental system can be reduced to the one thought to elevate the prince and to force down the subjects. Therefore later rulers did not intend to change this." According to Otto Franke, *Geschichte des Chinesischen Reiches*, 1st vol., Berlin, Leipzig 1930, 317.

¹⁸ Lin Yutang, *My Country and My People*, Taipei-edition 1968 (originally New York 1935), 206.

III. From *yang min* to *gongmin*?

1. Innovations

The “rule of the gentlemen” has meanwhile been criticized not only by liberal or iconoclastic intellectuals in the “May fourth” tradition, but also by the currently ruling “gentleman”, the Communist Party, itself. To overcome *renzhi* (regulating by men) and to establish *fazhi* (regulating by laws) became one of the standard slogans already a quarter of a century ago, and was formed into the notion of “ruling the country according to law” by the 15th Party Congress in September 1997. Ji-an-g Zemin elaborated on the value of *yi fa zhi guo* as being “(1) an objective need for the development of the socialist market economy, (2) a major criterion for the development of society and civilization, and (3) an important guarantee for sustainable political stability of the country”.¹⁹ Consequently *yi fa zhi guo* is seen as a basic strategy for restructuring the economic, social and political orders. One question is how this strategy may be transferred into the legal system. Further questions are whether the developing legal norm of *yi fa zhi guo* shows a tendency to assume the nature of what is called “rule of law” or “*Rechtsstaat*” and what form a Chinese version could take in the nearer future.

During the last one and a half decades certain innovations have been introduced into the legal system, which provide a certain legal status for the individual vis-à-vis the state, which transcends (using a well known terminology)²⁰ the “*status passivus*” or “*status subiectionis*” as characteristic for the political culture of the traditional *yangmin* type. Legislation imposed certain limitations on the executive power and the individual was granted certain rights to participate in administrative procedure and to protect himself against officials abusing their authority. Expressed in legal terms it is the acceptance of *gongfa shang quanli*, of “public law rights”, which challenges the traditional *yangmin*-concept by creating of what could become a *gongmin*-, a citizen concept.

The innovations introduced by legislation (mainly the Criminal and Criminal Procedure Law, Administrative Penalty Law, the Administrative License Law, the Environmental Impact Assessment Law and the Administrative Litigation Law) are the following:

- Certain rights and guarantees in criminal law and procedure, such as the rule of *nul-lum crimen sine lege*, the presumption of innocence, rights to counsel and open trial proceedings.
- The limitation of the competences of public authorities, imposing burden and granting advantage, as e.g. imposing penalties and granting licences. The relevant laws provide for legal preconditions, time-limits and fees, thus reducing opportunities to behave arbitrarily.

¹⁹ *Guowuyuan gongbao* 1997, 1366 et seq.

²⁰ After Georg Jellinek, *Das System der subjektiven öffentlichen Rechte*, Freiburg 1892.

- The acceptance of the importance of due process of law (*zhengdang chengxu*) (*Verfahrensgerechtigkeit*), and along with it the long neglected perception that procedure and procedural law are highly significant for legal protection – as the English law proverb goes: “justice must not only be done, but must be seen to be done.” This concept of natural justice, as it is called, has been expressed in legal documents as the rights of making statements, of having access to official records and of demanding public hearings.

- Judicial review of administrative acts, the system of administrative litigation (*xingzheng susong*) or, as it is called popularly, the system of *min gao guan* or “the people suing the officials”.

The Administrative Litigation Law (ALL) provides that “if a citizen ... considers that his lawful rights ... have been infringed upon by an administrative act (*juti xingzheng xingwei*) ... he or she has the right to bring a suit before a people’s court” (sect. 2). This rule reflects one of the most striking innovations of the “reform” (*gaige*) period thus far. Its unprecedented message is that officials – to use the expression of Lin Yutang – can be crooks, and this not only in fact (which is well-known) but also before a court of law.

