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Why China finds it difficult to appreciate democracy

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Abstract: This article explores the Chinese cognition of democracy in accordance with ancient Chinese political philosophy and modern constitutional jurisprudence. It argues that the classical Chinese cognition of democracy, i.e., demo-orientation, does not consist of any sense of equality and procedure, by which the Chinese people easily confuse democracy by the people with democracy for the people, thinking that China's democracy subsists when the Chinese Government decides in favour of their interests. Moreover, the lack of sense of procedure produces inadequate means against tyranny, that the Chinese people can either admonish the ruler when he or she is still tolerable, or rebel when he or she is unbearable. Neither means serves institutionally.

Keywords: Chinese characteristics; Confucianism; democracy; equality; procedure

I. Introduction

'Chinese characteristics' has become a term commonly used in various fields, especially when China cannot reject a Western value nominally, e.g., democracy, but resists the value substantively. For example, Zheng Yong-Nian asserted in 1999 that 'China needs democratization, but this does not mean that China should follow any single Western model for

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political democracy',[1] which implies that he saw China disagree with the definition of democracy in the West, but cannot deny the spirit of democracy the entire world is pursuing. Before the communist took the helm in 1949, Mao Zedong forcefully asserted on 12 June 1944 that the Chinese people needed electoral democracy with freedom of speech, publication and association because China's greatest defect lay in the lack of genuine democracy;[2] and the editorial of the Xinhua Daily on 17 May 1944 held that 'democracy was firstly developed in a specific country *per se*, but it is universal and can be applied in any country'.[3] It is therefore puzzling[4] what should be understood by the Chinese people as democracy in the context of Chinese political culture. This article aims to answer this question from the perspective of legal and political philosophy.

We all know that China is often described as a country with a 5000-year-old civilisation.[5] It has developed an independent philosophy supporting its political system,[6] though the system is indeed autocratic.[7] However, the ancient Chinese thinkers, including Confucius, Mencius and Xunzi, had constructed a theory of good governance, persuading the Chinese rulers into making decisions *for* the people.[8] But why has China remained autocratic? In other words, why has the Confucian philosophy of demo-orientation (*Min-Ben*) failed?

We disagree with opinions supporting Confucianism as an anti-democracy philosophy,[9] but we affirm that it lacks two major democratic

[1] Y Zheng, *Discovering Chinese Nationalism in China: Modernization, Identity, and International Relations* (Cambridge University Press, Hong Kong, 1999) 65.

[2] S Xiao, *Li Shi De Xian Sheng: Ban Ge Shi Ji Qian De Zhuang Yan Cheng Nuo: Xin Hua Ri Bao, Ren Min Ri Bao She Lun Xuan [The Herald in History: The Solemn Oaths of the Communists in 50 Years Ago: The Selected Editorials of Xinhua Daily and Jiefang Daily]* (Shantou University Press, Shantou, 1999) 3–5.

[3] (n 2) 73 (authors' translation).

[4] Mao certainly is not an ordinary Chinese person in terms of either political sophistication or political sensitivity, which makes our puzzle even more puzzling: why could the Chinese people not do anything when he turned against democracy?

[5] See generally O Siew-Chey, *China Condensed: 5000 Years of History and Culture* (Marshall Cavendish, Singapore, 2005) 1–108.

[6] See SN Zhang, *Confucianism in Contemporary Chinese Politics: An Actionable Account of Authoritarian Political Culture* (Lexington Books, Lanham, MD, 2015) 1–15.

[7] See generally Z Fu, *Autocratic Tradition and Chinese Politics* (Cambridge University Press, New York, 1993) 15–169.

[8] See generally DC Shin, *Confucianism and Democratization in East Asia* (Cambridge University Press, New York, NY, 2012) 115–23.

[9] *Contra* (n 6) 17–52.

elements: a sense of equality[10] and procedure.[11] In substance, we argue that Chinese demo-orientation does not embody solid sense of equality, owing to which the importance of democracy *by* the people is still not broadly appreciated by the Chinese people. As a result, they confuse making decisions *for* the people with making decisions *by* the people, thinking that China's democracy subsists when the Chinese Government decides in favour of their interests. In procedure, we assert that the Chinese demo-orientation provides only two inadequate means – either to admonish the ruler when he or she is still tolerable, or to rebel when he or she is unbearable.[12] Neither means serves institutionally, at least not adequately. In other words, we do not accuse Confucianism of breeding autocracy; we argue that it is just not good enough from the perspective of modern democracy.

II. Historical insights

In 1046 BCE, Jizi presented King Wu of Zhou with the Chinese *Magna* (*hong*) *Carta* (*fan*),[13] whose Preamble reads, 'Hong-Fan was recorded as a result of the return of Jizi, when King Wu of Zhou defeated the Shang dynasty, causing the death of King Zhòu of Shang but granting a peerage to [King Zhòu's son], Wu-Geng'.[14] This passage is usually skimmed over when people study Hong-Fan as a source of the Chinese concept of 'mandate of heaven';[15] however, if we read between the lines, the Preamble actually hints that the political ground of discussing the mandate of heaven claimed by the Zhou Kingdom, i.e., why the Zhou dynasty could legitimately replace the Shang dynasty,[16] arose from the fact that 'King Wu of Zhou defeated the Shang dynasty'.[17]

[10] N NT Li, *Ren Guo Zhi Li: Xian Fa Bian Qian De Kua Yue [The Classical Chinese 'Li (Charter)' of the Land and the People: The Transition of China's Constitutionalism]* (San Min Books, Taipei, 2012) 45–9.

[11] L Shuming, *Zhong Guo Wen Hua Yao Yi [The Essential Thoughts of the Chinese Civilisation]* (Shanghai People's Publishing, Shanghai, 2005) 252–3.

[12] It is noteworthy that the concepts of separation of powers and checks and balances were unknown to Confucianism or other school of thoughts before both were introduced into China from the West. It has been a foreign idea which is not grounded in political reality even today in mainland China. Hence, it cannot fill the mechanism devoid of some moderate approach next to the final resort of rebellion as suggested by Confucianism in the extreme case of tyranny.

[13] See <https://ctext.org/shang-shu/great-plan/zh>.

[14] (n 13) (authors' translation).

[15] See generally (n 10) 117–28.

[16] (n 10) 117–24.

[17] (n 13) (authors' translation).

According to Hsu Cho-Yun, 'the concept of the Mandate of Heaven [was] developed in the political context of the Zhou expansion'.[18] 'The Zhou conquest of Shang … in 1045 B.C. represented at the time perhaps only the replacement – through force of arms – of one local power by another, but for later Chinese it came to illustrate the irrepressible will of Heaven turning its mandate from one state, the rulers of which had grown distant from the people, to another state blessed with virtuous rulers'.[19] In other words, the mandate of heaven was originally a theory which justified Zhou's dominance created by the Zhou people,[20] asserting that 'rulers are empowered by Heaven …. If Heaven is disgusted by immoral behavior or offended by inadequate or improper sacrifices it will transfer the authority to rule to another man.'[21] Nevertheless, '[o]n those occasions when the ruling imperial Dynasty lost the "mandate of heaven" (legitimate right to rule), the people looked for an individual to arise worthy of Heaven's approval',[22] i.e., rebellion.[23] 'Normatively, over two millennia this was the method most favoured by the Chinese people for the resolution of crises concerning political legitimacy'.[24]

Hence, when we think it through, the mandate of heaven can be understood from two perspectives. First, the transfer of the mandate of heaven can be proved only by a successful rebellion or revolution,[25] otherwise it would be hard to imagine how the dethroned ruler could be compelled into accepting that the mandate of heaven had been transferred.[26] In King Wen of Zhou's Victory against Li, Shang Book of the Book of Documents,[27] King Zhòu of Shang said that he was born to enjoy the mandate of heaven, so he rejected Zu Yi's advice of not being an abusive ruler[28] – he was not aware of the transfer of the mandate of

[18] C-Y Hsu, *China: A New Cultural History*, translated by TD Baker, Jr. and MS Duke (Columbia University Press, New York, NY, 2012) 91.

