

Globalization and Constitutionalism

Preface

Globalization and constitutionalism are the hot topics discussed in the theoretic field of the world. No matter how their content can be defined, as one sort of special social phenomenon, the people may feel their existence and influence on the present and future life. The development of different civilizations in the world reflects the common tendency in some degree. Today it is very difficult for any state to say that it can develop independently.

Therefore, it is necessary for the states in the world to cooperate and communicate so as to deal with the common problems, including pollution of environment, prevention and shock of international crimes, blowing terrorism and the effective cooperation in the field of protection of human rights.

According to Marxism, social development depends on economic growth, and this social ideology contains the importance of a legal system in the development of a state. In particular, with growing importance of the WTO, economic globalization based on the world market gives rise to the states in the sphere of ideology and legal system. It is worth noting that the United Nations after the World War II have played a very important role in promoting the development of globalization and cooperation among the different civilizations, especially in the domain of protection of human rights and the rule of law.

In the 20 century, China experiences an immense disgrace and inner wars. In the early stage of globalization, the idea of globalization didn't bring the real prosperity but on the contrary insult and sadness to China. After the foundation of the new China, China's government pursued the policy of paddle its own canoe and so closed the door to the foreign world.

In 1978, China's government exercised the policy of opening to the outside world and began to accept all kinds of ideas existing in the world and to communicate with the international organizations and other countries. With the development of economic and social development and progress, more and more measures have been taken by China's government in order to put China into the framework of globalization. In 1997 and 1998, the two international covenants on human rights (CCPR and CESC) were signed by China's government, later CESC was ratified by the Standing Committee of NPC in 2001. In 2002, China's government joined the World Trade Organization, and the rules of WTO have been accepted effectively in China. In 2004 the first article concerning protection of human rights "Human Rights Shall be Guaranteed and Protected by the

State” was written in the Chinese Constitution. This implies that the conception of human rights in the international conventions on human rights has been grown popular both at the governmental and at the public level in China.

Thus globalization isn’ t a theoretical but a practical concept in the modern China. The importance in the public life has grown, particularly in the field of constitutional construction. The ideas about democracy, liberty, human rights and the rule of law based on the background of globalization have deeply changed the political reforms and legal construction in China.

On the basis of financial aid by the Konrad Adenauer Foundation, we organized a group of young scholars to analyze the relationship between globalization and constitutionalism in order to regard especially the influence of globalization on the democratic and legal construction in the future of China.

We have confidence in the significance of such research and we wish the topic on globalization and constitutionalism would become a hot issue in the academic field of legal construction.

The book on “**Globalization and Constitutionalism**” edited generally by Professor Mo Jihong, vice president of Chinese Association of Constitutional Law, consists of eight chapters.

The **first chapter** is called globalization and constitutionalism, containing the following matters as the conception and characteristic of globalization and constitutionalism, the main impact of globalization on constitutionalism and the effect of constitutionalism in promoting globalization.

The **second chapter** contains the influence of globalization on the activity of making constitution, including the national state and the traditional idea of constitution-making, its influence of foreign constitutions, its influence of international conventions on human rights and the partly releasing of sovereignty and legality by the constitution of the EU.

The **third chapter** comprises the influence of international protection of human rights on the constitutionalism in the national state, involved in the following issues as the birth , evolution and development of human rights , the basic legal framework of the relations of international human rights, the influence of international conventions on human rights of the member states and the significant and developing tendency of universal human rights in the constitution of China.

The **fourth chapter** is called global democratization and the party politics in the national state containing the historical tendency of development of the party politics, its influence of globalization and the issue of their legality and standardization.

The **fifth chapter** comprises freedom of association and

internationalization of NGOs, divided into the following three issues: the historical evolution of legal protection of freedom of association, the role of NGOs in the international and national protection of human rights and the influence of freedom of association in implementing two international covenants on human rights in China.

The **sixth chapter** contains environmental law and global protection of zoology, involved in the following points: the global issue of zoology and the birth of the conception of environmental law, its concern in the different states, the situation of the environmental protection in China and its legal remedy.

The **seventh chapter** comprises globalization and protection of the rights of foreigners, including its origin, its natural and basic content and the issue of its protection in our constitution and laws.

The **eighth chapter** is called constitutional litigation and internationalization of individual appealing mechanism, concerning the following points as the content of constitutionalism of globalization and the tendency of constitutional litigation, the rational choice of the modern constitutionalism through conferring the power to interpreting constitution to the judge, the common function and purpose of constitutional litigation, a historical survey of its system, the diversity of its forms and the development of individuals appealing mechanism to the system of constitutional litigation.

The **ninth chapter** contains the education and international cooperation and communication of human rights, its purpose, approach and mode of education, the role of research and propagation of human rights in the process of disseminating its idea, and promoting international cooperation and communication of its education further.