However, jurisdiction of the court in administrative conflicts is limited to those stipulated in the ALL, mainly concerning administrative penalties (such as fines, revocation of licences, an order to suspend production), administrative compulsory measures (such as those restricting personal freedom or the transfer of property), administrative acts infringing lawful business autonomy, acts denying licences etc.²¹ Since these types of administrative decisions are all related to property rights (*caichanquan*) and personal rights (*renshenquan*), other conflicts between citizens and governmental agencies – not related either to *renshenquan* or to *caichanquan* – cannot be reviewed by the courts. In order to find out where the courts cannot play any role in conflicts between society and government one only has to look at the second chapter of the Chinese constitution which deals with “Fundamental Rights and Duties of the Citizens”, and to compare the rights mentioned there with the enumerations in the ALL. So one will find that interference by governmental agencies in the freedom of speech, assembly, publication, association, demonstration and of religious belief as well as the right to work or the right to get an education are not covered by the jurisdiction clause of the ALL.

Although the creation of the *min gao guan* system is something like a breakthrough to “citizenship” and a first experience for administrative organs with being legally responsible toward the people (here the State Liability Law/*guojia peichang fa* of 1994 has to be mentioned)²², the relationship between the state and the individual remains strongly dominated by the *status passivus* or *subiectionis*.

²¹ For more details see Robert Heuser, The Role of the Courts in Settling Disputes between the Society and the Government, in: China Perspectives, October 2003, 17 et seq., and Robert Heuser, “Sozialistischer Rechtsstaat” und Verwaltungsrecht in der VR China (1987-2002), Hamburg (Mitteilungen des Instituts für Asienkunde, Bd. 366) 2003, 93 et seq.

²² For details see Robert Heuser, “Sozialistischer Rechtsstaat” und Verwaltungsrecht, op. cit., 119 et seq.

2. The Problem of the Constitution

The weak position of judicial review of administrative acts is not only due to its limited scope, but more basically due to the lack of a constitution as defined by the famous art. 16 of the “Déclaration des droits de l’Homme et du Citoyen” of 1789: “A society neither guaranteeing (human) rights, nor providing for the separation of powers has no constitution.”²³ What is called *xianfa* or “constitution” in China – the present one dates from 1982 – does not meet these conditions. With its four revisions between 1988 and 2004 it summarizes the results of the efforts of the Communist Party in gaining power, establishing the People’s Republic and pushing for economic reforms²⁴. Thus it also sets forth “basic rights (and duties) of citizens”; this, however, not as an expression of the limitations the government must observe in guaranteeing these rights, but as a declaration of what the government permits and forbids. In fact and in law the government is free to use any legal form – from a law promulgated by the NPC to a simple regulation of a Ministry – to put restrictions on these rights. So, for example, to restrict the freedom of the press (art. 35, *yanlun-ziyou*/freedom of speech, *chuban-ziyou*/freedom of publication) by regulations of the Ministry of Propaganda (*xuanchuanbu*), or the freedom of association (art. 35) by regulations of the Ministry of Civil Affairs (*minshibu*). Since the constitution does not see its *raison d’être* in guaranteeing rights, it also does not accept a necessity to provide for a separation of powers. This makes it difficult to limit executive power and consequently to establish an independent judiciary. Therefore, the above mentioned innovations strike against constitutional structures, which hamper their development into real building blocks of a “rule of law” type of governmental system.

IV. Challenges

The final question is therefore, whether such a traditional system, which still regards people in terms of subjects without rights and which lacks efficient mechanisms to control the abuse of power, can meet the challenges – domestic and international – visible already now, and probably more pressing in the future. These challenges mainly relate to a growing rights-consciousness of citizens, and the need to comply with obligations assumed by the accession to international agreements regarding international trade and human rights. Related challenges touch questions such as how to enforce rules concerning environmental, consumer and labour pro-

²³ “Toute société dans laquelle la garantie des droits n’est pas assurée, ni la séparation des pouvoirs déterminée, n’a point de constitution.”

²⁴ A concise study of Chinese “power” (or “political”) constitutions, in contrast to “law” (or “juridical”) constitutions, is Xie Hui, *Zhengzhijia de falü yu zhengzhijia de fa – ershi shiji zhongguo falü dui “xianzheng” de zhichi guanxi ji qi biange* (Law Understanding of Politicians and the Politicized Law. The instrumentalization of “constitutionism” in the 20th century), in: Xie Hui, *Fa de si-bian yu shizheng* (Speculativeness and Positivity of Law), Beijing 2001, 312-329.

tection, how to control the privatization of public funds and how to fight corruption.