[19] EL Shaughnessy, 'Western Zhou History' in M Loewe and EL Shaughnessy (eds), *The Cambridge History of Ancient China: From the Origins of Civilization to 221 B.C.* (Cambridge University Press, New York, NY, 1999) 292.

[20] (n 10) 120–1.

[21] JS Major and CA Cook, *Ancient China: A History* (Routledge, Abingdon, 2017) 121.

[22] E Bao, *China's Child Contracts: A Philosophy of Child Rights in Twenty-First Century China* (Blue Mountains Legal Research Centre, Blaxland, New South Wales, 2008) 141.

[23] Cf TT Meadows, *The Chinese and Their Rebellions: Viewed in Connection with Their National Philosophy, Ethics, Legislation, and Administration* (Cambridge University Press, Cambridge, 1856/2015) 24.

[24] (n 22) 141.

[25] See (n 21) 121.

[26] Compare (n 21) 121 with (n 22) 141.

[27] See <https://ctext.org/shang-shu/chief-of-the-wests-conquest-of-li/zh>.

[28] Ibid.

heaven until 'King Wu of Zhou defeated the Shang dynasty'[29] *per se*.[30] Second, even if we have no doubt that a ruler will behave properly to avoid being overthrown,[31] as long as he remains the person with a lifelong mandate of heaven, he still enjoys full discretion in administration,[32] engendering power imbalances between the ruler and the ruled,[33] by which any attempt to restrict the power of the person with the mandate of heaven is finite – if he is chosen by heaven, how can people disagree with him where there is no obvious right or wrong but only preferences? When his decision is not doomy, why will people bear the risk of rebelling against him? Moreover, why did rebellion become historically inevitable from time to time in China[34] as a non-institutional mechanism and a *de facto* threat to political stability in order to ensure the rulers with the mandate of heaven behave properly? Lastly, is this political system democratic?

When '[w]e hold [this] truth[] to be self-evident that all men are created equal',[35] our belief logically[36] implies that both mandate of heaven[37] from the East and Dieu et mon droit[38] from the West constitute inequality between the selected few (person or family) and the rest of the people in politics. Hence, Nigel NT Li argues that when it comes to the relationship (*li*) between the ruler and the ruled,[39] there was no sense of

[29] (n 13) (authors' translation).

[30] See generally (n 10) 118–19 (indicating that the King Wen of Zhou's Victory against Li shows that the mandate of heaven was a political theory developed by Shang originally, but it was adjusted and modified by the Zhou people in line with their need of a way to justify Zhou overtaking Shang).

[31] See generally (n 10) 128–35.

[32] E.g., D Bodde and C Morris, *Zhong Hua Di Guo De Fa Lu [Law in Imperial China]*, translated by Y Zhu (Jiangsu People's Publishing House, Nanjing, 2008) 163 (providing a criminal case in which Emperor Qianlong overruled the *nulla poena sine lege* principle, and the judges could only comply with the Emperor's order).

[33] See generally (n 10) 135–50.

[34] (n 11) 191–3.

[35] United States Declaration of Independence (1776).

[36] See generally M Shenefelt and H White, *If A, Then B: How the World Discovered Logic* (Columbia University Press, New York, NY, 2013) 88–91 (indicating the law of non-contradiction, i.e., LNC).

[37] See generally (n 10) 135–50.

[38] See generally WT Brande (ed), *A Dictionary of Science, Literature, and Art: Comprising the History, Description, and Scientific Principles of Every Branch of Human Knowledge; with the Derivation and Definition of All the Terms in General Use* (Longman, Brown, Green and Longmans, London, 1842) 342 (indicating that '*Dieu et mon droit* has always formed the royal motto of England').

[39] (n 10) 3–8 (interpreting that the Confucian concept of 'Li' is the rules in accordance with relationship, and only the rules governing the relationship between friends are equal).

equality within Confucianism,[40] though the idea of human dignity such as Zhang Qianfan has argued[41] 'is firmly rooted in Confucianism'.[42] Li states:

> Though Mencius highlighted the importance of the people throughout the concept of the 'people's parents', [he] did not alter the basis of the Confucian 'Li-Zhi', [i.e., social order], which identifies the rulers as the parents and the ruled as the children – there was no sense of social equality [but only] the classification of social classes within.[43]
>
> The term *ping dung* was not employed to represent equality until the late 19th century. It is not native to the Chinese language and was imported into the language as a translation. *Li*, as the core of social norms since ancient times China, performed the critical role of distinguishing the nobility, civilians and slaves, as well as *guan xis* [relationships] so that social/political hierarchy may be established.[44,45]

In other words, when read together, Zhang Qianfan and Nigel NT Li illuminate why China finds democracy difficult to appreciate from a historical perspective. The concept of the mandate of heaven narrowed the Chinese political system to an unequal system,[46] in which the ruler and the ruled are not one,[47] because 'parents' and 'children' can never switch positions,[48] so that the law in line with Confucianism 'sanctioned the doctrine of superiority of the father, the husband and the senior over the son, the wife and the junior respectively'.[49] Hence, where the 'Li' governing

[40] See generally (n 10) 3–186 (indicating that equality, if anything foreign to Confucianism, is not at all a denial of the significance of human relationships, but a new conceptual element to, at least some of the social bonding, such as the relationship between the ruler and the ruled, that traditional Confucianism emphasises as not ignorable by the individual human being for a peaceful living in the world).

[41] See generally Q Zhang, *Human Dignity in Classical Chinese Philosophy: Confucianism, Mohism, and Daoism* (Palgrave Macmillan, New York, NY, 2016) 17–142.

[42] (n 41) 17.

[43] (n 10) 135 (authors' translation).

[44] N NT Li, 'Cong Ping Deng Dao Xian He: Ping Deng Tiao Kuan Ru Xian Shi Tan Pian [From Obscurity to Light: Tracking Equality's Rise in the Making of Chinese Constitutions]' (2013) 24 *Fa Zhi Shi Yan Jiu [Journal for Legal History Studies]* 263, 286.

[45] (n 44) 265–6 (explaining that the term *ping dung* was initially created for the use of translation of Buddhism, which implies the concept of equality in afterlife, and so remained mainly a term of religious nature without carrying any secular meaning to affect or to challenge the ideological foundation of Confucianism in prevailing social, ethical and political norms).

[46] See generally (n 10) 99–186.

[47] Compare Magna Carta (1215) with United States Declaration of Independence (1776) (providing that the consent of the governed is indispensable).

[48] Cf H H-P Ma, *Law and Traditions in Contemporary Chinese Society* (National Taiwan University, Taipei, 1999) 43–57.

