

# Carl Schmitt in China: Why Is He Needed and How Is He Understood? – An Analysis of Chinese Political Constitutional Theory

Xiaodan ZHANG<sup>1</sup>

## Abstract

*Carl Schmitt's constitutional theory has been unexpectedly revived at the end of the first decade of the 21st century in China and contributes essentially to the emergence and boom of Chinese political constitutional theory. Through a concise description of constitutional history in the People's Republic of China, this article examines firstly the background as to why his constitutional theory is needed in China. It then proceeds to analyse the principle theoretical points made by Carl Schmitt, which are selected and reconstructed so as to explain and justify the special political reality under the Party-state. The article concludes that by degrading and withholding the normativity present in the existing Chinese Constitution, Chinese political constitutional theory hollows out the core connotations of the recently established "socialist rule of law state", impedes the enforcement of the constitution and finally serves to euthanize the existing Chinese Constitution.*

## 1. Introduction

Since the beginning of the first decade of the 21st century, constitutional study in China has experienced two obvious turns. The constitutional study which previously focused mainly on the interpretation, recapitulation and argumentation of policies, decisions and politics of the Chinese Communist Party (CCP) and served to propagandize political correctness has increasingly endeavoured to abandon its role as pure ideological means and delve into its own methodological basis and undertake a scientific and systematic consideration of the Chinese Constitution. These methodological reflections and associated efforts resulted firstly in the salience of the "normative constitutional school" and then led to a sudden shift to the so-called "political constitutional school" at the end of the first decade of the 21st century. Notwithstanding the divergences amongst concrete political constitutional schools in China, it is discernible that all of them have a common theoretical source based on the constitutional theory of Carl Schmitt and that they are influenced by him to a greater or lesser degree.

Carl Schmitt was a leading German jurist in the Weimar era and the following Nazi regime who argued generally against a liberal rule of law principle (especially in his early academic period) and vindicated the authority of the Nazis. With the collapse of Nazi Germany, his constitutional theory correspondingly and rapidly lost its influence and prestige and is generally depicted as the opposite of the current pervasive liberal constitutionalist model found in the West. However, unexpectedly, Carl Schmitt's constitutional theory

finds its resurgence in contemporary China. This article purports to examine why his constitutional theory is needed in China and, more specifically, to detail how some principal points of his theory have been chosen and interpreted to construct a Chinese political constitutional theory and adapted to the present political and legal reality under the single rule of the CCP and to the *sui generis* Party-state dualism.

In the second part of this article, the author enumerates principally three points as the background for adoption of the theory of Carl Schmitt, namely the severing of the traditional legitimacy chain based on Marxism-Leninism (2.1), the transitional period and the unstable day-to-day politics since the period of Reform and Opening (2.2) and the necessity of changing the legal narrative under the socialist rule-of-law state (2.3). The article then points out further why, in current China, a political rather than normative constitutional theory is more influential and obtains more institutional realization (2.4). The third part treats the main aspects of Carl Schmitt's constitutional theory that are selected by Chinese political constitutional scholars for their own theoretical constructions. Firstly, it offers a glance at the spread of Carl Schmitt's theory in China in terms of the translation of his works into Chinese (3.1). Subsequently it introduces three principal aspects of Carl Schmitt's theory that exert a decisive influence on Chinese political constitutional theory: the emphasis on the constitutional preamble (3.2), the realistic and historicist treatment of constitutions (3.3) and constituent power (3.4). The part concludes with an analysis of the institutional embodiment and realization of Chinese political constitutional theory (3.5). In the final part, the author provides a concise assessment of Chinese political constitutional theory.

<sup>1</sup> Doctor of law, LL. M. (Frankfurt/Main).

## 2. The need for a more constructive constitutional theory

Generally, the inheritance and acceptance of Carl Schmitt's constitutional theory in China results from the background whereby in recent years constitutional scholarship has desired a more constructive constitutional theory to achieve its own conceptual and systematic self-confirmation, or more accurately, self-rescue. The necessity of self-confirmation and the self-rescue of constitutional scholarship can be demonstrated and explicated in the brief constitutional history since the founding of the People's Republic of China in 1949. Simultaneously, the introduction of Carl Schmitt's theory into China is also a reaction to the weakness of normative constitutional theory, namely its poor explanatory force in the unique political and legal reality of China.

### 2.1 The severing of the traditional legitimacy chain based on Marxism-Leninism

After its founding, the PRC defined itself as "a people's democratic state led by the working class and based on the alliance of workers and peasants".<sup>2</sup> This confirmation of the nature of the Chinese state contains a strong class-oriented understanding based on Marxism-Leninism and backed by the coetaneous practice of the Soviet Union. The class understanding provided a long-term chain of legitimacy for Party and state from 1949 to 1978 and dominated both the constitution and constitutional study in this period. According to the state and law theory of Soviet Union, law is the manifestation of the will of the ruling class and serves as instrument for class rule. This fundamental narrative on law was completely and uncritically accepted by Chinese state and law theory.<sup>3</sup> Correspondingly, the constitution<sup>4</sup> was construed in China as the highest law to express the will of the class of workers and peasants and to exert a dictatorship over the bourgeoisie as an enemy-class.<sup>5</sup> Although the Constitution of 1954 included also articles confirming basic rights of citizens,<sup>6</sup> the guarantee, protection and fulfilment of them was of nearly no significance relative to the emphasis on the function of the constitution for maintaining the class nature of the state and undertaking class struggle. Yet the adoption and practical implementation of the Soviet Union model

brought China no constitutional order even in the sense of Marxism and Leninism. On the contrary, the division of the classes and the one-sided emphasis on the class nature of state and law provided a legitimated space for differentiating or, more accurately, fabricating "people and enemy" and for class struggles. For this reason, it was logically inevitable that the period following the Constitution of 1954 was suffused by constant political movements aimed at vanquishing "class enemies" (Rectification Movement 1957, Anti-Rightist Movement 1957, Great Leap Forward 1958–1960 and so on). All of these political movements finally led to and were polarized by the ten-year catastrophe of the Cultural Revolution (1966–1976), which held class struggle as its central programmatic element (*yi jieji douzheng weigang*). In this abnormal stage, constitutional scholarship existed hardly in any real sense. Just like constitutional practice, the constitutional scholarship of that time was also full of class formulations. The class nature of the constitution determined not only the object of constitutional study but also its analytical methods, framework and categories.<sup>7</sup> Consequently, constitutional study also became highly politicized.<sup>8</sup> On the one side, it centred merely selectively on those constitutional articles which were appropriate for justifying the political movements led by the Party; on the other side, it simply cited and repeated works of Marx and Lenin and even speeches of central leaders and documents of the Party Centre<sup>9</sup> as a fundament for its arguments, ignoring completely the written articles of the constitution and basing constitutional study on its political and ideological correctness. Constitutional scholarship hence degenerated into a manifestation of the political narrative: "Especially after 1957, academic questions were regarded as political questions and divergences in academic discussions were interpreted as path struggles between two classes."<sup>10</sup> The sizable mixture of class narrative and academic study hardly comprised an independent constitutional field of scholarship. Even where some kind of constitutional scholarship did exist in the context of strong class narrative, it, together with the class narrative, lost its legitimacy after the Cultural Revolution. The polarized class struggle during the Cultural Revolution did not lead to a pure state of proletarian dictatorship as Mao Zedong expected; rather, what it brought to China was all-round chaos and a breakdown of the political, eco-

<sup>2</sup> Article 1, Constitution of 1954.

<sup>3</sup> See ZHOU Yezhong (周叶中), HU Honghong (胡弘弘), A Centennial Retrospective on Chinese Constitutional Theory (zhongguo xianfaxue shiji huimou), in: faxue pinglun (法学评论), No. 6, 2001, p. 8; KONG Xiaohong (孔小红), A Brief Discussion on 40 Years of Chinese Legal Science (zhongguo faxue sishinian luelun), in: faxue yanjiu (法学研究), No. 2, 1989, pp. 48–51.

<sup>4</sup> Here it means the Constitution of 1954 as the first formal constitution of the PRC.

<sup>5</sup> "After the founding of the new China [...] the constitutional practice which had the class nature as its core was the main content of the construction of constitutionalism." MO Jihong (莫纪宏), On the Fundament for Building a 21st Century Constitutional Jurisprudence (lun 21 shiji de xianfaxue goujian jichu), in: faxue zazhi (法学杂志), No. 2, 2000, p. 14.

<sup>6</sup> Arts. 85–95 of the Constitution of 1954 enumerate wide-ranging basic rights of Chinese citizens.

<sup>7</sup> See HAN Dayuan (韩大元), Analysis and Reflection on the Basic Categories of Chinese Constitutional Study in the 1950s (dui 20 shiji 50 niandai zhongguo xianfaxue jiben fanchou de fenxi yu fansi), in: dangdai faxue (当代法学), No. 3, 2005, p. 14.

<sup>8</sup> HAN Dayuan (supra note 7), p. 16; LIN Laifan (林来梵), Status Quo and Prospects for Constitutional Study in China (zhongguo xianfaxue de xianzhuang yu zhanwang), in: faxue yanjiu (法学研究), No. 6, 2011, p. 20; ZHU Guobin (朱国斌), Heavy Wings – A Talk on the Fate and Task of Constitutional Scholars (chenzhong de chibang – xianfaxue jia de mingyun yu shiming zatan), in: faxuejia (法学家), No. 3, 2000, p. 25.

<sup>9</sup> Chongde (许崇德), WANG Yuming (王玉明), A Retrospect and Future Prospects for 10 Years of Constitutional Science (10 nian xianfaxue de huigu yu zhanwang), in: faxuejia (法学家), No. 6, 1989, p. 6.

<sup>10</sup> XU Chongde, WANG Yuming (supra note 9), p. 1.

conomic and social order. The rule of the CCP as well as the socialist state itself – legitimized traditionally by Marxism and Leninism and class struggle as its core narrative since the founding of the PRC in 1949 – was challenged fundamentally. Reflection on the Cultural Revolution forced the CCP to abandon the basis of legitimacy which relied merely on ideological reiteration and to find a new basis for its rule. This new basis was embodied in the “Reform and Opening Policy” which entailed a reconstruction of political order and, more importantly, “shifting the emphasis of the Party’s work and the attention of the people of the whole country to socialist modernization”<sup>11</sup> and which established “economic construction as the centre (*yi jingji jianshe wei zhongxin*)”.

## 2.2 The transitional period and the unstable day-to-day politics since the Reform and Opening Policy

The Reform and Opening Policy in 1978 is indicative of the beginning of a transitional period in China which has lasted up to now. In the official ideology, Marxism and Leninism as well as the class understanding of state and law have continued to play an important role in this transitional period, especially in the 1980s. In the Constitution of 1982,<sup>12</sup> Marxism and Leninism are still confirmed as giving fundamental guidance on how to achieve socialist modernization,<sup>13</sup> and the necessity of class struggle is also acknowledged.<sup>14</sup> As for constitutional study, due to ideological inertia and the political cautiousness and vigilance of constitutional scholars, the field continued to be trapped in the analytical method of class and under some basic theoretical preconditions of Marxism and Leninism in a long period lasting until the end of the 1990s.<sup>15</sup> How-

ever, the absolute ideological domination that Marxism and Leninism held over constitutional study became looser and looser, and the one-sided emphasis on the class nature of the state and law was increasingly challenged.<sup>16</sup> As pointed above, this resulted partly from the legitimacy crisis of Marxism and Leninism that was engendered by the catastrophe of the Cultural Revolution. What is more important, however, is that Chinese legal and constitutional study must envisage the new political and economic reality and concrete problems brought by the Reform and Opening. These concrete problems in the day-to-day politics and especially in the context of “making economic construction the centre” cannot be resolved through mere ideological reiteration. From the beginning of the 1980s, there began to be discussions on the nature of law which rejected law’s being a mere expression of the will of the ruling class, arguing instead that law had also social nature (*shehui xing*).<sup>17</sup> The social nature of law means

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the basic principles of Marxist legal science as its guidance is one of its merits and strong points.” ZHANG Youyu (张友渔), LIU Han (刘瀚), 40 Years of Chinese Legal Science (*zhongguo faxue sishinian*), in: *faxue yanjiu* (法学研究), No. 2, 1989, p. 45. “China is a socialist state; as a result, constitutional study must be guided by Marxism. This point cannot be called into doubt or fluctuate.” And the goal of legal study is “to construct a mature Marxist constitutional jurisprudence.” TONG Zhiwei (童之伟), LIU Maolin (刘茂林), On Building a Mature Marxist Constitutional Jurisprudence – Reflection on Consolidating the Self-Construction of Constitutional Study (*lun goujian chengshu de makeshi zhuyi xianfaxue – guanyu jiaqiang xianfaxue zishen jianshe de sikao*), in: *fashang yanjiu* (法商研究), No. 4, 1996, p. 10.

At the end of the 1990s, there was still a constitutional scholar arguing that “in the system of study methods, we must primarily insist on the theoretical guidance of dialectical materialism and historical materialism and be adept in employing the basic principles of Marxism and Leninism to resolve constitutional issues in the Chinese society. [...] Regarding the problem of the study methods of the constitutional jurisprudence, our advantage and key characteristic is the commitment to the basic theories of Marxism and Leninism.” HAN Dayuan (韩大元), The Developmental Tendency of Contemporary Constitutional Jurisprudence in China (*dangdai zhongguo xianfaxue de fazhan qushi*), in: *zhongguo faxue* (中国法学), No. 1, 1998, p. 58. “The constitutional study of the 21st century must insist on Marxism [...]” HAN Dayuan (韩大元), Chinese Constitutional Study – Towards the 21st Century (*mianxiang 21 shiji de zhongguo xianfaxue*), in: *faxuejia* (法学家), No. 5, 1999, p. 22.

<sup>16</sup> In reality, the reconstruction of Chinese constitutional jurisprudence, and even the whole of legal science was grounded in the reflection on and the critique and negation of a class narrative of state and law. “What the jurisprudence of class struggle represented was ‘political arbitrariness.’” WU Yan (吴彦), Legal Order and Political Decision – Critical Discussions on “Political Constitutional Theory” (*fazhixu yu zhengzhi jueguan – youguan “zhengzhi xianfaxue” de pipanxing jiantao*), in: *kaifang shidai* (开放时代), No. 2, 2012, p. 65.

<sup>17</sup> The debate on the nature of law was initiated by one article published in 1980. In this article, author Fengju Zhou raised the fundamental question “Is law merely an instrument for class struggle?” and endeavoured to justify the socially wide-ranging functions of law in regulating a modern society. In his article, he argued that “the viewpoint which deems law as mere instrument for class struggle excessively exaggerates the political character of law and obliterates the scientific nature of law and leads to legal nihilism and personal dictatorship; [...] it provides theoretical grounds for injustice in the judiciary and destroying the legal system. [...] it also offers pretexts for seriously damaging the principle that ‘all people are equal before law’ and justifies prerogatives of some people being above law.” ZHOU Fengju (周凤举), Is Law Merely an Instrument for Class Struggle? – Also on the Social Nature of Law (*fa danchun shi jieji douzheng de gongju ma? – jianlun fa de shehuixing*), in: *faxue yanjiu* (法学研究), No. 1, 1980, pp. 39–40.

