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## The Chinese Constitutional Social Welfare Articles Before 1949 – Comparison With the Weimar Constitution

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## Abstract

What had previously been social welfare rights were transformed into constitutional law in the Weimar Constitution of 1919, which established a new constitutional era. The Weimar Constitution was introduced to China very quickly, and the Chinese constitutional drafters combined the traditional ideals of People's Livelihood and great harmony with the new European constitutional tendency: People's Livelihood and the equalization of wealth became one of the most important issues in the constitution-making process. From the 1920s to the 1940s, social rights constituted a separate chapter in almost every constitutional draft. But just as a coin has two sides, social rights might come into conflict with basic rights. Within the context of modern legislative history, the fact that the constitutional drafters merged the rigid constitution with the weak rights and separated the social rights from the chapter on the basic rights represents a significant attempt to create a new constitutional structure.

Keywords: Social welfare rights, rigid constitution, weak rights, the People's Livelihood Doctrine, basic state policy



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## The Chinese Constitutional Social Welfare Articles Before 1949 – Comparison With the Weimar Constitution

### 1 Constitutional Social Rights: Weak Rights vs. Rigid Constitution

Constitutional rights clauses always face a dilemma: On the one hand, as a higher law, the rigid constitutional code provides people with greater rights protection than the normal law, and on the other, the people's rights guaranteed by the constitution will inevitably be limited by the state's legislative, administrative and judicial powers. Some constitutions bestow certain rights, only to deprive them of these rights via other rights. The classic example is Article 43 of the Irish Constitution 1937. Will this undermine the inherent consistency of constitutional provisions? Some scholars believe that »the ideal constitution should not include the declaration of rights, or should stipulate human rights as less as possible, though the ideal legal system will determine and guarantee many rights«. <sup>1</sup> As everyone knows, U.S. Federal Constitutional law did not originally establish basic rights clauses. It was only under oppositional pressure that the constitutional framers added ten constitutional amendments (known as the »Bill of Rights«) affiliated with the constitutional code in order to ensure enough support for the Constitution. Although the Bill of Rights was adopted, the U.S. Constitution still stipulates these rights in vague terms, leaving a large space for the conflicting constitutional interpretations. As for a clause on social rights, there is still no such thing in the U.S. Constitution. In the eyes of constitutional fundamentalists, the so-called »Second Bill of Rights« proposed by Roosevelt's New Deal is only a castle in the air. Contrary to the Constitution of the United States, the new paradigm of the constitution in the 20<sup>th</sup> century, such as the Weimar Constitution of Germany and the contemporary constitution of the Republic of South Africa, have

used a large number of provisions to specify the rights of the people in detail. However, merely having a declaration of rights does not necessarily bring about the realization of the people's rights, especially the implementation of the constitutional provisions of social welfare rights.

The issue of social welfare rights cannot afford to remain a purely theoretical construct developed in an ivory tower; instead, it is a social policy that needs to be implemented concretely and rooted in the needs of the society. These rights are meant to obligate the state to care for the weak in order to achieve the basic social and economic satisfaction of all classes in order to live together in peace. Since the realization of social rights comes at a cost, the improvement of the welfare of the poor inevitably comes at the expense of the restriction of the property rights of the rich. To balance both the people's positive social rights and negative freedom rights, the government would inevitably discount the constitutional rights of the people (usually social rights). Many scholars believe that the constitutional provision of social rights is arduous but fruitless. If the government actively realizes social rights, it could inevitably violate the basic rights of the people arbitrarily in the name of »public welfare«. On the other hand, if the constitutional social rights become a mere formality, it will damage the authority of the whole constitution. Despite these concerns, and even after the overthrow of the Weimar Republic, many countries have stipulated social rights in their constitutions in order to correspond to the trend of legal socialization that began in the 20<sup>th</sup> century, just like many new semi-presidential democracies share institutional and social similarities with Weimar. <sup>2</sup> Whether the constitutional drafters can incorporate the relatively flexible clauses of social rights into the »rigid« constitutional code, combine the

\* Research developed at the Max Planck Institute for European Legal History in 2019.

1 WHEARE (2006) 40–46.

2 SKACH (2005) 9.

ideals of the traditional Chinese Great Harmony, blend the practice of equalization and the latest constitutional trend represented by the Weimar Constitution, and integrate the ideals of social justice with the reality of the rule of law, modern Chinese constitutional history provides us with a unique perspective.

## 2 A New Paradigm of Weimar's Constitution: Constitutional Social Rights and Social Revolution

As mentioned above, the fundamental obstacle to the legitimation of constitutional social rights stems from fiscal realities. Under the premise of limited government resources, extra care for the weak means a redistribution of social wealth, such as tax increases on the rich and transfer the resulting increased fiscal revenue to the poor, while the more extreme way is the nationalization of big industry and the revolution of land property. The constitutionalization of the social rights, in a sense, is incompatible with the traditional constitutional idea represented by the U.S. Constitution. Bringing these two ideas together can only be achieved through what Bruce Ackerman refers to as the constitutional revolution. From the perspective of American constitutional history, the establishment of the higher law transcending the general legislation of Congress was to protect the freedom of the »people« from governmental infringement, which derived from the economic background that mass democracy was feared by elite property owners. The framers of the constitution worried that the general public would come together and use their vote to take away the poverty of the wealthy. The poor people could then fill the legislative branch with representatives who reflect the general will of the civilian population. This would allow them to achieve the redistribution of social wealth, including land property, through the revolutionary parliamentary legislation.<sup>3</sup> If Beard's theory is convincing, it means that the constitution itself, as a higher law, is incompatible with social rights in terms of the legislative purposes of the U.S. Constitution.