[49] Ibid 50.

the ruler and the ruled is inequal,[50] which forestalls a sufficient institutional mechanism checking and balancing the ruler's powers,[51] the rules of the game between a parent and a tyrant will still amount to the flip of a coin, even though '[f]or Confucianism, human dignity is fully illustrated in the ideal personality of a gentleman who has cultivated innate virtue through learning and the practice of *Li*'.[52] When a ruler can claim powers and rights in line with 'Li', that he shall be respected as the people's parent because the mandate of heaven is presumed to be with him as a ruler, what can the Chinese people do other than deviate from the 'Li' of respecting a lord-parent (*jun fu*) to spark a revolution to overthrow a lifelong emperor who was a tyrant?[53]

Nevertheless, Zhang Qianfan has keenly asserted that 'the classical ideas about human dignity require the establishment of a constitution …'.[54] We would like to further point out that the core of constitutionalism does not rest on whether 'the classical ideas about human dignity'[55] are constitutionalised. Many constitutions are not functioning. Hence, we pay more attention to the variables that guarantee the implementation of a constitution, and we hold that both equality and an institutional mechanism are essential.

III. Literature review

More than a decade ago, in a *liber amicorum* in honour of Professor and Justice Herbert Han-Pao Ma, Nigel NT Li published an essay containing various interpretations on the Chinese cognition of democracy in accordance with China's ancient constitutionalism.[56] The essay is titled 'The First Exploration of the Concept of the "People's Parent" and the

[50] (n 10) 3–8.

[51] Cf (n 41) 199 (arguing that 'the classical ideas about human dignity require the establishment of a constitution').

[52] (n 41) 200.

[53] See <https://ctext.org/shiji/ru-lin-lie-zhuan/zh> (implying the Chinese logic since the Grand Historian Sima Qian that a ruler is a tyrant when a revolution against him is successful).

[54] (n 41) 199.

[55] Ibid.

[56] N NT Li, '"Min Zhi Fu Mu" Yu Xian Qin Ru Jia Gu Dai Xian Zheng Si Xiang Chu Tan: Cong Shang Bo Chu Zhu Shu Jian Wen Tan Qi [The First Exploration of the Concept of the "People's Parent" and the Ancient Confucian Constitutionalism: From the Shanghai Museum Bamboo Slips]' in H H-P Ma (ed), *On Theories and Institutions of Law: In Honor of the 80th Birthday of Professor Herbert Han-Pao Ma: Public Law* (Angle Press, Taipei, 2006) 1–47.

Ancient Confucian Constitutionalism: From Shanghai Museum Bamboo Slips',[57] in which Li analyses how the Chinese people understand the modern concept of democracy[58] in accordance with[59] Richard Sheridan and Abraham Lincoln's famous words, i.e. 'government of the people, by the people, for the people',[60] holding that either there is no concept of democracy but only the ideal of enlightened despotism in China,[61] or the Chinese concept of democracy consists only of democracy *of* the people as well as *for* the people, but not *by* the people.[62] Li states:

> Many academics held that the ancient Confucianism does not consist of the concept of democracy, but only the concept of demo-orientation. For example, Ambrose Y.C. King stands in line with the Japanese sinologists, holding that demo-orientation can only constitute enlightened despotism. However, K.C. Hsiao held that China's demo-orientation consists only of democracy *of* the people and *for* the people, but not *by* the people, by which the crucial distinction between demo-orientation and democracy can be explained. Both are outstanding theories. Moreover, [I think] that another distinction between demo-orientation and democracy is a matter of equality, that democracy is a political structure which supposes that all men are created equal, whereas demo-orientation exists for the people communicating with their own rulers.[63]

Li's criticism has enlightened David KC Huang, who formularises the political ground of Taiwan's judicial supremacy in his PhD thesis titled 'Judicial Supremacy in Taiwan: Strategic Models and the Judicial Yuan, 1990–1999'[64] in September 2016. Huang argues in line with Li, holding that election is never the core of democracy in China,[65] because the Chinese

[57] Ibid 1–47; see also (n 10) 9–55 (originally published by Angle Press in 2006 and re-published by San Min Books Co. and Lee and Li Foundation in 2012).

[58] (n 10) 42–5.

[59] See also Constitution of R.O.C. section 1 (1947) (stipulating that '[t]he Republic of China … shall be a democratic republic of the people, to be governed by the people and for the people').

[60] R Keyes, *The Quote Verifier: Who Said What, Where and When* (St. Martin's Griffin, New York, NY, 2006) 83.

[61] (n 10) 43 (supported by A Y-C King and some Japanese sinologists).

[62] Ibid 43 (supported by K-C Hsiao but disagreed with Sa M-W, who further indicated that the Chinese concept of democracy consists only of democracy *for* the people, but neither *of* the people nor *by* the people).

[63] Ibid 43–4 (authors' translation).

[64] D KC Huang, *Judicial Supremacy in Taiwan: Strategic Models and the Judicial Yuan, 1990–1999*. PhD dissertation in constitutional law, SOAS, University of London, 2016 (Angle Thesis & Dissertation Submission Programme, Taipei, 2018) 1–424.

[65] Ibid.

people's cognition of democracy is *de facto* not contemporary democracy, but rather ancient demo-orientation *per se*, which is better described as good governance.[66] Therefore, '[i]n contrast to other democracies in which the courts are regularly doubted and challenged by countermajoritarian difficulties, the Justices of Taiwan have few reasons to be criticised on the ground of legitimacy'[67] as long as they provide democracy *for* the people such as Sa Meng-Wu had indicated,[68] i.e., making demo-oriented decisions.[69] Accordingly, Huang defines this Chinese model as indirect democratic legitimacy,[70] but also places a careful academic 'disclaimer':

> [T]his thesis does not intend to challenge electoral democracy. The intention here is to point out that it is possible for an unelected administrator or judge to obtain democratic legitimacy if his/her decision answers to public interests, and he may be as powerful as elected officials in politics by doing so. This thesis considers that elections provide the fundamental precepts of democracy and does not support the Chinese definition of democracy, i.e. democracy with Chinese characteristics.[71]

We find Huang falling into the trap of ancient Chinese political philosophy, though we know where he stands – where Li attempts to distinguish the concept of democracy from that of demo-orientation, Huang perfects the theory of demo-orientation for fear of its being misused by autocracies.[72] In contrast to Li who concludes from the Confucian philosophy that the Chinese difficulty in democratisation lies in the lack of a sense of equality,[73] Huang observes the Chinese poor sense of procedural justice and highlights it as a political ground for demo-orientation.[74] Though we have no intention to discard Huang's subtle theory of demo-orientation for being incorrect, we read the worries in his academic 'disclaimer'[75] and would like to bring the theory to the next stage in which both Li's and Huang's ideas about democracy and demo-orientation can be merged without conceptual contradictions.

We would like to build our new theory regarding the distinction between contemporary democracy and the ancient Chinese demo-orientation on

[66] Ibid 59–67.
[67] Ibid 157.
[68] (n 10) 43.
[69] (n 64) 1–424.
[70] Ibid 144–51.
[71] Ibid 63.
[72] Compare (n 10) 42–5 with (n 64) 59–67.
[73] (n 10) 45–9.
[74] (n 64) 67–75.
[75] Ibid 63.

the distinction between substantive law and procedural law (Materielles Recht und Verfahrensrecht[76]) applied permanently in both civil law[77] and common law[78] jurisdictions, and would define the ancient Chinese demo-orientation as a very matter of substantive democracy. However, contemporary democracy is not only a matter of substantive democracy but also a matter of procedural democracy.[79] In other words, we agree with the Chinese concept that democracy *for* the people, i.e. demo-orientation, is the substance of democracy; but we also agree with the Western model that democracy *by* the people denotes the necessary procedure of democracy. Though we do not deny that the ancient Confucian philosophy pursues a core value of democracy, namely *for* the people, it is obvious that the Chinese philosophy provides a poor mechanism for it.[80] Nevertheless, we take the view that only a combination of the substance and procedure will lead to genuine democracy *of* the people, and that is the ultimate form of government for all humankind.

