



# Contemporary Chinese Legal System

**Dr. Haihong Liu, SISU**  
**Spring Semester, 2016-2017**

# Schedule

Week	Date	Topic
1	Feb 23	No Class
2	March 2	Topic 1: Chinese legal system in general-Chinese Legal Culture and Traditions
3	March 9	Topic 1 Chinese legal system in general - Experience of Law in PRC
4	March 16	Topic 2: Chinese Constitutional Law & Rule of Law-Chinese Constitution
5	March 23	Topic 2: Chinese Constitutional Law & Rule of Law-Legal Institutions and the Administration of Justice and Law
6	March 30	Topic 2: Chinese Constitutional Law & Rule of Law-Sources of Law and Law-making
7	April 6	Topic 3: Chinese laws in operation-public law
8	April 13	Topic 3: Chinese laws in operation- civil law
9	April 20	Topic 3: Chinese laws in operation-Business law
10	April 27	Topic 3: Chinese laws in operation-Foreign Trade & Investment law
11	May 4	Internship: Visit the legal department of a multinational company in Shanghai (The time may be changed)
12	May 11	Topic 4: Dispute Resolutions
13	May 18	Topic 5-Implementation and Enforcement of Law

# Topic 2: Constitution and Rule of Law





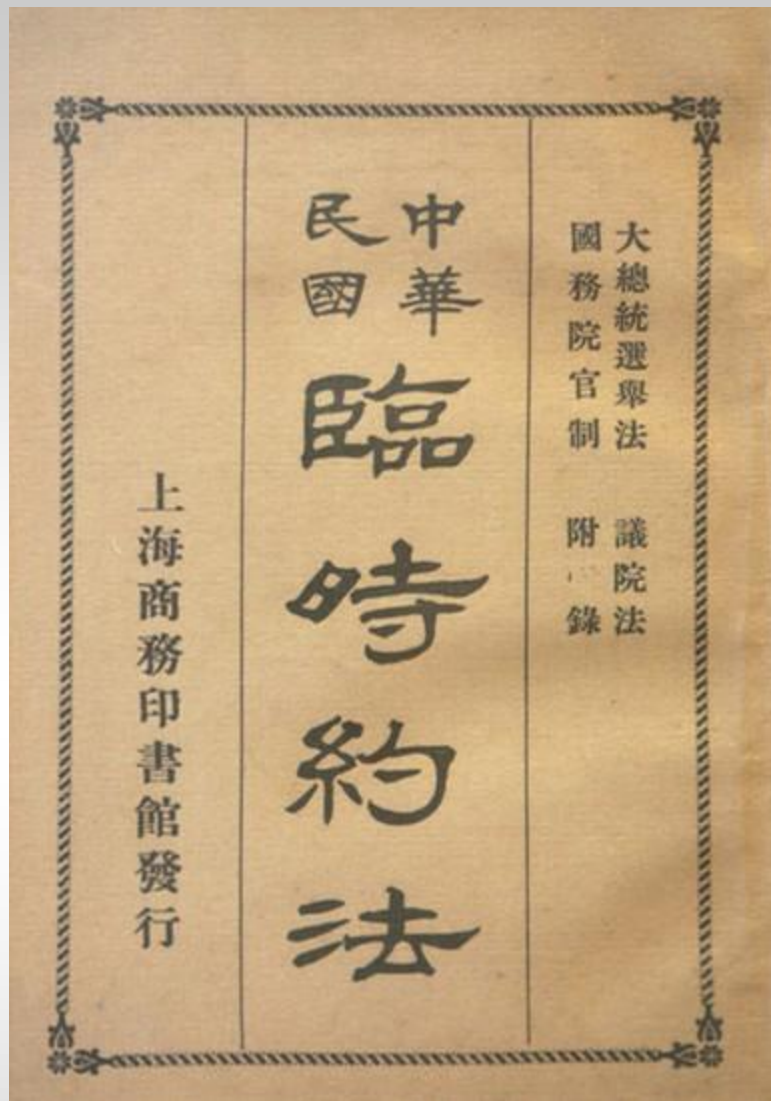
# **I. Historical Evolution of China's Constitution**

## **II. China's Constitution and Rule of law**



# Prelude: The Hundred Days' Reform (百日维新/戊戌变法)





**The Provisional Constitution  
of the Republic of China  
(March 1912)**



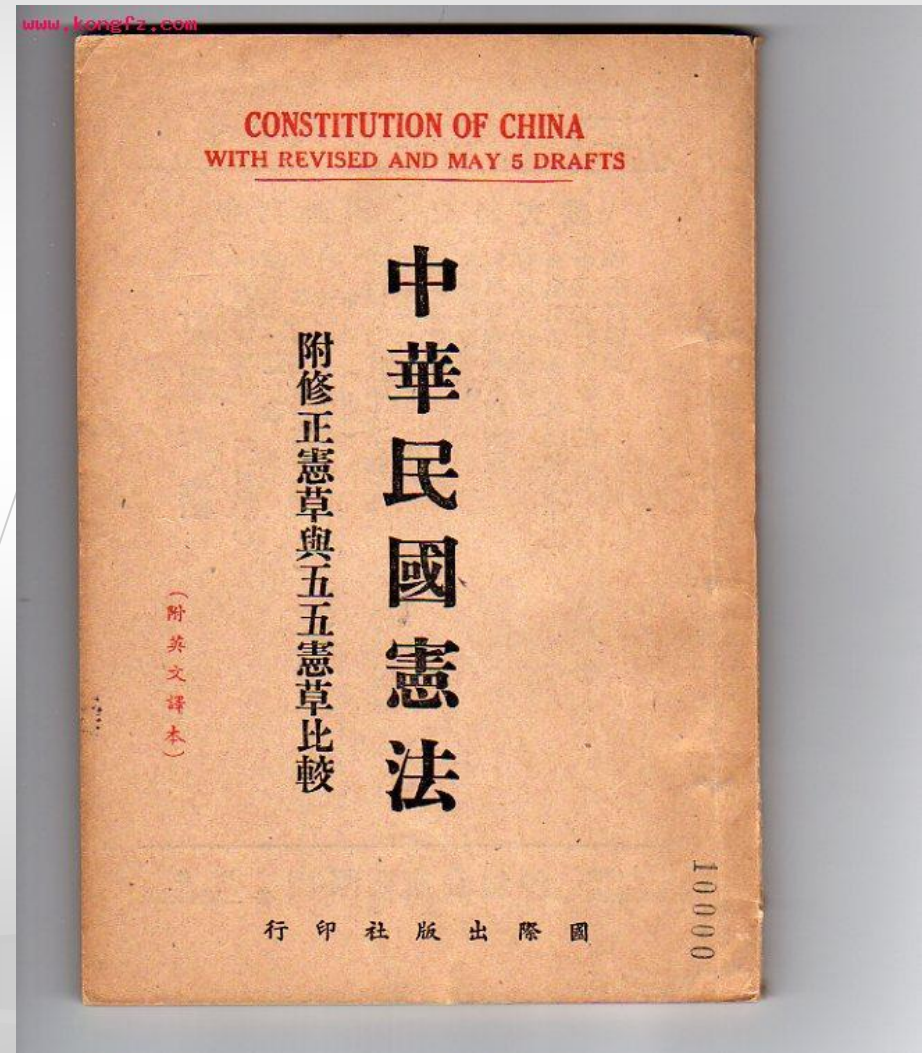
**The Temple of Heaven  
Draft (Oct 31, 1913)**



# May 5 Draft

(Provisional Constitution of Political Tutelage  
Period on May 5, 1931)

