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From the Third Cooperation to the Third Republic

A Centennial Anticipation

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

1.1 INTRODUCTION: ANTICIPATING A THIRD COOPERATION

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

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

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

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

1.1 Introduction: Anticipating a Third Cooperation

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

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

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

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

1.2 FAREWELL TO REVOLUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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