We are aware of the present Chinese democracy with Chinese characteristics promoted in China,[81] in which democracy *by* the people (elections) is not taken as the core of the definition of democracy as long as the government provides what the Chinese people want.[82] Through our new theory, we would not define this model a democracy due to the lack of a democratic procedure.[83] Even though we do not choose to challenge that the Chinese government's decisions are often made in line

[76] See L Gehrig and T Hirt, *Rechtskunde: Grundlagen mit Beispielen und Repetitionsfragen mit Antworten [Law: Fundamentals with Examples and Repetitive Questions with Answers]* (Compendio Bildungsmedien, Zürich, 2002) 193.

[77] E.g., V Krey, *German Criminal Procedure Law: Vol 1* (W Kohlhammer, Stuttgart, 2009) 1.

[78] E.g., TR Van Dervort, *American Law and the Legal System: Equal Justice under the Law* (Thomson Learning, Albany, NY, 2000) 55–7.

[79] For example, we consider the pursuit of human rights a form of substantive democracy. However, it is obvious that the contemporary Western democracy rests on the pursuit of procedural democracy and we particularly appreciate this character.

[80] See generally (n 10) 9–55.

[81] See N Fang, *China's Democracy Path*, translated by Wu Y and Liu A (Springer, Berlin, 2015) 1–12.

[82] Cf L Storey, *Humanity or Sovereignty: A Political Roadmap for the 21st Century* (Peter Lang, New York, NY, 2006) 22–3 (indicating that, in China, 'the only legitimate government was one that offered good government to all humans' in accordance with Mencius; *vice versa*, procedural democracy such as elections is completely not the core); see also EJ Perry, 'Chinese Conception of "Rights": From Mencius to Mao – and Now' (2008) 6(1) *Perspectives on Politics* 37, 37–47 (holding that the Chinese political 'rights' only lie in the development of 'an economically comfortable society').

[83] See generally RS Katz, *Democracy and Elections* (Oxford University Press, New York, NY, 1997) 3–9.

with the Chinese public interests, this does not change the fact that such a demo-oriented decision has been made in the absence of the democratic consent – public opinion is not a proper procedure. Moreover, we would not identify such a decision-making system as a political system that embraces a true sense of equality.[84] Hence, we would not hold that there is sensible democracy with Chinese characteristics; there is only Chinese demo-orientation when their government decides in accordance with the Chinese public interests.[85] An applicable analogy would be a political system that treats the people like juveniles without capacity[86] in politics, where decisions shall be made for the good of all the Chinese people without their consent.[87]

At the same time, we may agree with the argument that procedural democracy cannot guarantee substantive democracy *in toto*,[88] but we stand in line with Sir Winston Churchill, holding that 'democracy is the worst form of government except for all those others forms that have been tried from time to time'.[89] In other words, we are not going to 'pretend[] that democracy is perfect or all-wise',[90] but we do believe that procedural democracy is one of the most important mechanisms of democracy that cannot be wiped out. Our argument is simple: if procedural democracy cannot guarantee substantive democracy *in toto*, neither can enlightened despotism or democracy with Chinese characteristics.[91] Moreover, we are not convinced why a political system with a democratic procedure is inferior to one without a democratic procedure in pursuit of democracy[92] – that is just illogical. Hence, even if we agree with the demo-orientation concept that originated in the Chinese philosophy and proposed by the People's Republic of China, we are not certain about its feasibility in carrying out true democracy *for* the people.

[84] See generally (n 10) 38–54.

[85] Compare (n 10) 38–54 with (n 64) 59–67.

[86] See generally H Kelsen, *Pure Theory of Law*, translated by M Knight (University of California Press, Berkeley, CA, 1967) 158–63.

[87] One of our co-authors confronted with a challenge based upon elitism held by a Chinese student, who held that all the Chinese people should comply with the decisions made by elites. He responded: I am sure that you agree you are not an elite in front of me. Suppose that your argument is correct, what gives you the position to challenge an elite like me? Why cannot you just comply in accordance with your own argument? Or, you just prove your argument wrong?

[88] Cf R Youngs, *The Puzzle of Non-Western Democracy* (Carnegie Endowment for International Peace, Washington DC, 2015) 88–90.

[89] HC Deb 11 November 1947, vol 444, col 207.

[90] Ibid, col 206.

[91] See (n 81) 1–12.

[92] Cf JL Talmon, *The Origins of Totalitarian Democracy* (Mercury Books, London, 1961) 1–13; *contra* (n 88) 90 (indicating that 'China's supporters say it has learned responsiveness and self-correction better than Western democracies').

In a nutshell, our new theory distinguishes the ancient Chinese demo-orientation from contemporary Western democracy through two crucial characters: equality[93] and democratic procedure.[94] We do agree that both demo-orientation and democracy pursue democracy *for* the people, but we find both have different attitudes towards equality and mechanism, that demo-orientation consists of inequality in politics and autocracy as the mechanism, whereas democracy embraces both equality and a democratic procedure. Accordingly, we do not deem genuine redefined democracy with Chinese characteristics as Ambrose YC King has put so well, it is a modern Chinese version of enlightened despotism[95] that has claimed to be a democracy. Moreover, we value our ancestors' political thoughts regarding demo-orientation, with which Mencius indicated that democracy *for* the people shall be a moral obligation of the rulers;[96] but we must also admit that our ancestors provided us with not only an ineffective mechanism for China's democracy, but also a political philosophy that tolerates inequality.[97]

IV. Methodology

This article rests on contemporary constitutional jurisprudence mainly developed as a notion foreign to traditional Chinese thought, analysing why China finds democracy as defined by the West[98] difficult to appreciate through a critical review of the concept of demo-orientation, which is of Chinese origin, to reveal that democracy is different from demo-orientation in democracy's embrace of equality and procedure/institutional mechanism. There may be other differences between democracy and demo-orientation – we have no doubt – but they are beyond the scope of this article.

In addition, the International Covenant on Economic, Social and Cultural Rights (1966) has been signed by 169 countries around the world, showing that not only China but also other 168 countries have pursued a policy

[93] (n 10) 45–49.

[94] See generally (n 83) 3–9.

[95] Cf A Y-C King, *Zhong Guo Min Ben Si Xiang Shi [The Intellectual History of China's Demo-orientation]* (Commercial Press, Taipei, 1993) 47–50.

[96] (n 10) 11–38.

[97] Ibid 38–54.

[98] SM Lipset and JM Lakin, *The Democratic Century* (University of Oklahoma Press, Norman, OK, 2004) 19 (defining the minimal definition of democracy as '[a]n institutional arrangement in which all adult individuals have the power to vote, through free and fair competitive elections, for their chief executive and national legislature').

of developing socioeconomic well-being, and many of them are also the signatories of the International Covenant on Civil and Political Rights (1966). In other words, the pursuit of socioeconomic well-being as human right, such as Elizabeth J Perry argues preferably,[99] does not, however, necessarily exclude the pursuit of political equality and procedure. As a matter of fact, when Jürgen Habermas analyses a welfare state, he considers electoral democracy as a prerequisite.[100] Nevertheless, whether the pursuit of socioeconomic well-being shall be conducted first or not is beyond the scope of this article too.