Social rights explicitly affirmed by the constitution originated from the economic and social crises in the 19<sup>th</sup> and early 20<sup>th</sup> centuries. With the rise of the school of social solidarity and other trends of »social« thought, the relationship between the private and public, as well as the role of the government (or the relationship between society and state), have been rewritten accordingly. Compared to England, where industrial capitalism had developed earlier, the economic and social crises in the German-speaking countries were even worse at that time. Between the 1820s and 1840s, central Europe had experienced a serious social crisis, and this period was labeled »the age of pauperism«. As Beck contends, »[f]ear of social upheavals was bound to engender political response, and conservatives, liberals, and Hegelians tried in their own ways to grapple with the problem«. <sup>4</sup> »The term »social« emanated in the 1830s in Germany, with influence from France«, but »unlike British and French usage, the word »social« assumed a strongly normative and critical connotation in the German language«. <sup>5</sup> »The German tradition of political thought provided essential foundations for the development of the social state«, and »the social is in a very special way part of Germany's national identity«. <sup>6</sup> In the age of early capitalism, it is revived as the centerpiece of German particularities that the state should take the traditional responsibility for the lower orders; and the bureaucratic tradition in Prussia »facilitated the rise of the welfare state; in stronger terms, the establishment of the welfare state would have been impossible without this tradition«. <sup>7</sup> Although the school of social solidarity originated in France, the French social security system developed very late in the 20<sup>th</sup> century, and which »cannot be compared with Bismarck's creation of illness, accident, disability, and retirement insurance for German workers in the 1880s«. <sup>8</sup>

In the 19<sup>th</sup> century and around 1900, when the German Civil Code was promulgated, the economic ideology of civil law was mainly dominated by the laissez-faire liberalism, which tended to treat the economy as a self-regulating mechanism, and people believed that universal prosperity would naturally be achieved without the interference of

3 BEARD (2010) 53.

4 BECK (1995) 9.

5 STOLLEIS (2013) 4.

6 ZACHER (2013) 34–35.

7 BECK (1995) 248, 259.

8 DUTTON (2002) 1–2.

the state. It was criticized that the German Civil Code had added »a few drops of socialist lubricant«, even though this tendency toward legal socialization had not, generally speaking, penetrated into the field of private law at that time.<sup>9</sup> Outside the field of the Civil Code, however, legislation based on social standards began to emerge. The special regulation between public and private law, such as competition law, housing construction law, leasing law, farmland leasing law, and labor law, developed very quickly. Since the First World War, the emerging social and economic laws broke private law's monopoly in these fields. For example, the legislation on housing security and the regulation of land transactions had »profoundly broken through the freedom of contract and the freedom of property use«, which dispelled the »inherent unity« of private law. Just like in China, Germany's legal cultural background harbored two non-liberal (anti-individual) legal ideas, namely, the traditional feudal and patriarchal state concepts coincided with the modern welfare state concepts, which provided the fertile soil for the development of social legislation.<sup>10</sup>

The Weimar Constitution (1919) was the first to systematically stipulate social rights in the constitution itself, which are predominately found in Chapter 2, »Common Life«, and Chapter 5, »Economic Life«,<sup>11</sup> and is the first modern capitalist constitution in the western world. Similar to the Republic of China, the Weimar Republic was confronted with the requirements of modernization, such as democracy and freedom, as well as the problems of post-modernization, such as social solidarity and the welfare state. In the second chapter, which deals with the basic rights and obligations of the people, the Weimar Constitution incorporated aspects of the U.S. Constitution's Bill of Rights, the French Constitution's Declaration of Human Rights, and several socialist provisions derived from the Soviet Union, all of which can be understood in terms of a compromise between liberals and social democrats.<sup>12</sup> Its promulgation represents a landmark and established a new constitutional paradigm. The idea of social

solidarity might have originated in France, but the most typical constitutional code is the German Weimar Constitution. Before the promulgation of the Weimar Constitution, state and society were theoretically separated. Private law maintained the negative status of the legal subject, and it consequently upheld the principle of legal freedom by organizing a »non-politicized« economic society to exclude state intervention. The aim of public law was to restrict government powers. Although the government had already begun to implement the obligation of social protection in an authoritarian way, it was not until the promulgation of the Weimar Constitution that »the constitutional basis for the self-sufficiency of private law had vanished«. It marks the end of the substantive superiority of private law (personal negative freedom) to the constitution (public interests vested with the compulsory power of the welfare state).<sup>13</sup>