<sup>11</sup> Paragraph 1 of the Communique of the Third Plenary Session of the 11th CPC Central Committee (adopted on December 22, 1978).

<sup>12</sup> The Constitution of 1982 is the constitution which is currently in force in China.

<sup>13</sup> Paragraph 6 of the preamble of the Constitution of 1982.

<sup>14</sup> Paragraph 7 of the preamble of the Constitution of 1982 stipulates: “The exploiting classes as such have been eliminated in our country. However, class struggle will continue to exist within certain limits for a long time to come. The Chinese people must fight against those forces and elements, both at home and abroad, that are hostile to China’s socialist system and try to undermine it.”

<sup>15</sup> “In the period from 1979 to 1989, the analytical method of class was still regarded as a basic method of legal study.” KONG Xiaohong (孔小红), A Brief Discussion on 40 Years of Chinese Legal Science (*zhongguo faxue sishinian luelun*), in: *faxue yanjiu* (法学研究), No. 2, 1989, p. 52. “The utterance of constitutional conceptions (in the 1980s) did not cast off the framework which was established by the constitutional scholars of the Soviet Union.” DONG Fanyu (董璠舆), 40 Years of Chinese Constitutional Jurisprudence (*zhongguo xianfaxue sishinian*), in: *zhengfa luntan* (政法论坛), No. 5, 1989, p. 21.

The class understanding of the constitution can also be found in some works of the constitutional scholars in the 1980s and 1990s: “The constitution is the formulation of the will of the class which rules in the form of democracy.” ZHANG Guangbo (张光博), Relearning the Basic Categories of Constitutional Jurisprudence (*xianfaxue jiben fanchou de zai renshi*), in: *faxue yanjiu* (法学研究), No. 3, 1987, p. 1. “Through the ages, every legal school has its own theoretical basis and guiding thought. However, until now, there is no legal theory which is so scientific, profound, comprehensive and precise as basic Marxist legal theory. That Chinese legal science has always

that in the Reform and Opening era, law should not be limited only to advocating (abstract and, most of the time, inane) ideology and legitimating class struggle; rather, it should more meticulously satisfy the comprehensive regulatory demands of the whole society without consideration of the class status of society members. Correspondingly, it should guarantee the principle of “all people being equal before law (*falü mianqian renren pingdeng*)”<sup>18</sup> instead of class recognition and differentiation. Further, it should rely on institutional rationality and build modern institutions in all fields of the society, especially in the economic fields, to achieve the goal of “socialist modernization”. And finally, law should serve the common interest of the whole society instead of class interests.<sup>19</sup> The discussion on class nature and the social nature of law formed the category which dominated the basic theoretical topic of Chinese legal scholarship in the whole of the 1980s.<sup>20</sup> Compared with the previous systematized and rigid ideology, the transitional era is full of different reformatory experiments under the flexible pragmatism and utilitarianism of Deng Xiaoping, and it is character-

ized by unstable day-to-day politics, to which legal and constitutional study must respond. What the unstable day-to-day politics means is that the establishment of legal institutions was heavily influenced and determined by flexible reform measures of the CCP. Since the Reform and Opening, the most important measure of such kind was the introduction of the “socialist market economy” into China at the beginning of 1990s, and the conception of the “socialist market economy” was raised to the official guiding thought for the economic construction.<sup>21</sup> In this reform, “property rights (*chanquan*)”,<sup>22</sup> “market subjects (*shichang zhuti*)”,<sup>23</sup> “intellectual property (*zhishi chanquan*)”,<sup>24</sup> “rights of enterprises (*qiye quanli*)”,<sup>25</sup> “democratic rights of citizens (*gongmin minzhu quanli*)”,<sup>26</sup> “lawful rights and interests of proprietors and consumers (*jingyingzhe he xiaofeizhe de hefa quanli*)”,<sup>27</sup> and “multilevel social security system (*duo cengci de shehui baozhang tixi*)”<sup>28</sup> became key words in the 1990s, which made constitutional study in China experience another turn. When, by stressing the social regulatory function of law, the whole arena of legal scholarship and constitutional study began to cast off the influence of class narrative in the 1980s, the construction of “socialist market economy” rendered “social rights (*shehui quanli*)” as the core narrative of constitutional study in the 1990s.<sup>29</sup> The conception “social rights” is the extension of the social nature understanding of law in the 1980s. The latter is, in essence, based up on the regulatory demand from the perspective of the state. The emphasis on the social nature of law was to meet the general needs of (re)constructing a complete legal system in order to implement different reform policies of the CCP, and its primary goal was also limited to achieving the transition of the state’s task from class struggle to regular regulation of the

He simultaneously maintained that “in the new era, the law which should be undergirded is the law that serves to construct public interest and regulate public affairs. This kind of law is different from law of class struggle. [...] If a legal measure contributes to the common interest of all social members, then there is no so-called ‘class struggle’;” “In fact, contemporarily, there are many legal branches. Each field of people’s social life, including many technical fields, has law which cannot be accommodated by the small frame of class struggle.” ZHOU Fengju (周凤举), *Ji Xiang* (纪祥), The Great Debate on “the problem of social nature and the class nature of law” in the 1980s (guanyu 80 niandai “fa de shehuixing he jieixing wenti” da lunzhan), in: *faxue* (法学), No. 2, 1999, p. 2, 3.

His article broke through the ideological forbidden zone and the tedious atmosphere of previous constitutional study based solely on class narrative; further, his effort justified the large-scale (reconstructive) legislation in many social fields directly after the Cultural Revolution and generally met the need of “thought emancipation” in the legal field during the period of Reform and Opening.

<sup>18</sup> This principle is confirmed by article 5 sections 4 and 5 of the Constitution of 1982, which provides: “All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated; no organization or individual may enjoy the privilege of being above the Constitution and the law.”

<sup>19</sup> See ZHOU Fengju (周凤举), *Ji Xiang* (纪祥), The Great Debate on “The Problem of the Social Nature and Class Nature of Law” in the 1980s (guanyu 80 niandai “fa de shehuixing he jieixing wenti” da lunzhan), in: *faxue* (法学), No. 2, 1999, p. 4.

<sup>20</sup> There are a considerable number of articles focusing on this problem. Typical articles include: TANG Congyao (唐琮瑶), Socialist Law is the Expression of the Will of the Working Class (*shehui zhuyi fa shi gongren jieji yizhi de tixian*), in: *faxue yanjiu* (法学研究), No. 1, 1980, pp. 42–44; CHEN Xueming (陈学明), Law is the Unification of Class Nature and Social Nature (*fa shi jieixing he shehuixing de tongyi*), in: *Qinghai shehui kexue* (青海社会科学), No. 4, 1982, pp. 52–57; SUN Guohua (孙国华), ZHU Jingwen (朱景文), A Tentative Discussion on the Class Nature and Social Nature of Law (*shi lun fa de jieixing he shehuixing*), in: *faxue yanjiu* (法学研究), No. 4, 1982, pp. 24–27; WANG Zilin (王子琳), A Concise Discussion on Class Nature, Social Nature and Justice of Law (*lue lun fa de jieixing, shehuixing he zhengyixing*), in: *xiandai faxue* (现代法学), No. 4, pp. 13–16; HOU Jing (侯静), Law is the Unity of Class Nature and Social Nature (*fa shi jieixing he shehuixing de tongyiti*), in: *xiandai faxue* (现代法学), No. 4, 1985, pp. 9–11; YOU Junyi (尤俊意), The Essential Quality of Law is Its Class Nature (*fa de benzhi shuxing shi jieixing*), in: *faxue* (法学), No. 2, 1986, pp. 12–14, and so on.

<sup>21</sup> Through the constitutional amendment of March 15, 1993, the concept of a “planned economy” was abandoned and the concept of a “socialist market economy” was first incorporated into the constitution. And then this conception was elaborated in detail in the “Decision of the CCP Center on Some Problems Regarding Constructing a Socialist Market Economy System (*zhonggong zhongyang guanyu jianli shehui zhuyi shichang jingji tizhi ruogan wenti de jue ding*, adopted on November 14, 1993)” (hereafter, the Decision 1993)

<sup>22</sup> Paragraphs 2, 4, 5, 6, 9, 33 of the Decision 1993.

<sup>23</sup> Paragraph 45 of the Decision 1993.

<sup>24</sup> Paragraph 13 of the Decision 1993.

<sup>25</sup> Paragraph 5 of the Decision 1993.

<sup>26</sup> Paragraph 48 of the Decision 1993.

<sup>27</sup> Paragraph 15 of the Decision 1993.

<sup>28</sup> Paragraphs 2, 16, 26, 27, 28 of the Decision 1993.

<sup>29</sup> As the representative of the social rights theory said: “In order to establish a new category of constitutional scholarship which can better meet the needs of making economic constructions the centre [...] I propose the conception of ‘social rights’”. TONG Zhiwei (童之伟), Elaboration of “Social Rights” from the Perspective of Legal Philosophy (“*shehui quanli*” de fazhexue chanshi), in: *faxue pinglun* (法学评论), No. 5, 1995, p. 12; “Building the system of constitutional scholarship through the analytical method of social rights [...] can benefit from insisting on making economic constructions the centre in constitutional study.” TONG Zhiwei (童之伟), Reconstructing the System of Constitutional Science through the Analytical Method of Social Rights (*yong shehui quanli fenxi fangfa chonggou xianfaxue tixi*), in: *faxue yanjiu* (法学研究), No. 5, 1994, p. 19; id., Transforming the Research Method of Constitutional Study (*xianfaxue yanjiu fangfa zhi gaizao*), in: *faxue luntan* (法学论坛), No. 9, 1994, p. 3.

state and social life. It is undeniable that in the 1980s there were also a considerable number of articles focusing on discussing rights.<sup>30</sup> Nevertheless, discussions on rights which escaped from the shackle of distinction between “proletariat and bourgeoisie rights” and positioned rights under the antagonism of “state – society” and “(private) rights – (public) power” were products of only the 1990s. The market-oriented economy reform witnessed the formation and growth of the Chinese civil society which, in the 1990s, could not be completely identified with its western counterpart es-

<sup>30</sup> In the 1980s, the conception of “rights” had not become a conception which afforded the arguments of establishing a systematic theory of conformation and protection of citizen’s rights. Rather, most articles were still trapped in the ideology of Marxism and Leninism and tried to demonstrate and justify the necessity and legitimacy of citizen rights simply from the essence of the socialist state based on distinguishing “rights in bourgeoisie states” and “rights in socialist states”. See ZHANG Guangbo (张光博), A Tentative Discussion on the Limitation of Legal Rights (shi lun fading quanli de jixian), in: shehui kexue zhanxian (社会科学战线), No. 4, 1981, pp. 202–206; WANG Xiangming (王向明), The Reality of Basic Rights of Citizens of Our State (woguo gongmin jiben quanli de xianshi xing), in: zhengzhi yu falü (政治与法律), No. 1, 1982, pp. 53–62; LIU Zhaoxing (刘兆兴), On State Power and Rights of Citizens of Our Country (lun woguo de guojia quanli yu gongmin quanli), in: zhongguo shehui kexueyuan yanjiusheng yuan xuebao (中国社会科学院研究生院学报), No. 5, 1984, pp. 51–55; LI Gang (李钢), Querying the Nature of “Bourgeois Rights” (“zichan jiji quanli” xingzhi zhiyi), in: zhongnan caijing zhengfa daxue xuebao (中南财经政法大学学报), No. 6, 1984, pp. 87–88; HE Guowen (何国文), New Study on the Problems of Bourgeois Rights in a Socialist Economy (shehui zhuyi jingji zhong zichan jiji quanli wenti xin tan), in: xueshu yanjiu (学术研究), No. 6, 1985, pp. 30–35; YANG Haikun (杨海坤), Insisting On and Developing a Marxist Understanding of Rights and Obligations (jianchi he fazhan makeshi zhuyi de quanli yiwu guan), in: gansu zhengfa xueyuan xuebao (甘肃政法学院学报), No. 2, 1986, pp. 1–4.

Or, the discussion of rights was generally put under the framework of the relationship between rights and obligations and focused on demonstrating the uniformity of these two categories. See WU Jialin (吴家麟), On basic Rights and Obligations of Citizens of Our State (lun woguo gongmin de jiben quanli he yiwu), in: faxue zazhi (法学杂志), No. 4, 1982, pp. 20–23; GUO Runsheng (郭润生), On the Uniformity of Rights and Obligations of Citizens (tantan gongmin quanli he yiwu de yizhixing), in: shanxi daxue xuebao (山西大学学报), No. 3, 1983, pp. 26–27; GU Naizhong (顾乃忠), The Uniformity of Rights and Obligations of Citizens of Our State (woguo gongmin de quanli he yiwu de yizhixing), in: weishi (唯实), No. 3, 1983, pp. 28–30; LI Long (李龙), On the Relationship between Rights and Obligations of Citizens of Our State (lun woguo gongmin quanli yu yiwu de guanxi), in: hubei shifan xueyuan xuebao (湖北师范学院学报), No. 4, 1987, pp. 94–100.

At the end of the 1980s, articles began to appear which partly abandoned the domination of Marxism and Leninism and tried to undertake a more abstract and universal consideration of rights based on moral, ethical, philosophical, legal philosophical and constitutional theories of the West. These discussions evolved gradually into the so-called “rights standard theory (quanli benwei lun)” at the beginning of the 1990s which partly absorbed western liberalism, individualism and human rights theory and attempted to justify and stress the priority of rights over obligations. See ZHANG Wenxian (张文显), Considerations on Rights and Obligations (guanyu quanli he yiwu de sikao), in: dangdai faxue (当代法学), No. 3, 1988, pp. 16–20; GE Hongyi (葛洪义), On the Nature of Legal Rights (lun falü quanli de benzhi), in: dangdai faxue (当代法学), No. 3, 1988, pp. 21–25; WANG Yongqing (汪永清), On the Characteristics of Legal Rights (lun falü quanli de tezheng), in: faxue zazhi (法学杂志), No. 2, 1988, pp. 18–19; WEN Jing (文敬), On the Consciousness of Rights (lun quanli yishi), in: zhongguo faxue (中国法学), No. 4, 1988, pp. 54–59; LIN Zhe (林喆), Debates on Rights (quanli zhi bian), in: zhengzhi yu falü (政治与法律), No. 3, 1989, pp. 1–6; ZHENG Chengliang (郑成良), The Rights Standard Theory (quanli benwei shuo), in: zhengzhi yu falü (政治与

pecially from the perspective of political rights owned by citizens; however, it shared some basic common characteristics with the latter, namely the autonomy of society and limited government. In order to encourage free market competition, the equality of individuals and enterprises as market subjects within the market and the autonomy of them against the government were (to some degree) guaranteed, and accordingly, state and government, unlike in the planned economy, withdrew from comprehensive regulations and controls of economic activities and were limited to undertaking macro-control measures.<sup>31</sup> The market economy reform objectively stimulated the necessity of rights protection<sup>32</sup> and subjectively stimulated the rights consciousness of citizens.<sup>33</sup> The previous state-dominated (or Party-dominated) monolithic whole began to divide itself into state and society. The emphasis on private rights necessitated also the limitation of public power, and correspondingly, rights – deemed in the 1980s as something derived from the essence of the socialist state and granted or gifted by the state – became something acting against the state itself.<sup>34</sup> In constitutional

法律), No. 4, 1989, pp. 2–5; ZHANG Wenxian (张文显), Analysis on the Semantics and Meaning of a “Rights Standard” – Also on the Socialist Law as a New Type of Rights Standard Law (“quanli benwei” de yuyi he yiyi fenxi – jianlun shehui zhuyi fa shi xinxing de quanli benwei fa), in: zhongguo faxue (中国法学), No. 4, 1990, pp. 24–33; ZHANG Wenxian (张文显), The Evolution from an Obligations Standard to a Rights Standard Is the Development of the Rule of Law (cong yiwu benwei dao quanli benwei shi fa de fazhan guilü), in: shehui kexue zhanxian (社会科学战线), No. 3, pp. 135–144; LIN Zhimin (林志敏), On the Structure of Legal Rights (lun falü quanli de jiegou), in: jilin daxue shehui kexue xuebao (吉林大学社会科学学报), No. 4, 1990, pp. 44–48; WEN Zhengbang (文正邦), Reflections on Rights Problems from the Perspective of Legal Philosophy (yoguan quanli wenti de fazhexue sikao), in: zhongguo faxue (中国法学), No. 2, 1991, pp. 47–53.