V. Demo-Orientation: The substance

> The king is like a boat and his subjects the water. The water that bears the boat is the water that sinks the boat.[101] – Xunzi (313–238BCE)

Demo-orientation is the ancient Chinese ideal political system promoted by the Confucian school.[102] Its Mandarin pronunciation is 'Min-Ben'; and literarily it 'means treating "people" (*min*) as "roots" (*ben*)'.[103] According to Baogang Guo, Min-Ben 'can be translated as "regarding the people as the roots of the state" or simply "put the people first"'.[104] Many contemporary Chinese political scientists consider demo-orientation as the Chinese model of democracy;[105] however, Maestro Sa Meng-Wu not only disagreed but also held that demo-orientation consists only of democracy *for* the people but not democracy *of* the people and *by* the people,[106] by which demo-orientation can never be read as a form of democracy.

> The people are superior to the spirits of the land and grain, but the king is inferior to both the people and the spirits of the land and grain. Hence to gain the people is the way to be crowned, to please the king is the way

[99] See generally EJ Perry, 'Chinese Conception of "Rights": From Mencius to Mao – and Now' (2008) 6(1) *Perspectives on Politics* 37, 37–47.

[100] See generally J Habermas, *The Theory of Communicative Action, volume 2: Lifeworld and System: A Critique of Functionalist Reason*, translated by Thomas McCarthy (Beacon Press, Boston, MA, 1987) 360–3.

[101] See <https://ctext.org/xunzi/wang-zhi/zh> (authors' translation).

[102] (n 8) 115–23.

[103] Ibid 115.

[104] B Guo, *China's Quest for Political Legitimacy: The New Equity-Enhancing Politics* (Lexington Books, Lanham, MD, 2010) 8.

[105] See generally C Li, *The Tao Encounters the West: Explorations in Comparative Philosophy* (State University of New York Press, Albany, NY, 1999) 169–72.

[106] M-W Sa, *Ru Jia Zheng Lun Yan Yi [The Interpretation of the Confucian Political Thoughts]* (Great East, Taipei, 1982) 576–7.

> to become a feudal lord, [and] to serve the lords is the way to be knighted. When a lord dares to blaspheme against the spirits of the land and grain, he shall be attaindered; when the sacrifices to the spirits of the land and grain are held properly and punctually but drought or flood still ensues, [the people] shall worship other spirits.[107] – Mencius (372–289BCE)

Almost every scholar referring to the concept of demo-orientation begins with the above quote from Chapter Jin-Xin II of Mencius,[108] the classical Four Books.[109] The first sentence, i.e., 'The people are superior to the spirits of the land and grain, but the king is inferior to both the people and the spirits of the land and grain',[110] is commonly quoted in support of the Chinese cognition of democracy.[111] The original term, 'She Ji', is more often translated as 'the state',[112] though its literal meaning is 'the spirits of the land and grain'.[113] The above quote was very avant-garde when Mencius said it more than 2300 years ago, because he intended to link up a feudal ruler's moral responsibility with democracy *for* the people, so he defined the order of legitimacy of both the feudal rulers and states (or the spirits of the land and grain) in line with his thought of demo-orientation and placed the people as the ultimate goal.[114] In other words, we consider Mencius' demo-orientation a remarkable achievement, because he actually demanded that feudal rulers and states (or even spirits) take political responsibility for people's welfare more than 2300 years ago. He even said:

> [A king] who is not benevolent is simply a demon; [a king] who is not just is merely a ruffian. One who is neither benevolent nor just is no longer qualified to be a king and should be deposed. [Therefore], I only know a single person named Zhòu [King Zhòu of Shang] being killed, instead of a king being overthrown.[115] – Mencius (372–289BCE)

Nevertheless, when we recall pre-Mencius literature regarding demo-orientation, it appears that demo-orientation may not necessarily link to

[107] See <https://ctext.org/mengzi/jin-xin-ii/zh> (authors' translation).

[108] E.g., (n 8) 115; (n 104) 8.

[109] See generally DK Gardner, *The Four Books: The Basic Teachings of the Later Confucian Tradition* (Hackett Publishing, Indianapolis, IN, 2007) XIII–XXX.

[110] (n 107) (authors' translation).

[111] See generally S-H Tan, *Confucian Democracy: A Deweyan Reconstruction* (State University of New York Press, Albany, NY, 2003) 132–6.

[112] E.g., (n 8) 115; (n 104) 8.

[113] (n 107) (authors' translation).

[114] See (n 107).

[115] See <https://ctext.org/mengzi/liang-hui-wang-ii/zh> (authors' translation).

the people directly, as it did not even justify citizens' revolutions.[116] Unlike Mencius, who legitimised citizens' revolution, demo-orientation in pre-Mencius times was no more than political advice suggesting that the Chinese feudal rulers make demo-oriented decisions in order to avoid an aristocratic revolution. Here are some examples:

> [Our] royal ancestor had admonished that [we must] cotton to the people instead of despising [them. Because] the people are the roots/bases[117] of the state, a state is at peace [insofar as its] roots/bases are consolidated.[118]
> – The Book of Documents (772–476BCE)

> Every superpower is based upon humanism [because the people are the bases of the state. Hence], a state is consolidated insofar as its bases are well governed; a state is in danger insofar as its bases are badly ruled.[119]
> – Guan Zhong (720–645BCE)

We find no sense of equality in the ideal of demo-orientation[120] *in toto* in pre-Mencius times. In the Song of the Five Princes, Xia Book of the Book of Documents,[121] the first prince recalled an admonition regarding demo-orientation from his royal ancestor, Yu the Great, concluding with sorrow that the throne of his brother was taken away by another noble family because the people did not care.[122] In Guanzi, i.e., the Analects of Guan Zhong,[123] Guan Zhong expounded on how to build a superpower in accordance with demo-orientation;[124] however, in contrast to Rule Britannia, in which the British people proudly chant 'Rule Britannia, Britannia rules the waves! And Britons never never never shall be slaves',[125] we still find no sense of equality in Guan Zhong's proposal.[126]

[116] See <https://ctext.org/shiji/chen-she-shi-jia/zh> (Shi Ji [the Records of the Grand Historian] recording that the first citizen's revolution against tyranny in China occurred in 209BCE).

[117] According to Shuo Wen Jie Zi (Explaining and Analysing Characters) published around 30–124CE, the Chinese character 'Ben' is a word to depict the part of a tree buried in the ground. Hence, 'Ben' can be translated either as root or basis. See <https://ctext.org/shuo-wen-jie-zi/mu-bu1/zh>.

[118] See <https://ctext.org/shang-shu/songs-of-the-five-sons/zh> (authors' translation).

[119] This is figuratively an ancient Chinese concept which is very similar to the British 'Rule Britannia! Britannia rules the waves'. See <https://ctext.org/guanzi/ba-yan/zh> (authors' translation).

[120] See generally (n 10) 9–55.

[121] (n 118).

[122] Cf (n 118).

[123] (n 119).

[124] Ibid.

[125] HF Reddall and D Buck, *Songs that Never Die: Being a Collection of the Most Famous Words and Melodies* (B.F. Johnson & Co., Richmond, VA, 1892) 97.

[126] See (n 119).