The title of the **tenth chapter** is globalization and the developing tendency of the contemporary constitutionalism, involved in the three issues as international democratic principle: one possible political purpose, the coming era of the world citizen and whether global governance implies the developing direction of constitutionalism under the background of globalization.

To sum it up, the authors try to express the new ideas about every issue based on collecting the abundant materials and discussing them deeply. The concrete ideas have been unveiled in each chapter. The most obvious characteristic of each chapter is the different writing mode of each author. The above research is able to make understand the significance of globalization and constitutionalism. The following parts will focus on the main ideas in each chapter.

In the **first chapter**, the author points out that the conception of globalization isn't very clear, but there are some standards which can identify its historical evolution and main meaning. The early origin of globalization stems from the capitalistic colonialism in form of input

and output of the international capital .The actual birth of globalization can be seen in the forming process of the United Nations which has enhanced the cooperation and communication among the national states and promoted the development of protection of human rights through a series of international conventions on human rights since 1948 .The World Trade Organization has become a global economic organization in the world which has established the basic economic order.

However the category and extent of globalization isn't definitive complete particularly the conception of globalization didn't comprise legal and political factors. Legal but not economic globalization is more concerned in the academic and practical sense. According to the understanding of the author, constitutionalism is a common conception which meaning can be accepted in the academic field. It refers to the domain of democracy, liberty, rule of law and protection of human rights both in traditional and modern sense. Constitutionalism possesses universal values relied on the background of market economy. With the development of the economy and the society, the ideas of constitutionalism may grow up automatically in a specified society and state in support of globalization.

In this chapter, the author emphasizes that the democratic movement is the stable tendency in the cultural environment of constitutionalism. Without the development of democratic values, the political, economic and cultural system can't be really established and maintain smoothly. Therefore, the reciprocal influence and impact between globalization and constitutionalism can be found in the process of modernization in the world.

In China, since 1978, the democratic system is restored from the devastation during the "Cultural Revolution"; legal system has been improved by adopting a great number of laws, regulations and rules. Moreover the conception of human rights has entered into the Constitution of China. The above changes come from the inner reforms and outside impulses. The political policy of ruling a state according to the laws has been replaced by that of ruling a state in accordance with the constitution.

In the recent year, China's communist party as the ruling party enhances the ruling idea of exercising the power according to the constitution. The new ruling program shows the apparent progress in the development of constitutional construction. It is possible to predict that the real democratic system can be set up and fortified in the wide background of internationalization and globalization.

In the **second chapter**, the author refers to the influence of globalization on the activity of making a constitution in the national state.

In the author' view, the traditional view of constitution-making

stems from the academic school of the people's sovereignty in form of the theoretical basis of the right to make a constitution. The identity of the subject of constitution-making determines the concrete process of accepting the people's will and forming the content of constitutional law. In the early time of constitution-making, a lot of countries copied the mode of the Constitution of the United States, France and England. In the process of constitution-making, more and more countries have learned from one other, for instance, the Spanish Constitution of 1931 was imitated by Italia, the Switzerland and France, on contrary the Spanish Constitution of 1978 was influenced by the Italian Constitution, the French Constitution and so forth.

It seems that the reciprocity of constitution-making in the traditional countries is obvious. In the modern society, on the basis of the system of international protection of human rights, a series of international conventions on human rights create a strong impact on constitution-making in the member states. The universal value about protection of human rights has been accepted in the different constitutional laws. In particular, the Constitution of the EU at the end of 2004 will put a great impact on the member states of the EU through the political process of constitution-making.

Constitution-making is becoming a global movement. In 2004, when the Constitution of China was amended, regarding the fact of ratifying and signing two international covenants on human rights, the important sentence which specifies the state respects and guarantee human rights was stipulated in the Constitution of 1982. It states the tendency of international protection of human rights has put substantial impact on constitution-making procedure in China.

In the **third chapter**, the author points out that human rights emerged in the process of anti-inhuman treatment in time of wars. In the early twentieth century, international labor organizations and the other international organs played a very important role in protecting human rights mainly in the field of minorities and labors. After the Second World War, in regard of the lesson caused by the fascist authorities in violating human rights and disregarding the human dignity, Universal Declaration of Human Rights was adopted and proclaimed by general Assembly Resolution 217A(III) of 10 December 1948. It settled the foundation of protection of human rights in the sphere of the world. It was the first time to proclaim human rights which were equally suitable to everyone without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

On the basis of all provisions in Universal Declaration of Human Rights, in 1966, both International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights

were adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December. In the subsequent period, two optional protocols to CCPR have been past and got into effect for the ratified member states. Until now, the above international documents constitute the legal framework of international protection of human rights.