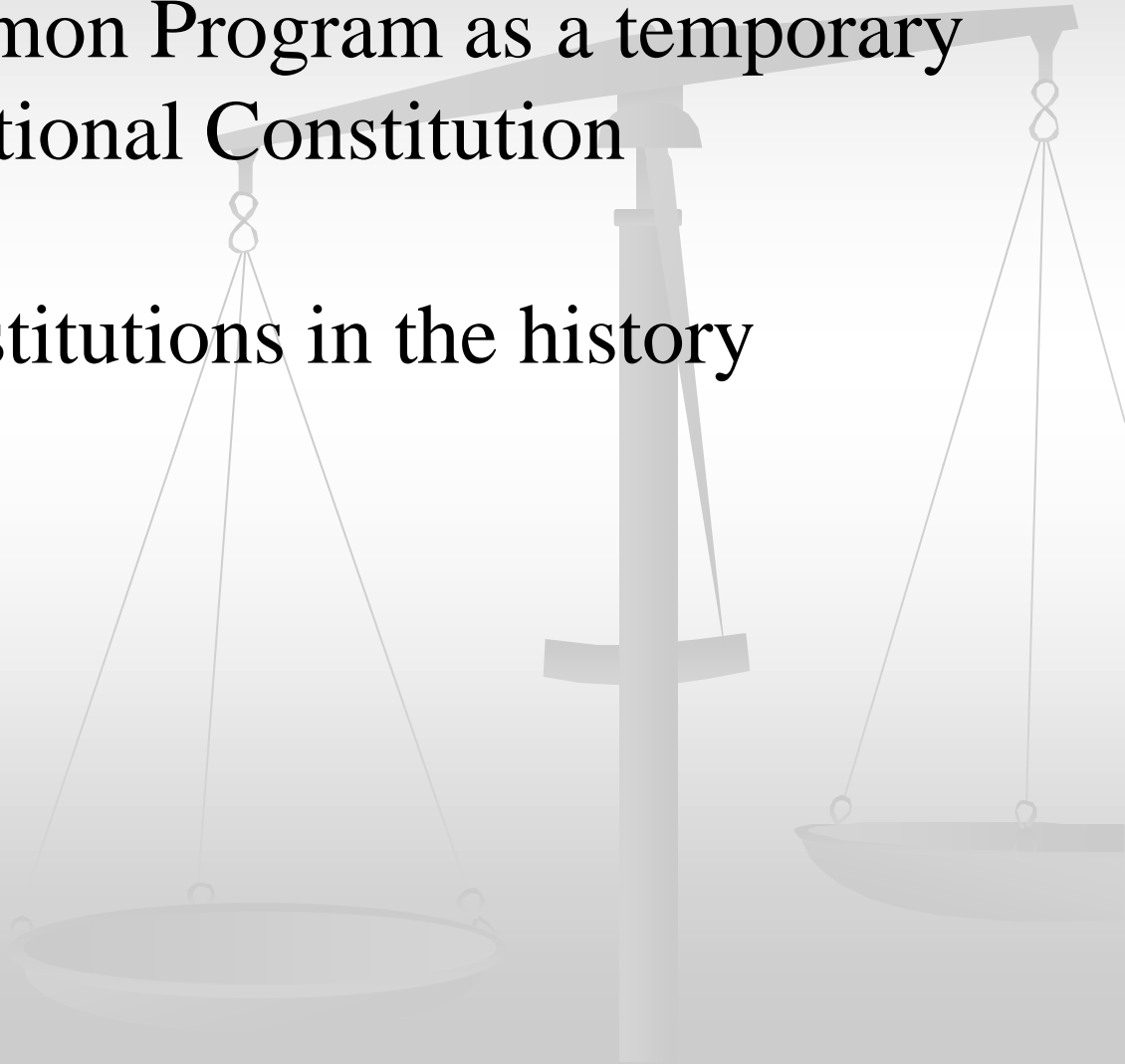
**One-party system  
with supreme power  
held by the National  
Congress of the  
Kuomintang and  
effective power held  
by the Central  
Executive Committee  
of the Kuomintang.**



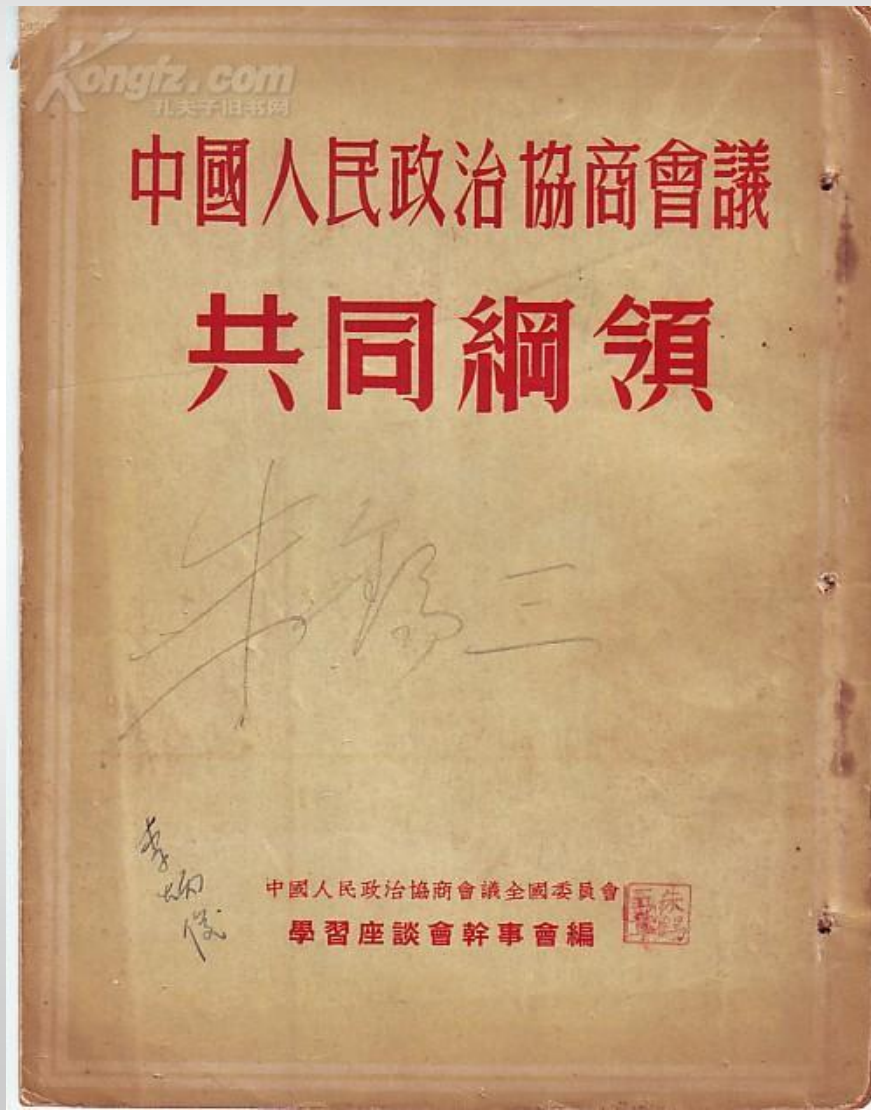
# I. Historical Evolution of China's Constitution

A. The Common Program as a temporary and transitional Constitution

B. Four Constitutions in the history



# A. Temporary and transitional Constitution



# A. Temporary and transitional Constitution

- The Common Program for the Political Consultative Conferences of China adopted on September 29, 1949.
- Outlined the nature, task, and the guidance of the newly-born country in the form of fundamental law.
- With regard to legal system, the newly-born People's Republic would “abolish all the laws, regulations and judicial systems established by the anti-revolutionary KMT government which aimed to oppress people, and build up new laws, regulations, and judicial systems to protect people.”



# A. Temporary and transitional Constitution

The National Workers, Peasants, Soldiers' Representatives has the supreme law-making power.



Based on the Constitution of Chinese Soviet Republic of 1932  
and the theory of democratic dictatorship of the people

# B. Four Constitutions in the history

1. 1954 Constitution
2. 1975 Constitution
3. 1978 Constitution
4. 1982 Constitution
5. 4 amendments of 1982 Constitution