Of course, these Chinese thinkers were all proto-democratic thinkers living more than 2000 years ago; we cannot blame them for not possessing any sense of equality. However, we must state clearly that it is not appropriate to apply their theories without modern sophistication accordingly, because we do not live in the ancient world, and equality is morality in our epoch.[127]

> Mencius was a (proto-)democratic thinker, as is often claimed. Living in the ancient feudal world, Mencius never challenged the existing social distinction between the aristocratic class and the laypeople. In fact, he (and all other Confucians including Confucius) never questioned the moral legitimacy of the monarchical system even if he believed the ideal way to transmit the throne was by abdication.[128]

Though we do not blame these ancient Chinese thinkers for lacking a sense of equality, we hold that the methods they proposed for implementing demo-orientation are either inadequate or incompetent from the perspective of modern constitutionalism.[129] Due to the lack of a sense of equality, these thinkers 'highlighted the need for interaction between the rulers and the ruled'[130] as the main and only method for demo-orientation because 'demo-orientation [by its nature] is a dialogue between Confucianism and monarchy. It functions as a [moral] writ, that the people can plead for mercy … . It does not change the [absolute] monarchy'.[131] In other words, demo-orientation is not a legal right (subjektives Recht[132]) but only a reflex of interest (Reflexrecht[133]) in accordance with German jurisprudence; or by English jurisprudence, it is not a right but the Royal Prerogative.[134] However, we found that ancient Chinese demo-orientation lies in the theory of the 'People's

[127] See T Jefferson, *The United States Declaration of Independence* (Wildside Press, Rockville, MD, 1776/2009) 19 (asserting that '[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed … with certain unalienable rights, that among these are life, liberty and the pursuit of happiness').

[128] S Kim, *Confucian Democracy in East Asia: Theory and Practice* (Cambridge University Press, New York, NY, 2014) 79.

[129] Cf D Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, Oxford, 2016) 171–2.

[130] (n 64) 145.

[131] (n 10) 44 (authors' translation).

[132] G Jellinek, *System der subjektiven öffentlichen Recht [System of Subjective Public Law]* (JCB Mohr, Freiburg im Breisgau, 1892) 63–76.

[133] Ibid.

[134] *De Freitas v Benny* [1976] AC 239 (Lord Diplock holding in the Privy Council that '[m]ercy is not the subject of legal rights. It begins where legal rights end').

Parents',[135] which is obviously the Chinese version of reflex of interest or royal prerogative.

> The King is graceful and humble, [and he shall behave like] the people's parent.[136] – The Book of Poetry (1046–771BCE)

The concept of the king as the people's parent originated[137] in the Book of Poetry,[138] and it has been figuratively transformed into the Confucian ideal of good governance, and the image of great ruler has been shaped accordingly.[139] In Shanghai Museum Bamboo Slips, Confucius enlightened Zixia on the concept of the king as the people's parent, in which Confucius listed the terms by which a king can be honoured as the people's parent.[140] That is, the original concept of the king as the people's parent should be an honour the king has to earn, according to Confucius,[141] but this concept also implies not only hierarchy (paternalism[142]) but also inequality (dualism between the ruler and the ruled[143]) because parents and children can never switch positions.[144] It is even more problematic when the concept is applied unfairly, where the rulers claim powers and rights as the people's parents without taking the corresponding responsibilities.[145] Unfortunately, we learn from history that it happens all the time:

> King Hui of [Wei at] Da-Liang said, I am willing to be lectured.
> Mencius responded, is there any difference between killing a person by a stick and killing him by a blade?
> [The King] answered, no difference.

[135] See generally (n 10) 9–55.

[136] See <https://ctext.org/book-of-poetry/jiong-zhuo/zh> (authors' translation).

[137] In terms of the origin of the concept of the people's parent, there are opinions because China is an old civilisation so that it is not easy to identify the origin of an archive which was produced more than 3000 years ago. See also (n 10) 57 (holding that the concept originated in multiple resources other than the Book of Poetry).

[138] (n 136).

[139] The concept originated in the Book of Poetry; hence, it is originally no more than the ancient Chinese 'God Save the Queen' or 'Kaiserhymnen'. However, Confucius had transformed 'God Save the Queen' or 'Kaiserhymnen' into the king's regulatory law (Aufsichtsrecht), limiting the king to behave like what the ode is chanted in politics – we once again appreciate his wisdom.

[140] See generally (n 10) 15–21.

[141] Ibid 23–38.

[142] See JD Douglas, 'Cooperative Paternalism versus Conflictful Paternalism' in R Sartorius (ed), *Paternalism* (University of Minnesota Press, Minneapolis, MN, 1983) 198.

[143] See L Ma, *Leading Schools of Thought in Contemporary China*, translated by J L Liu (World Scientific Publishing, Singapore, 2013) 181 (indicating that '[t]he Chinese system is sustained by the ruler having absolute power and the ruled being ruled absolutely').

[144] See (n 10) 45–9.

[145] (n 10) 21–3.

> [Mencius] asked, is there any difference between killing a person by a blade and killing him by tyranny?
> [The King] answered, no difference.
> [Mencius] said, [I saw] fat meat in your kitchen and beautiful horses in your stables, but [I saw] your subjects with hungry looks and corpses of those who died of starvation in the wilds [of your nation]. This is to lead animals to devour humans. People dislike animals devouring each other, [but you claimed to] rule as the people's parents, still leading animals to devour humans, [and] how dare [you] claim [yourself] to be the people's parent?[146] – Mencius (372–289BCE)

When the positions of the rulers and the ruled are solidified like parents and children in politics, there will be more structural problems. Firstly, when a ruled subject makes a request to the ruler like a child making a request to the parent, it implies that there are no 'rights' but only 'favours' within,[147] because there were no children's rights in pre-modern China.[148] Hence, there were no civil rights in pre-modern China[149] accordingly. Secondly, it is immoral to accuse parents of incompetence or evil in Chinese culture.[150] When the concept of the king as the people's parent is applied, it becomes difficult to accuse the ruler of tyranny.[151] That is to say, though the Confucian thinkers attempted to build up a model of good governance through the concept of the people's parent, the concept can lead to only one right the Chinese people actually have for thousands of years, i.e. the right of rebellion,[152] which is the worst democratic 'procedure' we have ever known.

> The Chinese people have no right of legislation, they have no right of self-taxation, they have not the power of voting out their rulers or of limiting or stopping supplies. They have therefore the right of rebellion. Rebellion is in China the old, often exercised, legitimate, and constitutional means of stopping arbitrary and vicious legislation and administration.[153] – Thomas Meadows (1856)

[146] See <https://ctext.org/mengzi/liang-hui-wang-i/zh> (authors' translation).

[147] Compare (n 48) 27–42, with Su L, *The Constitution of Ancient China*, edited by Zhang Y and DA Bell and translated by E Ryden (Princeton University Press, Princeton, NJ, 2018) 178 (holding that '[a]ncient China was a despotic regime: no rights were protected; no powers constrained).

[148] See generally (n 48) 27–57.

[149] See generally Y Pines, *The Everlasting Empire: The Political Culture of Ancient China and Its Imperial Legacy* (Princeton University Press, Princeton, NJ, 2012) 134–61.

[150] (n 10) 35.

[151] Ibid 31–38.

[152] (n 23) 24.

[153] Ibid.