<sup>31</sup> In the Chinese context, this was often referred to as “transforming the functions of government (zhuanbian zhengfu zhineng)”. See paragraph 16 of the Decision 1993.

<sup>32</sup> The protection of rights in the 1990s was mainly achieved by substantive and procedural legislation which was relevant to market regulation. For example, Copyright Law of the PRC (1990); Civil Procedural Law (1991); Anti-unfair Competition Law (1993); Law on Protection of the Rights and Interests of Consumers (1993); Corporate Law (1993); Arbitration Law (1994); Labour Law (1994), and so on.

<sup>33</sup> As some scholars argued, “rights consciousness is the ideology of the society under a market economy.” CHANG Jian (常健), quanli lishi shi shichang jingji shehui de yishi xingtai, in: lilun yu xiandaihua (理论与现代化), No. 4, 1997, pp. 7–9; “The market economy is an economy of rights.” ZHOU Yongkun (周永坤), On the Direct Forces of Basic Constitutional Rights (lun xianfa jiben quanli de zhijie xiaoli), in: zhongguo faxue (中国法学), No. 1, 1997, p. 20; “The constitution is the book for guaranteeing civil rights, hence the effective protection of civil rights is situated as the dominant status in constitutional content. [...] The basic rights of citizens are the core of the constitution.” LI Long (李龙), ZHOU Yezhong (周叶中), A Brief Discussion on the Basic Category of Constitutional Scholarship (xianfaxue jiben fanchou jianlun), in: zhongguo faxue (中国法学), No. 6, 1996, pp. 68–69.

<sup>34</sup> In constitutional theory, it was summarized: “We must strictly define the relationship between rights and power [...] and construct a full-fledged civil society which can contend against the political society (state).” XIE Hui (谢晖), The Functional Deviation of Rights and Power – the Crux and Its Solution in the Development of China’s Modernization (quanli yu quanli de gongneng beifan: zhongguo xiandaihua jincheng zhong de zhengjie jiqi xiaojie), in: ningbo daxue xuebao (renwen kexue ban) (宁波大学学报 (人文科学版)), No. 2, 1995, p. 103. See also MIAO Liangying (苗连营), ZHENG Lei (郑磊),

study, it was commonly argued that “protecting rights of citizens and maintaining state power are of equal importance.”<sup>35</sup> Some points of view of contemporaneous constitutional study moved even further by combining rights with the concept of the “rule of law”, which was at that time still not a concept defined by the constitution or by other laws: “Civil rights must be strictly distinguished from state power and such a distinction is the basic prerequisite for realizing rule of law.”<sup>36</sup> Methodologically, constitutional study in the 1990s began to use cases in the real life to expound on and reify constitutional rights of citizens, and, what is more important, to advocate and uphold the direct binding force of civil (constitutional) rights.<sup>37</sup>

### 2.3 The legal narrative under the socialist rule of law state and normative constitutional theory

In 1999, “establishing a socialist rule of law state (*jianshe shehui zhuyi fazhi guojia*)” was incorporated into the Chinese Constitution through the third constitutional amendment.<sup>38</sup> Although socialist rule of law cannot be completely identified with rule of law in the western sense, it brought a fundamental shift to the Chinese legal narrative, moving namely from the previous class narrative (before 1978), the narrative of law as a regulatory means of the state (in the 1980s), and the economic narrative of law as a means for a social-

Knowledge Transformation and Methods Synthesization of Constitutional Science – Based on Academic Debates since the 1990s (*xianfaxue de zhishi zhuanxing yu fangfa zonghe – yi 20 shiji 90 niandai yilai de xueshu zhenglun wei sucai*), in: *fazhi yu shehui fazhan* (法制与社会发展), No. 1, 2012, p. 148.

<sup>35</sup> TONG Zhiwei (童之伟), The Thinking Connotation of the Analytical Model of Social Rights in Constitutional Study (*xianfaxue shehui quanli fenxi moxing de sixiang yunhan*), in: *falü kexue* (法学科学), No. 4, 1996, pp. 23–24. “The constitution is a fundamental law which guarantees the basic rights of citizens.” LÜ Taifeng (吕泰峰), Some Reflections on the Basic Theoretical Study of Constitutional Jurisprudence (*xianfaxue jichu lilun yanjiu de ruogan sikao*), in: *faxue yanjiu* (法学研究), No. 3, 1998, p. 141.

<sup>36</sup> TONG Zhiwei (童之伟), Compendium on the Unity-of-Opposites-Relationship between Civil Rights and State Power (*gongmin quanli yu gongjia quanli duili tongyi guanxi lungang*), in: *zhongguo faxue* (中国法学), No. 6, 1995, p. 19.

<sup>37</sup> For example, in the article by constitutional scholar Zuoxiang Liu, he enumerated five cases in which education rights, labour rights, the right to personal liberty, the right to association and the right to behavioural liberty were infringed by public powers, and he argued that civil rights possessed legal effect. See LIU Zuoxiang (刘作翔), The Location of Power and Rights in a Rule of Law Society (*fazhi shehui zhong de quanli he quanli dingwei*), in: *faxue yanjiu* (法学研究), No. 4, 1996, pp. 69–71, 73. Another similar viewpoint: “It has been the common sense of citizens that the constitution is fundamental law, a mother law which possesses the highest legal force. However, if basic constitutional rights having the highest legal force cannot be criteria for judicial decisions, there will be a great paradox in the operation of the constitution, which causes a huge discrepancy between the supremacy and normativity of the constitution”. “The direct force of basic rights is the requirement for a rule of law state.” ZHOU Yongkun (周永坤), On the Direct Forces of Basic Constitutional Rights (*lun xianfa jiben quanli de zhijie xiaoli*), in: *zhongguo faxue* (中国法学), No. 1, 1997, pp. 20, 23.

<sup>38</sup> Article 5 section 1 of the Chinese Constitution provides: “The People’s Republic of China governs the country according to law and establishes a socialist rule of law state.”

ist market economy<sup>39</sup> to the narrative of law itself.<sup>40</sup> Constitutional study continued to focus on “rights” study. Nevertheless, unlike the widely-used conception of “social rights” or “civil rights” in the 1990s – which, strictly speaking, is not an exclusively legal or constitutional concept but rather contains also obvious political appeal, aspirations and the ideal to fully eradicate the influences of the previous class state and achieve a civil society – the concept of rights under a socialist rule of law state is a legal concept in a full sense and often formulated as the constitutional conception of “basic rights (*jiben quanli*)”.<sup>41</sup> Further, in a

<sup>39</sup> As pointed out above, legal and constitutional study in the 1990s indeed emphasized “social rights” and “civil rights” considerably. However, in essence, such an emphasis was just a by-product of the need for the construction of the socialist market economy. The application of the conception of rights was always combined with “market subjects” and rights protection (especially property rights protection) served chiefly to establish and maintain a market economy order. The rights narrative in the 1990s did not completely centre on rights themselves.

<sup>40</sup> On the one side, the conception of “rule of law” in China is based upon the socialist ideology which originally has Marxism-Leninism as its main fundament; however, since the Reform and Opening it has increasingly been extended and sinicized by guiding thought of each leading generation of the CCP (Mao Zedong Thought, Deng Xiaoping Theory, “Three Representatives (of Jiang Zemin)” and the “Scientific Development Concept (of Hu Jintao)” and also by the restoration of the traditional Confucianist philosophical and political thought, for example, the “moderately prosperous society (*xiaokang shehui*).” Compared with the western model of rule of law, which is explicitly and mainly based upon liberal-democratic values, power-separation mechanisms and a general election system, the current Chinese socialist ideology and the corresponding conception of the rule of law is amorphous in terms of content and connotation.

On the other side, and what is more important, the conception of “rule of law” in the Chinese Constitution is generally modified and limited by “governing the state according to law (*yifa zhiguo*)”, which is often interpreted by western scholars merely as “rule by law”. Nevertheless, the meaning and importance of “governing the state according to law” for Chinese legal construction cannot be emphasized enough when one takes into account the previous history of a sizable mixture of law and policies of the CCP as a common (normative) means for the regulation of state and society. For detailed discussions on the non-separation of “Party and state” as well as the overlap between state law and Party policies and decisions, please see my article, Rule of Law Within the Chinese Party-state and Its Recent Tendencies (in: *Hague Journal on the Rule of Law*, Vol. 2, 2017, pp. 1–28), in which I deem the separation of Party and state, beyond any formal or substantive way of evaluating rule of law in China, as the foremost problem of and a fundamental condition for the Chinese socialist rule of law.

“Governing the state according to law” acknowledges the independence of law in opposition to the Party (even if to a large degree only in a functional sense) and endows the “socialist rule of law” with a more visible and graspable form which confirms the constitution and state laws, instead of (economic or political) policies and decisions of the CCP (no matter how important they could be), (at least formally) as the centre; further, it directs constitutional study and legal study to concentrate on the constitution and the laws themselves.

<sup>41</sup> The conception of “basic rights” has been a constitutional conception since the formulation of the Constitution of 1982. Chapter two of the Constitution of 1982 confirms the basic rights of citizens in 18 articles (arts. 33–50). However, and surprisingly, leaving aside some exceptions, the constitutional conception of “basic rights” had not become an often-used conception in constitutional study until the end of the 20th century. As already demonstrated above, the often-used conceptions in the 1990s were “social rights” and “civil rights”. Since 2002, there began to be legal academic conferences which were held in the name of “basic rights protection (*jiben quanli baozhang*)”, see HAN Dayuan (韩大元), WANG Dezhi (王德志), Retrospect on the Study of Constitutional Science in 2002 and Its Outlook (2002 nian

manner showing less political sensitivity, the antagonism between “state – society” and “rights – power” became a more overt category used by constitutional scholars to argue for limiting the public power of the government<sup>42</sup> and even for constraining the rule behaviours of the CCP by strengthening the CCP as a single ruling Party such that it must also abide by the existing constitution and state laws. Accordingly, the binding force of basic constitutional rights was continuously reiterated;<sup>43</sup> simultaneously, the study of basic rights was particularized and reified.<sup>44</sup> Methodologically, the foremost characteristic of constitutional study since the beginning of the 21st century is that the previously long-neglected text of the constitution<sup>45</sup> has come back to the centre of constitutional study: initially, it required primarily the application of constitutional text regarding basic rights<sup>46</sup> and, then, the comprehensive application of the whole constitution. Constitutional study with the text of the constitution as its centre purified the research methodology in a legal way so as to exclude the direct citation of works

xianfaxue yanjiu de huigu yu zhanwang), in: faxuejia (法学家), No. 1, 2003, p. 25.

<sup>42</sup> See WU Jiaqing (吴家清), On the Basic Problems of Constitutional Jurisprudence (lun xianfaxue jiben wenti), in: faxue pinglun (法学评论), No. 4, 2001, p. 23.

<sup>43</sup> “The core for establishing a mechanism for power control is constraining power through rights. [...] The true realization of controlling power through rights is based on the dualization of state and society.” ZHOU Yezhong (周叶中), ZHOU Youyong (周佑勇), Reflections on and Reconstruction of the Theoretical System of Constitutional Jurisprudence (xianfaxue lilun tixi de fansi he chonggou), in: faxue yanjiu (法学研究), No. 4, pp. 23, 24, 27.

<sup>44</sup> The study of basic constitutional rights was deepened into individual rights study, for example, the right of equality, environmental rights and so on. See HAN Dayuan (韩大元), WANG Dezhi (王德志), Retrospect on the Study of Constitutional Scholarship in 2002 and Its Outlook (2002 nian xianfaxue yanjiu de huigu yu zhanwang), in: faxuejia (法学家), No. 1, 2003, pp. 28–29.

<sup>45</sup> It definitely does not mean that the previous constitutional study failed to pay any attention to existing articles of the constitution. Rather, it means that the study of constitutional articles in a systematic way with the goal of justifying the binding force of constitutional articles and achieving an explanatory application of the constitution is just a product of the “socialist rule of law state.”

<sup>46</sup> For a discussion on the relationship between a “constitutional text” and “basic rights”, see ZHANG Xiang (张翔), HAN Dayuan (韩大元), Self-consciousness of and Reflection on the Study of Constitutional Texts (xianfa wenben yanjiu de zijue yu fansi), in: faxuejia (法学家), No. 1, 2008, pp. 47–48. For other articles concerning the normative analysis of basic rights, see HAN Dayuan (韩大元), Normative Analysis of the Human Rights Clause in the Constitutional Text (xianfa wenben Zhong renquan tiaokuan de guifan fenxi), in: faxuejia (法学家), No. 1, 2004, pp. 23–26; YAN Hailiang (严海良), Normative Connotation of “State Respects and Protects Human Rights” (guojia zunzhong he baozhang renquan de guifan yihan), in: faxue zazhi (法学杂志), No. 2, 2006, pp. 141–143; RAN Sidong (冉思东), On the Human Rights Expression of the Chinese Constitution (lun zhongguo xianfa de renquan biaoda), in: faxuejia (法学家), No. 3, 2006, pp. 62–68; ZHANG Xiang (张翔), The Normative Structure of Basic Rights Conflict and Its Resolution Model (jiben quanli chongtu de guifan jiegou yu jie jue moshi), in: fashang yanjiu (法商研究), No. 4, 2006, pp. 94–102; id., The Beneficial Function of Basic Rights and the Duty of the State – Starting from the Innovation of the Analytical Framework of Basic Rights (jiben quanli de shouyi gongneng yu guojia de jifu yiwu – cong jiben quanli fenxi kuangjia de gexin kaishi), in: zhongguo xianfaxue niankan (中国宪法学年刊), No. 1, 2006, pp. 21–36.

of Marx and Lenin,<sup>47</sup> the simple restatement of policies and decisions of the CCP and even the speeches of high-ranking Party-leaders; instead it emphasized the highest authority and the comprehensive normativity of the constitutional text (norms) and maintained the independence of constitutional study as a field of academic inquiry against definition of constitutional study as a mere political (ideological) manifestation.<sup>48</sup> In order to detect and define the meaning of constitutional articles, conceptions and terminologies, great emphasis was put on an explanatory understanding of the constitutional text and relevant text-explaining skills and methods.<sup>49</sup> The emphasis on basic constitutional rights and its practical realization as well as the methodological concentration on explaining the text of the constitution amounted to the emergence of a more complete constitutional theory, namely the “constitution explaining school” (*xianfa jieshi xuepai*) or the “normative constitutional school” (*guifan xianfa xuepai*),<sup>50</sup> which is aimed at realizing the internal academic conception and systematization of Chinese constitutional study. The core requirement of normative constitutional theory is “a focus on norms (*weirao guifan*)” and the notion of “going back to norms (*huidao guifan*)”.<sup>51</sup> It absorbs the typical German category of “reality and normativity (Faktizität und Normativität)”

<sup>47</sup> In the 1980s and even in the 1990s, it was quite usual that constitutional scholars in their articles directly cited the works of Marx and Lenin as a basis of argumentation. With the rapid fading of the ideological colour of constitutional study after the “socialist rule of law state”, it has been rare to do so again.