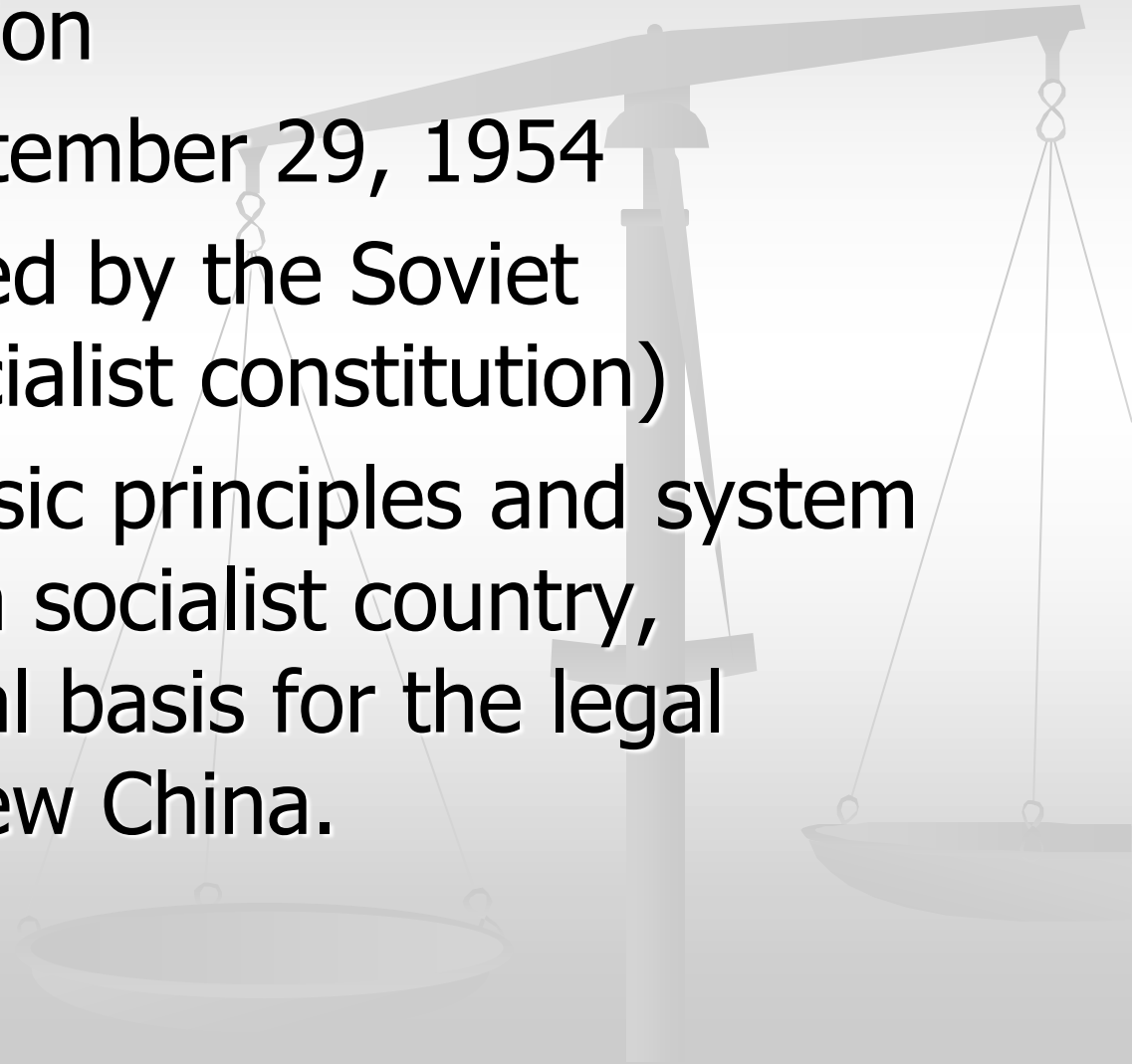




# B. Four Constitutions in the history

## 1. 1954 Constitution

- Created on September 29, 1954
- deeply influenced by the Soviet Constitutions (socialist constitution)
- Affirmed the basic principles and system of new China as a socialist country, providing the legal basis for the legal construction of new China.



# B. Four Constitutions in the history

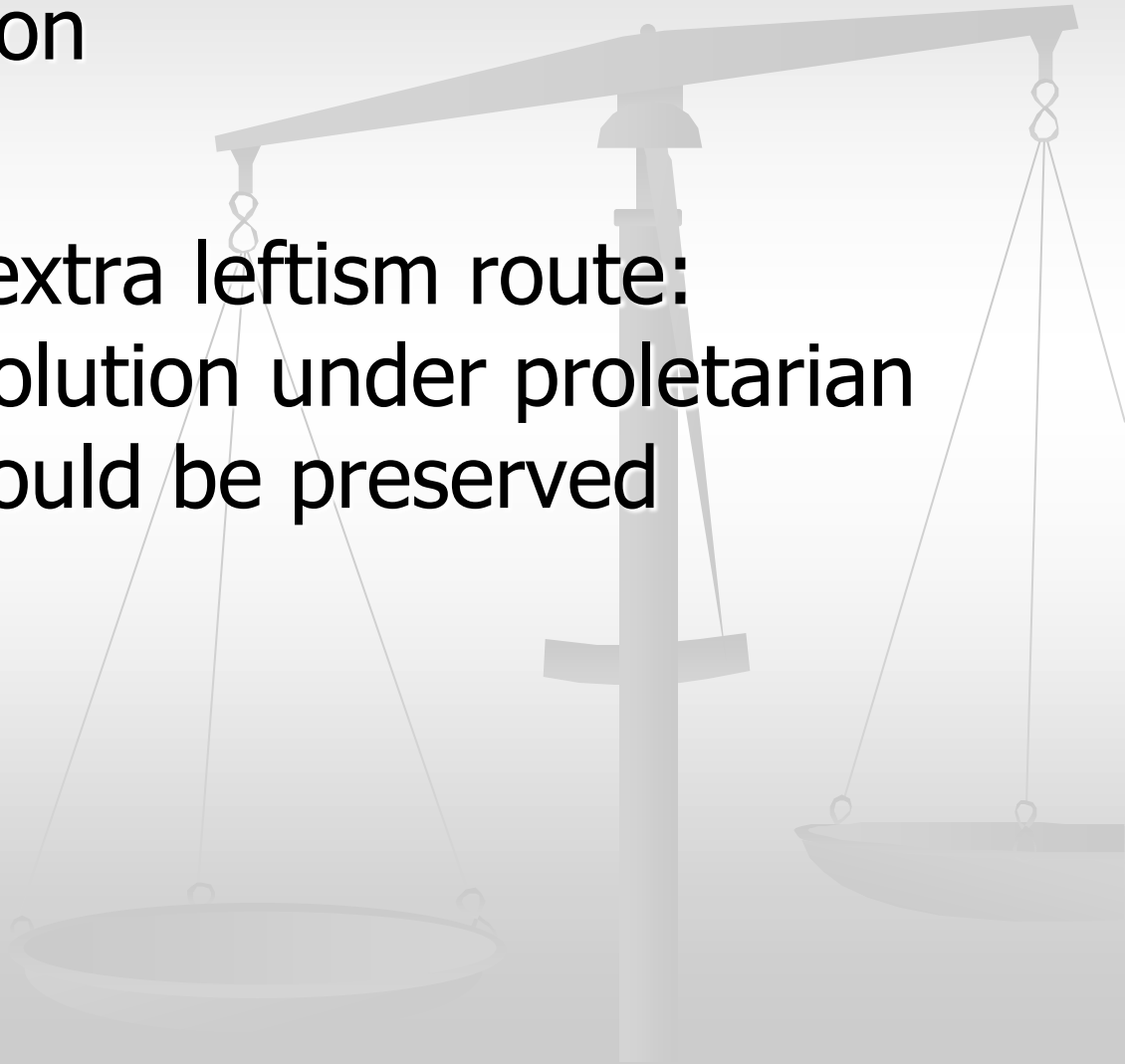
## 2. 1975 Constitution

- 1957 -1966 extra-leftism
- 1966, the Cultural Revolution broke out, 1975 Constitution was adopted to prevent Liu Shaoqi, national president at that time from using the provisions relating to his post in the Constitution of 1954 to protect his personal rights.
- Based on the theory of class struggle

# B. Four Constitutions in the history

## 3. 1978 Constitution

- Influenced by extra leftism route: continuous revolution under proletarian dictatorship should be preserved



## B. Four Constitutions in the history

### 4. 1982 Constitution

- Adopted in December 4, 1982, in the fifth plenary session of the Fifth National People's Congress.
- Contains four chapters , a total of 138 articles, referring to the basic system and the basic task of state , inheriting much more principles from the Constitution of 1954, still in force.

## B. Four Constitutions in the history

5. 4 amendments of 1982 Constitution  
(1988, 1993, 1999, 2004)

1) Amendments of 1988: allowing legitimate existence of private economy and permitting the legitimate transfer of land

## B. Four Constitutions in the history

5. 4 amendments of 1982 Constitution  
(1988, 1993, 1999, 2004)

2) Amendments of 1993: developing socialist market economy, more realistic attitude to national development

“state-run enterprise” in place of “state-owned enterprise”;  
“socialist market economy” in place of “planned economy”;  
“responsibility system” in rural areas mainly the household contract responsibility system with remuneration linked to production” in replace of “rural people’s communes and agricultural producers”

## B. Four Constitutions in the history

5. 4 amendments of 1982 Constitution  
(1988, 1993, 1999, 2004)

3) Amendments of 1999: primary stage of socialism prolonged, rule according to law, promoting status of non-public ownership; insertion of “thoughts of Deng Xiaoping”

## B. Four Constitutions in the history

5. 4 amendments of 1982 Constitution  
(1988, 1993, 1999, 2004)