VI. Democracy: The procedure

> Since the periods of Qin and Han dynasties [221BCE], China has fallen into a cycle of rise and collapse without innovation. […] If the Age of Discovery never happened so that China had never been influenced by modern Western [political] thoughts (like today), no one [in China] had ever imagined how to break such a cycle.[154] – Liang Shuming (1949)

Maestro Liang Shuming, a Mongol-Chinese philosopher and sinologist, criticised the classical Chinese political civilisation of inadequacy,[155] because 'the Chinese people had attempted to institutionalise their democracy *of* the people and *for* the people, but never considered democracy *by* the people such as voting or representative democracy as an institutional method'.[156] Liang satirised this as a 'Chinese cultural characteristic'[157] in 1949, and he even remarked that 'democracy defined by the East'[158] will be proposed in contrast to 'democracy defined by the West'.[159] However, we appreciate Liang's idea because he exposed the weakness of China's classical demo-orientation – China 'never considered democracy *by* the people such as voting or representative democracy as an institutional method'.[160]

Democracy comes from Greek,[161] i.e. δημοκρατία, which means 'direct rule by the people'.[162] Hence, it is not so much a substantive concept as a procedural or methodological means[163] in accordance with its literal construction. In contrast with demo-orientation, which is originally a descriptive term profiling a substantive concept, i.e., 'treating "people" (*min*) as "root" (*ben*)',[164] democracy emphasises the procedure, where a decision shall be made *by* the people[165] more than made *for* the people.

[154] (n 11) 193 (authors' translation).
[155] Ibid 191–211.
[156] Ibid 19 (authors' translation).
[157] Ibid 17–19.
[158] Ibid 19.
[159] Ibid 19.
[160] Ibid 19 (authors' translation).
[161] N Urbinati, 'Representative Democracy and Its Critics' in S Alonso, J Keane and W Merkel (eds), *The Future of Representative Democracy* (Cambridge University Press, Cambridge, 2011) 23.
[162] (n 161) 23 (indicating that democracy is 'a Greek word with no Latin equivalent, stands for direct rule ("getting things done") by the people').
[163] Cf (n 76) 193 (distinguishing substantive law from procedural law).
[164] (n 8) 115.
[165] (n 161) 23.

In other words, decision made *for* the people is only the logic extension[166] (goal) of democracy, but not its intension[167] (definition). Unlike demo-orientation, which describes decision made *for* the people as its definition,[168] demo-orientation is logically impossible to be read as a form of democracy, so that there is no democracy with Chinese characteristics *per se*.

When we juxtapose demo-orientation with democracy, we wonder whether any institutional method or due procedure exists. David KC Huang argues in his PhD thesis regarding judicial supremacy that public opinion can construct indirect democratic legitimacy for unelected judges, by which an indirect enforcement mechanism proposed by George Vanberg[169] can be developed as a method.[170] However, when we read Huang's definition regarding public opinion, that it 'represents political pressure from the public as it is received or inferred by the Justices in their examination of how the decision-making process influences eventual result',[171] it becomes clear that this is not an effective institutional method or due procedure if it is applied beyond the judicial power, because an indirect enforcement mechanism, such as Georg Vanberg says, will simply be ineffective if the public is unaware of the situation.[172] Accordingly, Huang, like Vanberg, never agrees that this mechanism can replace electoral democracy – with his academic 'disclaimer', Huang indicates that he has no intention at all to 'challenge electoral democracy'.[173]

Hence, it is reasonable to conclude that China's common cognition of democracy is not so much democracy as demo-orientation, though it is often claimed to be democracy,[174] because democratic procedure in China's decision-making process does not exist.[175] The Chinese people often confuse making decision *for* the people with that of *by* the people, thinking that China's democracy subsists when the Chinese Government

[166] See generally PJ Hurley, *A Concise Introduction to Logic* (Wadsworth Publishing, Boston, MA, 2012) 88–92.

[167] See generally (n 166) 88–92.

[168] See (n 8) 115; (n 104) 8.

[169] See generally GS Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, Cambridge, 2005) 1–178.

[170] (n 64) 144–51 (defining the legitimacy of demo-orientation as indirect democratic legitimacy).

[171] (n 64) 47.

[172] See (n 169) 95–115.

[173] (n 64) 63.

[174] KS Tsai, *Capitalism Without Democracy: The Private Sector in Contemporary China* (Cornell University Press, Ithaca, NY, 2007) 200.

[175] P Cf Xiang, *Zhong Guo Da Luo Ji: Mei You Gong Chan Dang, Wei She Me Bu Xing? [China's Great Logic: Why China Needs the Communist Party?]* (Taihai Publishing, Beijing, 2012) 131–52 (holding firmly that democratic procedure does not have to exist in China).

decides in favour of their interests.[176] As far as we are concerned, such misunderstanding is rooted in the Chinese poor sense of procedure,[177] because of which the Chinese people find it culturally difficult to distinguish demo-orientation from democracy – 'as long as the result was favourable, there was no need to care about procedural details'.[178] We can also read this unique phenomenon through David KC Huang, who published an essay regarding China's constitutionalism with an articulate profile of the Chinese poor sense of procedure in politics.[179] Huang writes:

> The Chinese people traditionally accept a regime being established by military force, as long as thus regime rules righteously afterwards. The Chinese people traditionally have a poor sense of procedural justice, and thereby, they easily become realists in politics – the one who *de facto* controls China is already the ruler of China, and any debate referring to the process as well as methodology reverse nothing in politics. […] It is not the constitutional legal procedure (democratic procedure) that matters; it is about who can really control the whole of China that matters.[180]

VII. Democracy: Substance Is Rooted in Procedure

> For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.[181] – Sir William Blackstone (1768)

We quote this 'settled and invariable principle in the laws of England'[182] and make our argument accordingly: what are supposed to be the remedy

[176] See D-Q Han, Min Zhu: Cheng Xu Hai Shi Shi Zhi [Democracy: Procedure or Substance], available at <http://npc.people.com.cn/GB/28320/160692/166630/9897875.html#>.

[177] See M YK Woo and ME Gallagher, *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge University Press, Cambridge, 2011) 13.

[178] C Wang, 'From the Rule of Man to the Rule of Law' in D Cai and C Wang (eds), *China's Journey toward the Rule of Law* (Brill, Leiden, 2010) 38 (holding that the Chinese people care only for the substance and that it becomes a barricade of the Chinese rule of law).

[179] D KC Huang, 'Different Patterns of Applying Transitional Constitutionalism between the Nationalists and the Communists' in C-F Lo, N NT Li and T-Y Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma* (Springer, Singapore 2016) 127–45.

[180] (n 179) 133.

[181] W Blackstone, *Commentaries on the laws of England: Book the Third* (Clarendon Press, Oxford, 1768) 109.

[182] (n 181) 109.

and redress of demo-orientation except rebellion[183] when the ruler refuses to comply with the Confucian political ideal of the people's parent in accordance with the ancient thinkers? The truth is perhaps brutal – no remedy or redress because it is not binding in China.[184] Hence, demo-orientation as far as we are concerned cannot be read as China's constitutional law in accordance with Blackstone,[185] though we can concede that it is part of the Chinese constitutionalism in ancient times.

The Blackstone quote embodies the spirit of substance being rooted in procedure,[186] by which we can distinguish political institution from political theory, where political institution subsists when a ruler is obliged to comply; *vice versa*, political theory guides the ruler when he or she is willing to be enlightened. However, when we examine democracy and demo-orientation together, we find democracy as Western constitutionalism is based upon various procedural means, such as election,[187] rule of law[188] and the separation of powers framework.[189] On the other hand, it is embarrassing that demo-orientation, which is supposed to be China's constitutionalism,[190] provides only two inadequate means – either to admonish the ruler[191] when he or she is still tolerable, or to rebel[192] when he or she is unbearable. Neither means serves institutionally, as seen in Maestro Liang Shuming's criticism, in which he critically diagnosed this phenomenon as a symptom in the Chinese civilisation[193] in 1949. Liang said:

[183] See (n 101); (n 115).