In the mid-20<sup>th</sup> century, the constitutional laws of Ireland in 1937, Italy in 1946, and India in 1950 explicitly stipulated the right of social welfare. The Weimar Constitution clearly stipulates that property ownership is connected with public duty and its usage should benefit the public welfare. The state may expropriate property for the needs of public interests and nationalize private enterprises that are suitable for socialization. While restricting private rights, at the same time, the Weimar Constitution stipulates in very precise terms the use and distribution of land; housing and natural resources; protection of the labor force; enactment of labor law, the guarantee of freedom of association for the protection and promotion of labor and economic conditions; social and labor insurance; the protection of labor rights; unemployment compensation; the protection of small and medium-sized enterprises; the participation of workers and employees in wage negotiations, working conditions, and other relevant public decisions (labor and economic conferences), etc.

In modern China, the efforts to incorporate social welfare rights into the constitutional code probably go back to the two constitutional drafts of the 1922 National Convention. Despite their different conceptions of the form of government,

9 ZWEIGERT/KOTZ (2003) 218, 226.

10 WIEACKER (2006) 524–525.

11 In addition to the »transitional and termination provisions«, the Weimar Constitution is divided into two

parts. The first part is about »the organization and duties of the Federation«, and the second part deals with »the basic rights and obligations of the German people«.

12 SCHMITT (2005) 2–3.

13 HABERMAS (2003) 493–494.

both »Draft A« by Zhang Junmai and »Draft B« by Zhang Taiyan stipulated the education and livelihood of the people. More precisely, they stipulated special funds to promote the development of education and culture, redistribute social wealth by means of taxation, and the restriction of land ownership in order to ensure the livelihood of ordinary people.<sup>14</sup> The detailed enumeration of social rights were transplanted into the draft constitution, which was mainly influenced by the school of social solidarity in continental Europe at that time and the Weimar Constitution promulgated in 1919. Zhang Junmai was traveling in Germany at the time of the Weimar Constitution's promulgation. After having quickly acquired a copy of the text, he met with Hugo Preuß, the drafter of the constitution.<sup>15</sup> Zhang Junmai translated the Weimar Constitution into Chinese and published it in China in April 1920. He clearly pointed out that the Weimar Constitution represents the new paradigm in the constitutional history of the world: »The American Constitution represents the individualism of the Anglo-Saxon nation in the eighteenth century; the French Constitution represents the spirit of civil liberty in the nineteenth century; and the present German Constitution represents the trend of social revolution in the twentieth century.«<sup>16</sup>

In the late Qing Dynasty, Liang Qichao, who was Zhang Junmai's mentor, advocated mercantilism and emphasized that »the most urgent mission in China is not the distribution of wealth, but its production«. In his view, rewarding capitalists should have precedence over protecting workers. On the one hand, Liang's theoretical premise claimed that Chinese society was different from Western society (at that time). Because there was no economic polarization in China, there was no need for social revolution. On the other hand, Liang did not unconditionally accept Anglo-American capitalism; instead, he advocated a mixed system much closer to the German-style of social reformism: »In this system, the private enterprises would be regulated by a set of socialist policies established by the government, which were very similar to the institutions established by the German government in the Bismarck era.«<sup>17</sup>

### 3 The People's Livelihood Doctrine and the Ideal of Great Harmony

In the 1930s, Wu Jingxiong (John C.H. Wu), the legislator and vice chairman of the Constitutional Drafting Committee, had written an article advocating the society-based legislation of the National Government: »As the saying goes, no coincidence happens. Our recent legislation coincides with the new legal thoughts and the legislative trends of the West, which are perfectly in line with the traditional national psychology of China.« Wu emphasized the adjustments made to individualism by means of legal socialization (moralization) in the West since the 20<sup>th</sup> century. He believed that »the Western legal thought has changed from the basis of an ungrateful individualism to the harmonic social solidarism«, which coincides with the tradition of the integration of law and morality in China. It also provided the »local resources« for modern China to transplant the Western modern social legislation.<sup>18</sup>

Unlike modern capitalism in the West, which advocates individualism and free competition, traditional Chinese culture always preferred the ideal of »equal distribution of wealth« and »great harmony«. Modern Chinese scholars had introduced the Confucian idea of »equality« to the West, which had some influence on Keynesianism and Roosevelt's New Deal.<sup>19</sup> After World War I, Chinese scholars, represented above all by Liang Qichao and Zhang Junmai, had reconceived Anglo-American individualistic philosophy. They began combining continental European philosophy (especially German thought) with traditional Chinese Confucianism (New Song School). The product of this new path emphasized the value of human beings and the superiority of people's happiness via a critique of Western materialism. In the field of constitutional law, they advocated the constitutional social rights created by the Weimar Republic.<sup>20</sup>

Liang Qichao, who was the consultant to the Chinese delegation at the Paris Peace Conference and appointed by the Beijing Government of the Republic of China, had published *The Record of Spiritual Travel in Europe* after his long travels in

14 XIA (2004) 749–769.

15 DU (2014) 124.

16 ZHANG (2006) 254.

17 ZHANG (1997) 189–193.

18 WU (2005) 172–176.

19 See CHEN (2009). Written in the early 20<sup>th</sup> century, this doctoral dissertation in economics at Columbia University

inspired John Maynard Keynes and U.S. Vice President Wallace.