It is worth noting that international conventions on human rights have played a substantial influence on constitution-making and policy-making in the field of protection of human rights in the member states. Lots of member states have wholly accepted the views of universal human rights affirmed in international conventions on human rights. The common standard of protection of human rights for all people and all nations as showed in Universal Declaration of Human Rights has been established both among the people of member states themselves and among the people of territories under their jurisdiction.

In the process of accepting the views of universal human rights, there exist many value contradictions which need to be resolved both in the theoretical and practical sense. The most important issue is the relation between international conventions on human rights and the laws of protection of human rights in the member states, particularly in form of connections between universal human rights and the rights protected by the inner laws in member states. According to the understanding of the author, when we discuss the relationship between international conventions on human rights and international laws in the member states, in essence, we need to probe into the relationship between the rule of law and the protection of human rights. Without the conformity or a kind of consensus of the international and internal principles of the rule of law, the value of human rights is able to become softened because a great number of value contradictions among member states and other states could not be resolved peacefully.

It is very important on the level of national states that the dialogue and mutual understanding shall be established so that all states can be respected and encouraged in the field of protection of human rights. Since the beginning of 1990s, the universal view of human rights have been confirmed and respected by the peoples and the government in China. Although there is a long way in China to improve the situation of protection of human rights, the substantial reform has been found in the process of constitution-making and policy-making. It can't be doubted that universal views of human rights would be accepted completely both in the institutional level and in the theoretical level.

In the **fourth chapter**, the author puts her focus on global democratization and the party politics in the national state. In the author's view, the party politics roots in the democratic movement which manifests the tendency of globalization based on the academic school of

“the People’s Sovereignty” and “Proletarian Revolution in the Whole World” in a traditional sense. In modern society, it is apparent that a lot of the political parties are created in purpose of globalization such the movement of green earth and the common ideology. At present, the green party has played a bigger role in the process of general election in many states.

The other worth-noting phenomenon is the regionalizing development of the political party in order to play a more important role in the inner affairs of regional organizations such as the EU. With the development of the party politics, the party programs for the political parties in similar nature in different countries have been concerned and disseminated effectively on the background of globalization. The democratization of the political party and the globalization of the party politics are turning into the main subject of the modern democratic politics. Such tendency possesses some influence on the political reform in China in the coming future. The slogan of enhancing the ability of exercising the power has its important meaning in developing the modern party politics.

In the **fifth chapter**, the author discusses the relationship between freedom of association and internationalization of NGOs. The author mentions the historical evolution of freedom of association, and points out that the birth of NGOs at the international level can be contributed to the development of freedom of association in the civil society. In the theoretical sense, freedom of association is the basis of the civil society and the premise of the complete democracy. Freedom of association is helpful to guarantee the rights of minorities and the weak groups in the society. After the Second World War, some international non-governmental organizations began to play a very important role in the field of international protection of human rights through the working mechanism of the United Nations. NGOs at the international level are very active in providing consultation and suggestion to promote human rights and to settle the bridge between UN and the member states and so forth. In the domestic domain, NGOs play a positive role in participating in the democratic process and in becoming the leaders of public opinions.

It is worth noting that NGOs can play a very important role in hoisting the development of globalization in the sphere of organizing international congresses of NGOs in the world and disseminating the non-governmental culture and politics and so on.

In China, freedom of association has been respected and protected by the Constitution of China, but there do exist lots of factors which need to be improved such as freedom of the trade union, political and religious organizations. Thus we need to reform our legal system and allow more forms of non-governmental organizations to survive for their contribution to the establishment of the democratic and legal society in

order to protect human rights more effectively.

In particular, there should be wider channel for individuals to set up the non-governmental organizations without the political interference so that international conventions on human rights can be implemented really and completely.

In the **sixth chapter**, the author runs back over the history of environmental law, and points out that environmental protection consists of a group of legal rights both in international field and internal domain. The author earnestly insights into all kinds of provisions concerning the environmental awareness in the constitutions of different states, and finds the present protection mainly focuses on the governmental liability but lack of individual duties. In this part, the author puts more attention to the right to understand the environmental messages. According to the author, understanding the environmental information is one of most important duties, containing seeking, imparting and accepting all kinds of environmental information in order to avoid the environmental disaster and damage.

The author points out that the cause of the environmental disaster is the production of global industrialization, so environmental protection needs more common efforts made by all countries in form of common management of environmental pollution and disaster.

China is a developing country, which has the important task to cooperate with the other countries against environmental pollution.

Therefore it is necessary not only to put environmental protection into the Constitution of China but also to set up the judicial remedy mechanism for providing legal aid to the victims of environmental disaster.

In the **seventh chapter**, the author scrutinizes the history of foreigner's rights in the different constitutional laws, and points out that the foreigner's rights have been neglected in a long term by most of the national states. The foreigners were violated during the Second World War found on the racial discrimination and animosity.