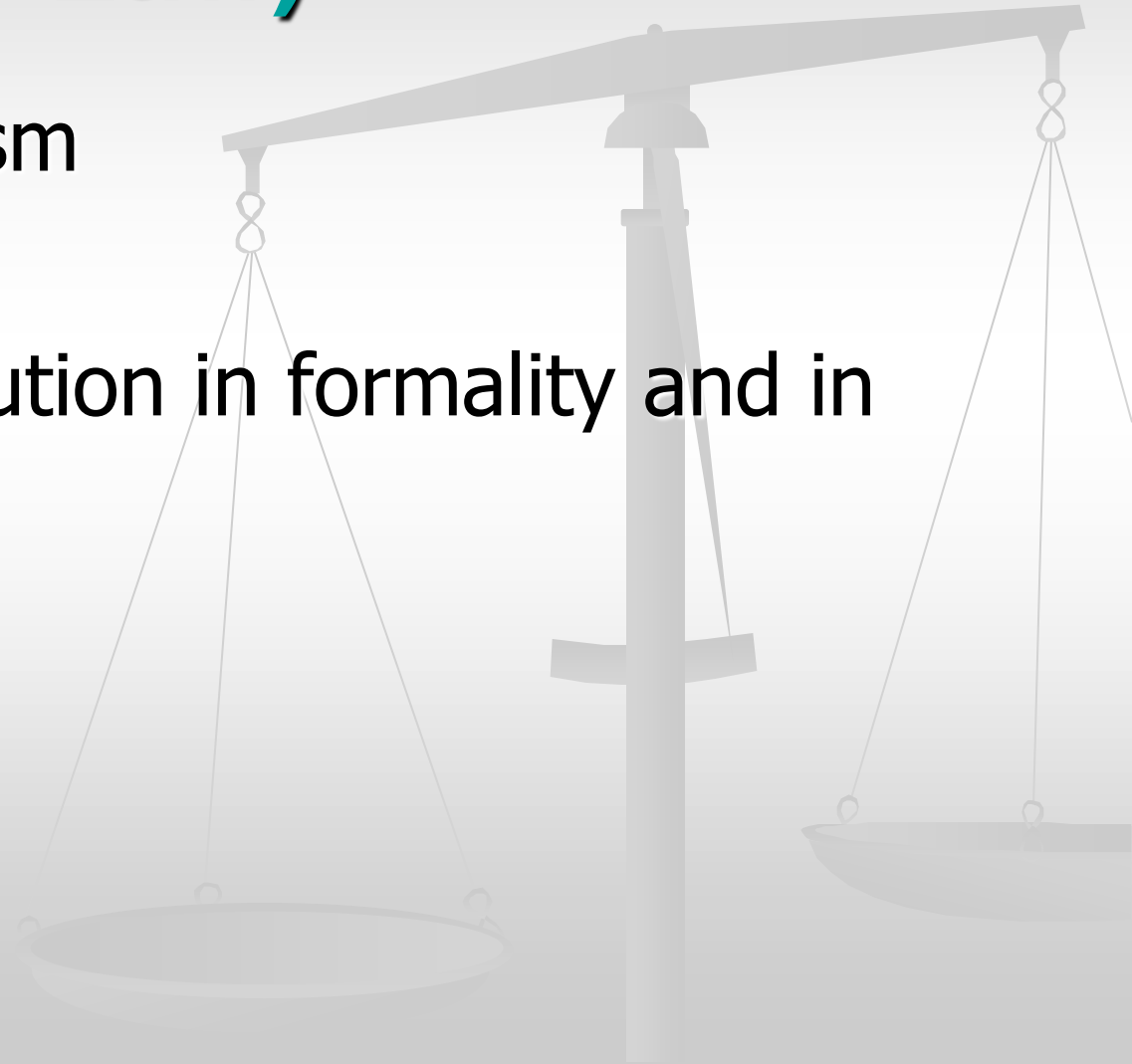
4) Amendments of 2004: compensation for the land and other private property expropriated, establishing a sound social security system, non-public economy encouraged and supported, protecting human rights, insertion of “three-represents theory”



# II. China's Constitution & Constitutionalism (Rule of Law)

A. Constitutionalism

B. China's constitution in formality and in operation



## II. China's Constitution & Rule of Law

What is  
“constitutionalism”  
& “rule of law”?



# Constitutionalism

- Constitutionalism is "a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law"

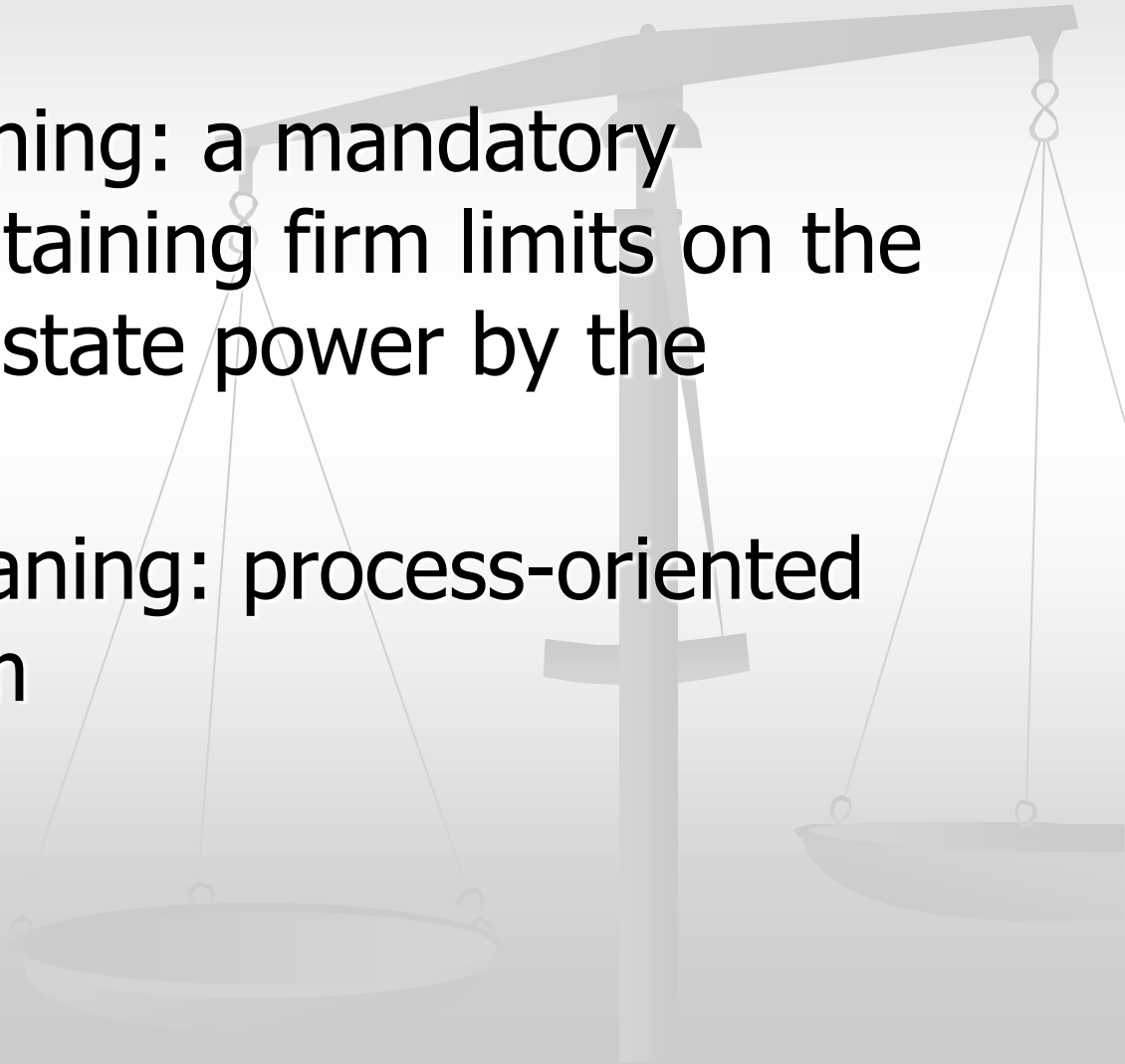
-Don E. Fehrenbacher

- Political organizations are constitutional to the extent that they "contain **institutionalized mechanisms** of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority".

- Gordon, Scott

# Constitution

- Procedural meaning: a mandatory system for maintaining firm limits on the arbitrary use of state power by the individual.
- Substantive meaning: process-oriented constitutionalism