1. There is growing rights-consciousness. A market economy creates a class of people with property, eventually holding economic power, who have an incentive to insist on their rights. As a consequence of the need to restructure the state-owned enterprises people can no longer be dependent on the state, but will have to take care of themselves. They will have to rely on the law “and will require the government to also abide by law”.²⁵ As a consequence, it is no longer true that the *min gao guan* system is ahead of the development of the society. In October last year I met a peasant in a Shandong village whose hobby is to represent his fellow peasants aggrieved by administrative decisions in the courts.²⁶ People are not satisfied to be treated like minors, and the “rights of the citizens” mentioned in the constitution are taken seriously and taken into court.²⁷

As a consequence, social pressure is growing to broaden jurisdiction for judicial review of administrative decisions. Two examples among others can be given. In 1997 an intermediate court in Fujian decided a case in which a middle school teacher appealed against the personnel office (*renshiju*) of a city requesting to cancel a decision to prematurely retire him and to re-employ him.²⁸ The court considered this decision to be in violation of the plaintiff’s constitutional right to work (*laodongquan*) and held that it had jurisdiction to review the decision. A similar case (in which it is very problematic whether the court had jurisdiction) concerned a handicapped student suing a commercial school because of infringement of his right to receive an education.²⁹ The plaintiff, who became handicapped after contracting polio, participated in the entrance-examinations for vocational schools in Henan. Although he received higher marks than needed for entering the school of his choice, he was not accepted because of his physical condition. The plaintiff, claiming that his right to an education provided for in the Constitution and in the Handicapped Persons’ Protection Law was violated, brought an administrative law suit requesting the court to reverse the decision of the school. After the court had accepted the case, the school voluntarily reversed its decision and accepted the plaintiff as a student.

²⁵ Zhang Qi (note 1), at 21.

²⁶ For the story of Zhou Guangli see *Fazhi-ribao* Oct. 28, 2002; Nov. 25, 2002 and Dec. 1, 2003.

²⁷ The long established view that the constitution cannot be cited as a legal basis for judgements in the courts (and thus not be interpreted by the courts) is frequently more and more being challenged. See e.g. Nanping Liu, *Judicial Interpretation in China, Hong Kong, Singapore*, 1997, 94 et seq.; Hu Jingnang, *Zhongguo xianfa de sifa shiyongxing tantao* (On the Judicial Applicability of the Chinese Constitution), *Zhongguo renmindaxue xuebao*, 1997, no. 5, 58 et seq.; Wang Yong, *Xianfa sifahua sheji de you guan wenti* (On Questions Concerning the Judicialization of the Constitution), *Renda yanjiu* 2002, no. 5, 30 et seq.; Zhou Wei, *Zur Grundrechtsbindung chinesischer Gerichte*, in: Newsletter Deutsch-Chinesische Juristenvereinigung 2003, 8 et seq. See also Henrik Bork, *Gespaltene Zunge und geballte Faust: Chinas Doppelstrategie in Sachen Menschenrechte*, *Jahrbuch Menschenrechte* 2000, Frankfurt a.M. 1999, where (p. 217) is pointed out, that “eine große Zahl von Chinesen ganz konkret ihre politischen Grundrechte einfordern (wollen). Es ist nicht eine kleine Zahl von Träumern, die womöglich ihrer Zeit voraus sind.”

²⁸ Supreme People’s Court Legal Research Section (Ed.), *Collection of Cases of People’s Courts* (*Renmin fayuan anlixuan*), vol. 32 (2000), no. 57.

²⁹ *Ibid.* vol. 25 (1998), no. 65.

In view of such cases it is not surprising that the Chinese Litigation Law Society (*zhongguo susong-faxue yanjiuhui*) considered at its annual meeting in November last year the revision of the ALL, because the present version “hardly can attain the requirements of *yi fa zhi guo*”.³⁰ Therefore it suggested (1) to establish under the Supreme Court specialized administrative courts, separated from the general courts; (2) to change the *ratio legis* of the ALL from the duality of protecting the rights of citizens and safeguarding the administrative organs to exercise their competences according to law to the single aim of rights-protection³¹; (3) to broaden the scope of judicial review.