20 XUE (1993) 38–39.

Europe. While this book introduced the League of Nations and the International Labour Union in the Treaty of Versailles, it also criticized the Chinese people's ignorance on the issue of social rights at that time, thus demonstrating the author's keen concern for the prevailing issues regarding the guarantee of labor rights and social security in Europe.<sup>21</sup> Zhang Junmai, who accompanied Liang Qichao on his journey to the Europe, had crystallized Liang's propositions on the social rights and presented them to the constitutional field. He published the book *Comment on the National Constitution* to propagate the constitutional draft of the National Convention. In his book, Zhang Junmai combined the traditional Chinese thought of »Great Harmony« with the modern Western trend of socialist thought in order to advocate for the inclusion of »socialist articles« in the Chinese Constitution: »To the Chinese people, the theory of »Great Harmony« in *Li Yun* and the thought of »equal distribution of wealth« in *The Analects of Confucius* are the essence of our civilization and the foundation of our state. The states and individuals in Europe and America occupy their property selfishly, which incurs class conflicts internally and international wars externally.« »The so-called individualism, or liberalism, is the cultural policy of Europe and America in the past hundred years [...] which lead to the Great War in Europe [...]. It is the result of making industry and commerce the foundation of the state.« »Industry and commerce should be developed, which is the trend of its nature. However, the development of industry and commerce must be in harmony with social ethics.« »Equality and Justice is the fundamental principle of a country's livelihood organization.« »The chapter on livelihood in the constitutional draft is mainly based on the German Constitution. In the original draft, there was a clause that large industries should be owned by the state, provinces, or local governments, and the clause was given up because almost all members of the constitutional assembly opposed it.«<sup>22</sup>

Actually, prior to the Chinese Revolution of 1911 and World War I, Sun Yat-sen took the principle of the »Equalization of Landownership

and Regulation of Capital« as the core of the People's Livelihood Doctrine, which together with »Nationalism« and the »People's Sovereignty« (democracy) constituted Sun's thought of the »Three Principles of the People«. The so-called »Equalization of Landownership and Regulation of Capital« not only originated from the work of foreign thinkers such as the theory of Henry George<sup>23</sup> and other socialists, but it was also in line with the Chinese tradition. As far as the »Equalization of Landownership« and the realization of »Land to the Tiller« are concerned, the Public Field System is the highest ideal within Confucianism, and the Land Equalization System had been implemented for hundreds of years (from the Northern Wei Dynasty to the Tang Dynasty). Despite the underdevelopment of traditional Chinese industry and commerce, the idea of the regulation of capital had been adopted since ancient times – for instance, the state monopoly on salt. According to the historical records contained in the book *On Salt and Iron*, as early as the Western Han Dynasty, the Imperial Chief Censor Sang Hongyang put forward the proposition and reason for the regulation of capital. In Sang's theory, salt production requires large amounts of capital, and those with such amounts of capital tend to hoard and manipulate the market price. As a result, the gap between the rich and the poor in society would broaden. The nationalization of the salt industry, however, could greatly increase the national financial revenue without increasing the tax on ordinary people, and at the same time, it would strike down the local despotic forces in order to realize the people's equality and social stability.<sup>24</sup> In fact, the central fiscal revenues generated by the nationalization of the salt industry not only financed military affairs, but were sometimes used to recruit refugees, sponsor people's livelihood, and achieve the purpose of social welfare in ancient China.<sup>25</sup>

It is generally believed that the nationalism advocated by Sun Yat-sen (»Expelling the Tartars and Restoring China«) hit on the key point of the sharp ethnic contradiction in the late Qing Dynasty, so it exerted a strong appeal.<sup>26</sup> But as far as the political and social basis of the KMT (Kuomin-

21 Guo (2011) 670–671.

22 ZHANG (2006) 85–92.

23 Sun Yat-sen's idea of »the rise in price of the land should belong to the public« might have been inspired by

Henry George's works, including *Progress and Poverty*. See TANG (2015) 378–379.

24 Ou (1935) 14–21.

25 Du (1988) 229–230.

26 At that time, the slogan »Revolution to Overthrow the Manchu and Qing Dynasties« was »almost an unreasonable religion«. See Hou (2011) 128.

tang) is concerned, Sun Yat-sen's the People's Livelihood Doctrine is a radical and unrealistic ideology. Nevertheless, after the founding of the Nanjing National Government in 1927, the KMT leaders still adhered to the Three Principles of the People, including the People's Livelihood Doctrine. Both the constitution and the ordinary law promulgated by the Nanjing National Government also contained many elements of the People's Livelihood Doctrine, such as the Land Law of 1930 and the Basic National Policy Chapter of the Constitution of the Republic of China 1946. From the point of view of the redistribution of land property rights attempted by the Land Law, the legislators were intent on realizing the ideal of equal land rights. Although the legal revolution on paper had not been implemented as a social revolution in reality, it should not be forgotten that the original intention of the national government was to realize the People's Livelihood Doctrine. In fact, the realization of this doctrine was to serve as a constitutional paradigm of social revolution. The social rights stipulated in the Weimar Constitution were not enforceable; the ideals and principles of the »social state« were absorbed and implemented by the Federal Basic Law of Germany after World War II. If we take the first part of the Chinese National Anthem literally – »Three Principles of the People are our Party's Doctrine, which guide us to establishing the Republic of China and to achieve Great Harmony« – as defined by the KMT government, the process of carrying out the People's Livelihood Doctrine should be a gradual one, and the realization of the social revolution of Great Harmony should take place after the establishment of the Republic.