<sup>48</sup> For a long period, Chinese constitutional study was completely trapped in the so-called “political nature (*zhengzhi xing*)” and gave up its academic (scientific) nature: On the one side, constitutional study paradoxically neglected the constitution itself and undertook mainly the task of maintaining Marxist-Leninist ideology and strengthening the legitimacy of the current regime; on the other side, due to simple repetition of works of Marx and Lenin and policies and decisions of the CCP, it lacked systematic and academic methods for handling the constitutional text. As one constitutional scholar summarized, “the 30-year experience shows that maintaining [...] academic independence is the important condition for the development and maturity of constitutional scholarship. [...] Respecting the constitutional text and academic logic is crucial to Chinese constitutional science.” HAN Dayuan (韩大元), 30 Years of Chinese Constitutional Study (1985–2005) (*zhongguo xianfaxue yanjiu sanshinian (1985–2005)*), in: fazhi yu shehui fazhan (法制与社会发展), No. 1, 2016, p. 9.

<sup>49</sup> As one scholar said: “If our constitutional study always stays on the level of constitutional ideas [...] and fails to realize these ideas through (explanatory) techniques [...], we cannot achieve the goal of ‘rule of the constitution’”. ZHANG Xiang (张翔), Disenchantment and Self-sufficiency: The Influences of Political Theory on Constitutional Explanation and Its Limitation (*qumei yu zizu: zhengzhi lilun dui xianfa jieshi de yingxiang jiqi xiandu*), in: zhengfa luntan (政法论坛), No. 4, 2007, p. 30.

<sup>50</sup> Although in the map of current Chinese constitutional study the Constitution explaining school and the normative constitutional school are represented by different scholars, their discrepancies can be ignored when compared with their common points, especially the emphasis on the authority and normativity of the constitutional text. To a large degree, the constitution explaining theory is just a pre-stage of normative constitutional theory; however, the core content of the latter, namely the emphasis on an explanatory understanding of the constitution, overlaps markedly with the content of the former.

<sup>51</sup> LIN Laifan (林来梵), From Constitutional Norms to a Normative Constitution – A Foreword of Normative Constitutional Theory (*cong xianfa guifan dao guifan xianfa – guifan xianfaxue de yizhong qianyan*), *falu chubanshe*, 2001, p. 7.

as its theoretical basis and argues for overcoming the gap between general constitutional norms and concrete cases through an explanatory understanding of the former and, finally, achieving a practical application of the constitution.<sup>52</sup> At the end of the first decade of the 21st century, normative constitutional theory experienced a German-style turn. Some Chinese constitutional scholars having a German background began to energetically introduce German constitutional *Rechtsdogmatik-Theorie* (legal dogmatics theory) into China and endeavoured to promote the application potential of the constitution through a further academic conception and systematization of constitutional study.<sup>53</sup>

It is argued that “the constitutional text is the starting point and goal of constitutional interpretations” and “the fundamental content of constitutional scholarship is understanding and explaining the constitutional text.” ZHANG Xiang (张翔), *Why Constitutional Scholarship Should Centre on Constitutional Text* (xianfaxue weishenme yao yi xianfa wenben wei zhongxin), in: *zhejiang xuekan* (浙江学刊), No. 3, 2006, pp. 14, 15. The requirement of “going back to constitutional text” focuses mainly on the structure, content, essence and validity of constitutional norms, see HAN Dayuan (韩大元), *Towards Professionalization in Chinese Constitutional Jurisprudence—An Analysis Based upon Sectional Academic Articles Published in 2006* (maixiang zhuanxue de zhongguo xianfaxue – yi 2006 nian fabiao de bufen xianfaxue xueshu lunwen de fenxi weili), in: *zhongguo faxue* (中国法学), 2007, p. 127.

<sup>52</sup> See FAN Jinxue (范进学), *From Normative Analytical Constitutional Theory to Constitution Explaining Theory – the Constitutionalist Sense of the Paradigm Transition of Chinese Constitutional Jurisprudence* (cong guifan fenxi xianfaxue dao xianfa jieshi xue – zhongguo xianfaxue yanjiu fanshi zhuanxing zhi xianzheng yiyi), in: *henan sheng zhengfa guanli ganbu xueyuan xuebao* (河南省政法管理干部学院学报), No. 2, 2005, pp. 1, 3; id., *Constitutionalism and Method* (xianzheng yu fangfa), in: *zhejiang xuekan* (浙江学刊), No. 2, 2005, pp. 18–23. “Normative constitutional theory argues for [...] explanations of the existing norms, and raises the human rights norm to core norm status. Its implicit intent is to limit public power through the explanation and application of the human rights norm.” YE Haibo (叶海波), *The Theoretical Trajectory and Basic Consensus of Methodological Debates on Constitutional Jurisprudence in Our Country* (woguo xianfaxue fangfa lunzheng de lilun mailuo yu jiben gongshi), in: *qinghua faxue* (清华法学), No. 3, 2013, p. 78.

<sup>53</sup> As one constitutional scholar pointed out: “Given the fact that in today’s China there is still no constitutional review mechanism, it is undoubtedly of great significance to undertake normative, conceptual and systematic construction from the academic perspective.” LI Zhongxia (李忠夏), *Dogmatization of Constitutional Scholarship – The Methodological Evolution of German State Law Scholarship* (xianfaxue de jiaoyihua – deguo guojia faxue fangfalun de fazhan), in: No. 5, 2009, p. 60. Other typical articles, for example, ZHAO Hong (赵宏), *Limitation on Limitation – The Internal Mechanism of the Limiting Model of German Basic Rights* (xianzhi de xianzhi – deguo jiben quanli xianzhi moshi de neizai jili), in: *faxuejia* (法学家), No. 2, 2011, pp. 152–166; id., *Subjective Rights and Objective Values – Two Dimensions of Basic Rights in German Law* (zhuguan quanli yu keguan jiazhi – jiben quanli zai deguo fa zhong de liangzhong mianxiang), in: *zhejiang shehui kexue* (浙江社会科学), No. 3, 2011, pp. 38–46; LIU Fei (刘飞), *The Rule Synthesis Model and Outcome Orientation of Constitutional Interpretation – Research on the Constitution Explaining Methods Centering on the German Federal Constitutional Court* (xianfa jieshi de guize zonghe moshi yu jieguo quxiang – yi deguo lianbang xianfa fayuan wei zhongxin de xianfa jieshi fangfa kaocha), in: *zhongguo faxue* (中国法学), No. 2, 2011, pp. 70–87; ZHANG Wei (张慰), *German Basic Rights Theory – Between Adaption and Autonomy* (shiying yu zizhu zhijian de deguo jiben quanli jiaoyixue), in: *fazhi yu shehui fazhan* (法制与社会发展), No. 3, 2012, pp. 92–103; ZHANG Xiang (张翔), *The Outset of Constitutional Dogmatics* (xianfa jiaoyixue chujie), in: *zhongwai faxue* (中外法学), No. 5, 2013, pp. 916–936. Moreover, the decisions of the German Federal Con-

## 2.4 Why a political instead of a normative constitutional theory?

Constitutional normative theory and constitutional doctrine have, to a large extent, produced an enlightenment of Chinese constitutional study: On the one hand, they bring conceptions such as “basic rights” and “power limitation” into the core narrative of Chinese constitutional study; on the other hand, they have partially realized, especially based on the German model, an internal scholarly conception as well as a systematization and academic independence of constitutional jurisprudence. As academic accomplishments of normative constitutional theory (besides the considerable number of articles focusing on comparatively introducing and describing German constitutional study in terms of its relevant institutional realization, e.g. the “Bundesverfassungsgericht (Federal Constitutional Court)”, and the notion of “Verfassungsgerichtsbarkeit (constitutional review)”), worth enumerating is primarily the emergence of works on the current Chinese Constitution in the form of “Kommentar (commentary)”<sup>54</sup> as well as the case-based teaching methods oriented to the German Gutachtenstil (evaluation-manner) in many law schools. However, the core appeal of normative constitutional theory, namely to achieve the judicial application of the Chinese Constitution, *inter alia*, the judicial protection of the basic constitutional rights of citizens, has experienced no breakthrough. In the Chinese context, constitutional scholars gave the judicial application of the constitution a special terminology, namely the “judicialization of the constitution (*xianfa sifa hua*)”, which generally argues that the Supreme People’s Court can decide constitutional litigation directly based on constitutional articles and should be endowed with the power to explain the constitution.<sup>55</sup> In 2001, there was once a spark for realizing constitutional judicialization, however, this transitory spark disappeared in 2008.<sup>56</sup> The

stitutional Court were also selectively translated into Chinese and commented on. See ZHANG Xiang (张翔) (ed.), *Selection and Elucidation of German Constitutional Cases* (Vol. 1 and Vol. 2) (*deguo xianfa anli xuanshi*), *falü chubanshe* (法律出版社), 2012, 2016.

<sup>54</sup> For example, CAI Dingjian (蔡定剑), *Elaborate Interpretation of the Chinese Constitution* (*xianfa jingjie*), *falü chubanshe* (法律出版社), 2006; XU Anbiao (许安标) (ed.), *Explanation and Reading of the Chinese Constitution and Relevant Laws* (*xianfa ji xianfa xiangguan fa jiedu*), *zhongguo fazhi chubanshe* (中国法制出版社), 2015.

<sup>55</sup> However, the meaning of this often-used theoretical conception of “constitutional judicialization” is sometimes not clear, especially when one takes relevant conceptions into account, for example, “constitutional litigation”, “constitutional complaint”, “constitutional review”, “judicial review” and so on. For some discussions, see SHANGGUAN Piliang (上官丕亮), *The Construction Road of Constitutional Litigation Revisited* (*zai tan xianfa susong de jiangou zhi lu*), in: *fashang yanjiu* (法商研究), No. 4, 2003, pp. 37–38; CAI Dingjian (蔡定剑), *The Conception and Way of Constitutional Application* (*xianfa shishi de gainian yu xianfa shishi zhi dao*), in: *zhongguo faxue* (中国法学), No. 1, 2004, pp. 21–26.

<sup>56</sup> On June 28, 2001, in its reply to the people’s court of the Shandong province, the Supreme People’s Court (SPC) cited directly the basic right of education (Art. 46 section 1 of the Chinese Constitution) as the criterion for deciding a concrete case. This action of the SPC was sincerely welcomed by some constitutional scholars and interpreted as the beginning of constitutional judicialization. However, in



appeal for constitutional judicialization by assigning to the Supreme People's Court the power to explain and apply the constitution is inconsistent with the existing mechanism in the current Chinese Constitution, in which the power to explain and apply the constitution is assigned to the Standing Committee of the National People's Congress (SCNPC) as a state legislative organ, although the latter has rarely exercised this power since 1982.<sup>57</sup> More radical requirements of normative constitutional theory for establishing a constitutional review mechanism and a corresponding independent constitutional court similarly remain unrealistic. Under the Chinese single-Party rule state, state behaviour overlaps greatly with the behaviour of the Party. The Constitution of the CCP provides mainly three ways for achieving leadership of the CCP, namely political, ideological and organizational leadership.<sup>58</sup> Especially from the organizational perspective, all the formal state organs are occupied in parallel with corresponding Party members and groups, and the behaviours of state organs can hardly be distinguished from those of the Party. Thus, considering the Party-state reality and the absolute dominance of the Party over the state, it is logically impossible to establish an independent court to review the behaviour of state organs which is simultaneously the behaviour of the Party. Without institutional realization and guarantee, all efforts of normative constitutional theory remain just the self-entertainment of constitutional scholars having an interest in comparative law. Further, willingly or unwillingly, normative constitutional theory was involved in the constitutionalism debate in 2013, which represents a significant incident when observing the constitutional development in China in recent years.<sup>59</sup> Strictly speaking, the constitutionalism debate is a political debate focusing on political reform in China, which was deemed by Chinese constitutional-

ists as long having stagnated. The main participants were pro-constitutionalism newspapers and journals and official orthodox newspapers and journals of the CCP. However, the constitutionalism dream of the constitutionalists requires wide-ranging legal realization and guarantees, for example, "enforcement of the constitution"<sup>60</sup>, "judicial independence", "protecting basic rights of citizens", "power checks and balances", "acknowledging and respecting the highest authority of the current constitution", "establishing constitutional review and an independent constitutional court" and, most importantly, as its final goal, "locating the Party under law".<sup>61</sup> Notwithstanding a high affinity between the main standpoints of Chinese normative constitutional theory and the core elements of western constitutionalism,<sup>62</sup> the main constitutional scholars advocating normative constitutional theory consciously avoided the usage of the conception "constitutionalism" as their theoretical basis so as to escape from the mire of the ideological debates. However, as pointed out above, due to the overlap between the political requirements and their corresponding legal realization and guarantee as understood by the Chinese constitutionalists and the internal legal demands of normative constitutional theory, the latter was inevitably involved in the constitutionalism debate. The main argumentations of the official newspapers and journals against constitutionalism and constitutionalists were based, on the one side, on the previous frequently-used method of class narrative. It was argued: "Key institutional elements and ideas of constitutionalism belong only to capitalism and capitalist class dictatorship and are not part of the socialist system of people's democracy";<sup>63</sup> "constitutionalism is the discourse hegemony of the western bourgeoisie";<sup>64</sup> "constitutionalism both in theory and practice refers in particular to the enforcement of the bourgeois constitution".<sup>65</sup> On the other side, advocating constitutionalism was politically attributed to hostile action undertaken by western hostile forces and their agents in China which were deemed as intending to "realize the complete westernization of

the following years there was no similar action by the SPC, and the deemed "milestone" reply of 2011 was also repealed by the SPC in 2008. The unique hope of constitutional judicialization fell through.

<sup>57</sup> Art. 67, No. 1 of the Chinese Constitution. Further, the SCNPC possesses also powers to "annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the statutes"; and to "annul those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations." (Art. 67, No. 7, 8 of the Chinese Constitution). The powers to explain the Constitution and to annul the lower level laws in given conditions build together the legislative supervision and review system in China. Nevertheless, as history shows, the SCNPC has rarely exercised these two powers and the legislative supervision and review system is of nearly no practical significance.