2. Pressure to enhance protection by the courts and strengthening rights also results from international expectations. Under GATT China has assumed the obligation “to maintain ... judicial or administrative tribunals or procedures for the purpose ... of the prompt review and correction of administrative action ... Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement ...” (sect. 10 III). A reflection of China’s intended accession to the International Covenant on Civil and Political Rights may be seen in adding the clause “the state respects and preserves human rights” to the constitution (art. 33) in March 2004, and more substantially in the activities of academic circles and legislative drafting-bodies, for example concerning to introducing a right to silence (*chenmoquan*) into the Criminal Procedure Law³², to re-establish a constitutional freedom of movement (*qianxi ziyou*)³³, to consider the drafting of a Public Information Law (*qingbao gongkai fa*) in order to create a so-called right to know (*zhishiquan*)³⁴, or to strengthen the rights of privacy (or personality) (*rengquan*) (such as a right to one’s name, likeness, reputation, honour etc.) by reserving for them a separate section in the coming Civil Code.³⁵ A prerequisite of implementing the International Covenant is “judicialization of the constitution”. Therefore, it is suggested “to

³⁰ FZRB (Fa Zhi Ri Bao) Jan. 29, 2004.

³¹ This is the result of a ten year debate in legal theory and administrative law circles concerning the function of administrative law as *guanlifa*, as an instrument of the executive attaining administrative ends, or as *kongquanfa*, serving as a means to protect rights of the citizens by putting limits and control on administrative agencies.

³² For instance Yu Guizhong, *Chenmoquan bu gai zai chenmo* (The Right to Silence Should Not Further Be Silent), in: *Guojia jianchaguan xueyuan xuebao* (Journal of the State Procurators Academy) 2003, Nr. 2, 57 et seq. and Ai Sitong/Wang Min, *Chenmoquan yu zhongguo chuantong wenhua* (The Right to Silence and Chinese Traditional Culture), *Fazhibao* Dec. 25, 2003.

³³ Sheng Hong/He Li et al., *Ren shi fou yinggai yongyou ziyou qianxiquan?* (Should Men Have a Right of Free Movement? Symposium on the rewriting of the freedom of movement into the constitution), *Shehui kexue luntan* 2002, Nr. 7, 54 et seq.

³⁴ For instance Zhou Hanhua, *Qicao “Zhengfu xinxi gongkai tiaoli” (zhuanjia jianyigao) de jiben kaolu* (Considerations concerning the experts’ draft of the “Provisions on Accessibility to Governmental Information”), *Faxue yanjiu* 2002, No. 6, 75 et seq. Concerning environmental protection, the Vice-Minister of the State Environmental Protection Administration, Pan Yue, pointed out: “Although China has laws on environmental protection, they have not been fully adhered to or effectively enforced. Lack of active public participation is a contributing factor. The public should be informed that participation in environmental protection is one of their rights. Relevant laws are needed to ensure citizens’ rights of knowing the truth and safeguarding interactive communication between the public and government” (China Daily, June 17, 2004).

³⁵ For example Wang Liming, *Rengquan zhidu zai zhongguo minfadian zhong de diwei* (The Position of the Rights of Privacy in the Chinese Civil Code), *Faxue yanjiu* 2003, Nr. 2, 32 et seq.

base our judicial activity directly on the two covenants and establish a system of constitutional cases".³⁶

3. Both a growing rights consciousness and the need to comply with international obligations are directly related to the functioning of the judiciary. This also holds true for most other problems confronting Chinese society, such as environmental protection, protection of labour rights, and fighting corruption and the theft of public property. A precondition for strengthening the role of the courts is independence from interference by administrative or party agencies. Such independence and strengthening cannot be achieved without establishing institutional structures, commonly known as the separation of state-powers, in order to provide for checks and balances. Therefore, the most urgent and fundamental challenge for the legal system is reform of the constitutional structure.