#### 4 The Adoption of the People's Livelihood Rights in the Constitution and the Disputes

As the non-governmental organizations finished the constitutional draft of the National Convention, the Parliament of the Peking Government, which was the statutory constitutional organ in the Republic of China, resumed its session in August 1922. The Parliament also considered the adoption of either the social welfare articles or special chapter in the constitution. The legislative

reasons included the Chinese traditional emphasis on the People's Livelihood and equality, the new trend represented by the Weimar Republic, and the cruel socio-economic realities of the Republic of China. »The provisions of this chapter mostly adopt the provisions of the new German Constitution on the Economic Life, it's safe to say that the German Constitution is the origin of the chapter.« »However, national livelihoods have been the focus of our ancient political doctrine, Confucius said: ›Those who have a country do not suffer from a lack of wealth, but suffer from uneven distribution; do not suffer from poverty, but suffer from insecurity. For if the distribution of property is fair and reasonable, there will be no poverty; if there is harmony between the upper and lower levels, there will be no need to worry about uneven distribution; if there is social stability, there will be no danger of overthrow of the state.‹ This is the fundamental meaning of modern socialism.« »Although there are provisions on people's freedom and equality in the Provisional Constitution, the local landownerships have transacted many times, but the tenants themselves and their descendants are still living as tenants, their plight similar to that of serfs. The oppression to the Chinese people by the world trade is extremely severe today. The decline of the Chinese people's livelihood is unprecedentedly terrible compared with the Europeans and Americans.«<sup>27</sup> Significantly, although Sun Yat-sen's Three Principles of the People were not the guiding ideology of the Peking government in the early Republic of China, the Constitutional Drafting Committee still suggested that the title of the constitutional social rights chapter should be »People's Livelihood«.

The title is given the name People's Livelihood because it has a broad but clear meaning. Some people suggest that the title should be defined as Financial Accounting, while others advocate that the title should be defined as the National Livelihood. Neither of them can cover the meaning of the public life. It seems more appropriate to use the term Economic System. However, Economic System is a new concept recently imported from Japan, and the meaning of Economy is quite different in traditional China. And the meaning of life not only refers

27 Wu (2013) 1021, 1074.

to food and clothing, but also refers to the free choice on the occupation and other human activities. That is why the second chapter of the German Constitution includes freedom of marriage, freedom of assembly and association, freedom of election and so on, and its title is Mutual Life. In the same way, Chapter 3 is entitled Livelihood System, because it could not be generalized by the term Economy. This chapter focuses on the freedom of livelihood and the relief of the general unemployed and disabled [...]. Therefore, the title of this chapter has been carefully considered, and the term People's Livelihood is still recommendable.<sup>28</sup>

Wu Zongci, who was a Congressman and constitutional historian, had participated in the constitutional drafting at that time. He believed that the livelihood and educational chapters of the constitution were extremely important, even more significant than the separation of power between the central and local governments. »The important part of the whole constitution lies in the system of the local government; the whole spirit of the constitution lies in the two chapters of livelihood and education.«<sup>29</sup> However, although several drafters advocated the establishment of a social welfare chapter and proposed various drafts, in the end the 1923 Constitution of the Republic of China did not adopt it. Some scholars had explained that it was because the parliamentarians hurriedly passed the constitution to cover up the bribery scandal in the election of President Cao Kun, thus they had no time to confirm the two chapters on education and livelihood.<sup>30</sup> But if we simply conclude that »the chapters on constitutional social rights were abandoned because it was too late to consider them«, does this mean that most representatives did not consider the provisions of the constitutional social rights indispensable? By contrast, the most controversial chapter was the system of the local government (i.e. the relationship between the central and the local governments), which triggered a huge debate in the constitutional drafting process, but in the end a compromise had been reached and the chapter remained in the constitution. Why were the two

chapters on livelihood and education, which were more important in Wu Zongci's eyes, not added to the constitution? Does this mean that the drafters of the constitution were confronted with an even greater controversy concerning the legitimacy of constitutional social rights but were not able to reach a compromise in the short term, so they decided to leave the matter of the chapters unsettled? If we concede that the legitimacy of constitutional social rights is still today controversial, the above explanation might not be a fanciful illusion. In fact, some representatives did raise objections to the constitutional social rights articles at that time. The first reason had to do with economic considerations. They believed that capitalism in China was underdeveloped, and that the ideology behind the Regulation of Capital would hinder the survival and development of the vulnerable private industry and commerce. The second reason concerned the guarantee of basic rights. They thought that the active implementation of constitutional social rights by the government would inevitably infringe on the people's negative rights (the rights to freedom and property). »Chinese industry is underdeveloped, so we need to advocate capitalism, which must not be suppressed.« »It is not the general reality that capitalists oppress the laborers in our country. If the Constitution stipulates the content of People's Livelihood, it is purely a »sentimental twaddle.« »The so-called public interests are boundless if we follow this rule; when the Constitution with such articles is promulgated, it is very dangerous that the ownership of land by the people would be in danger of uncertainty.«<sup>31</sup>