For relevant discussions, see also MIAO Lianying (苗连营), ZHENG Lei (郑磊), Knowledge Transformation and Methods Synthesis of Constitutional Scholarship – Based on the Academic Debates as Materials since the 1990s (xianfaxue de zhishi zhuanxing yu fangfa zonghe – yi 20 shiji 90 niandai yilai de xueshu zhenglun wei sucai), in: fazhi yu shehui fazhan (法制与社会发展), No. 1, 2012, p. 153.

<sup>58</sup> Paragraph 24, General Program of the Constitution of the Chinese Communist Party.

<sup>59</sup> For a detailed description of the constitutionalist debate, please see Rogier Creemers, China's Constitutionalism Debate: Content, Context and Implications, in: The China Journal, No. 74, 2015, pp. 91–109.

<sup>60</sup> The Constitution of 1982 is not a constitution in the western sense. However, it contains many important clauses, for example, the protection of basic rights, the emphasis on legal authority, the guarantee of the independence of courts and so on, which are regarded by constitutionalists as progressive; however, in the past 30 years they were not actually in force, and thus constitutionalists require their enforcement. See ZHANG Qianfan (张千帆), On the Selective Enforcement of the Constitution (lun xianfa de xuanze shiyong), in: zhongwai faxue (中外法学), No. 5, 2012, pp. 887–906.

<sup>61</sup> Editorial of the yanhuang Chunqiu, Constitution Is the Consensus on the Reform of the Political System (xianfa shi zhengzhi tizhi de gongshi), in: yanhuang Chunqiu (炎黄春秋), No. 1, 2013, p. 1.

<sup>62</sup> In fact, many core arguments of the Chinese normative constitutional theorists originate from constitutionalist models of America and Germany.

<sup>63</sup> YANG Xiaqing (杨晓青), A Comparative Study on Constitutionalism and the People's Democracy System (xianzheng yu renmin minzhu zhidu zhi bijiao yanjiu), in: hongqi wengao (红旗文稿), No. 10, 2013, p. 4.

<sup>64</sup> YANG Xiaqing (杨晓青) (supra note 63), p. 6.

<sup>65</sup> ZHENG Zhixue (郑志学), Recognizing the Essence of "Constitutionalism" (renqing "xianzheng" de benzhi), in: dangjian (党建), No. 6, 2013, p. 29.

China”, “change the Chinese political system”, “abrogate the leadership of the CCP” and finally “subvert the Chinese socialist regime” and “force China to accept the western political system”.<sup>66</sup> The arguments used by official constitutional theorists are of high political sensitivity and thus exerted great pressure on the ideological and political correctness of constitutional study and forced constitutional study to conduct stricter self-examinations.<sup>67</sup> After the constitutionalism debate, the space left for Chinese normative constitutional theory was further shrunk. The suppression of the trend toward constitutionalist thought as undertaken by official and orthodox newspapers and journals was, however, in essence, initiated by the pure political will of the CCP, which instinctively reacted to forces against its rule. The seemingly strong arguments of the official constitutionalists which turn to “class narrative” and the method of simple “friend-enemy” description are mere platitude and of little theoretical persuasion and construction. Especially when one takes into account the miserable experiences caused by arguments of such kind during the Cultural Revolution, it is unlikely to again render class narrative and friend-enemy description as the basis of constitutional study in the current China. Thus, the strong resurgence of Marxist ideology in the constitutionalism debate did not consequently bring a retrogression of Chinese constitutional study into one of class analysis as in the Cultural Revolution and in the early stage of the Reform and Opening. Rather, some constitutional scholars began to endeavour to establish a more constructive constitutional theory, that means, a theory which is more appropriate and potent for explaining the current reality of China. These endeavours evolved gradually into the Chinese political constitutional theory which, on the one hand, carefully keeps its distance from the previous completely politicalized and ideologicalized constitutional study and, on the other hand, fights fiercely against normative constitutional theory.<sup>68</sup> From the internal perspective of

constitutional study, the salience of political constitutional theory is the result of the frustration of normative constitutional theory in China. The basic characteristic of the former is to discern and acknowledge the Party-state reality which is consciously neglected by normative constitutional theory, or more accurately, consciously excluded from its research focus due to purification of its normativist research methods,<sup>69</sup> and to make it to the basic starting point of constitutional study. Additionally, the Party-state reality which is emphasized by political constitutional theory is not merely interpreted as politically absolute dominance of the CCP over state and society; rather, it includes also the huge economic achievements since the Reform and Opening, which signifies the renaissance of the Chinese nation as a hundred-year project under the leadership of the CCP. The economic achievements legitimate also theoretical and institutional establishments and, more generally speaking, the self-development path of China created by the CCP in the Reform and Opening era which are not definitely consistent with western solutions. Whereas constitutional study in the Cultural Revolution and the early stage of the Reform and Opening era justified CCP rule through a simple and coarse manner of political and ideological reiteration, Chinese political constitutional theory tends to do the same thing in a more academic and sophisticated way by digging into the Party-state reality and endowing it with theoretical explanatory forces.<sup>70</sup> As

istic antagonism between state and citizens covers up the Party-state reality and results in the loss of the theoretical self-consciousness of Party problems with constitutional study.” YE Haibo (叶海波), *The Theoretical Trajectory and Basic Consensus of Methodological Debates of Constitutional Jurisprudence in Our Country* (woguo xianfaxue fangfa lunzheng de lilun mailuo yu jiben gongshi), in: *qinghua faxue* (清华法学), No. 3, 2013, p. 85.

<sup>69</sup> Excluding the Party-state reality brings no systematic and logical integrity to the reasoning behind legal theory as the legal normativists expect. The application of some constitutional articles in the strict way of legal theory can result in severe conflicts between constitutional clauses and the Party-state reality and in turn ruin the systematic requirement of legal theory. Illustrative articles here include: Art. 5 section 4 “All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated.” and Art. 126 “The people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.” Completely different from these textual stipulations, the CCP as a political party possesses absolute control over the constitution and state laws and exerts also decisive influences over courts.

<sup>70</sup> For example, the definition of the leadership of the CCP as an absolute force of constitutional nature (*dang de lingdao zuowei xianfa xing de juehui lixiang*), see GAO Quanxi (高全喜), *Political Constitutionalism and Judicial Constitutionalism – A Constitutionalist Reflection based on the Chinese Political Society* (zhengzhi xianzheng zhuyi yu sifa xianzheng zhuyi – jiyu zhongguo zhengzhi shehui de yizhong lixian zhuyi sikao), report of December 27, 2008, see <<http://www.aisixiang.com/data/25266.html>>, last visited on June 10, 2017. “The first theoretical model of the current Chinese Constitution is the absolute leadership of the CCP over state affairs and public affairs. [...] This is the primary principle of the real Chinese constitutional system. [...] However, it bears reflecting that this so obvious and important political and constitutional principle hasn’t entered into the view of the current constitutional study.” YU Zhong (喻中), *Seven Theoretical Models Contained in the Chinese Constitution* (zhong-

<sup>66</sup> ZHENG Zhixue (郑志学), (supra note 65), pp. 29–30; Editorial of *Global Times* (huanqiu shibao), “Constitutionalism” Is Indirect Negation of the Development Path of China (“xianzheng” shi douzhe quanqi fouding zhongguo fazhan zhilu) on May 22, 2013; *Qishi* (秋石), Consolidating the Guiding Status of Marxism in the Ideological Area (gonggu makesi zhuyi zai yishi xingtai lingyu de zhidao diwei), in: *qiushi* (求是), No. 19, 2013, p. 13.

<sup>67</sup> In the 2017 Working Plan of the China Law Society (*zhongguo fa xuehui*), it is stipulated: “We must strengthen the political leadership over legal theorists and practitioners and realize the system of ideological responsibility. [...] [W]e must fight definitely against advocating ‘western constitutionalist democracy’, ‘universal values’ and ‘separation of power’”.

<sup>68</sup> As one political constitutional scholar has pointed out: “The divergence between legal reality and legal theory is more and more obvious. [...] Politics and law are practical things. Without real institutions, [...] protection of basic rights, judicial independence and constitutional review are merely fludub.” GAO Quanxi (高全喜), *Political Constitutionalism and Judicial Constitutionalism – A Constitutionalist Reflection based on the Chinese Political Society* (zhengzhi xianzheng zhuyi yu sifa xianzheng zhuyi – jiyu zhongguo zhengzhi shehui de yizhong lixian zhuyi sikao), report of December 27, 2008, see <<http://www.aisixiang.com/data/25266.html>>, last visited on July 1, 2017. “The often-used theoretical structure of dual-

constitutional history shows, Chinese political constitutional theory is initiated by and faced with Chinese problems. Nevertheless, it is heavily influenced by Carl Schmitt. Such influences are demonstrated not only objectively in the repeated citations of his works, but also in the consistent concrete theoretical construction and research dimensions of the Chinese political constitutional theory vis-à-vis the constitutional theory of Carl Schmitt. It could be arbitrary to argue that Carl Schmitt was the unique theoretical source of Chinese political constitutional theory. In reality, besides Carl Schmitt's constitutional theory, the English practice of an unwritten constitution and its meanings for a political constitutional theory are also often referred to and transformed and adapted into the Chinese constitutional context.<sup>71</sup> However, compared with the explicit and objectively graspable absorption of Carl Schmitt's theory, the influences of English-style political constitutional theory is quite recessive, or at least not so strong as its representatives in China have claimed.<sup>72</sup> Further, some consistencies between English political

guo xianfa yunhan de qige lilun moshi), in: zhejiang shehui kexue (浙江社会科学), No. 8, 2009, pp. 31–32.

<sup>71</sup> See GAO Quanxi (高全喜), Political Constitutional Theory: Theory of Political Constitution or Political Constitutionalism? (zhengzhi xianfaxue: zhengzhi xianfa lilun, yihuo zhengzhi lixian zhuyi?), in: qinghua daxue xuebao (zhexue shehui kexue ban) (清华大学学报(哲学社会科学版)), No. 5, 2015, p. 29.

<sup>72</sup> Since recent years, in English constitutional scholarship there can be observed an obvious resurgence of political constitutional study. In 2007, the well-known book of Richard Bellamy titled "Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy" was published. And then some English legal journals organized special sets of articles focusing on political constitutional study, for example, Special Issue of German Law Journal on Political Constitution (2013), International Journal on Constitutional Law (2016), Vol. 14, No. 1. Some main representatives of the political constitutional theory also published updated thoughts on political constitutionalism: *Graham Gee*, The Political Constitutionalism of JAG Griffith (Legal Studies (2008), Vol. 28, No. 1, pp. 20–45); *Adam Tomkins*, The Role of the Courts in the Political Constitution (The University of Toronto Law Journal (2010), Vol. 60, No. 1, pp. 1–22.); id., What's Left of the Political Constitution? (German Law Journal (2013), Vol. 14, No. 12, pp. 2275–2292); *Richard Bellamy*, Political constitutionalism and the Human Rights Act (International Journal of Constitutional Law (2011), Vol. 9, No. 1, pp. 86–111); *Paul Craig*, Political Constitutionalism and the Judicial Role: A response (International Journal of Constitutional Law (2011), Vol. 9, No. 1, pp. 112–131); *Marco Goldoni*, Two Internal Critiques of Political Constitutionalism (International Journal of Constitutional Law (2012), Vol. 10, No. 4, pp. 926–949); *Michael A. Wilkinson*, Political Constitutionalism and the European Union (Modern Law Review (2013), Vol. 76, No. 2, pp. 191–222); *Panu Minkkinen*, Political Constitutionalism versus Political Constitutional Theory: Law, power, and politics (International Journal of Constitutional Law (2013), Vol. 11, No. 3, pp. 585–610); *Graham Gee*, *Grégoire Webber*, Rationalism in Public Law (MLR (2013), Vol. 76, No. 4, pp. 708–734) and so on.

The emergence of Chinese political constitutional theory roughly coincided with the resilience of political constitutional study in the English constitutional scholarship. However, detailed observations can ascertain that the Chinese political constitutional scholars who argue that their theoretical sources derive from the political constitutional theory of English origin were completely absent from these discussions in the English scholarship. The most objective evidence is that there are nearly no citations of nor comments on corresponding English articles, setting aside a few exceptions (for example, the Chinese political constitutional scholar GAO Quanxi in his 2015 article cited and commented occasionally on the article "Political Constitutionalism vs. Political Constitutional Theory: Law, Power and Politics" by Panu Minkkinen).

constitutional theory and Carl Schmitt's political constitutional theory render also the influences of the former invisible.

### 3. Main aspects of Carl Schmitt's theory selected as the basis of political constitutional theory in China

In this part, the author traces the main aspects of Carl Schmitt's constitutional theory which have been consciously chosen as the theoretical basis of Chinese political constitutional theory and explores how they have been adjusted and adapted to explain "the political" under the Chinese Party-state reality. The influences of Carl Schmitt's theory on the Chinese political constitutional theory can be summarized in terms of three aspects, namely theme and conception choice; historicist, realistic and decisionist constitutional methodology; and an emphasis on constituent power. It deserves noting that although Carl Schmitt's constitutional theory is

Further, what "the political" means in English political constitutionalism is fundamentally different from "the political" in Chinese political constitutionalism, and its transformation into the Chinese context appears also suspicious. "The political" in the English conception means principally liberal democratic politics and their dynamic realization in the day-to-day parliamentary operation, and English political constitutional theory entails a liberal-democratic constitution. The discussion on English political constitutional theory is also based on the antithesis and tension between liberal democratic politics and (court-centred) rule of law; hence, it includes corresponding principal theses, for example, the relationship between the dynamic of day-to-day politics and the stability of a legal order, the understanding of the conception of rights and the path for their protection ("Human Rights Act"), "open government", "ministerial responsibility", "anti-judicialization of the administrative process", a "mixed constitution", "republican thinking", the status and form of judicial review, and so on. (See *K. D. Ewing*, The Resilience of the Political Constitution, in: German Law Journal, Vol. 14, No. 12 (2013), p. 2135; *Graham Gee*, *Grégoire C. N. Webber*, What Is a Political Constitution? in: Oxford Journal of Legal Studies, Vol. 30, No. 2 (2010), pp. 278, 281; *J. A. G. Griffith*, The Political Constitution, in: Modern Law Review Vol. 42, No. 1 (January 1979), pp. 16, 18, 18–19; *Janet L. Hiebert*, The Human Rights Act: Ambiguity about Parliamentary Sovereignty, in: German Law Journal, Vol. 14, No. 12 (2013), p. 2254; *Adam Tomkins*, What's Left of the Political Constitution? in: German Law Journal, Vol. 14, No. 12 (2013), p. 2276; *Marco Goldoni*, *Christopher McCorkindale*, A Note from the Editors: The State of the Political Constitution, in: German Law Journal, Vol. 14, No. 12 (2013), p. 2104; *Mark Tushnet*, The Relation Between Political Constitutionalism and Weak-Form Judicial Review, in: German Law Journal, Vol. 14, No. 12 (2013), pp. 2250–2251.)