Any attempt at achieving this has, of course, to reckon with strong opposition on the part of the current power-holders. In his speech on the occasion of the 80th anniversary of the Chinese Communist Party on July 1, 2001, Jiang Zemin (introducing his theory of the "Three Represents") again put it in plain language: "We must resolutely resist the impact of Western political models such as the multi-party system or separation of powers among the executive, legislative and judicial branches ..." This view, however, of *sanshan fenli* as a "Western" political model rather than a universally applicable mechanism for preventing abuse of power is far from being unshakable. As in other countries before, it will be the role of constitutional legal science to prepare the road towards constitutionalism.³⁷ An author like Cao Siyuan, who although expelled from the Communist Party in 1990 is still influencing public (including governmental) opinion, expresses a view well established in constitutional legal circles when he refers to the separation of powers as "the highest development in human political civilization", and that "the concentration of power in ... any single institution is prone to lead to errors".³⁸ To regard the constitution (*xianfa*) in terms of constitutionalism (*xianzheng*), which means in terms of the role of a constitution and the legal system to limit the power of government organs, is a method which is becoming more and more influential among administrative and constitutional lawyers. In the more popular "Law Science Magazine" (*Faxue zazhi*), edited by the Beijing branch of the Communist Party (Committee for Politics and Law), an author from the Hebei Yanshan University, School of Literature and Law, wrote in a recent edition: "The aim of constitutionalism (*xianzheng*) is human rights; a constitution is

³⁶ Han Dayuan/Wang Shitao, "Liangge renquan gongyu" yu wo guo renquan xianzheng tizhi de zhengbe (The Two Human Rights' Covenants and the Conformity of China's System of Constitutionalism of Human Rights), *Faxue kexue* 2001, no. 2, 27 et seq.

³⁷ See e.g. Christian Starck (ed.), *Die Rolle der Verfassungswissenschaft im demokratischen Verfassungsstaat*. Zweites deutsch-taiwanisches Kolloquium, Baden-Baden 2004.

³⁸ Framework for a New Chinese Political System, Andrew Nathan (ed.), in: *Chinese Law and Government*, Sept./Oct. 2003, 14. Less outspoken but with similar meaning e.g. Yu Xunda, *Zhongguo: Xiang minzhu, wending de xianfa zhixu guodu* (China: In the Transition Towards a Democratic and Stable Constitutional Order), in: *Zhejiang daxue / renwen shike ban* 2000, no. 3, 5 et seq.: "It is true, modern constitutionalism originated in the West, and the institutions and experiences produced by western countries in the course of establishing a constitutional government cannot mechanically be taken as a model, however, the core contents of the notion of constitutionalism is of a universal nature, ... to which belong effective institutions in order to check the implementation of the constitution."

a precondition to constitutionalism; a constitution with defective human rights articles is an incomplete constitution.³⁹ It will be gradually understood also by a changing Chinese leadership that the traditional “care for the people” has to be modernized to include respect for and protection of citizens’ rights and that obtaining the confidence of the citizens cannot be separated from allowing more efficient control mechanisms against the abuse of executive power.

V. Conclusion

It can be expected therefore, that the strategy and the reality of *fazhi* (or *fazhi guojia*) will gradually come closer to the “rule of law”. The steps to be taken could be as follows.

First, the legal system, especially in the *min-shang*-, the civil and commercial law sector, will become more complete through legislation. The promulgation of the Civil Code later in this decade will be of great significance for the rights consciousness of the whole country, promoting the further development of plural forces and interests in society.⁴⁰

Secondly, enterprises competing on the market will expect administrative agencies to exercise their functions in accordance with law, follow fair procedures and accept judicial review of their decisions.

Thirdly, the need to strengthen judicial authority will create greater independence of the courts, enhance the self-assertion of the judges, and by this gradually contribute to a system of checks and balances. Another contribution to this end could materialize by strengthening the National People’s Congress (through professionalization, full-time occupation of deputies),⁴¹ which will reserve for itself more legislative competences, thus enhancing society’s participation in legislation and restricting the law-making of the executive branch.⁴²

Fourthly, more time will elapse before a limited government subject to a bill of human rights can be established. There is no evidence which could foster the assumption that the recent insertion of the two characters *renquan* (“human rights”) into the constitution could indicate a deeper change of the attitude of the Chinese leadership towards human rights. On the contrary, intellectuals deplore that the government expects them “to behave like children” and to accept an arbitrary system of censorship.⁴³ It seems to be clear that such rights in the

³⁹ Wang Xiuling, *Yu shi jujin de wo guo xianfa quanli* (To Develop the Rights of the Chinese Constitution According to the Time), *Faxue zazhi* 2003, no. 7, 47.