[184] See (n 95) 17 (holding that demo-orientation is only a theory which has never been institutionalised as a political system, i.e., it is not legally binding).

[185] Cf (n 181) 109 (meaning that democracy consists of remedy and redress such as hierarchy of law, by which a rule that is in contradiction with the constitution is invalid; election/recall, by which a ruler who fails to satisfy the people will leave office).

[186] Cf D KC Huang, *The Rule of Law with Chinese Characteristics: An Analysis of China's Administrative Law*. Conference Paper, 7th Annual International Conference on Law, Regulations and Public Policy, 25 June 2018 (GSTF, Singapore, 2018) 15 (holding in accordance with Blackstone that 'if the law provides legal rights without a pertinent procedure for relief, then the law provides nothing at all').

[187] (n 98) 19.

[188] See T Paine, *The Writings of Thomas Paine, Volume III*, edited by MD Conway (G.P. Putnam's Sons, New York, 1895) 4 (claiming himself as 'a Citizen of a country which knows no other Majesty than that of the People; no other Government than that of the Representative body; no other sovereignty than that of the Laws').

[189] See T Fleiner and LR Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World*, translated by K Le Roy (Springer, Berlin, 2009) 400–6.

[190] See generally (n 10) 9–55.

[191] H-Y Yeh, 'Xian Qin De Zheng Zhi Zhe Xue [The Political Philosophy in Ancient China]' in C-H Tseng (ed), *Zhong Guo Zhe Xue Gai Lun [Introduction to Chinese Philosophy]* (Wu-Nan, Taipei, 2005) 361.

[192] (n 23) 24.

[193] (n 11) 250–4.

> In my opinion, democracy in China is nothing more than an ideal, but it is an institution in the West. When it is an ideal, it is not legally binding even if it is obviously just – it is wise but impracticable. When it becomes an institution, it is legally binding even if it merely constructs a simply rule – it is direct and practicable.[194] – Liang Shuming (1949)

If we were to take the perspective of the Chinese rulers, we would surely find demo-orientation not attractive[195] because making decisions *for* the people lies in their choice, not a legal duty.[196] In contrast to Western political history, European rulers from Charles I of England,[197] Louis XVI of France,[198] to Prince Klemens von Metternich[199] on behalf of Ferdinand I of Austria, also found making decisions *for* the people unattractive when they were not bound to do so. As a matter of fact, King John of England was compelled to ratify the *Magna Carta*[200] in 1215; however, in 1046BCE, Jizi presented King Wu of Zhou with the Chinese *Magna* (*hong*) *Carta* (*fan*) because Jizi considered King Wu of Zhou a good king.[201] In other words, England's first constitution already qualified as a court enforceable institution the king must comply with, but China's first constitution remained an ideal that only the good kings are entitled to learn.[202] The lack of institutionalisation in Hong-Fan, the *Magna Carta* of China, had resulted in different consequences in contrast to England, where the English *Magna Carta* has built up England's democracy with law.[203] But Hong-Fan as China's *Magna Carta* has built up China's demo-orientation

[194] Ibid 253 (authors' translation).

[195] Cf L Baum, *Judges and Their Audiences* (Princeton University Press, Princeton, NJ, 2006) 25 (formulising the audience theory of judges from a social psychological perspective which is also applicable to administrative decision-makers).

[196] Please be aware that moral duty and legal duty are different. Confucius attempted to burden the rulers with the people's parents as their moral duty, but this never reaches to the level of legal duty.

[197] See generally C Holmes, *Why Was Charles I Executed?* (Hambledon Continuum, London, 2006) 1–201.

[198] See generally AA Caiani, *Louis XVI and the French Revolution, 1789–1792* (Cambridge University Press, New York, NY, 2012) 1–25.

[199] See generally M Walker, *Metternich's Europe* (Palgrave Macmillan, London, 1968) 323–46.

[200] See generally C Daniell, *From Norman Conquest to Magna Carta: England 1066–1215* (Routledge, London, 2003) 50–2.

[201] See (n 13).

[202] (n 13) (implying that the Chinese *Magna Carta* was probably a direction rather than a code).

[203] Cf *De Freitas v Benny* [1976] AC 239 (Lord Diplock holding in the Privy Council that '[m]ercy is not the subject of legal rights. It begins where legal rights end').

only with mercy.[204] We appreciate the wisdom and contribution of these ancient Chinese thinkers to democracy, but the deficiencies in their theories are clear – even democracy *for* the people is mercy instead of right;[205] 'it begins where legal rights end'.[206]

VIII. Conclusion

> I am, indeed, an insurrectionist. I was not involved in the coup d'état [of 1898; however, I sincerely believe that China's classical system of] six ministries should be abolished. If the said classical system could bring [us] prosperity and mightiness, China should have stayed powerful for long – how did [we] fall into a political impasse? If any person who is deemed an insurrectionist because of [his] tendency towards legal and political reform, I am afraid that I am absolutely an insurrectionist.[207] – Li Hong-Zhang (1898)

History indicates that the short-lived blueprint of China's first and last modern constitutional monarchy[208] had the tacit approval of the Empress Dowager Cixi because of the above quotation,[209] and it is said that the Empress Dowager Cixi was rendered speechless when Li Hong-Zhang proclaimed himself an insurrectionist.[210] For thousands of years, 'the Chinese typically did not consider themselves "Chinese" so much as "civilized", equating Chinese culture with civilization';[211] however, we sincerely admit China's classical demo-orientation to be unsatisfactory as a modern means of democracy because of two missing components: a sense of equality[212] and procedure.[213]

[204] Cf ibid (applying Lord Diplock's *obiter dictum* that a request for decision-making where the ruler is not obliged to decide by law is merely a request for mercy).

[205] Cf ibid (applying Lord Diplock's *obiter dictum* that mercy cannot be requested because it not a legal right).

[206] Cf ibid.

[207] Ching C-J, *Zhong Guo Li Xian Shi [The History of Chinese Constitutionalism]* (Linking, Taipei, 1984) 67 (authors' translation).

[208] Nineteen Main Articles of the Imperial Constitution (1911) (providing China's first constitutional monarchy between 3 November 1911 and 12 February 1912, but it did not prevent the Qing Empire from collapsing).

[209] (n 207) 67.

[210] Ibid.

[211] JH Cole, 'Competition and Cooperation in Late Imperial China as Reflected the Native Place and Ethnicity' in G Hershatter, E Honig, JN Lipman and R Stross (eds), *Remapping China: Fissures in Historical Terrain* (Stanford University Press, Stanford, CA, 1996) 162.

[212] (n 10) 45–9.

[213] (n 11) 252–3.

In substance,[214] Chinese demo-orientation does not comprise any sense of equality, by which the importance of democracy *by* the people is still not broadly appreciated by the Chinese. As a result, they confuse making decisions *for* the people with making decisions *by* the people, thinking that China's democracy subsists when the Chinese Government decides in favour of their interests. In procedure,[215] Chinese demo-orientation provides only two inadequate means – either to admonish the ruler when he or she is still tolerable, or to rebel when he or she is unbearable. Neither means serves institutionally from the perspective of modern democracy.

We do not criticise ancient Chinese thinkers for those limitations. On the contrary, we admire and cherish their wisdom, insight and contribution. However, we blame ourselves if we are not *nanos gigantum humeris insidentes* and do not develop our democracy *per aspera ad astra* – we admit them to be deficiencies because we aim for democracy as much as those ancient thinkers did.

[214] See generally (n 78) 55–7.
[215] Ibid.