What "the political" means in the context of the Chinese political constitutional theory, however, is the given power structure and power operation under the Party-state reality, from which the above-enumerated main contents of English political constitutional theory can hardly be deduced. What the relevant Chinese political constitutional scholars intend through absorbing the English conception of an "unwritten constitution" and emphasizing its practical meaning is merely to justify the reality of the long-period of non-enforcement of the existing Chinese written constitution and create a legitimate space for the leadership activities and practices of the CCP which are not necessarily consistent with the given Chinese Constitution. See *JIANG Shigong* (强世功), "Unwritten Constitution" – Enlightenment on the English Constitutional Tradition ("buchengwen xianfa" – yingguo xianfa chuantong de qishi), in: dushu (读书), No. 11, 2009, pp. 63–70; id., Unwritten Constitution in the Chinese Written Constitution – A New Perspective for Understanding the Chinese Constitution (zhongguo xianfa zhong de buchengwen xianfa – lijie zhongguo xianfa de xin shijiao), in: kaifang shidai (开放时代), No. 12, 2009, pp. 10–35.

usually categorized as “political constitutional theory”, he did not himself employ the terminology “politische Verfassung (political constitution)” in his works. Rather, the place where “politische Verfassung” appeared and was used to summarize his constitutional theory is in the book “Wesen und Inhalt der politischen Verfassung (Essence and Content of the Political Constitution)”,<sup>73</sup> which was written by his student Ernst Rudolf Huber, who purported to demonstrate and systematize the political constitutional thought of Carl Schmitt. Thus, in the following discussion, this work of Ernst Rudolf Huber will also be taken into account.

### 3.1 A glance at the scope of Carl Schmitt’s theory in terms of the translation of his works in China

As far as the author can discern, at present direct citations of Carl Schmitt’s German works are rare.<sup>74</sup> The influences of Carl Schmitt’s theory in China are based *inter alia* on the translation of his works into Chinese. Since 2004, the main works of Carl Schmitt have gradually and systematically been translated into Chinese. In 2004, his work “Der Begriff des Politischen (The Concept of the Political)” was translated into Chinese,<sup>75</sup> and subsequently his most well-known work “Verfassungslehre (Constitutional Theory)”.<sup>76</sup> Translations that followed include “Der Hüter der Verfassung (The Guardian of the Constitution)”,<sup>77</sup> “Über die Drei Arten des Rechtswissenschaftlichen Denkens (On the Three Types of Juristic Thought)”,<sup>78</sup> “Legalität und Legitimität (Legality and Legitimacy)”,<sup>79</sup> and “Politische Theologie (Political Theology)”.<sup>80</sup> The newest translations are “Politische Romantik (Political Roman-

ticism)”<sup>81</sup> and “Positionen und Begriffe – im Kampf mit Weimar – Genf – Versailles 1923–1939) (Positions and Conceptions – in the Fight with Weimar – Geneva – Versailles 1923–1939)”.<sup>82</sup> Based on the great interest of Chinese constitutional scholars in Carl Schmitt in recent years,<sup>83</sup> it can be foreseen that more works of Carl Schmitt will be translated into Chinese, and discussions and studies on his constitutional theory will be extended and deepened in Chinese scholarship.

### 3.2 The focus on the constitution preamble

The core argument of Carl Schmitt’s constitutional theory is that “the constitution is the total decision on the sort and form of the political unity”<sup>84</sup> and it is “the total state of political unity and order”.<sup>85</sup> In order to obtain textual evidence for such a judgment, the meaning and significance of the constitutional preamble was repeatedly emphasized. The text of the preamble to a constitution, having an introductory, advocative, and ceremonial style, rarely contains, unlike the concrete constitutional articles, normative stipulations; however, it can accommodate enough semantic space for the grand thesis of the constitution as embodying political decisions (of the people). In his *Verfassungslehre*, Carl Schmitt refers to the preambles of the *Reichsverfassungen* (Constitutions of the German Empire) of 1871 and 1919, in which, he argues, “the political decision is especially clearly and urgently pronounced.”<sup>86</sup> Further, he is strongly against the treatment of constitution preambles as “mere statements (Aussagen)” and “historical narrative” or as being “enuntiativ (enunciative) instead of dispositiv (dispositive).”<sup>87</sup> What Carl Schmitt emphasizes is that:

*The preamble of the Weimarer Verfassung (Weimar Constitution) contains the authentic declaration of the German People that they as holder of the con-*

<sup>73</sup> Ernst Rudolf Huber, *Wesen und Inhalt der politischen Verfassung*, Hanseatische Verlagsanstalt, 1935.

<sup>74</sup> For some exceptions, see LI Zhongxia (李忠夏), *Methodological Reflections on Chinese Constitutional Jurisprudence* (zhongguo xianfa xue fangfa lun fansi), in: *faxue yanjiu* (法学研究), No. 2, 2011, pp. 164, 165; id., *Observing the Constitutional Development of the New China from the Perspective of Constituent Power* (cong zhixianquan jiaodu toudi xin zhongguo xianfa de fazhan), in: *zhongwai faxue* (中外法学), No. 3, 2014, pp. 619, 626, 634; id., *Epochal Thesis on the Relationship between the Constitution and Politics – Interpretation and Comment on Chinese “Political Constitutional Theory”* (xianfa yu zhengzhi guanxi de shidai mingti – zhongguo “zhengzhi xianfa xue” de jiedu yu pingxi), in: *zhongguo falü pinglun* (中国法律评论), No. 1, 2016, pp. 124–127.

<sup>75</sup> *Zhengzhi de gainian*, translated by LIU Zongkun (刘宗坤), published by shanghai renmin chubanshe (上海人民出版社) in 2004. The translation was updated in 2016.

<sup>76</sup> *Xianfa xueshuo*, translated by LIU Feng (刘锋), published by shanghai renmin chubanshe (上海人民出版社) in 2005. The translation was updated in 2016.

<sup>77</sup> *Xianfa de shouhuzhe*, translated by LI Juntao (李君韬) and SU Huijie (苏慧婕), published by shangwu yinshu guan (商务印书馆) in 2008.

<sup>78</sup> *Lun faxue siwei de sanzong moshi*, translated by SU Huijie (苏慧婕), published by zhongguo fazhi chubanshe (中国法制出版社) in 2012.

<sup>79</sup> *Hefa xing yu zhengdang xing*, translated by FENG Keli (冯克利) and LI Qiuling (李秋零), published by shanghai renmin chubanshe (上海人民出版社) in 2014.

<sup>80</sup> *Zhengzhi de shenxue*, translated by LIU Zongkun (刘宗坤) and WU Zengding (吴增定), published by shanghai renmin chubanshe (上海人民出版社) in 2014.

<sup>81</sup> *Zhengzhi de langman pai*, translated by FENG Keli (冯克利) and LIU Feng (刘锋), published by shanghai renmin chubanshe (上海人民出版社) in 2016.

<sup>82</sup> *Lunduan yu gainian – zai yu weima, rineiwa, fanersai de douzhengzhong*, translated by ZHU Yanbing (朱雁冰), published by shanghai renmin chubanshe (上海人民出版社) in 2016.

<sup>83</sup> For example, in order to satisfy the great interest of Chinese constitutional scholars in Carl Schmitt, the German public law workshop of Prof. Dieter Grimm, which was held by the law school of Renmin University of China (*zhongguo renmin daxue*) in April 2017 in Beijing, was totally dedicated to Carl Schmitt. Concrete topics included: “The Weimar Republic as context of Schmitt’s theory – the dispute about legal science and methodology”; “Schmitt’s concept of constitution and constitutional law – constituent power and constitutional amendments”; “Constitutional adjudication (the Schmitt-Kelsen-debate) – constitutional law and emergency” and “Schmitt’s position on constitutional democracy – Liberalism, pluralism, parliament, political parties”. See <<http://www.calaw.cn/article/default.asp?id=12037>>, last visited on June 15, 2017.

<sup>84</sup> “Die Verfassung als Gesamt-Entscheidung über Art und Form der politischen Einheit”, see Carl Schmitt, *Verfassungslehre*, 5th ed., Duncker & Humblot 1993, pp. 20–21.

<sup>85</sup> The constitution as “der Gesamtzustand politischer Einheit and Ordnung”, see Carl Schmitt (supra note 84), p. 3.

<sup>86</sup> Carl Schmitt (supra note 84), p. 25.

<sup>87</sup> Carl Schmitt (supra note 84), p. 25.

stituent power will decide with complete political awareness.<sup>88</sup>

For the Weimar Constitution, the decision for democracy is a fundamental decision which the German People make by virtue of their conscious political existence as people (Volk). This decision finds its expression in the preamble (“das deutsche Volk hat sich diese Verfassung gegeben (the German People have given themselves this constitution)”).<sup>89</sup>

Through strongly arguing against the theory of Hans Kelsen, who “regards the state as a system and a unity of legal norms”<sup>90</sup> under the presumed logically necessary basic norm (*Grundnorm*) which consciously excludes the value- and fact dimension of the constitution,<sup>91</sup> Carl Schmitt renders the constitution preamble text, which is usually not deemed as containing positive and normative clauses and is accordingly deprived of normativity, back into the focus of constitutional study. Strengthening the decisive importance of the constitution preamble as expressing the political will of the people makes it possible to endow the constitution preamble with dispositive and legal character and finally some kind of binding force. It is exactly in the constitution preamble that the grand narrative of Carl Schmitt’s political constitutional theory obtains its textual support and embodiment. The constitution preamble and its functions of expressing the political will of a political unity, setting out fundamental values that have been chosen, and restating some (historical) facts are also taken as the basic methodological starting point of Chinese political constitutional theory. By shifting the focus of constitutional study from normative constitutional clauses (especially the basic rights clauses which are emphasized by normative constitutional theory) to the constitution preamble text, Chinese constitutional study achieves its paradigmatic transformation. The preamble of the 1982 Constitution contains 14 paragraphs which mainly describe and summarize the revolutionary history of the Chinese nation since the late Qing Dynasty (paragraphs 1–6), define the guiding thoughts and the fundamental tasks of the PRC (paragraph 7) and confirm other basic principles and strategies of the state (paragraphs 8–14). The most important content and underpinning of the preamble of the 1982 Constitution is, however, that it constitutionally stipulates and manifests the “leadership of the CCP (*zhongguo gongchandang lingdao*, 中国共

产党领导)” over the whole state and society.<sup>92</sup> Notwithstanding its constitutional confirmation, the principle of the leadership of the CCP has experienced no normative realization under normative constitutional theory because it is generally excluded from the scope of study of normative constitutional theory due to its origin in the preamble, and it has been deemed as a destructive element for a systematic, closed and pure dogmatic application of the constitution due to the superior status of the CCP over the legal system of the state. Thus, the enshrined principle of the leadership of the CCP has for a long time remained a bare reality or just an ideological impression. What Chinese political constitutional theory means to do is to theoretically revive the leadership of the CCP and to render the leadership of the CCP as a constitutional principle which can possess some kind of binding force. In an article that is generally deemed to have marked the beginning of Chinese political constitutional theory,<sup>93</sup> the author jointly analyses the preamble and the main normative body of the Chinese Constitution<sup>94</sup> and comes to the conclusion that there are five so-called “fundamental laws (*genben fa*, 根本法)” in the Chinese Constitution: “the Chinese People under the leadership of the CCP”; “socialism”; “democratic centralism”; “modernization” and “protection of basic rights”.<sup>95</sup> Among these, the leadership of the CCP over the people takes first place and is regarded as “the first fundamental law (*diyi genben fa*, 第一根本法)”, whereas the protection of basic rights, which is the core of normative constitutional theory, takes the last place as the “fifth fundamental law”. Unlike “the political” in Carl Schmitt’s theory, which means “the existence of a political nation which forms itself into a state”,<sup>96</sup> in the Chinese context what “the political” means is that the Chinese people have obtained the independence and sovereignty of the state and accomplished national power and strength under the leadership of the CCP. The political existence of the Chinese nation is achieved solely under the leadership of the CCP. The leadership of the CCP is thus,

<sup>92</sup> The preamble of the 1982 Constitution refers to the leadership of the CCP a total of five times, which confirms the absolute dominant status of the CCP in the Chinese revolution and in building a modern, strong China. See paragraphs 5, 7, 10 of the preamble of the 1982 Constitution.

<sup>93</sup> CHEN Duanhong (陈端洪), On the Constitution as Fundamental Law and High-Ranking Law of the State (*lun xianfa zuowei guojia de genbenfa he gaoji fa*), in: *zhongwai faxue* (中外法学), No. 4, 2008, pp. 485–511.

<sup>94</sup> CHEN Duanhong (陈端洪) (*supra* note 93), p. 494. Similarly, another constitutional scholar argues that “although the status [...] of the CCP is not provided in the main body of the Chinese Constitution, it is confirmed in the preamble in the form of principle. [...] The formulations (regarding the CCP) in the preamble, confirm the leadership status of the CCP over the Chinese nation in the form of fundamental law.” YU Zhong (喻中), Seven Theoretical Models Contained in the Chinese Constitution (*zhongguo xianfa yunhan de qige lilun moshi*), in: *zhejiang shehui kexue* (浙江社会科学), No. 8, 2009, p. 31.

<sup>95</sup> CHEN Duanhong (陈端洪), On the Constitution as Fundamental Law and High-Ranking Law of the State (*lun xianfa zuowei guojia de genbenfa he gaoji fa*), in: *zhongwai faxue*, No. 4, 2008, p. 485.

<sup>96</sup> Ernst Rudolf Huber, *Wesen und Inhalt der politischen Verfassung*, Hanseatische Verlagsanstalt, 1935, p. 39.

<sup>88</sup> Carl Schmitt (*supra* note 84), p. 25.

<sup>89</sup> Carl Schmitt (*supra* note 84), p. 23.

<sup>90</sup> Carl Schmitt (*supra* note 84), p. 9. As Ernst Rudolf Huber summarizes: “In the political constitutional conception (*dem politischen Verfassungsbegriff*), the constitution is no longer regarded as a system of abstract categories; rather, it is understood as the basic order of the people’s unity and entirety.” Ernst Rudolf Huber, *Wesen und Inhalt der politischen Verfassung*, Hanseatische Verlagsanstalt, 1935, p. 6.

<sup>91</sup> Ernst Rudolf Huber, *Wesen und Inhalt der politischen Verfassung*, Hanseatische Verlagsanstalt, 1935, p. 21.

ahead of all other constitutional values and objectives, to be confirmed as the first fundamental law of the Chinese Constitution, as the “constitution is the basic norm for political existence (die Verfassung ist die Grundnorm für das politische Sein).”<sup>97</sup> Acknowledging and justifying the leadership of the CCP as the first fundamental law builds the core connotation and aim of Chinese political constitutional theory, whereas it remains unclarified how the “first fundamental law” can be legally coordinated with the “fifth fundamental law (protection of basic rights)”.