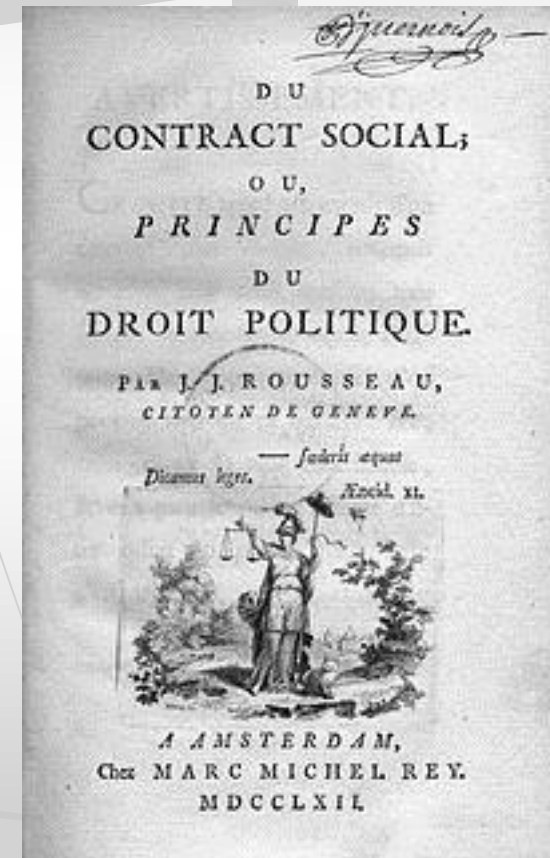


# Rule of Law

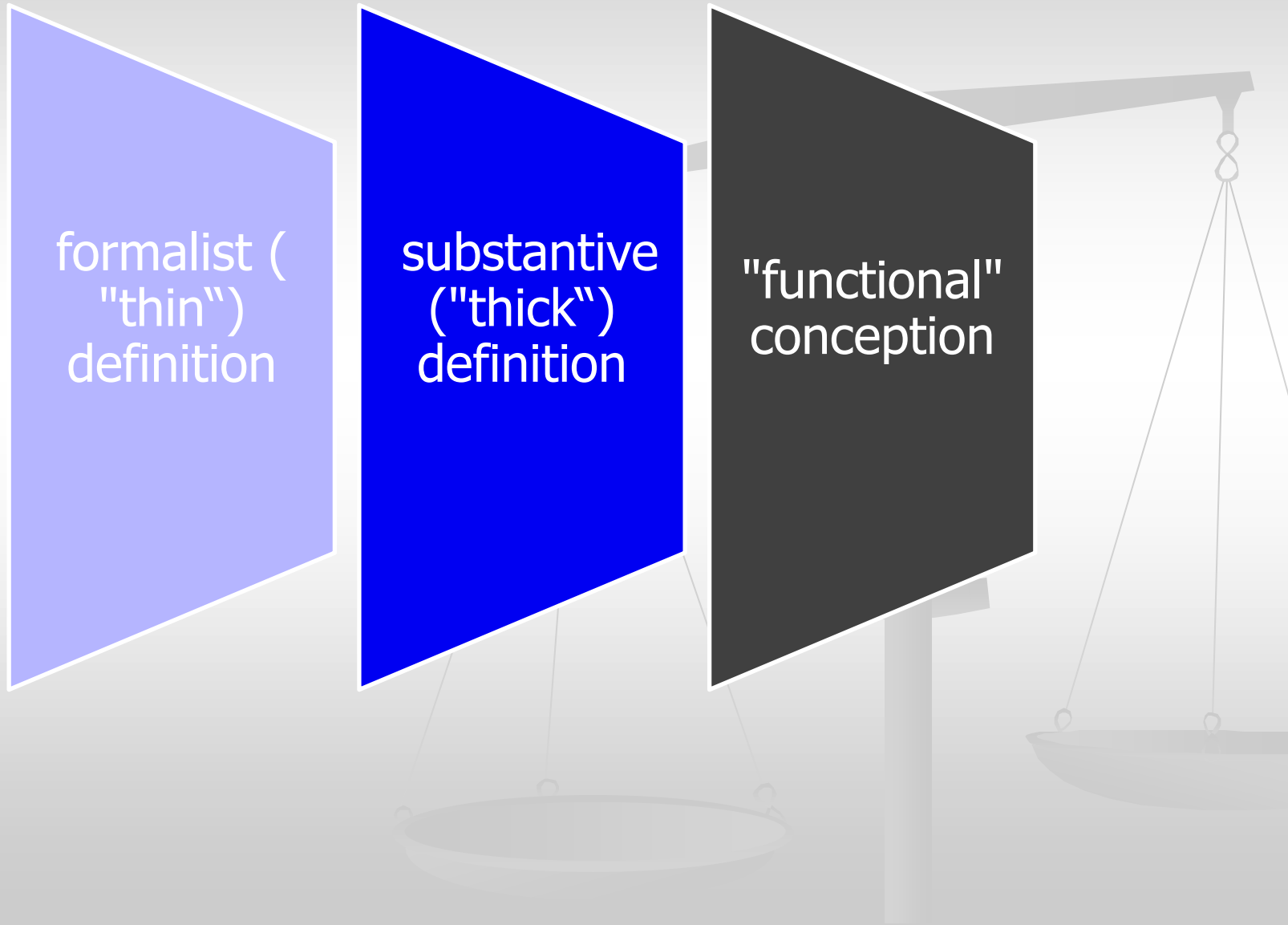
- The authority and influence of law in society, esp. when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes.
  - Oxford English Dictionary

# Party-State model of governance

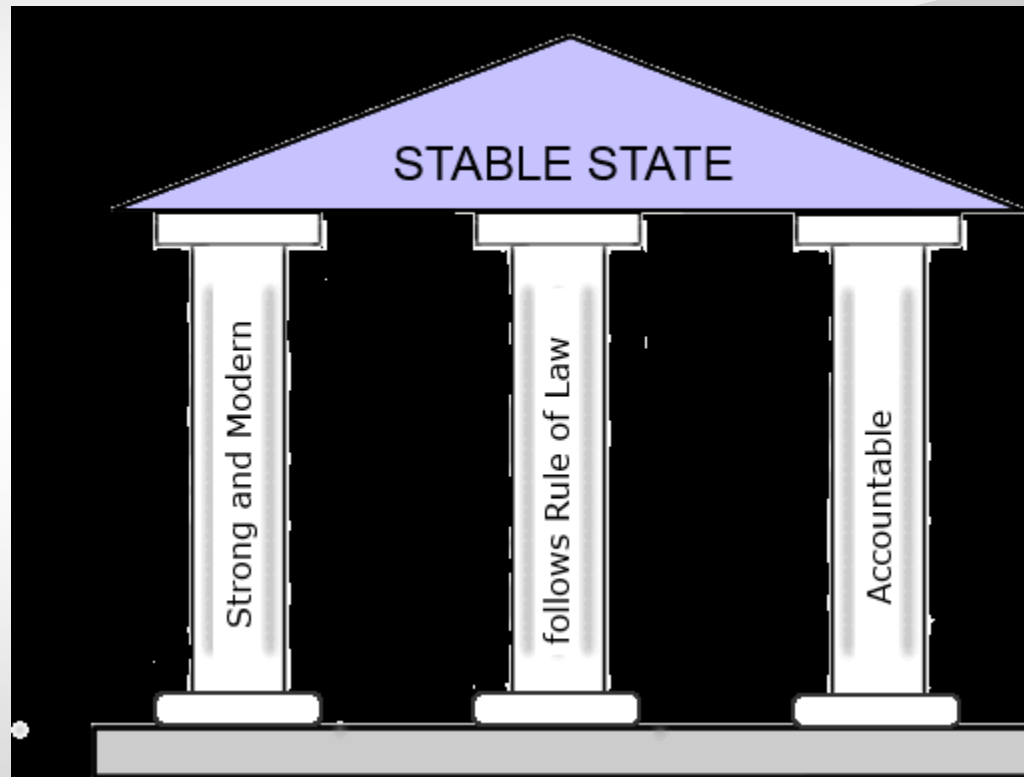
- Social contract between people and state  
Sovereign/government
- Parties as fractions



# Rule of Law



# Stability of Political System



- Francis Fukuyama "The Origins of Political Order"(2011)



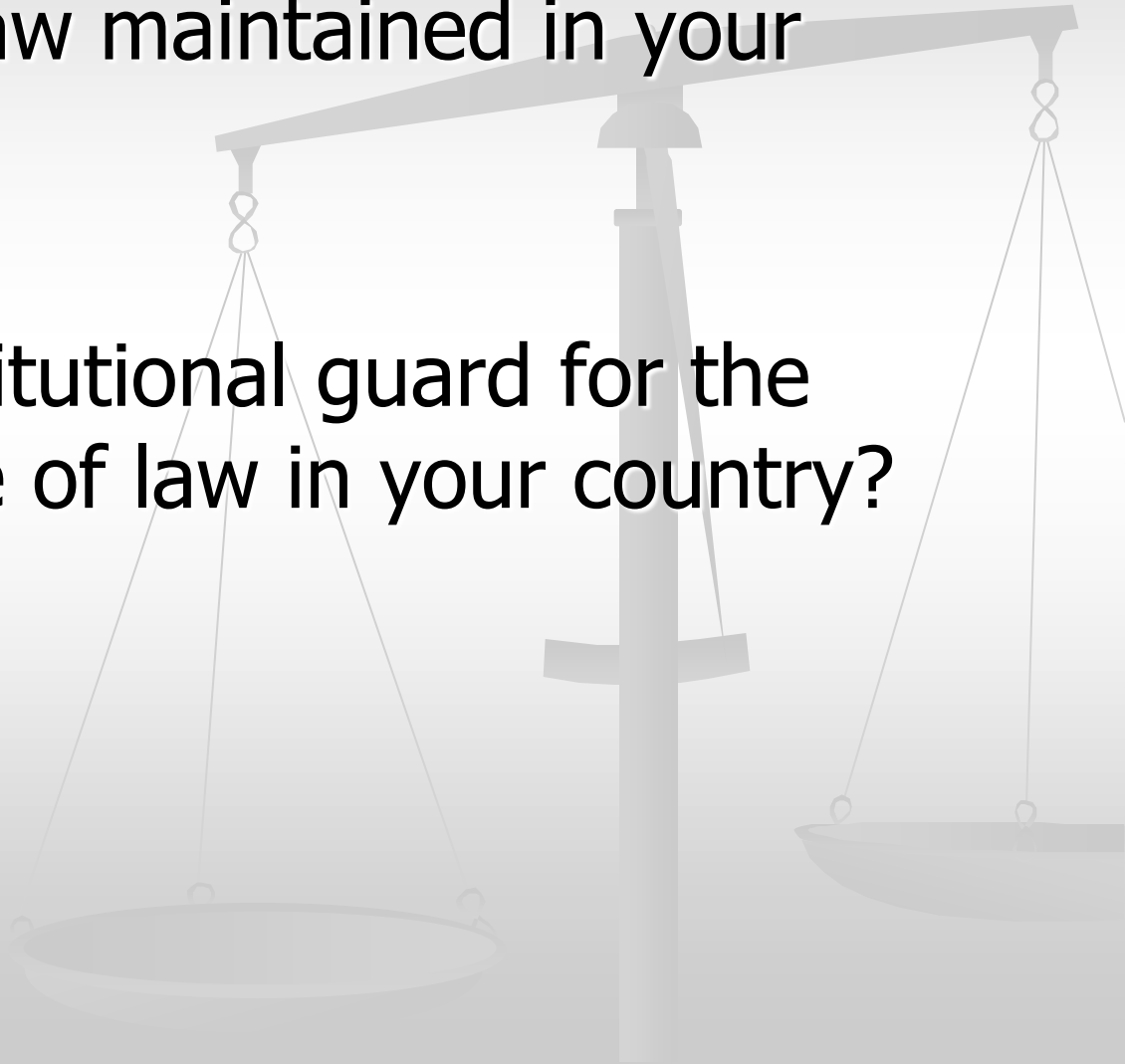
# A Political State (state-party model of governance)