In the 1930s, the drafting process of constitutional law was carried out against the background of the one-party dominance of the KMT, which adhered to the »the instructions left by the Founding Father (Sun Yet-sen)«. From the first constitutional draft to the final draft, the constitutional social rights were still designed as a separate chapter of the constitution. In both Wu Jingxiong's and Zhang Zhiben's personal constitutional drafts, the chapter is directly designated as »People's Livelihood«, specifically including »National Livelihood« and »National Education«. The final draft bearing the name »May Fifth Constitutional Draft«

28 WU (2013) 1076–1077.

29 WU (2013) 1019.

30 WANG/QIAN (1997) 388.

31 DU (2014) 131, 136.

divides it into two chapters: one is »National Economy« and the other is »Education«. There are 23 articles in the two chapters and 148 articles in the whole draft, the proportion of the social rights articles is very impressive. The articles of the constitutional draft cover a wide range of social fields, such as land reform, state-owned economy, labor security, special protection of women and children, social relief, free compulsory education, and a fixed proportion budget guarantee of the educational funds.<sup>32</sup> In view of the underdeveloped capitalism in China, some people criticized that Sun Yat-sen's Regulation of Capital in the People's Livelihood Doctrine went too far. But the level of underdevelopment of industrial capitalism did not mean that the living standards of the lower classes should be too high to warrant state interference and social aid. On the contrary, the social underclass were living in desperate plight in the young Republic. And, as mentioned above, just like China in the first half of the 20<sup>th</sup> century, when Prussia began to discuss the establishment of the social welfare state in the mid-19<sup>th</sup> century, the process of national industrialization had not been completed. Wu Jingxiong, who was the vice chairman of the Constitution Drafting Committee, retorted that: »China is a backward country in industry. At the beginning of the revolutionary transformation, instead of choosing the capitalist path and causing the tragedy of the social class struggle in the future, we should be cautious at the start to avoid the unnecessary path.« »That's why Sun Yat-sen advocated the People's Livelihood Doctrine to control capital in order to prevent private capital from being too developed to dominate the livelihood of the ordinary people. And the equalization of landownership is used to prevent private landlords from owning too much land.« As the Weimar Constitution says, »[o]rganizations of the economic life should be in accord with the principles of justice, which results the guarantee of the proper living condition for all the people.« »What the May Fifth Constitutional Draft guarantees is »the equal livelihood of the people« (Article 116 of the Constitutional Draft), that is, the equal and adequate life of the ordinary people.«<sup>33</sup>

When the Legislative Yuan propagated the May Fifth Constitutional Draft, it particularly clarified the importance of the People's Livelihood Doctrine:

In the first year of the Republic of China, the Founding Father made speeches everywhere, focusing on the People's Livelihood Doctrine. At that time, the shallow-minded people thought that they had achieved complete victory by overthrowing the regime of Manchu and establishing parliament as well as a responsible cabinet. There's no need to realize the People's Livelihood Doctrine. The Founding Father strongly denounced them, he said, »If we don't insist on the People's Livelihood Doctrine, it's not revolution«. From this case, we can see the Founding Father's determination to carry out the People's Livelihood Doctrine. In China today, what we need is the constitution guided by the Three Principles of the People, which means it is self-evident that we should make the constitution of the national economy. It is a serious misunderstanding that the national economy is not the important function of the constitution, and the constitutional law should not include national economic articles. The People's Livelihood Doctrine is implemented in order to equalize land ownership and to control capital, so that the productive forces of the people would be fully developed, and the organization of the economy can be gradually reformed. Then the subsequent social revolution would be avoided. Therefore, the economic system based on the People's Livelihood Doctrine is to control private capitalism and to develop state capitalism, so as to achieve the goal of equal sharing by the whole of the people. The declaration of Tung Meng Hui (Chinese Revolutionary League, the predecessor of the KMT) says, »The well-being of civilization should be shared equally by all citizens. Everyone in the world ought to live and work in peace and contentment.« It is the essence of the equalization of the national livelihood.<sup>34</sup>