The foreigners were regarded as the citizens of a second level inferior to the native citizens. After the Second World War, with the development of international protection of human rights, according to the spirit of the Universal Declaration of Human Rights, the member states have taken responsibility to protect everyone's rights in the domain of their territories under their jurisdiction. In the author's view the development of protection of universal human rights supports the respect to foreigner's rights in the sovereign domain of national states.

In the recent years, in some countries such as Germany, Japan and some Nordic countries, the foreigners working or living there can enjoy the right to election at the local level in order that they can have chance to participate in the managing affairs connecting with their interests.

In China, according to the Present Constitution of China, the foreigners working or living there have wide rights including right to work, right to personal freedom and all kinds of economic and cultural rights.

However, there isn't any clear stipulation in the Constitution or laws to put foreigners in an equal position to the Chinese citizen. So there is a long way for us to revise or amend our legislation to improve the political and legal status of foreigners working or living in China so as to prevent them from the discrimination of national or social origin.

In the **eighth chapter**, the author studies such issues as constitutional litigation and internationalization of individual appealing mechanism, concerning the following points as the content of constitutionalism of globalization and the tendency of constitutional litigation, the rational choice of the modern constitutionalism through conferring the power to interpret constitution to the judge, the common function and purpose of constitutional litigation, its historical survey, the diversity of its forms, and the development of individual appealing mechanism to the system of constitutional litigation.

In the author's opinion, constitutional litigation manifests its popular influence on globalization. The two main models in the aspect of constitutional litigation reflect global impact on the different constitutional systems. The constitutional review originated from the Supreme Court of the United States of America has been accepted by or transferred to many countries in the tradition of common law in virtue of the political principle of checks and balances.

The constitutional court mode emerged in the continental countries has been exported in lot of countries in the written constitution. The latter can be run back to Germany or Austrian constitutional courts. However no matter which kind of constitutional litigation can be used, the basic function of constitutional litigation in the field of interpreting constitutional law and protection of human rights is similar or close.

The author emphasizes that the constitutional judges can play a very important role in defending the constitutional authority through constitutional litigation, and the victims can utilize its mechanism to remedy their damage. With the development of globalization, as one part of modern constitutionalism, constitutional litigation has been accepted by more and more democratic countries. The same or similar principle of constitutionalism should support the same or similar mechanism of litigation. Its institutionalization under the background of globalization is getting stronger and stronger. It could be predicted that such a system will be established in the process of political and judicial reforms in China in the not far future.

In the **ninth chapter**, the author probes into the history of "The Ten

Years Education of Human Rights of UN”, and sees about the purpose, way and method of education of human rights under the framework of UN.

The author points out, that the education of human rights can be divided into formal and informal education.

Formal education of human rights organized by the government aims to train the skillful group of the experts in the field of education of human rights. Informal education mainly includes dissemination and propagation of the views about protection of human rights through NGOs. In the author’s opinion it is necessary to cooperate and provide mutual aid in the field of education of human rights for the states particularly through the training program offered by internationalized institute of human rights for example Norwegian, Danish or Irish Institute of Human Rights.

Education of human rights should combine the professional and social education for the sake of improving the effectiveness of education. In China, for the purpose of spreading education of human rights, there should be some regular courses about their protection in the system of university education, at the same time through mass media or public channel, propagation of the protection must be paid more attention to such an extent that the public could understand the notion of significance of protection of human rights correctly in order to guarantee their own rights protected both in international law and domestic law.

For the sake of perfecting the system of education of human rights in China, we need to establish regular ties with some internationalized institute of human rights so as to improve the effectiveness of education of human rights.

In the **tenth chapter**, the author takes into consideration that with the development of globalization the biggest influence on national constitutionalism construction may be the form of international democratic principles.

However without the institutional support of the world citizens, it is very hard for international democratic principles to play any substantial role in determining the important policy in the field of international affairs.

Hence in the process of developing international democratic principles, the free flowage of the population should not be limited, and the foreigner’s rights should be protected in a higher degree. For the purpose of setting up the forming procedure of the people’s will, the political referendum in the national state should be encouraged and popularized.

In addition, the international governance represents one kind of developed direction of international relations. In the era of globalization, the traditional views of constitutionalism must be constantly changed and perfected in order that the value of democracy,

human rights and rule of law could be fit the contemporary requirements.

Putting it in a nutshell by going through the all kinds of different factors of mutual influence between globalization and constitutionalism, the authors in this book attempt to point out that there exists in some degree identity among the human civilizations. Constitutionalism in the sense of tradition still possesses universal impact on the political procedure both in the national state and in international relations. Democracy, human rights and the rule of law should deserve to be disseminated and spread in the whole world based on the orientation of globalization.

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