- State is not politically neutral
- State and party are in permanent conflict:
  - Party has to use the state apparatus before the elimination of class conflicts and realization of communism
  - State apparatus could be abused by a few to protect their interests

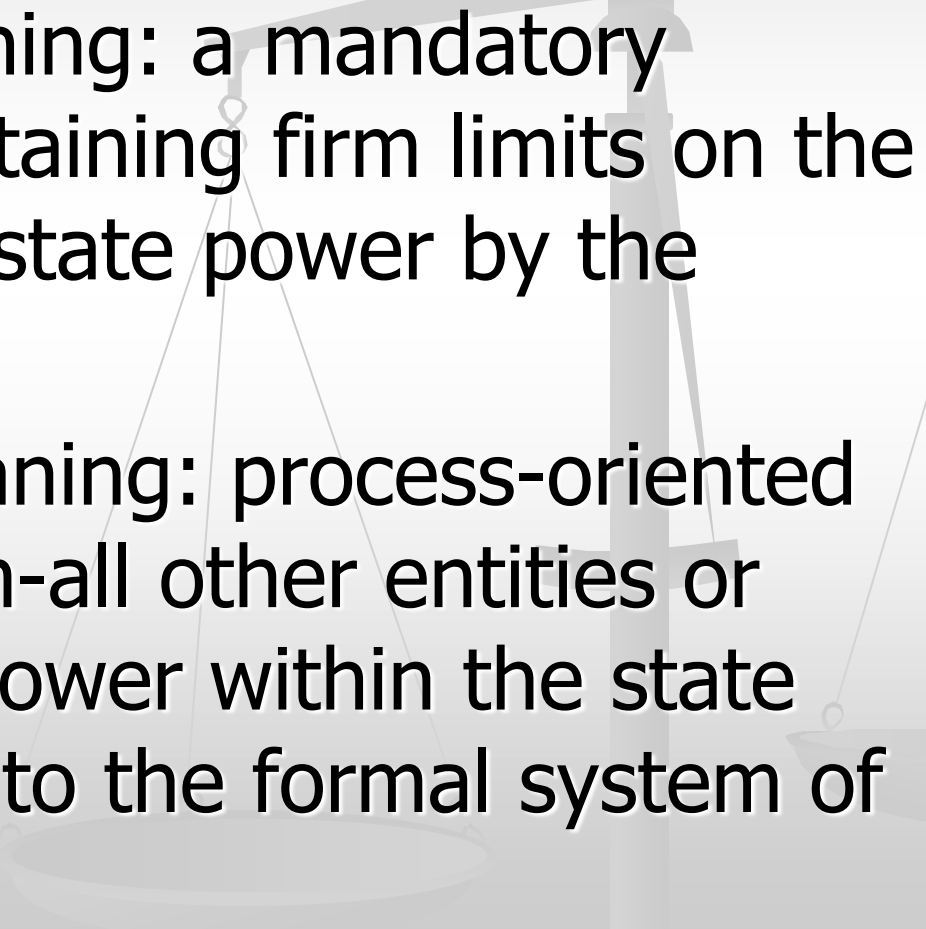
Party could deteriorate from a vanguard party to a class party.

## II. China's Constitution & Rule of Law

- How is rule of law maintained in your country?
- What is the institutional guard for the maintaining rule of law in your country?



## II. China's Constitution & Rule of Law

- Procedural meaning: a mandatory system for maintaining firm limits on the arbitrary use of state power by the individual.
  - Substantive meaning: process-oriented constitutionalism-all other entities or expressions of power within the state are subordinate to the formal system of state power.
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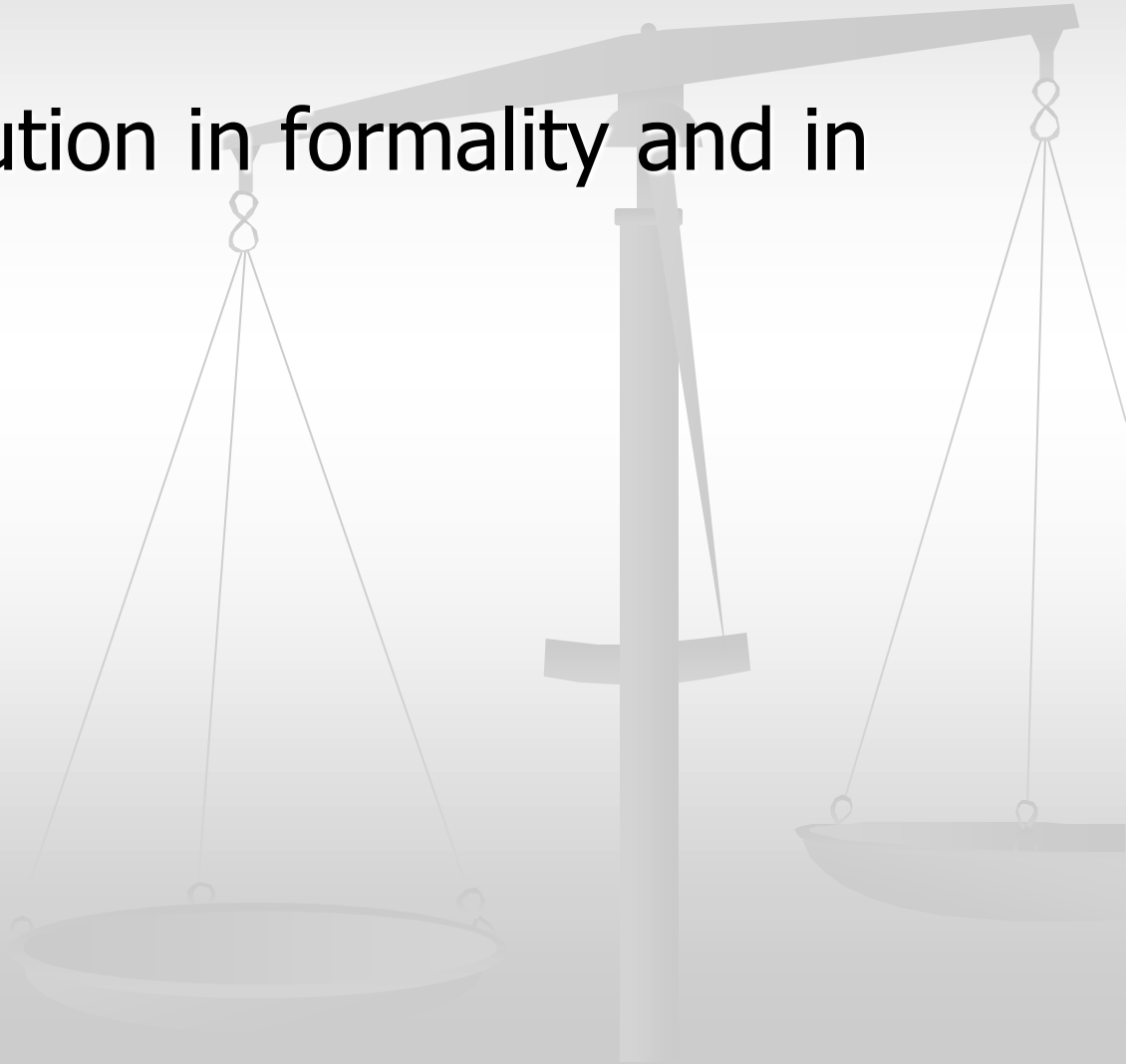
## II. China's Constitution & Rule of Law

What obstacles are there in the China's constitution to maintain rule of law?