32 XIA (2004) 990–991.

33 WU (2005) 133–135.

34 LEGISLATIVE YUAN (1940) 97–98.

## 5 Basic State Policy Chapter: A Compromise Between Rigid Constitution and Flexible Rights (Weak Rights)

As mentioned above, beyond the system of Sun Yat-sen's People's Livelihood Doctrine, Zhang had advocated constitutional social rights based on the Chinese Confucian tradition and the Weimar experience in Germany. However, when he participated in the drafting of the constitution of the Political Consultative Conference in 1946, he abandoned the idea of the superiority of social rights, which was largely due to the terrible human rights record at that time.<sup>35</sup> In essence, the extension of constitutional social rights must come at the cost of the limitation of constitutional basic rights (the first-generation human rights). At that time, it was the consensus that the constitutional law should guarantee the people's freedom and restrict the government's extensive invasion of people's basic rights.<sup>36</sup> The Constitution of the Republic of China, enacted in 1946, actively protects the fundamental freedoms and rights of the people. The articles of human rights abolish the rhetoric that some right is »unrestricted unless it is stipulated by the law« in order to prevent the government from abusing its legislative power to deprive the people's rights, which is obviously different from the previous constitutional texts. However, Article 23 of the Constitution states that »the rights to freedom enumerated in the preceding articles shall not be restricted by any law except those necessary to prevent obstruction of the freedom of others, to avoid emergency distress, to maintain social order or to advance public welfare.«<sup>37</sup> »To advance public welfare« is one of the legal reasons for restricting people's rights to freedom.

At the same time, the constitution established the chapter on »Basic State Policy«, which specified in the form of 15 articles the state's social and economic policies in great detail. It emphasized that »the national economy should take the Peo-

ple's Livelihood Doctrine as its basic principle, implement the principle of Equalization of Landownership and Regulation of Capital in order to strive for equality and prosperity of the national economy and people's livelihood« (Article 142). Some of the constitutional provisions basically copy the provisions of the Weimar Constitution,<sup>38</sup> for example, paragraph 3, Article 143 of the Constitution: »The added value of the land shall be levied by the state and shared by the people, if it is not increased by the investment of labor capital«, which is in line with the latter half of paragraph 3, Article 155 of the Weimar Constitution that »if the increase of land value is not due to investment or labor, it should belong to the society«.<sup>39</sup> In addition, in Section 3, »National Economy«; Section 4, »Social Security«; Section 5, »Education and Culture«; and Section 6, »Frontier Areas« of the Basic State Policy Chapter, there are 28 articles related to the social rights of the constitution. At first, in Zhang Junmai's Constitutional Draft for the Political Consultative Conference, the National Economy Chapter of the May Fifth Draft Constitution was greatly simplified. The chapter was merged with the issues of »National Defense Diplomacy« into the new chapter of Basic State Policy, which diluted the characteristics of the Constitutional Draft as a national economic constitution. However, in the process of deliberating on the Constitutional Draft by the Constitution-Making National Assembly – because the KMT delegates who insisted on Sun Yat-sen's People's Livelihood Doctrine accounted for the majority of the representatives – the final constitutional text had shifted from Zhang Junmai's »relative value neutrality« on the issue of social rights to the socialist ideology of the May Fifth Draft Constitution.<sup>40</sup> Section 3, »Economic Life«, and Chapter 13, »Basic State Policies«, of the Constitution clearly states that »the basic principle of national economic development is the People's Livelihood Doctrine, that is, the state has the obligation to actively realize the Equalization of Landowner-

35 XUE (1993) 99–101.

36 See NIE (2007).

37 XIA (2004) 1105–1106.

38 Considering the collapse of the Weimar Republic and the rise of Nazi Germany, as well as the fact that China and Germany were hostile countries during World War II, it

required a certain amount of courage and wisdom on the part of the drafters of the constitution to transplant the provisions derived from the German Weimar Constitution.

39 The Constitution of the Republic of China in 1947 refers to XIA (2004) 116; the Constitution of Weimar

refers to the COMPILATION OFFICE OF THE LEGISLATIVE YUAN (1933) 230.

40 NATIONAL ASSEMBLY (1946) 448–450, 491–497.

ship and Regulation of Capital in order to strive for equality and the prosperity of the national economy and people's livelihood. Section 4, »Social Security«, directly transplants the advanced social welfare systems of the European industrial democratic countries, such as full employment and social insurance in Germany and Sweden, national health services in Britain and Sweden, family policies in France, Belgium, and Austria, as well as the labor protection policies of these countries since the Industrial Revolution.«<sup>41</sup>

Generally speaking, the primary controversy within the constitution-making process in 1946 was the form of government (the separation of powers); moreover, the legal restriction of constitutional basic rights also aroused considerable attention. The amendment and adoption of the constitutional social rights provisions were, however, not controversial, which might be attributed to the »half-hearted« mentality of the constitutional drafters represented by Zhang Junmai on the issue of constitutionalizing social rights. It should be noticed in the Constitutional Draft of the National Convention of 1922, the May Fifth Constitutional Draft of 1936, and the Constitutional Law of 1946 that the social rights articles are all outside the chapter on »The Basic Rights and Obligations of the People«. The Chinese systematic arrangement of the social rights in the constitution is very different from the Weimar Constitution, which stipulates social rights in the second part (»Fundamental rights and obligations of the German people«) of the Constitution.