### 3.3 Realistic and historicist treatment of the constitution

Carl Schmitt’s constitutional theory is methodologically characterized by his realistic treatment of the constitution. This is mainly based on his critiques on the “bürgerlicher Rechtsstaat (civil rule of law state)” conception under the liberalism of the 19th century and on the legal positivist theory which has Hans Kelsen as one of its main representatives. Regarding the problem of “souverän (sovereignty)” under the civil rule of law state, he argued:

*The formulation that, not people, but norms and laws rule and, in this sense, are ‘sovereign’, is very old. For modern constitutional theory, the following historical development should be taken into account: In the period of the monarchical restoration in France and under the July Monarchy (from 1815 to 1848), the representatives of civil liberalism, the so-called ‘doctrinaire’, especially described the constitution as ‘sovereign’. The strange personification of a written law (Personifizierung eines geschriebenen Gesetzes) had the significance of raising law with its guarantees of civil freedom and private property over all the political powers. In this way, the original question, whether the rulers or the people are sovereign, was avoided; the answer was just simple: Neither the rulers nor the people but rather, ‘the constitution’ is sovereign. This is the typical answer of the liberals adhering to the civil rule of law state [...].*<sup>98</sup>

Further, he pointed out:

*In its great epoch during the 17th and 18th centuries, the bourgeoisie mustered the strength to establish an effective system, namely the individualistic law of reason and of nature, and formed norms valid in themselves out of concepts such as private property and personal freedom, which should be valid prior to and above every political being, because they are correct and reasonable and, consequently, can contain a genuine ought (Sollen) without regard to the actually existing (seinsmäßig), namely, positive-legal reality. That*

*was a logically consistent normative order. Man was able to speak of system, order and unity.*<sup>99</sup>

The legal positivist standpoint of Hans Kelsen that tried to ground the force of legal norms in the “Grundnorm” was denounced by Schmitt as “tautology”.<sup>100</sup> By criticizing the deification and personification of the constitution and its abstract norms formulated by logically and sophisticatedly combined legal conceptions, what Carl Schmitt meant to do was reveal the reality which is consciously hidden in the reasonably constructed legal (constitutional) norms and concealed by the enshrined principles (or value presumptions) of “personal freedom” and “private property”. For him, the reality behind the abstract norms was, as demonstrated above, “political powers” and the “political being”. The definition of the constitution as a formulation of the political being has two-fold significance:

On the one hand, it takes the real relationships and situations of political power in their concrete operations into the account of constitutional study, it overturns the simplification of power relationships into pure legal relationships, it stops the attempt to reduce dynamic vivid and wide-ranging political operation into static, rigid and narrow legal normative reasoning and, finally, it reconstructs the relation between “the political” and “the legal”. As Carl Schmitt pointed out:

*In reality, the Rechtsstaat, notwithstanding all its legality and normativity (Rechtlichkeit und Normativität), remains a state and contains, as a result, besides the special part of the Rechtsstaat, still another special political part. [...] Therefore, there is no constitution which was completely a system of legal norms protecting individuals from the state. The political cannot be separated from the state – the political unity of a nation [...]. What contained in the Rechtsstaat is just a segment of every modern constitution.*<sup>101</sup>

On the other hand, it changes the legitimacy and basis (for the force) of the constitution by subverting the arguments of Hans Kelsen’s theory, which finds the legitimacy and force of the constitution in the logical consistency of a hierarchical order under the Grundnorm. Carl Schmitt argued:

*A constitution is legitimate, that means, not only as a factual status, but also as a lawful order, when the power and authority of the constitution-making power, on whose decision it rests, is acknowledged. The political decision made regarding the sort and*

<sup>99</sup> Carl Schmitt (supra note 98), pp. 8–9.

<sup>100</sup> Carl Schmitt (supra note 98), p. 9.

<sup>101</sup> Carl Schmitt (supra note 98), p. 125. Similarly, Ernst Rudolf Huber argued: “It is forgotten that the written conformation can never grasp the whole political order; rather, it can only grasp a limited clipping of the whole political order. Even in the place where a basic state law or a set of such basic laws is formulated, the constitution does not exhaust itself in them. Ernst Rudolf Huber, *Wesen und Inhalt der politischen Verfassung*, Hanseatische Verlagsanstalt, 1935, pp. 8–9.

<sup>97</sup> Ernst Rudolf Huber (supra note 96), p. 20.

<sup>98</sup> Carl Schmitt, *Verfassungslehre*, 5th ed., Duncker & Humblot 1993, pp. 7–8.

*form of state existence, which constitutes the substance of the constitution, is valid, because the political unity whose constitution is concerned exists, and the subject of the constitution-making power can decide the sort and form of this existence. The decision demands no justification via an ethical or a juristic norm. Instead, it makes sense in terms of political existence. A norm would not be able to justify anything here at all. The special type of political existence need not and cannot legitimate itself.*<sup>102</sup>

That the political being (of the people) is just a concrete and timely symbiotic existence defines the realistic constitution of Carl Schmitt as also a historicist one.<sup>103</sup> Thus, the historical sort and form of such an existence is *inter alia* considered in explaining the essence and force of the constitution, and it was used to justify the political being even in an abnormal stage like in the Nazi-regime.<sup>104</sup> Further, the historicist treatment of constitutions was also used to argue against the generalized treatment of constitutions in legal positivist theory and, in turn, to intensify the realistic treatment of constitutions: “Every existing political unity has its value and its ‘existence right (Existenzberechtigung)’ not in the correctness and usability of the norms, but in its existence.”<sup>105</sup>

The historicist and realistic treatment of constitutions delivers Chinese political constitutional scholars an easily used tool to justify the revolutionary history led by the CCP as well as the current political reality under the rule of the CCP. In turn, the revolutionary leadership and the current leadership status of the CCP opens up the space for a non-normative interpretation of the Chinese Constitution. Further, when the constitution, regardless of its concrete normative norms, is a bare expression of historical and current reality, it is also unproblematic to convert the reality of the CCP’s leadership in the revolutionary epoch into a basis of legitimacy for its current rule.

In Chinese political constitutional theory, it is generally argued: “If one cannot understand the history of existence, revolution, state founding, [and] constitution making [...] in modern China, one cannot understand the theoretical background of Chinese political consti-

tutionalism [...] either.”<sup>106</sup> Confronted with the pressure of political reform since the Reform and Opening Policy, the political reality which was previously based upon a narrative of the revolutionary experiences and accomplishments of the CCP was then skillfully transformed into a reformatory and transitional reality as regards an “exceptional or extraordinary moment (*liwai huo feichang shike*, 例外或非常时刻);<sup>107</sup> accordingly, the Chinese Constitution has been categorized as a so-called “reform constitution” (*gaige xianfa*, 改革宪法),<sup>108</sup> which is, to some extent, deprived of normativity and should tolerate the so-called “benign constitutional violations (*liangxing weixian*, 良性违宪)” caused by the reform measures taken by the CCP.<sup>109</sup> More radically, the constitution is thus defined as “the true rules for political operation”, and it is argued that “how political practices work in a state shapes fundamentally also its constitutional situation. [...] Chinese constitu-

<sup>106</sup> GAO Quanxi (高全喜), Political Constitutional Theory: A theory on Political Constitution or Political Constitutionalism? (zhengzhi xianfaxue: zhengzhi xianfa lilun, yihuo zhengzhi lixian zhuyi?), in: qinghua daxue xuebao (zhexue shehui kexue ban) (清华大学学报(哲学社会科学版)), No. 5, 2015, p. 34.

<sup>107</sup> See GAO Quanxi (高全喜), Revolution, Reform and Constitutional System: The “1982 Constitution” and its Evolutionary Logic (geming, gaige he xianzhi: “ba’er xianfa” jiqi yanjin luoji – An Interpretation of Political Constitutional Theory), in: zhongwai faxue (中外法学), No. 5, 2002, pp. 915, 916; ZHENG Lei (郑磊), In What a Period We Are? – A Concise Analysis of the Fundamental Discrepancies between Normative and Political Constitutional Theory (women chuyi shenme shidai – jianxi guifan xianfaxue yu zhengzhi xianfaxue zhi genben fenqi), in: suzhou daxue xuebao (苏州大学学报), No. 3, 2011, p. 86.

<sup>108</sup> See editorial of zhongwai faxue, Evaluation on the Development of Chinese Constitutional Jurisprudence (2010–2011) – An Analysis based on Journal Articles (zhongguo xianfaxue fazhan pingjia (2010–2011) – jiyu qikan lunwen de fenxi), in: zhongwai faxue (中外法学), No. 4, 2013, pp. 667–668.

<sup>109</sup> The so-called “benign constitutional violation” is a theory which was developed at the end of the 1990s and aimed to explain the phenomena of divergence between the written constitutional norms and the reality of their non-enforcement in practice. The 1990s were characterized with the introduction of considerable reform measures of the CCP. Many of the reform measure were, however, inconsistent with the existing constitutional norms. For example, Art. 15 of the 1982 Constitution prescribed the planned economy as the basic economic system of China; nevertheless, the CCP began already at the beginning of the 1990s to advocate and practise the “socialist market economy” prior to the relevant constitutional amendment in 1993. The theory of “benign constitutional violations” justifies, thus, the priority of the factual political leadership conduct of CCP over the written constitution and “sets political standards for the constitution”. For relevant discussions, see HAO Tiechuan (郝铁川), On “Benign Constitutional Violations” (lun liangxing weixian), in: faxue yanjiu (法学研究), No. 4, 1996, pp. 89–90; id., Soft Resistance – Several Explanations of “Benign Constitutional Violations” (wenrou de dikang – guanyu “liangxing weixian” de jidian shuoming), in: faxue, No. 5, 1997, p. 18; XI Zhong (曦中), Some Reflections on “benign constitutional violations” (dui “liangxing weixian” de fansi), in: faxue pinglun (法学评论), No. 4, 1998, p. 27; TONG Zhiwei (童之伟), Doubts on “Benign Constitutional Violations” (“liangxing weixian” buyi kending), in: faxue yanjiu (法学研究), No. 6, 1996, pp. 19–22; LI Zhongxia (李忠夏), Epochal Thesis on the Relationship between the Constitution and Politics – Interpretation and Comment on Chinese “Political Constitutional Theory” (xianfa yu zhengzhi guanxi de shidai mingti – zhongguo “zhengzhi xianfa xue” de jiedu yu pingxi), in: zhongguo falü pinglun (中国法律评论), No. 1, 2016, p. 119; id., Methodological Reflections on Chinese Constitutional Jurisprudence (zhongguo xianfa xue fangfa lun fansi), in: faxue yanjiu (法学研究), No. 2, 2011, p. 165.

<sup>102</sup> Carl Schmitt, *Verfassungslehre*, 5th ed, Duncker & Humblot 1993, p. 87.

<sup>103</sup> Ernst-Wolfgang Böckenförde, Was kennzeichnet das Politische und was ist sein Grund? – Bemerkungen zu einer Kommentierung von Carl Schmitts “Begriff des Politischen”, in: *Der Staat*, Vol. 44, No. 4 (2005), pp. 597, 598.

<sup>104</sup> More clearly, Ernst Rudolf Huber pointed out: “The people’s constitution is rooted in the sort and idea of the people, which alone promote the social existence to political order. It is only from the combination with these historical principles that the concrete political act obtains the power for arranging the constitution (verfassungsgestaltende Kraft). Only the historical ground in which the political decision is rooted and the historical value which the political decision is realized give the political decision the capacity to build state unity and order.” Ernst Rudolf Huber, *Wesen und Inhalt der politischen Verfassung*, Hanseatische Verlagsanstalt, 1935, p. 41.

<sup>105</sup> Carl Schmitt, *Verfassungslehre*, 5th ed., Duncker & Humblot 1993, p. 22.

tional study should concentrate on the real political processes, practices and situations in current China.”<sup>110</sup> Methodologically, the consciousness of the “Chinese problem” becomes the most obvious feature of political constitutional theory. The often-used explanatory conceptions are, for example, “China’s (peculiar) political nature (*zhongguo de (teshu) zhengzhi leixing*, 中国的(特殊)政治类型)”, “China’s reality (*zhongguo shiji*, 中国实际)”, “China’s transformational and reformatory politics (*zhongguo zhuanxing he gaige zhengzhi*, 中国转型和改革政治)”, “the true problem of China (*zhongguo de zhenshi wenti*, 中国的真实问题)”, and “the true Chinese constitutional system (*zhenshi de zhongguo xianzhi*, 真实的中国宪制)”.<sup>111</sup> The historicist and realistic treatment of the Chinese Constitution results in the representative conclusion of Chinese political constitutional theory: “Seen historically and in its entirety, the fundamental Chinese law is a law of existence which highly advocates the currently existing political will, whereas it has no demands for comprehensive, strong normative enforcement.”<sup>112</sup> Moreover, by emphasizing the historicist and realist nature of the Chinese Constitution based on the special political reality of China, Chinese political constitutional theory bears the task of, or more accurately, caters to the demand in recent years for de-westernization and anti-universalism.<sup>113</sup>

### 3.4 Constituent power

Based on the historicist and realistic treatment of constitutions, Carl Schmitt developed his decisionist standpoint on constitutions without any difficulties. When a constitution is regarded as the formulation of a political being, especially in the name of the people, it is also unproblematic to convert a constitution into the expression and decision of the will of the people. The constituent power as the power to bear out the will of the people thus acquires a core-significance in Carl Schmitt’s theory. He defines the constituent power (*verfassungsgebende Gewalt*) as

*the political will, whose power and authority is able to reach a concrete total decision on the sort and form of one’s own political existence, namely to*

<sup>110</sup> YU Zhong (喻中), Seven Theoretical Models Contained in the Chinese Constitution (*zhongguo xianfa yunhan de qige lilun moshi*), in: *zhejiang shehui kexue* (浙江社会科学), No. 8, 2009, pp. 30, 30–31.

<sup>111</sup> For more detailed discussion, see ZHANG Xiaodan, Rule of Law Within the Chinese Party-state and Its Recent Tendencies, in: *Hague Journal on the Rule of Law*, Vol. 2, 2017, p. 395.

<sup>112</sup> CHEN Duanhong (陈端洪), On the Constitution as Fundamental Law and High-Ranking Law of the State (*lun xianfa zuwei guojia de genbenfa he gaoji fa*), in: *zhongwai faxue* (中外法学), No. 4, 2008, p. 485.

<sup>113</sup> “Chinese political constitutional theory is opposed to examining the Chinese Constitution, including its text and enforcement, from the perspective of western standards. It is also opposed to simply copying and transplanting western conceptions and theories while interpreting the Chinese Constitution.” LI Zhongxia (李忠夏), Epochal Thesis on the Relationship between the Constitution and Politics – Interpretation and Comment on Chinese “Political Constitutional Theory” (*xianfa yu zhengzhi guanxi de shidai mingti – zhongguo “zhengzhi xianfa xue” de jiedu yu pingxi*), in: *zhongguo falü pinglun* (中国法律评论), No. 1, 2016, p. 119.

*determine the existence of the political unity completely.*<sup>114</sup>

And from this definition, he concludes that constituent power has a superior status over existing constitutional laws (*Verfassungsgesetze*):

*The validity of every other norm of constitutional laws derives from the decisions of this will. The decisions distinguish themselves qualitatively from the stipulations of the constitutional laws which are made on the basis of the former.*<sup>115</sup>

*A constitutional law is, according to its content, the enforcing stipulation (die ausführende Normierung) of the constitution-making will. [...] A constitution is not based on a norm whose correctness was the reason for its validity.*<sup>116</sup>

What is the most influential point of view affecting the Chinese political constitutional theory, however, is his belief in the his “constant existence (permanence) of the constituent power (*ständiges Vorhandensein* (Permanenz) *der verfassungsgebenden Gewalt*)”. He argued:

*The constituent power is not exhausted and eliminated due to the fact that it was once exercised. The political decision means the constitution cannot react against its subject and cannot abolish the political existence of this subject. The will remains existent alongside and over the constitution. Thus, every real constitutional conflict which concerns the bases of the total decision can be determined only by the will of constituent power; every loophole in the constitution – different from the vagueness of and individual opinion disagreements on constitutional text – will also be filled only by an act of constituent power; every unforeseen case whose decision concerns the fundamental political decision will be determined by constituent power.*<sup>117</sup>

*The constituent power cannot be transferred, divested, absorbed or consumed. It remains, as far as possible, always existing and stands alongside and over every constitution which is deduced from it and every stipulation of constitutional law which is valid in the framework of this constitution.*<sup>118</sup>

As pointed out above, the most intractable problem which Chinese constitutional study is faced with is the dualism of Party and state, with the former having absolute control over the latter. In practice, the

<sup>114</sup> Carl Schmitt, *Verfassungslehre*, 5th ed., Duncker & Humblot 1993, pp. 75–76.