# II. China's Constitution & Rule of Law

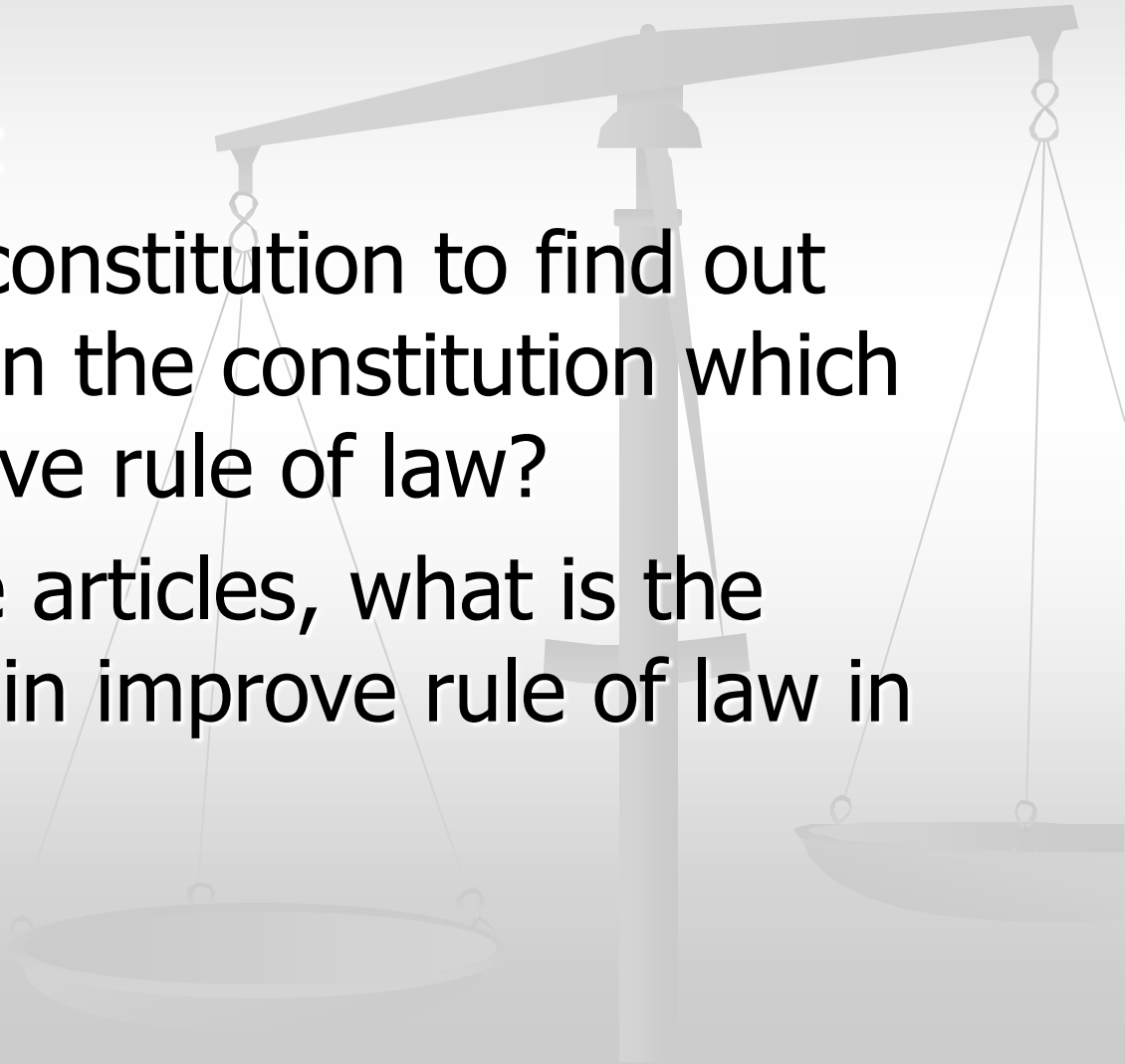
B. China's constitution in formality and in operation



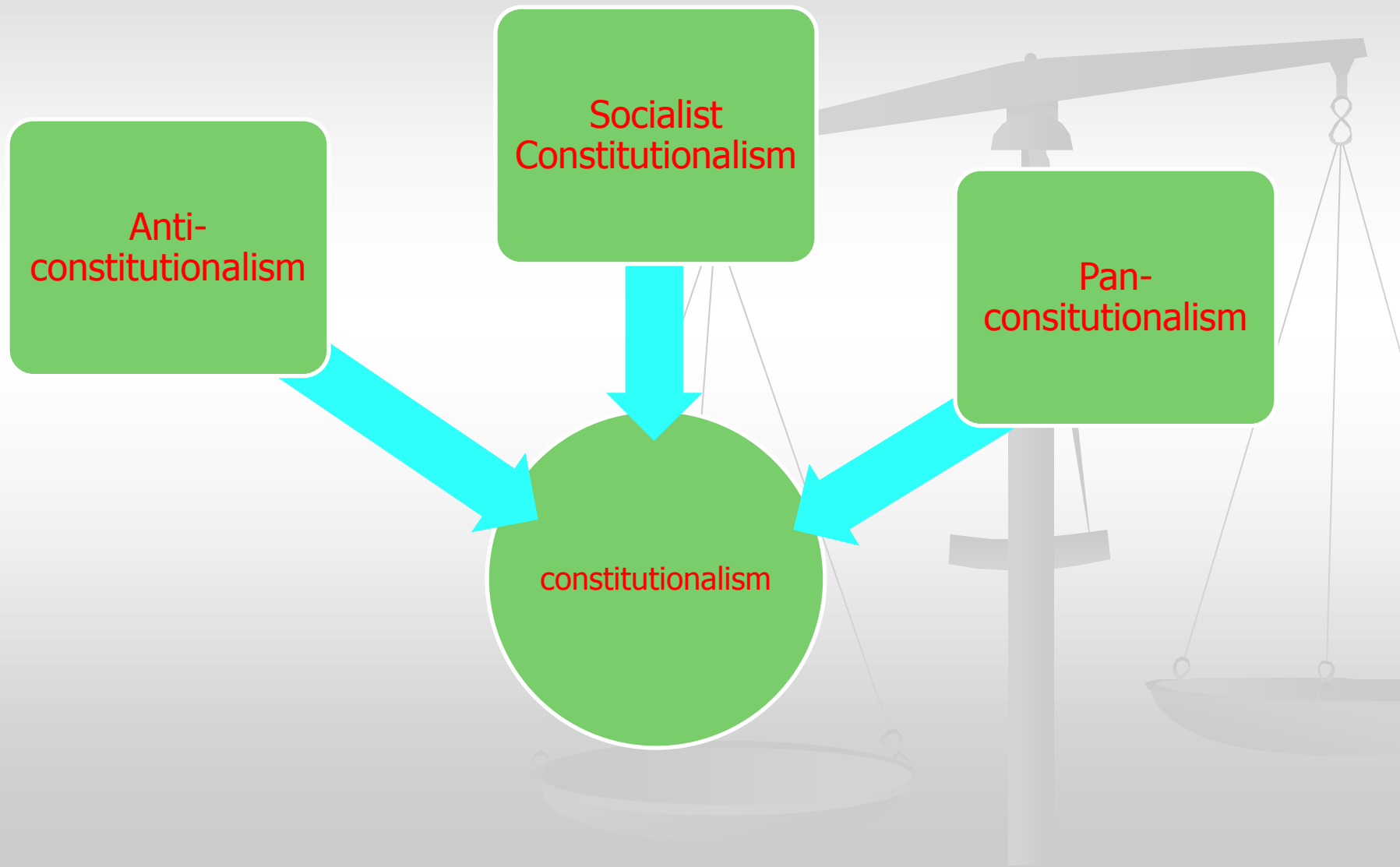
# II. China's Constitution & Rule of Law

## Group Work Task:

1. Read Chinese constitution to find out the institution in the constitution which serves to achieve rule of law?
2. Read reference articles, what is the essential issue in improve rule of law in China?