Therefore, whether they were listed in the chapters on »National Livelihood«, »People's Livelihood«, or »Basic State Policy«, scholars usually distinguish the social rights provisions from the constitutional basic rights articles. In terms of the semantic interpretation, social rights are not »basic« rights; in terms of the purposive interpretation concerned with economic realities, social rights are expensive rights; in terms of the systematic interpretation, the »Rights and Duties of the People« chapter follows the first chapter, »General Principles«, and precedes the chapters on governmental organizations. However, Chapter 13, »Basic State Policy«, is the penultimate chapter, which only precedes the final chapter, »Implementation and

Amendment of the Constitution«. Does this imply that its lower constitutional status might be responsible for the lack of effectiveness of the »Basic State Policy«? According to academic consensus, the Constitutional Law of 1946 included social rights in the chapter on »Basic State Policy«, the purpose of which is to guide the government by means of the »Basic Policy«. »This chapter is designated Basic State Policy, the constitutional framers only indicated the objectives of the legislation and administration. The articles are not mandatory. If the government fails to achieve the objectives regarding the poor conditions, it could not be regarded as unconstitutional.« Although the social rights stipulated in the constitution are only »declarative rights«, and could not be fully enforced, this does not mean that these provisions are hypocritical or meaningless. The transplantation of the constitutional social rights is »the answer to the requirements of the welfare state representing the modern idea of the rule of law«, and it is the gesture which is significant. As a result of the adoption of this part of the modern constitution, the Chinese constitution has shifted from the traditional paradigm, which was devoted to the passive protection of individual rights and the prevention of government autocracy, to the new paradigm, the task of which is to actively promote the development of the whole society and urge the government to strive for the welfare of the people – effectively changing both the spirit and outlook of the constitution from that of the traditional one.<sup>42</sup>

Compared to the Weimar Constitution, modern China has unique ideas on the systematic arrangement of social rights stipulated in the constitution, which distinguishes social rights from the basic rights in terms of their constitutional meaning and system, thus avoiding the embarrassment associated with the incomplete implementation of constitutional social rights due to financial realities, and saves the authority of the constitution. At the same time, the Chinese constitution-makers had not forgotten to stipulate the ideal of social rights in the constitution, which is based on the political responsibility (rather than legal responsibility) of the government to realize social rights. This is a unique way of bring the ideal of Great Harmony to social reality. At the time of the

41 Su (2006) 280.

42 LIN (1993) 245–248.

drafting of the Constitution of the Republic of China in 1946, many countries tried to incorporate the weak social rights provisions into the rigid constitution and were confronted with the challenge of »combining the rigidity with flexibility«. Article 45, »Guiding Principles of Social Policy«, of the Irish Constitution 1937 begins with the statement that the principles stipulated in the Social Policy provision of the constitution should be specified as laws made by Congress, but should not be enforced by the courts through judicial review. In drafting the constitution, some drafters wanted to transplant the social rights articles of the Weimar Constitution; however, there were others who argued that the statement on social rights might be »meaningless« and »such a provision could give rise to claims of unconstitutionality if they fall short of the guarantee«. Finally, the drafters found that the social rights of the Weimar Constitution »had been designed merely as platitudes and had never been the basis for upholding a citizen's rights against the state«, and the solution of the Irish drafters was to make the social rights »non-justiciable«. <sup>43</sup> Similarly, in the Federal Republic of Germany, the constitutional social rights cannot be justified directly as a civil right that would be protected by the judicial system, generally speaking. The »value system« (the constitutional social rights) contained in the Basic Law (*Grundgesetz*, 1949) might be extrajudicial, but »at the same time it was grounded in (or should be grounded in) the legal system«. <sup>44</sup> Although the Basic Law has abandoned the specific social rights provisions of the Weimar Constitution, it's not »value-neutral«. On the contrary, the Basic Law regards the principle of the »social state« as one of

the basic constitutional principles – one running parallel to the principles of democracy and rule of law (*Rechtsstaat*). In the eyes of the Federal Constitutional Court, »*Rechtsstaat* and social state could well be conjoined at the constitutional level without greater problems«. <sup>45</sup> In fact, Germany has developed a very successful social welfare system.

The choice of a state's legal system is inevitably related to its inherent culture. The tradition of the bureaucratic state, paternalistic government, and communitarianism provides political and social resources for the establishment of constitutional social rights, as we see in the cases of Germany and China. Furthermore, the legislative movement of the social welfare state was initiated in the age of early capitalism both in Germany and China, which were very different from the situations in England and France. It is safe to say that the constitutional framers in modern China have fully localized the institution and theory of the constitutional social rights transplanted from Germany through the traditional ideal of Great Harmony and the modern People's Livelihood Doctrine. The Constitution of the Republic of China 1946 might have moved beyond the advanced European and American paradigm in legislative technology. It has properly dealt with the conflict between social rights and basic rights of the constitution, the contradiction between rigid code and flexible rights in the text and system of the constitution, and has taken into account both ideals and reality. It has explored a unique path that we can safely say differed somewhat from the Weimar experience. ■

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43 COFFEY (2018) 242–244.

44 STOLLEIS (2018) 137.

45 STOLLEIS (2018) 140.

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