⁴⁰ See Wang Jiafu, *Ersbi shiji yu zhongguo minfa de fazhan* (The 21st Century and the Development of Chinese Civil Law), *Faxuejia* 2003, no. 4, 9 et seq. and Mi Jian, Zu einigen Problemen bei der gegenwärtigen Reform des chinesischen Zivilrechts, in: Newsletter Deutsch-Chinesische Juristenvereinigung, 2003, 1 et seq.

⁴¹ Discussed e.g. by Lin Siyuan et al., “On the Feasibility of full time deputies”, *Gansu zhengfa-xueyuan xuebao* 2003, no. 3, 1 et seq.

⁴² The Legislation Law (*lifafa*) of 2000 made a beginning by excluding governmental organs from legislating concerning the restriction of personal freedom.

tem of censorship.⁴³ It seems to be clear that such rights in the International Covenants which may challenge the leadership of the ruling party will continue to be severely restricted by corresponding legislation or rule-making.

Chinese *fazhi* therefore for the time being has to be characterized as a way of governing in which governmental authority has to be executed by strict reference to positive law (*yi fa er zhi*).⁴⁴ Such a “rule by laws”, if achieved, may reduce arbitrariness, improve predictability of governmental action and develop the role of courts in dealing with social (including administrative) conflicts. At the same time, however, it serves as a legal basis for suppression “according to law” (labour, religious, environmental protection movements). The strategy of *fazhi*, therefore, is thus far not aiming to evolve into a system of a “rule of constitutionally guaranteed (civil and political) rights” (i.e. “*fazhi*” in the sense of “rule of law”) functioning as restraints on governmental (including legislative) discretion. Here, traditional paternalism will continue to be influential. We may conclude that *fazhi* is still basically understood to be the opposite notion of *renzhi* (the legal system serving as a tool to maintain and safeguard political power), and is still reluctant to incorporate notions which presume the limiting of the state and the expansion of individual private liberty.

However, further growth of an urban middle-class, unprecedented as it is in Chinese history, and further elaboration of an enlightened legal science, might develop Chinese *fazhi* gradually into a higher niveau, including respect for different political opinions, much more quickly than some are inclined to believe today.⁴⁵

⁴³ According to the *Neue Zürcher Zeitung* (May 22/23, 2004), Jiao Guobiao, a professor of journalism at Bei-Da, made the public statement that “the censorship-regulations are entirely groundless, absolutely arbitrary and in contradiction to the basic standards of civilization” (“sind die Zensurbestimmungen völlig grundlos, absolut willkürlich und befinden sich im Widerspruch zu den Grundstandards der Zivilisation.”) The intellectuals were expected to behave like children who are supposed to obey their parents.

⁴⁴ As reflected in the definition given by Jiang Zemin at the 15th Party Congress in October 1997: “To rule the country by law (*yi fa zhi guo*) means that the broad masses of the people, under the leadership of the Party and in accordance with the constitution and the laws, manage (*guanli*) in different ways state affairs, economic and cultural undertakings and social affairs, and that it is guaranteed that all work of the state proceeds in keeping with law, that socialist democracy is gradually institutionalized (*zhidubua*) and codified (*falubua*) so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader.” (*Guowuyuan gongbao*/Bulletin of the State Council 1997, at 1366 et seq.).

⁴⁵ More than 15 years ago Simon Leys (a Belgian scholar of Chinese literature) expressed the opinion that, unlike in the Soviet Union, where “the political reforms are being initiated from the top, and thus can be called off at any time”, in China “the demand comes from the people, and this generates an irrepressible force for change” (*Far Eastern Economic Review*, June 15, 1989, at 19).