<sup>115</sup> Carl Schmitt (supra note 114), p. 76.

<sup>116</sup> Carl Schmitt (supra note 114), p. 77.

<sup>117</sup> Carl Schmitt (supra note 114), p. 77.

<sup>118</sup> Carl Schmitt (supra note 114), p. 91.



political leadership behaviour of the CCP is not necessarily consistent with the written constitutional norms of the state. This problem cannot, however, be resolved by a normative interpretation of the constitution which demands the general and highest binding force of the constitution, also regarding the ruling behaviour of the CCP. To the contrary, regarding the constitution as merely a manifestation of constituent power and, further, recognizing the constant existence being (permanence) of this constituent power offer an ideal method for resolving the dilemma between Chinese constitutional study and reality.

Further, it bears noting that unlike Carl Schmitt's conception of constituent power which grounds the "permanence of constituent power" in the permanence of the abstract people,<sup>119</sup> Chinese political constitutional theory, guilefully and more radically, equates the permanence of the people with the permanence of a concrete political party – the CCP – and it acknowledges the "CCP as the constantly existing representative of constituent power (*zhongguo gongchandang shi zhixianquan de changzai daibiao*, 中国共产党是制宪权的常在代表)".<sup>120</sup> Simultaneously, the theory (consciously) declines to legally clarify the relationship between the CCP and the people, instead just recognizing the given reality of the absolute leadership status of the CCP in history and at present.<sup>121</sup> Based on Carl Schmitt's theory, in Chinese political constitutional theory it is argued that:

*The Chinese Constitution itself is just the claim of the Party and the expression of the will of the Party in the form of law.*<sup>122</sup>

*The characteristic of the real constitutional system of China is that the representative of constituent power constantly exists and co-exists with and is above constituted powers. [...] The error of normative constitutional theory lies in the fact that it tries to evaluate and bind the behaviour of the representative of constituent power. [...] The representative of constituent power [...] is naturally not bound by the constitution.*<sup>123</sup>

Moreover, the "advantages of the constant existence of constituent power" are also advocated:

*The constant existence of the representative organ of constituent power has three advantages: Firstly,*

*it can concentrate the constituent power, perceive and absorb the creativity of society through a constant organ, prompt society to make institutional innovations, prevent the creativity of society from becoming an opposite political force and maintain the authority of the ruling Party; secondly, it can flexibly respond to society [...] and thirdly, it is consistent with the experimental spirit of reform.*<sup>124</sup>

The view of the constantly existing entity of constituent power establishes and justifies also Carl Schmitt's significant conceptual pairing of the "constitution (*Verfassung*)" and "constitutional laws (*Verfassungsgesetze*)". Essentially, the "*Verfassung*" is equal to constituent power, because, in Carl Schmitt's usage, both of them are absolute and "inviolable (*unantastbar*)" and cannot be dissolved into masses of individual "*Verfassungsgesetze*",<sup>125</sup> whereas "*Verfassungsgesetze*" are relative and "can in an 'emergency situation (*Ausnahmезustand*)' be suspended and breached by emergency measures."<sup>126</sup> In Chinese political constitutional theory, this conceptual pairing is remodelled into the conceptual pairing of the "policy of the CCP" and the "written constitution", which endows the policy of the CCP with an absolute status which can change and amend the written constitution. It is argued that:

*When the written constitution seriously conflicts with the situation of the state (*guoqing*, 国情), the ruling party (the CCP) exercises its power as the representative organ of constituent power and has full decision-making power the existence of the nation in the form of issuing policies (*yi fabu zhengce de xingshi*, 以发布政策的形式).<sup>127</sup>*

### 3.5 The institutional embodiment and realization of Chinese political constitutional theory

Chinese political constitutional theory absorbs and transforms Carl Schmitt's theory, consciously caters to the political and legal reality of the Party-state, and renders the justification of the rule of the CCP and the Party-state into reality – unlike through bare political and ideological propaganda, it is more constructive and legally more tenable. Thus, Chinese political constitutional theory, notwithstanding its short history in overall Chinese constitutional history, has obtained a wide-ranging institutional embodiment and realization. First of all, it generally challenges the more recently confirmed "socialist rule of law state" in the current Constitution of China. As analysed in part 2.3, although the conception of the "socialist rule of law state" is not completely identical with the western conception of "rule of law", it shares some basic common points with the latter, particularly: respecting

<sup>119</sup> On Carl Schmitt's idea of a "völkische Verfassung (people's constitution)", see Ernst Rudolf Huber, *Wesen und Inhalt der politischen Verfassung*, Hanseatische Verlagsanstalt, 1935, pp. 39, 44, 47, 51.

<sup>120</sup> CHEN Duanhong (陈端洪), *The Knowledge Boundary Monument of Constitutional Study – The Dialogue on Constituent Power between Scholars of Politics and Scholars of Constitutional Jurisprudence (xianfaxue de zhishi jiebei – zhengzhi xuezhe yu xianfa xuezhe guanyu zhixianquan de duihua)*, in: *kaifang shidai (开放时代)*, No. 3, 2010, p. 97.

<sup>121</sup> CHEN Duanhong (陈端洪) (supra note 120), p. 96.

<sup>122</sup> YU Zhong (喻中), *Seven Theoretical Models Contained in the Chinese Constitution (zhongguo xianfa yunhan de qige lilun moshi)*, in: *zhejiang shehui kexue (浙江社会科学)*, No. 8, 2009, p. 31.

<sup>123</sup> CHEN Duanhong (陈端洪) (supra note 120), p. 95.

<sup>124</sup> CHEN Duanhong (陈端洪) (supra note 120), p. 96.

<sup>125</sup> Carl Schmitt (supra note 114), pp. 20–21.

<sup>126</sup> Carl Schmitt (supra note 114), pp. 26–27.

<sup>127</sup> CHEN Duanhong (陈端洪) (supra note 120), p. 96.

the authority of the text of the written constitution, appreciating the interpretative approaches and methods of the constitutional text, emphasizing the protection of basic rights, and finally demanding the complete binding force and the whole enforcement of the constitution. Political constitutional theory denies, however, these core connotations of the socialist rule of law state by generally depriving the Chinese constitutional text of normativity; as a result, also deconstructed is the previously and arduously established (functional) separation between Party and state as the pre-condition of “socialist rule of law state”. In this context, the significant appeal of Chinese normative constitutional theory as being capable of establishing a mechanism of constitutional review has thus had no chance of realizing an institutional breakthrough in recent years. Even certain supplementary measures for strengthening constitutional enforcement have also been stagnating for a long time.<sup>128</sup> Concerning constitutional review, political constitutional theory argues that: “The Chinese ruling party is [...] the constant representative of constituent power. Thus, it cannot be included into the objects of constitutional review. Rather, we can take this special institute into account and use it, and let the CCP exercise some power of constitutional review.”<sup>129</sup> Secondly, the degradation of the normativity of the constitution and the (over-)emphasis on the legal interpretation of the reality of the CCP rule create another source of normativity and has in recent years resulted in a boom of intra-party legislation in the name of “intra-party rule of law (*dangnei fazhi*, 党内法治)” whose purpose is to establish an intra-party regulation system (*dangnei fagui tixi*, 党内法规体系) outside, or more accurately, over the state’s constitution and legal system.<sup>130</sup> “Since 2013, several intra-Party laws have been promulgated in order to realize the intra-

Party rule of law, the most important of which are the ‘Regulation of the CCP concerning the formulation of intra-Party regulations’ and the ‘rules of the CCP concerning filing of intra-Party regulations and normative documents’. Both together are named as the ‘intra-Party legislation law’; like the state Legislation Law, they aim at the formalization of the intra-Party legislation by defining the legislative competences of Party-organs and normalizing the procedures of drafting, approving, publishing, amending and abolishing of party regulations.”<sup>131</sup> Since 2015, more substantial intra-Party regulations have also been formulated.<sup>132</sup> “The large-scale intra-Party legislation has shaped a supra-state normative system which demands direct binding forces against its objects, however, [...] its relationship to the state legal system remains unanswered.”<sup>133</sup>

#### 4. Conclusion

The emergence and boom of Chinese political constitutional theory in recent years generally derives from the need to change the narrative style for the justification of the rule of the CCP. Compared with the previous – and simple – political and ideological reiteration and propaganda based on Marxism and Leninism as well as the guiding thoughts of the CCP leaders, today’s Chinese political constitutional theory intends to offer a more theoretical and more legally constructive approach. The Chinese political constitutional school grounds its theory mainly in the constitutional theory of Carl Schmitt. His principal theoretical points, especially his emphasis on the study of the constitutional preamble and his realistic and historicist treatment of the constitution and constituent power have been absorbed by Chinese political constitutional theory and reconstructed to adapt to the Party-state reality.

Chinese political constitutional theory employs the “reality of China” to legitimate Chinese political reality, while consciously neglecting that the Chinese

<sup>128</sup> For a number of years, there have been constitutional scholars asserting that while comprehensive constitutional review is not realistic in the current political and legal reality in China, some supplementary measures could be taken: firstly, for example, to enact a “procedural law of constitutional interpretation (*xianfa jieshi chengxu fa*, 宪法解释程序法)” which can contribute to the application of the constitution. However, this eclectic proposal has similarly remained only in theoretical discussions up to now. See HAN Dayuan (韩大元), Meaning, Thought and Framework of the “Procedural Law of Constitutional Interpretation” (“*xianfa jieshi chengxufa*” de yiyi, silu he kuangjia), in: *zhejiang shehui kexue* (浙江社会科学), No. 9, 2009, pp. 15–22; id., On the Value of an Interpreting Procedure for the Current Constitution (*lun dangdai xianfa jieshi chengxu de jiazhi*), in: *jilin daxue shehui kexue xuebao* (吉林大学社会科学学报), No. 4, 2017, pp. 20–30; QIN Qianhong (秦前红), The Idea of Enacting a “Procedural Law of Constitutional Interpretation” and Studies on Some Relevant Problems (“*xianfa jieshi chengxufa*” de zhiding silu he ruogan wenti tanjiu), in: *zhongguo gaoxiao shehui kexue* (中国高校社会科学), No. 3, 2015, pp. 24–38.

<sup>129</sup> CHEN Duanhong (陈端洪) (supra note 120), p. 96; id., Constituent Power and Fundamental Law (*zhixian quan yu genben fa*), *zhongguo fazhi chubanshe* (中国法制出版社), pp. 331–332. See also Albert H. Y. Chen, The Discourse of Political Constitutionalism in Contemporary China: Gao Quanxi’s Studies on China’s Political Constitution, in: *China Review*, Vol. 14, No. 2, Special Issue: Doing Sinology in Former Socialist States (Fall 2014), p. 191.

<sup>130</sup> As summarized: “Political constitutional theory creates a theoretical model of ‘Party over constitution (*dang zai fa shang*, 党在法上)”. YE Haibo (叶海波), The Theoretical Trajectory and Basic Consensus of Methodological Debates of Constitutional Jurisprudence in

Our Country (*woguo xianfaxue fangfa lunzheng de lilun mailuo yu jiben gongshi*), in: *qinghua faxue* (清华法学), No. 3, 2013, p. 74.

<sup>131</sup> ZHANG Xiaodan, Rule of Law Within the Chinese Party-state and Its Recent Tendencies, in: *Hague Journal on the Rule of Law*, Vol. 2, 2017, pp. 392–393.

<sup>132</sup> For instance, the CCP temporary regulation on Party organization work (*zhongguo gongchandang dangzu gongzuo tiaoli* (shixing), passed on June 11, 2015); the CCP regulation on inspection work (*zhongguo gongchandang xunshi gongzuo tiaoli*, passed on August 3, 2015); the CCP norms on probity and self-discipline (*zhongguo gongchandang lianjie zilü* zhunze, passed on October 12, 2015); the CCP regulation on local Party committee work (*zhongguo gongchandang difang weiyuanhui gongzuo tiaoli*, passed on December 25, 2015); the CCP regulation on selecting and appointing cadres of the Party and the government (*zhongguo gongchandang dangzheng ganbu xuanba renyong tiaoli*, passed on October 28, 2015); the CCP regulation on disciplinary punishments (*zhongguo gongchandang jilu* chufeng tiaoli, passed on January 1, 2016); the CCP regulation on accountability (*zhongguo gongchandang wenze tiaoli*, passed on July 7, 2016); the CCP regulation on intra-Party supervision (*zhongguo gongchandang dangnei jiandu tiaoli*, passed on October 27, 2016).

<sup>133</sup> ZHANG Xiaodan, Rule of Law Within the Chinese Party-state and Its Recent Tendencies, in: *Hague Journal on the Rule of Law*, Vol. 2, 2017, p. 393.

political reality is a main component of the “reality of China.” The seemingly constructive Chinese political constitutional theory is thus a bare tautology. By catering to the political will of the ruling party, Chinese political constitutional scholars absolve themselves of their burden as constitutional scholars, as – unlike in normative constitutional theory – their study rarely encroaches on political sensitivities or politically forbidden areas. Further, by degrading the text of constitution and depriving it of normativity, Chinese political constitutional theory becomes constitutional study without a constitution; it hollows out the core connotations of the “socialist rule of law state”, impedes the enforcement of the constitution and finally achieves the euthanasia of the existing Chinese Constitution.

\* \* \*

### ***Carl Schmitt in China: Warum wird er gebraucht und wie wird er verstanden?***

*Gegen Ende des ersten Jahrzehnts des 21. Jahrhunderts erlebt Carl Schmitts Verfassungstheorie in der Volksrepublik China eine unerwartete Renaissance und trägt ganz wesentlich zum Aufkommen und zur Blüte der chinesischen politischen Verfassungstheorie bei. Im Wege einer präzisen Beschreibung der Verfassungsgeschichte der Volksrepublik China untersucht dieser Beitrag zunächst den Hintergrund dieser Entwicklung und geht der Frage nach aus welchem Grunde Schmitts Verfassungstheorien in China von Nutzen sind. Der Beitrag analysiert sodann die Hauptpunkte seiner Theorie, welche ausgewählt und angepasst zur Erklärung und Rechtfertigung der Wirklichkeit des Parteistaates dienen. Der Beitrag schließt mit der Erkenntnis, dass die chinesische politische Verfassungstheorie durch die Herabsetzung und Vorenthaltung der Normativität, wie sie in der heutigen chinesischen Verfassung zu finden ist, die Kernassoziationen des gerade erst ins Werk gesetzten „sozialistischen Rechtsstaates“ aushöhlt, die Durchsetzung der Verfassung behindert und diese letztlich einschläfert.*