# Debate on Constitutionalism





Larry Cata Backer v. Qiang Shigong

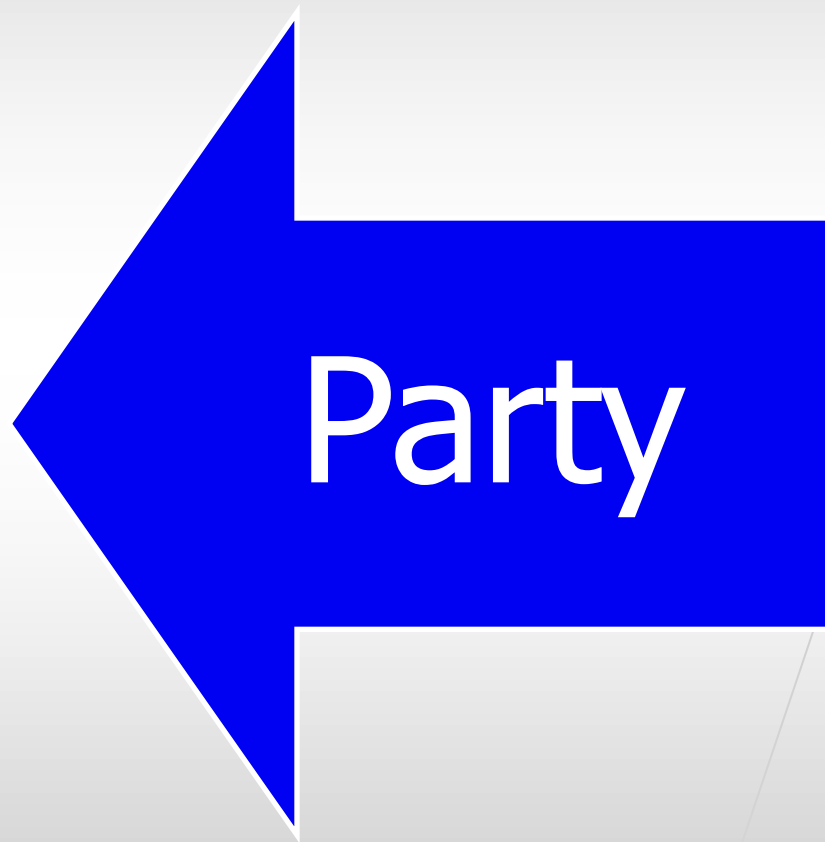




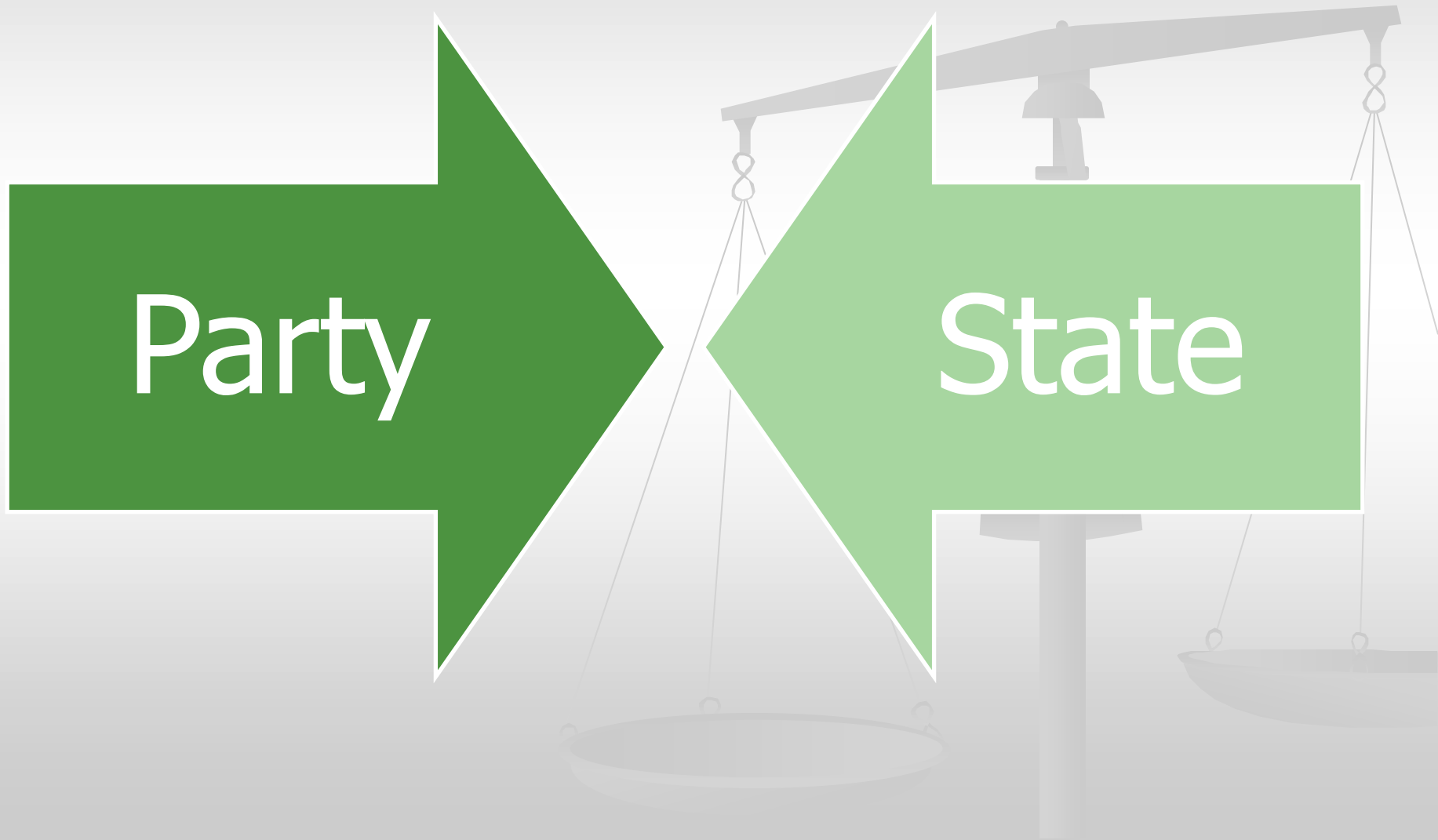
Legislative  
Rule of Law

Judicial  
Rule of Law

Administrative  
Rule of Law



# Party-state Governance initiated by Qiang Zhigong



# Constitutional Litigation

## -Direct application of Constitution

Qi Yuling Case:

Qi Yuling vs Chen Xiaoqi



# 2001 Judicial Interpretation

## 司 法 解 释

### 最 高 人 民 法 院

#### 关于以侵犯姓名权的手段侵犯宪法保护的公民 受教育的基本权利是否应承担民事责任的批复

(2001年6月28日最高人民法院审判委员会第1183次会议通过,自2001年8月13日起施行。)

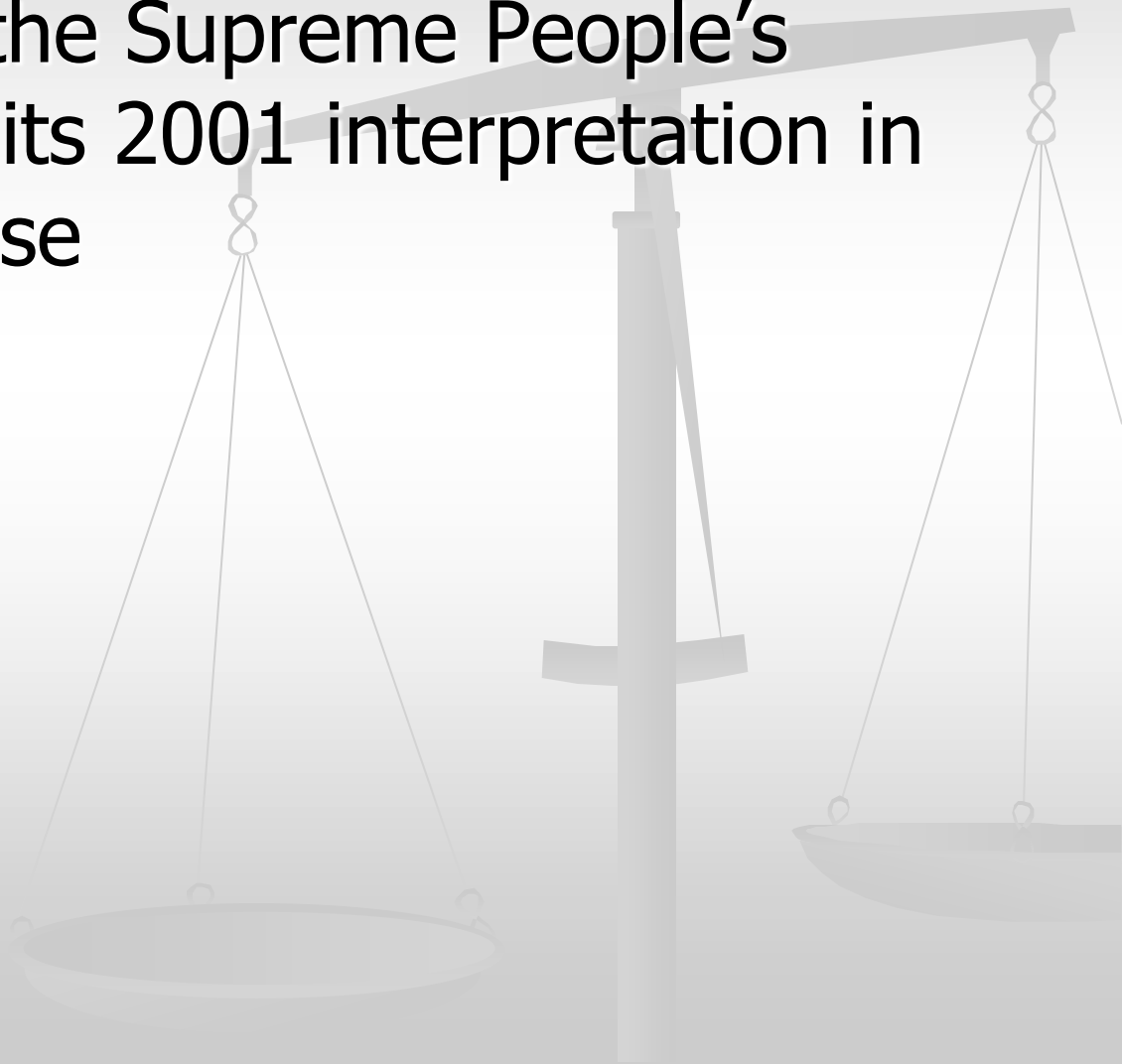
法释〔2001〕25号

山东省高级人民法院:

你院〔1999〕鲁民终字第218号《关于齐玉等与  
陈晓琪、陈克政、山东省济宁市商业学校、山东省滕  
州市第八中学、山东省滕州市教育委员会姓名权利

纠纷一案的请示》收悉。经研究,我们认为,根据本案事  
实,陈晓琪等以侵犯姓名权的手段,侵犯了齐玉等依  
据宪法规定所享有的受教育的基本权利,并造成了  
具体的损害后果,应承担相应的民事责任。

- Dec. 18, 2008, the Supreme People's Court withdrew its 2001 interpretation in the Qi Luling Case



# Further Presentation Topics:

- 1. Party system
- 2. Direct application of constitutional provision in private litigation.
- 3. Judicial review: how to resolve the contradiction between laws and constitution
- 4. Alternative Resolutions of medical disputes

